[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]
Case No. 18-5007

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.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:17-cv-02534-TJK

BRIEF OF AMICI CURIAE 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. IN SUPPORT OF APPELLANT AND REVERSAL

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February 6, 2018

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amici state as follows:

(A) Parties and Amici

All parties, intervenors, and amici appearing before the district court and that have appeared in this Court to date are listed in Plaintiff-Appellant's Brief and Defendants' Response to Plaintiff's Motion to Expedite Appeal (Jan. 19, 2018). The amici curiae joining this brief are:

1. Public Citizen, Inc.
2. Americans for Financial Reform
3. Center for Responsible Lending
4. Consumer Action
5. National Association of Consumer Advocates
6. National Consumer Law Center
7. National Consumers League
8. National Fair Housing Alliance
9. Tzedek DC, Inc.
10. United States Public Interest Research Group Education Fund, Inc.

The required corporate disclosure statement for each amicus curiae joining this brief is set forth below.

(B) Rulings Under Review

Reference to the ruling under review is in Plaintiff-Appellant's Brief.

(C) Related Cases

Counsel for amici are not aware of any pending related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Circuit Rule 26.1, amici curiae Public Citizen, Inc., 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. state that they are nonprofit, non-stock corporations. They have no parent companies, and no publicly traded companies have an ownership interest in them.

Amicus curiae Americans for Financial Reform states that it is a project of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, two nonprofit, non-stock corporations. These two nonprofit corporations have no parent companies, and no publicly traded companies have an ownership interest in them.

Amicus curiae Center for Responsible Lending states that it is a nonprofit, non-stock corporation. Its parent company is Center for Community Self-Help, a nonprofit, non-stock corporation. No publicly traded companies have an ownership interest in Center for Responsible Lending or the Center for Community Self-Help.

All ten amici curiae are organizations devoted to the protection of consumer interests.

CERTIFICATE REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel for amici curiae Public Citizen, Inc., et al. certify that a separate brief is necessary to provide a perspective informed by amici curiae's long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Amici have extensive knowledge of the consumer needs that the Consumer Financial Protection Bureau (CFPB) addresses, the statutes that the CFPB enforces, and the work that the agency has accomplished. Further, amici have a rich understanding of the CFPB's place in history and the broader regulatory landscape affecting consumers. Most of the amici were advancing the interests of consumers—the people the CFPB was created to protect—for decades before the CFPB existed and were heavily involved in the policy debates that led to the agency's creation. Amici also address a wide variety of consumer issues, including those under other regulators' purview. Amici's experience and perspective are thus different from those of the other amici who have provided notice of their intent to participate in this appeal (consumer finance scholars), and the other district court amici in support of plaintiff (scholars, current and former members of Congress, and states and the District of Columbia).

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CFPB	Consumer Financial Protection Bureau
OMB	Office of Management and Budget

INTEREST OF AMICI[1]

Amici are ten nonprofit consumer organizations that protect and defend the rights of consumers through education, advocacy, policy, research, and litigation. Their consumer advocacy work spans decades. Before Congress created the Consumer Financial Protection Bureau (CFPB), many of these organizations were leading voices advocating for its formation. Since the CFPB launched, amici curiae have frequently engaged with the agency and vigorously supported both its mission and its independence. Amici curiae are now deeply concerned about the CFPB's ability to continue pursuing its work as an independent agency. Additional information about each amici was included in the separately filed representation of consent and is repeated in the addendum to this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to address the fourth prong of the preliminary injunction standard, to which the district court gave short shrift: the public interest.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

A preliminary injunction will serve the public interest by enabling the CFPB to pursue its statutory mission and maintain its independence during the course of this litigation.

The CFPB is a response to the 2008 financial crisis. Inattention by other regulatory agencies, along with limitations on their authority, contributed significantly to the crisis that destabilized the American economy and caused grave hardship to American families. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). As part of this reform, "Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So it established the Consumer Financial Protection Bureau." *PHH Corp. v. CFPB*, -- F.3d --, 2018 WL 627055, *1 (D.C. Cir. Jan. 31, 2018). Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced." H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally PHH*, 2018 WL 627055, at *3-4.

From the day of the agency's creation until the start of this dispute, the CFPB used its authority and accountability to serve the public interest. The CFPB's supervision and enforcement actions alone resulted in nearly $12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers* (July 2017);[2] Zixta Q. Martinez, *Six Years Serving You*, CFPB (July 21, 2017).[3]

Now, with the dispute over its acting director, the CFPB is at a turning point. Although Plaintiff's claims regard *who* can serve as acting director until the next Senate-confirmed director is seated, the district court, in considering the motion for a preliminary injunction, should also have examined *how* Plaintiff English or Defendant Mulvaney would lead the CFPB. The answer to this question has great significance to the fourth prong of the preliminary injunction standard: where the public interest lies. The public has an overriding interest in the CFPB's continued pursuit of its statutory role, including both its consumer protection mission and the independence that Congress deemed "necessary for the effectiveness," *PHH*, 2018

[2] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf.

[3] https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.

WL 627055, at *11, of the new agency. Plaintiff English, a long-time and full-time CFPB official, has a track record of preserving this mission and independence. By contrast, Defendant Mulvaney has an inherent conflict of interest with the agency's statutory mission and independence as long as he serves in his White House leadership position, as Director of the Office of Management and Budget (OMB). Further, he has been using his purported appointment at the CFPB to slow or halt execution of the CFPB's core functions and to tie the independent agency to the current Administration's priorities. For this reason, the public interest weighs strongly in favor of Plaintiff's motion for a preliminary injunction.

ARGUMENT

I. Prior to this dispute, the CFPB vigorously served the public interest.

A. Congress intended the CFPB to be an independent consumer agency.

Congress created the CFPB in 2010 after more than 100 hearings and extensive debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis from occurring in the future. *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010). When it did so, Congress "gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products." *PHH*, 2018 WL 627055, at *3; *see also* 12 U.S.C. § 5511(a).

To direct its work, Congress assigned the CFPB five key functions, in addition to support activities: (1) "collecting, investigating, and responding to consumer complaints"; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) "issuing rules, orders, and guidance" to implement consumer protection law; (4) "conducting financial education programs"; and (5) researching and monitoring the markets for consumer financial products and services. 12 U.S.C. § 5511(c)(1)-(6).

Congress concluded that with this singular focus on consumers, the CFPB could serve American households more effectively than other regulators. In the past, "[f]ederal bank regulators had given short shrift to consumer protection." *PHH*, 2018 WL 627055, at *3. The Federal Reserve, for example, "waited more than 14 years to implement rules Congress gave it to address unfair and deceptive trade practices in the mortgage lending market … ." Ctr. for Responsible Lending, *Neglect and Inaction: An Analysis of Federal Banking Regulators' Failure to Enforce Consumer Protections* 1 (July 13, 2009).[4] The Office of the Comptroller of the Currency exempted national banks from following state anti-predatory lending

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[4] http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/neglect-and-inaction-7-10-09-final.pdf.

laws, helping "create[] an environment where abusive mortgage lending could flourish." S. Rep. No. 111-176, at 16-17. "Congress concluded that [the] 'failure by the prudential regulators to give sufficient consideration to consumer protection … helped bring the financial system down.'" *PHH*, 2018 WL 627055, at *3 (ellipsis in original) (quoting S. Rep. No. 111-176, at 166). "All told, nearly $11 trillion in household wealth … vanished" in the 2008 financial crisis. *Id.* (internal brackets and quotation marks omitted). "In Congress's view, the 2008 crash represented a failure of consumer protection." *Id.*

Congress responded to these failures by consolidating in the CFPB "authorities to protect household finance that had previously been scattered among separate agencies in order to … ensure accountability." *Id.* (internal quotation marks and brackets omitted); 12 U.S.C. § 5581(b). It also gave the CFPB important new authority. The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers' most important financial transactions. *See CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012);[5] *see generally* 12 U.S.C. § 5481(15)(A)(ix). More generally, Congress

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[5] https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-superivse-credit-reporting/.

made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders. *See* 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017).[6] With this "level playing field" approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market. S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4).

Congress also paid careful attention to the CFPB's structure. Vital to the new agency's success, Congress concluded, was its independence. *See* S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874.[7] "By providing the Director with a fixed term and for-cause protection, Congress sought to promote stability and confidence in the country's financial system." *PHH*, 2018 WL

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[6] https://www.consumerfinance.gov/data-research/research-reports/semi-annual-report-spring-2017/.

[7] Congress also provided exacting direction about other aspects of the new agency's organization. The Dodd-Frank Act required specific offices and units and an advisory board, 12 U.S.C. §§ 5493(a)(5), (b)-(g), 5494, 5535, specified personnel rules, *id.* § 5493(a)(1)-(4), and described how employees could be transferred from other agencies, *id.* § 5584.

627055, at *4. "Congress also determined 'that the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator.'" *Id.* (quoting S. Rep. No. 111-176, at 163). Other financial regulators had been "overly responsive to the industry they purported to police." *Id.* at *1. With the Dodd-Frank Act, as Senator Cardin put it, Congress aimed to "create a consumer bureau … that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure." 156 Cong. Rec. S5871 (daily ed. July 15, 2010).

To that end, the Dodd-Frank Act expressly designated the agency as independent. 12 U.S.C. § 5491(a). To further its independence, the Act gave the CFPB funding from the Federal Reserve, rather than annual appropriations from Congress, *id.* § 5497(a), allowed the CFPB to make financial operating plans without OMB approval, *id.* § 5497(a)(4)(E), and placed the agency under a single director appointed by the President and confirmed by the Senate for a five-year term, removable by the President only for "inefficiency, neglect of duty, or malfeasance in office," *id.* § 5491(b)(1)-(2), (c)(1), (c)(3). The Dodd-Frank Act also allowed the CFPB to make independent recommendations to Congress, *id.* § 5492(c)(4), and represent itself in court, *id.* § 5564(b). Consistent with this independence, the CFPB's only political appointee prior to the start of this dispute was its director, who had been nominated by then-President Obama and confirmed by the Senate to a five-year term. *See* Zach Piaker, *Help Wanted: 4,000 Presidential Appointees*, Center for Presidential Transition (Mar. 16, 2016);[8] *see also* S. Comm. on Homeland Sec'y and Gov't Affairs, 114th Cong., 2d Sess., *United States Government Policy and Supporting Positions* 151 (Comm. Print 2016).[9]

B. The CFPB has meaningfully improved consumer financial markets and concretely benefited consumers.

Between its 2011 launch and the start of this dispute, the CFPB advanced the public interest that Congress identified in the Dodd-Frank Act. By operating independently of the government's political branches, it delivered on its mission to protect consumers and make the markets for consumer financial products fair, transparent, and competitive. On its opening day, for example, the agency started a consumer complaints program that responded to a detailed set of Dodd-Frank Act directives. *See* 12 U.S.C. §§ 5493(b)(3), 5511(c)(2), 5534(a); CFPB, *Monthly*

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[8] http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php.

[9] https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf.

Complaint Report, *Vol. 25*, at 2 (2017).[10] A legal aid attorney identified this program as the source of the "biggest change" in the consumer financial industry since the 2008 financial crisis; now, when he "complains about a large company, the company actually responds." Shahien Nasiripour, *Banks Can't Wait to Wipe this Complaints Database*, Bloomberg (Feb. 8, 2017).[11] By July 2017, the CFPB had collected more than 1.2 million consumer complaints and helped hundreds of thousands of consumers receive relief. Companies responded to nearly every complaint forwarded to them by the CFPB and provided relief to consumers in about 20 percent of cases. *See* CFPB, *Monthly Complaint Report*, *supra* p. 9, at 5, 8-9.

Congress anticipated that the CFPB could also use consumer complaints like canaries in coal mines, to help federal agencies identify more widespread problems. *See* 12 U.S.C. §§ 5512(c)(4)(B)(i) (regarding the CFPB's use of complaints to monitor markets for risks to consumers), 5514(a)(1)(C) (giving the CFPB authority to supervise a nonbank financial company when the CFPB

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[10] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_monthly-complaint-report-vol-25.pdf.

[11] https://www.bloomberg.com/news/articles/2017-02-08/the-cfpb-keeps-a-database-that-banks-can-t-wait-to-wipe.

determines, based on consumer complaints, that a company's conduct poses risk to consumers); *see also id.* § 5493(b)(3)(D) (requiring the CFPB to share complaint data with other agencies). The agency did just that. One set of complaints to the CFPB sparked a Department of Justice investigation of student loan companies for ignoring servicemembers' rights under consumer law. The matter ended with the companies agreeing to pay about $60 million in compensation to about 60,000 servicemembers. *Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans*, U.S. Dep't of Justice (May 13, 2014).[12]

Through its other key functions, the CFPB likewise forcefully pursued the consumer protection mission that Congress required of it. The CFPB's enforcement and supervision actions led to nearly $12 billion in ordered relief for more than 29 million consumers. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra* p. 3; Martinez, *Six Years Serving You*, *supra* p. 3. In one heavily publicized matter, the CFPB forced Wells Fargo to pay a $100 million fine in addition to refunds for opening millions of accounts without

[12] https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging.

consumers' authorization. *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB (Sep. 8, 2016).[13] In dozens of other enforcement actions, the CFPB halted myriad other abuses, such as "illegal debt collection tactics," "reselling sensitive personal information to lenders and debt collectors," "illegal redlining and discriminatory mortgage underwriting and pricing practices," and deception of students by a for-profit education provider. *Testimony of Richard Cordray* 4-5 (Apr. 5, 2017);[14] *see also* CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* p. 7, at 77-100; *see generally* Am. for Fin. Reform, *CFPB Enforcement Actions (through April 2017)*.[15] In supervisory actions, the CFPB rooted out illegal practices in auto loan servicing, credit card accounts, debt collection, deposit accounts, mortgage origination and

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[13] https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

[14] https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-rcordray-20170405.pdf.

[15] https://docs.google.com/spreadsheets/d/1q5nD0Zku1YAoiu2GUOwLNodPdoqCu2j0sFPE3pW7Jy0/.

servicing, remittances, and short-term small-dollar lending. CFPB, *Supervisory Highlights*, *Issue 16, Summer 2017* (Sept. 2017).[16]

The CFPB's regulations brought important protections to the mortgage market, where abuses by lenders and federal agencies' weak oversight were widely viewed as key contributors to the 2008 financial crisis. *See* S. Rep. 111-176, at 11-14, 167. For instance, the agency's rules require lenders to determine that borrowers can afford their loans. *See Ability-to-Repay and Qualified Mortgage Standards*, *Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408 (Jan. 30, 2013). The CFPB also overhauled mortgage disclosures so that consumers receive two easy-to-use disclosures rather than four forms. *See* 12 U.S.C. § 5532(f); CFPB, *TILA-RESPA Integrated Disclosure Rule: Small Entity Compliance Guide* 15-16 (Oct. 2017).[17] More than 10 million consumers have received the new disclosures. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra* p. 3; *see generally* CFPB, *Semi-Annual Report of*

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[16] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.

[17] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_KBYO-Small-Entity-Compliance-Guide_v5.pdf.

the Consumer Financial Protection Bureau, *supra* p. 7, at 59-69 (describing other rulemaking activities and initiatives to support companies in implementation).

The CFPB's financial education programs have also reached millions. By July 2017, the agency's "Ask CFPB" website had received over 13 million unique visitors. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra* p. 3. Students at more than 3,200 colleges are now benefiting from a "financial aid shopping sheet" that the CFPB developed with the Department of Education, and that colleges are voluntarily adopting to help students understand college financing options. *Id.* (with link to materials). Additional CFPB programs have helped consumers navigate other critical financial decisions. The agency's online resources include materials for practitioners to use with economically vulnerable consumers, and consumer tools for: Buying a House, Planning for Retirement, Managing Someone Else's Money, and Navigating the Military Financial Lifecycle. *See We're the CFPB*, CFPB.[18]

The CFPB's research and monitoring of consumer financial markets has undergirded its work. The Dodd-Frank Act required the research and monitoring

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[18] https://www.consumerfinance.gov/ (navigate to "Consumer Tools" and "Practitioner Resources" menus) (last visited Feb. 2, 2018).

function so that the new agency could identify key risks to consumers and prioritize its activities accordingly. *See* 12 U.S.C. §§ 5512(c)(1), 5514(b)(2). To implement the Dodd-Frank Act's commands, the CFPB built multiple teams to research and monitor the markets that it regulates. *See Research, Markets, and Regulations*, CFPB.[19] Years of CFPB research and market monitoring anchored the CFPB's recent rulemaking activities. *See, e.g.*, 82 Fed. Reg. 54472, 54507-09 (Nov. 17, 2017) (describing CFPB research and market monitoring prior to a rulemaking on payday loans); Kelly Cochran, *Spring 2017 Rulemaking Agenda*, CFPB (July 20, 2017) (recognizing CFPB research that has preceded rulemaking activities regarding overdraft products).[20]

In short, by dedicating itself to its statutory mission, the agency—before this dispute began—consistently worked to advance the public interest as identified in the Dodd-Frank Act. To use its own words, the CFPB has

> aim[ed] to make consumer financial markets work for consumers, responsible providers, and the economy as a whole. [It has] protect[ed] consumers from unfair, deceptive, or abusive practices and

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[19] https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/research-markets-regulation/ (last visited Feb. 2, 2018).

[20] https://www.consumerfinance.gov/about-us/blog/spring-2017-rulemaking-agenda/.

> take[n] action against companies that break the law. [It has] arm[ed] people with the information, steps, and tools that they need to make smart financial decisions.

The Bureau, CFPB.[21] In accordance with statutory requirements, the CFPB has done so with special attention to the needs of underserved consumers, servicemembers, older Americans, and students. *See* 12 U.S.C. §§ 5493(b)(2), 5493(e), 5493(g), 5535; *Consumer Education and Engagement Division*, CFPB.[22]

C. The CFPB's independence has been central to its success.

Until this dispute, the CFPB maintained its commitment to the Dodd-Frank Act's mandates through turbulence in federal politics and under repeated pressure from elected officials and regulated entities to reduce, reverse, or stop its operations. As Congress foresaw, the agency's independence has been central to its ability to perform its statutory function.

Although the CFPB enjoys strong support from many members of Congress, other politicians and financial companies have regularly criticized the congressionally-mandated structure of the CFPB and the agency's implementation

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[21] https://www.consumerfinance.gov/about-us/the-bureau/ (last visited Feb. 2, 2018).

[22] https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/consumer-education-engagement/ (last visited Feb. 2, 2018).

of Dodd-Frank Act directives. *See generally* Steve Eder, et al., *Republicans Want to Sideline this Regulator. But It May Be Too Popular*, N.Y. Times (Aug. 31, 2017).[23] Political criticisms of the CFPB have intensified under the current Administration. Although the Dodd-Frank Act protects the CFPB's budgeting process and funding from control by the President and Congress, *see* 12 U.S.C. § 5497(a)(1), (a)(4)(E), the President used his initial budget documents to call for the agency to be funded through appropriations rather than the Federal Reserve, and to advocate for a dramatic reduction in the CFPB's budget. OMB, *Major Savings and Reforms: Budget of the U.S. Government, Fiscal Year 2018*, at 158-69 (2017);[24] *see also* Megan Leonhardt, *Buried in Trump's Budget: A New Attempt to Kill a Powerful Consumer Watchdog*, Money (May 23, 2017).[25] The President's Secretary of the Treasury evaluated the CFPB against Administration priorities, and branded the CFPB's congressionally-created structure "unaccountable," labeled as "unduly broad" its statutorily-granted authority over financial

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[23] https://nyti.ms/2wVYGr5.

[24] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf.

[25] http://time.com/money/4790486/trump-budget-2018-cuts-cfpb-consumers/.

companies' unfair, deceptive, and abusive practices, and deemed "unnecessary" the supervisory authority that Congress expressly granted to the agency. U.S. Dep't of the Treasury, *A Financial System That Creates Economic Opportunities Banks and Credit Unions* 79, 81, 88 (2017).[26] The President himself labeled the CFPB a "total disaster." Donald J. Trump (@realDonaldTrump), Twitter (Nov. 25, 2017, 1:48 PM).[27]

Nevertheless, until Defendant Mulvaney arrived at the CFPB, the agency maintained both its financial stability and its focus on its statutorily defined mission. *See* CFPB, *Financial Report of the Consumer Financial Protection Bureau*, *Fiscal Year 2017*, at 13, 15-28 (Nov. 15, 2017) (showing the CFPB's continued funding and accomplishment of its performance goals).[28] In 2017 alone, for example, the CFPB issued rules regarding payday loans and arbitration

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[26] https://www.treasury.gov/press-center/press-releases/Documents/A%20 Financial%20System.pdf. The Treasury report responded to Executive Order 13772, which stated the current Administration's "Core Principles" for financial regulation and required the Secretary to report to the President on whether existing laws and policies promote those principles. Exec. Order No. 13772, §§ 1-2, 82 Fed. Reg. 9965, 9965 (Feb. 3, 2017).

[27] https://twitter.com/realDonaldTrump/status/934539256940417024.

[28] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_ financial-report_fy17.pdf.

agreements. In accordance with Dodd-Frank Act instructions about how the CFPB should do its work, the CFPB issued both rules after years of study and multiple rounds of input from industry and consumer stakeholders. *See Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. at 54503-19 (describing the CFPB's multi-year process of seeking and receiving public input before issuing rule on payday loans); *Arbitration Agreements*, 82 Fed. Reg. 33210, 33245-46 (July 19, 2017) (similar, regarding rule on arbitration agreements); *see also* 5 U.S.C. § 609 (requiring the CFPB to seek input from small entities prior to certain rulemakings); 12 U.S.C. § 5512(b)(2)(A) (requiring CFPB rulemaking to consider potential costs and benefits). Reflecting the significance of the independence conferred on it by statute, the CFPB issued both rules in the face of strong political opposition. *See* Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243 (2017); H.J. Res. 122, 115th Cong. (2017) (introduced).[29]

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[29] Congress, of course, maintains the authority to change the CFPB's focus and structure. With regard to the CFPB's arbitration rule, it exercised this authority. In 2010, Congress expressly gave the CFPB the ability to restrict companies' use of mandatory pre-dispute arbitration agreements. 12 U.S.C. § 5518. In 2017, after the Vice President broke a tie vote in the Senate, a different Congress voted to vacate the CFPB's rule regarding such arbitration agreements. *See* Pub. L. No. 115-74, *with vote information,* https://www.congress.gov/bill/115th-congress/house-joint-resolution/111/actions (last visited Feb. 2, 2018).

That said, independence does not mean that the CFPB acts alone. The Dodd-Frank Act requires regular engagement with Congress, industry, and other stakeholders. *See, e.g.*, 5 U.S.C. § 609; 12 U.S.C. §§ 5493(b)(3)(C), 5496, 5512(b)(2), 5535(d), 5587(b); *see also Bureau Structure*, CFPB (Dec. 5, 2017) (with links to descriptions of outreach offices in the divisions of External Affairs and Research, Markets, and Regulations).[30] The overriding thrust of the Dodd-Frank Act, however, is that the agency should view external input through the lens of the law, not politics. Like other financial regulators, the CFPB is "designed to protect the public interest in the integrity and stability of markets from short-term political or special interests." *PHH*, 2018 WL 627055, at *20; *cf. Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (describing the Federal Trade Commission as "charged with the enforcement of no policy except the policy of the law"). Appropriately, in 2017, former CFPB Director Richard Cordray instructed his staff to "tune out the political noise." Eder, *supra* p. 17.

[30] https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/. By March 2017, senior CFPB officials had testified before Congress 63 times. CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau, supra* p. 7, at 166.

II. The public interest lies in the CFPB's faithful adherence to its mission and independence.

Significant weight should be accorded to the "overriding public interest" in both the specific Dodd-Frank Act provisions that this case implicates and "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); *see also Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 42 (D.D.C. 2006). Because the public interest "is best assessed through the statutory provisions passed by the public's elected representatives," the public's interest in the CFPB implementing the Dodd-Frank Act's commands "outweighs" any general arguments about the agency's value. *See Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 76 (D.D.C. 2006) (in the context of a Freedom of Information Act request, concluding that the public's interest in statutorily-authorized expedited processing "outweighs any general interest that it has in first-in-first-out processing of FOIA requests").

In this case, the public interest in the CFPB's ability to carry out its statutory mandate is particularly strong because the agency's focus is protecting consumers from harm. *See, e.g.*, 12 U.S.C. § 5511(b)(2), (4) (describing CFPB objectives including "ensuring that … consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination," and that "Federal consumer financial law is enforced consistently"). The laws that the CFPB implements and enforces, such as the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act, 12 U.S.C. § 5481(12), (14), "seek to curb fraud and deceit and to promote transparency and best practices." *PHH*, 2018 WL 627055, at *3; *see also id.* (regarding the CFPB's authority to prohibit unfair, deceptive, or abusive acts or practices). They are thus fundamentally about the safety and fairness of consumer financial markets. Relaxation of the CFPB's efforts to implement and enforce these laws will irreparably harm consumers by increasing their risk of exposure to discrimination, unfair, deceptive, or abusive practices, and other illegal actions. *Cf. Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 613 n.39, 616 (D.C. Cir. 1980) (regarding safety laws and the public interest).

The overriding public interest in the CFPB's statutory mission encompasses the public interest in the agency's independence. A basic management principle holds that an organization's strategy and structure should be "inextricably linked." *See* Steven Aronowitz, et al., *Getting Organizational Redesign Right*, McKinsey Q. (June 2015).[31] Congress has repeatedly recognized and applied this principle. It has

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[31] https://www.mckinsey.com/business-functions/organization/our-insights/getting-organizational-redesign-right.

concluded that "for-cause removal restrictions" are "necessary for the effectiveness of certain types of agencies." *PHH*, 2018 WL 627055, at *11; *see also id.* at *9. Relatedly, "Congress has consistently deemed insulation from political concerns to be advantageous in cases where it is desirable for agencies to make decisions that are unpopular in the short run but beneficial in the long run." *Id.* at *13 (internal quotation marks and brackets omitted).

This management principle could not be truer here. The CFPB is "designed to protect the public interest in the integrity and stability of markets from short-term political or special interests." *Id.* at 20. "Congress validly decided that the CFPB needed a measure of independence." *Id.* at *13.

Reduction in that independence creates a very real risk to the CFPB's ability to pursue its mission. The current Administration has already expressed interest in neutering the CFPB. OMB, *supra* p. 17, at 158-69; U.S. Dep't of the Treasury, *supra* p. 18, at 79-92. If the boundaries that Congress drew between the CFPB and the Administration fall, the President will gain coercive authority to implement his vision and direct the agency away from the Dodd-Frank Act's commands. *See generally PHH*, 2018 WL 627055, at *9; *Humphrey's Ex'r*, 295 U.S. at 630 (concluding that the President's authority to remove FTC Commissioners at will would have "coercive influence" that "threatens the independence of [the] commission").

III. The public interest weighs in favor of a preliminary injunction.

A. Without an injunction, the CFPB will be stymied from pursuing its mission, to the detriment of the public.

The public interest lies strongly with Plaintiff's requested injunction because, absent the injunction, Defendants' actions risk slowing the agency to a halt. The CFPB's "faithful adherence to its statutory mandate," *Jacksonville Port Auth.*, 556 F.2d at 59, will suffer dramatically. Plaintiff English is a full-time CFPB employee, prepared by her tenure at the agency to continue the CFPB's implementation of the Dodd-Frank Act. She has directed the CFPB to press forward with pending enforcement actions, for example. Patrick Rucker & Pete Schroeder, *U.S. Consumer Financial Watchdog Official Defies Trump from Within Agency*, Reuters (Dec. 1, 2017).[32] By contrast, Defendant Mulvaney aims to drastically pare back the CFPB's mission work. As a member of Congress,

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[32] https://www.reuters.com/article/us-usa-trump-cfpb/u-s-consumer-financial-watchdog-official-defies-trump-from-within-agency-idUSKBN1DV5IC.

Defendant Mulvaney co-sponsored legislation to eliminate the CFPB,[33] and his early actions at the CFPB have shown his continued antipathy to the agency's operation.

Defendant Mulvaney himself gives the CFPB only part-time leadership, working at the agency just three days per week. *Acting CFPB Director Mulvaney News Conference*, C-Span (Nov. 27, 2017) (video at approximately 4:36).[34] This half-way commitment slows any action requiring the acting director's review, input, or approval. *See, e.g.*, 12 C.F.R. § 1080.6(e)(4) (giving the Director authority to rule upon a petition for an order modifying or setting aside a civil investigative demand, an investigative tool of the CFPB).

Defendant Mulvaney has attempted an even more drastic cut-back in the work of the CFPB staff. In his first week at the agency, he froze hiring and contracting, and halted statutorily-mandated mission work: rulemaking and guidance, enforcement actions, and payments from the CFPB's Civil Penalty Fund,

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[33] H.R. 3118, 114th Cong. (2015) (Bill "[t]o eliminate the Bureau of Consumer Financial Protection by repealing title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Consumer Financial Protection Act of 2010").

[34] https://www.c-span.org/video/?437841-1/acting-cfpb-director-mick-mulvaney-speaks-reporters.

a fund that Congress required to provide relief to the victims of financial companies' abuses, 12 U.S.C. § 5497(d). *See Acting CFPB Director Mulvaney News Conference*, *supra* p. 25 (video at approximately 2:35); Dave Boyer, *Mulvaney Scrutinizing 125 CFPB Cases Opened by Liberal Predecessor*, Wash. Times (Nov. 30, 2017).[35] Shortly thereafter, Defendant Mulvaney halted the agency's collection of certain consumer information, a move that could reduce the CFPB's ability to enforce the law, address consumer complaints, and develop and implement rules. *See* Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, Wall St. J. (Dec. 4, 2017).[36] In sum, Defendant Mulvaney explained: "We stopped a good many things…. We stopped all new regs going out the door. We stopped all the new contracting. We're stopping the filing of new lawsuits." Boyer, *supra.*

With these actions, Defendant Mulvaney was not leading the CFPB to pursue its statutory mission of implementing and enforcing consumer protection law. Nor was he simply taking time to get up to speed at the agency or making a

[35] https://www.washingtontimes.com/news/2017/nov/30/mick-mulvaney-seeks-more-trump-appointees-help-him/.

[36] https://www.wsj.com/articles/new-cfpb-chief-curbs-data-collection-citing-cybersecurity-worries-1512429736.

routine policy shift. Defendant Mulvaney's statements make clear his intention to change the agency fundamentally, to "limit as much as we can what the CFPB does to sort of interfere with capitalism and with the financial services market." John Bowden, *Mulvaney: Authority I Have at Consumer Bureau 'Should Frighten People'*, Hill (Nov. 30, 2017) (quoting Mulvaney);[37] *see also id.* (quoting Mulvaney as stating, "Authority that I have now as the acting director really should frighten people"). This goal is directly at odds with the consumer protection mission that Congress created for the CFPB. The agency's very purpose, as set forth by statute, focuses on changing markets, to make them more "fair, transparent, and competitive." 12 U.S.C. § 5511(a).

Defendant Mulvaney continues to emphasize that he is working to shift the CFPB away from its statutorily mandated focus on protecting consumers, to protecting businesses. He recently opined that the agency should serve regulated entities, not just consumers. Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, Wall St. J. (Jan. 23, 2018).[38] He launched an exploration of how the

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[37] http://thehill.com/homenews/administration/362709-mulvaney-authority-i-have-at-consumer-bureau-should-frighten-people.

[38] https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561/.

CFPB can improve "outcomes" for companies. *Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions*, CFPB (Jan. 17, 2018).[39] And he reorganized the agency to weaken the agency's ability to pursue discriminatory lending practices. *See* Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, Wash. Post. (Feb. 1, 2018).[40] With these actions, Defendant Mulvaney is pushing the CFPB toward the trap that Congress designed it to avoid: being "overly responsive to the industry [it] purport[s] to police." *See PHH*, 2018 WL 627055, at *1.

Defendant Mulvaney's actions also directly harm consumers during this litigation. When this lawsuit began, for example, the CFPB had open about 100 investigations regarding companies such as Wells Fargo and Zillow. Boyer, *supra* p. 26; Matt Egan, *After Political Drama at Consumer Agency, What Happens to Its*

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[39] https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/.

[40] https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/.

Open Investigations?, CNN (Nov. 27, 2017).[41] A freeze on the agency's ability to take any of these companies to court, even if temporary, means that companies violating the law have more time to harm more consumers.

Defendant Mulvaney's hiring freeze exacerbates the harm to the public interest that his directives cause. Unfilled positions mean vital mission work goes undone. The agency has fewer resources to enforce the law, monitor markets for risk, or educate consumers on financial decision-making. The stress and uncertainty experienced by current employees and potential new hires can have lasting organizational effects. *Cf.* Beth Reinhard & Rebecca Ballhaus, *Impact of Federal Hiring Freeze Seen at Veterans Affairs, Prisons, Social Security,* Wall St. J. (Apr. 9, 2017);[42] Alissa Greenberg, *The Real-Life Consequences of the Federal Hiring Freeze*, Atlantic (Feb. 9, 2017).[43]

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[41] http://money.cnn.com/2017/11/27/investing/cfpb-mick-mulvaney-consumer-agency/index.html.

[42] https://www.wsj.com/articles/impact-of-federal-hiring-freeze-seen-at-veterans-affairs-prisons-social-security-1491735612.

[43] https://www.theatlantic.com/business/archive/2017/02/real-life-consequences-hiring-freeze/516150/.

As this litigation has progressed, Defendant Mulvaney's slow-down of the CFPB has persisted. Though he changed some of his initial directives,[44] his data freeze remains and is hampering the ability of CFPB examiners to review financial companies' operations. James Kim & Bowen Ranney, *CFPB Data Collection Freeze Impacting CFPB Examinations*, Consumer Finance Monitor (Dec. 15, 2017).[45] Defendant Mulvaney has also indefinitely extended his hiring freeze. Gillian B. White*, Mick Mulvaney Is Quickly Deregulating the Financial Industry*, Atlantic (Jan. 5, 2018).[46] Additionally, now more than two months since this dispute began, the agency has not filed any new lawsuits, but has dismissed one and ended at least one other investigation. *Enforcement Actions*, CFPB;[47] Kate

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[44] Defendant Mulvaney has restarted Civil Penalty Fund payments, for example. Stacy Cowley, *Consumer Bureau Lifts Freeze on Payments to Crime Victims*, N.Y. Times (Dec. 7, 2017), https://nyti.ms/2klKiTQ.

[45] https://www.consumerfinancemonitor.com/2017/12/15/cfpb-data-collection-freeze-impacting-cfpb-examinations/.

[46] https://www.theatlantic.com/business/archive/2018/01/cfpb-gop-trump/549755/.

[47] https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ (last visited Feb. 2, 2018).

Berry, *CFPB Drops Probe into Lender That Gave to Mulvaney's Campaigns*, Am. Banker (Jan. 23, 2018).[48]

Defendant Mulvaney also continues to find new ways to reduce the agency's work. Under his purported leadership, the CFPB shelved key aspects of its own authority to enforce a new rule, for at least a year. *CFPB Issues Public Statement on Home Mortgage Disclosure Act Compliance*, CFPB (Dec. 21, 2017).[49] This year, Defendant Mulvaney significantly weakened the agency's financial status. The CFPB was facing its first opportunity, since Director Cordray's departure, to request funds to continue its operations. Defendant Mulvaney took that opportunity to request no funds; he sought to spend down the agency's reserves instead of maintaining funding flows. Letter from Mick Mulvaney, Acting Director, CFPB, to Janet Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys. (Jan. 17, 2018).[50]

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[48] https://www.americanbanker.com/news/cfpb-drops-probe-into-lender-that-gave-to-mulvaneys-campaigns.

[49] https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/.

[50] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf.

B. Without an injunction, the public loses the CFPB's independence.

The public interest in the CFPB's independence also weighs strongly in favor of a preliminary injunction, which will preserve Plaintiff in her role as acting director. Plaintiff English has a proven commitment to the CFPB's independence. Defendant Mulvaney, by contrast, is inherently conflicted from supporting this congressionally-mandated aspect of the CFPB's structure; he has also taken active steps to eviscerate it.

By the very nature of his OMB Director position, Defendant Mulvaney's presence at the CFPB guts the agency's independence. OMB drives the President's budget agenda and is in charge, more generally, of "overseeing the implementation of [the President's] vision across the Executive Branch." *Office of Management and Budget*, White House.[51] Defendant Mulvaney's OMB responsibilities and role thus inherently conflict with those of the CFPB director. Congress intentionally divorced the CFPB and its director from the budget and policy processes that OMB drives. *See* 12 U.S.C. §§ 5492(c)(4), 5497(a)(4)(E).

The conflict between Defendant Mulvaney's OMB role and his purported CFPB role is readily apparent here. The President's "vision" includes restructuring

[51] https://www.whitehouse.gov/omb (last visited Feb. 2, 2018).

the CFPB and making it funded through appropriations—a priority that *OMB itself* explained in the President's budget, with estimates of CFPB budget reductions so severe that they could amount to the agency's elimination. OMB, *supra* p. 17, at 158-69; Leonhardt, *supra* p. 17. With this Presidential priority at issue, Defendant Mulvaney cannot dutifully serve both the President as OMB Director and the CFPB. *See generally* OMB, *supra* p. 17, at 1 (directing that the "Administration will build on [the listed] proposals in order to implement the President's charge."). As the Supreme Court has recognized, "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r*, 295 U.S. at 629.

Defendants have also left no doubt that they intend to work together to run the CFPB in accordance with the Administration's priorities, thus eliminating the CFPB's independence in practice. The President pronounced that he will "cut Regs" at the agency, a pronouncement made as he reacted to a news article about a CFPB investigation and also explained how he would impose penalties at the CFPB. Donald J. Trump (@realDonaldTrump), Twitter (Dec. 8, 2017, 7:18 AM);[52] *see also* Patrick Rucker & Pete Schroeder, *Exclusive: Wells Fargo Sanctions Are*

[52] https://twitter.com/realDonaldTrump/status/939152197090148352.

on Ice Under Trump Official-Sources, Reuters (Dec. 7, 2017) (news article regarding CFPB investigation, published prior to the President's tweet).[53] Defendant Mulvaney, for his part, promised a "new attitude" "in light of the fact that the Trump Administration is now in charge," while expressing "fundamental principled misgivings" about the agency's structure. *Acting CFPB Director Mulvaney News Conference*, *supra* p. 25 (video at approximately 2:25, 7:49).

Defendant Mulvaney has quickly sought to put these views into practice. While freezing the hiring of career officials, he sought immediately to infuse the CFPB with political appointees—an approach that would mirror OMB's but be dramatically out of step with those of independent financial regulators, which typically have few political appointees. *See* Ian McKendry, *Mulvaney's First Days at CFPB: Payday, Personnel and a Prank*, Am. Banker (Dec. 4, 2017);[54] Kevin Wack, *Mulvaney's Plan to Embed Political Staffers in CFPB Sparks Backlash*,

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[53] https://www.reuters.com/article/us-usa-trump-wells-fargo-exclusive/exclusive-wells-fargo-sanctions-are-on-ice-under-trump-official-sources-idUSKBN1E12Y5.

[54] https://www.americanbanker.com/news/cfpbs-mulvaney-backs-congressional-repeal-of-payday-lending-rule.

Am. Banker (Dec. 5, 2017).[55] While directing agency staff to stop their work for consumers, he dialed up the agency's collaboration with CFPB detractors in Congress. *See* Boyer, *supra* p. 26; *see also* Ian McKendry, *supra* p. 34.[56]

OMB Director Mulvaney's commitment to White House priorities and his efforts to link the CFPB to politics stand to destroy the agency's independence and thus its ability to focus on its statutory mission. This type of risk is one that the Supreme Court foresaw decades ago when it considered the Federal Trade Commission's independence in *Humphrey's Executor*. Central to the agency's independent character, the Supreme Court recognized, was that the agency was "free from political domination and control," *Humphrey's Ex'r*, 295 U.S. at 625 (internal quotation marks omitted), and charged with "the enforcement of no policy except the policy of the law," *id.* at 624. The same is true here, as this Court's recent *PHH* opinion confirmed. *See PHH*, 2018 WL 627055, at *4, *14, *20. Accordingly, an acting director beholden to the White House and politics would be anathema to the Congress that purposely crafted an independent CFPB.

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[55] https://www.americanbanker.com/news/mulvaneys-plan-to-embed-political-staffers-in-cfpb-sparks-backlash.

[56] https://www.americanbanker.com/news/cfpbs-mulvaney-backs-congressional-repeal-of-payday-lending-rule.

CONCLUSION

For the foregoing reasons, the public interest weighs strongly in favor of Plaintiff's motion for a preliminary injunction and the decision below should be reversed.

Dated: February 6, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because excluding the material referenced in Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e), it contains 6,393 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

ADDENDA

ADDENDUM: STATUTES

STATUTES

Except for the following, all pertinent statutes are contained in the addendum to Plaintiff-Appellant's Brief.

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12 U.S.C. § 5497(a)

(a) Transfer of funds from Board of Governors

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to--

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) Transition period

Beginning on July 21, 2010 and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the Secretary needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from July 21, 2010 until the designated transfer date.

(4) Budget and financial management

…

(E) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

…

(5) Audit of the Bureau

…

[remainder omitted]

12 U.S.C. § 5511

(a) Purpose

The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) Objectives

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services--

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(c) Functions

The primary functions of the Bureau are--

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 5514 through 5516 of this title, supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

ADDENDUM: ORGANIZATIONAL DESCRIPTIONS OF AMICI CURIAE

ORGANIZATIONAL DESCRIPTIONS OF AMICI CURIAE

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, with members in all 50 states, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the general public. Of particular relevance here, Public Citizen advocates for strong consumer-protection laws to bring fairness to consumer finance and accountability to the financial sector. Public Citizen actively supported establishment of the CFPB to serve as the first federal agency devoted to protecting the financial interests of consumers. Public Citizen believes that the political independence of the CFPB is a crucial feature of the agency's ability to effectively ensure that banks, lenders, and other financial companies treat consumers fairly and in accordance with law.

Americans for Financial Reform (AFR) is a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups that works through policy analysis, education, advocacy, and outreach to lay the foundation for a strong, stable, and ethical financial system. AFR was formed to advocate for the passage of the legislation that became the Dodd-Frank Wall Street Reform and Consumer Protection Act and continues to protect and advance the reforms in that legislation, including a strong and independent CFPB.

Center for Responsible Lending (CRL) is a nonprofit, nonpartisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Since 1980, Self-Help has provided over $7 billion in financing to 131,000 families, individuals, and businesses underserved by traditional financial institutions. Through its credit union network, Self-Help's two credit unions serve over 130,000 people in North Carolina, California, Chicago, Florida, and Wisconsin and offer a full range of financial products and services. Additionally, CRL's research and policy reports and recommendations have addressed numerous issues within the mission and activities of the CFPB, including auto loans, debt collection, mortgage lending, payday lending, and student loans. CRL also has advocated rules to be issued by the CFPB and commented on the agency's rulemaking. As a result, CRL has a direct and immediate interest in the independence and agility of the CFPB and its Director.

Consumer Action, a nonprofit 501(c)(3) organization, has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on consumer education that empowers low-to-moderate-income and limited-English-speaking consumers to financially prosper. Consumer Action has a keen interest in the independence and effectiveness of the CFPB. Consumer Action advocated for the creation of the CFPB and has worked to support its role as a thoughtful, independent regulator with a commitment to fair and transparent consumer financial transactions—and consumer protection—since its inception. Consumer Action has engaged with the CFPB, regularly sharing consumer perspectives and advocating for reasonable rules and actions related to credit cards, credit reporting, mortgages, student loans, debt collection, and, especially, its complaint process and public complaint database. Nearly 7,500 community and grassroots organizations benefit annually from Consumer Action's extensive outreach programs, free multilingual training materials, advocacy and support, and materials on Consumer Action's comprehensive consumer financial website (www.consumer-action.org).

National Association of Consumer Advocates (NACA) is a nonprofit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding in 1969, NCLC has been a resource center addressing consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee, as the Federal Trade Commission's designated consumer representative, and on committees of the National Conference of Commissioners on Uniform State Laws. NCLC staff engage with the CFPB on a broad range of issues, and an NCLC staff member serves on the CFPB's Consumer Advisory Board.

National Consumers League (NCL), founded in 1899, is the nation's oldest consumer advocacy organization. NCL's mission is to protect and promote the interests of consumers in the United States. Since 1992, NCL's Fraud.org campaign has helped millions of consumers avoid financial scams. NCL also works with a network of more than 90 federal, state, local, and international law enforcement and consumer education partners to share consumer fraud complaint information. Through efforts such as its 30-member Alliance Against Fraud and the #DataInsecurity Project, NCL coordinates state and federal anti-fraud advocacy and public education efforts on fraud generally. NCL has worked closely with the CFPB to protect consumers against fraud.

National Fair Housing Alliance (NFHA) is a national organization dedicated to ending discrimination in housing. NFHA is a consortium of private, nonprofit, fair-housing organizations, state and local civil rights groups, and individuals. NFHA engages in efforts to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. NFHA and its members have undertaken important fair housing enforcement initiatives in cities and states across the country; NFHA's work to enforce fair lending laws and advance fair and equal access to credit has contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

Tzedek DC, Inc. is a nonprofit public-interest organization dedicated to safeguarding legal rights and interests of low-income District of Columbia residents facing predatory debt collectors, including in litigation, as well as other consumer financial crises. Headquartered as an independent center at the University of the District of Columbia David A. Clarke School of Law, its work is aided by students and legal volunteers. Tzedek DC and its client communities have a substantial interest in the continued, robust work of the CFPB, the only federal agency dedicated solely to consumer financial protection. Through March 2017, according to a CFPB report, debt collection was the topic on which the CFPB received the most complaints from D.C. households.

U.S. Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is an independent, nonpartisan 501(c)(3) organization that works for consumers and the public interest. Founded in 1984, U.S. PIRG Education Fund advocated and worked for the creation of the CFPB, urging Congress to create "a robust, independent federal Consumer Financial Protection Agency to protect consumers from unfair credit, payment, and debt management products."[1] U.S. PIRG Education Fund now continues to collaborate with the CFPB to ensure that its mission is fulfilled. For example, U.S. PIRG Education Fund has used the CFPB's Consumer Complaint Database to write in-depth reports (10, thus far) that uncover patterns in the problems that consumers are experiencing with financial

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[1] *Consumer Group Testimony on Enhancing Consumer Financial Products Regulation*, Consumers Union (June 24, 2009), https://consumersunion.org/research/consumer_group_testimony_on_enhancing_consumer_financial_products_regulation/ (Testimony of Travis Plunkett, Consumer Federation of America and Edmund Mierzwinski, U.S. PIRG, before the Committee on Financial Services, U.S. House of Representatives, Hearing on Regulatory Restructuring: Enhancing Consumer Financial Products Regulation).

products.[2] The most recent report, published in June 2017, examines complaints from servicemembers and documents financial companies' widespread mistreatment of servicemembers.[3] In addition, U.S. PIRG Education Fund has worked with the CFPB to protect students from unfair financial practices that have occurred when colleges and universities have partnered with financial institutions. Thus, in May 2012, U.S. PIRG Education Fund released a report that analyzed the campus card marketplace and surveyed practices at 120 colleges and universities.[4] Prompted in part by U.S. PIRG Education Fund's work, the CFPB released in December 2015 the Safe Student Account Scorecard, which is a resource to assist colleges and universities that are seeking to select college-sponsored financial

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[2] *See Reports: The CFPB Gets Results for Consumers*, U.S. PIRG Education Fund, https://uspirgedfund.org/page/usp/reports-cfpb-gets-results-consumers.

[3] *See* U.S. PIRG Education Fund, *Protecting Those Who Serve: How the CFPB Safeguards Military Members and Veterans from Abuse in the Financial Marketplace* (2017), https://uspirg.org/reports/usp/protecting-those-who-serve.

[4] *See* U.S. PIRG Education Fund, *The Campus Debit Card Trap* (2012), http://www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf.

accounts. U.S. PIRG Education Fund strongly supported the release of the Safe Student Account Scorecard.[5]

[5] *See News Release, U.S. PIRG Lauds Consumer Guide for Safe Bank Accounts on Campus*, U.S. PIRG (Dec. 16, 2015), http://uspirg.org/news/usp/us-pirg-lauds-consumer-guide-safe-bank-accounts-campus.

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rebecca Smullin
Rebecca Smullin

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5007

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

LEANDRA ENGLISH,
APPELLANT,

V.

DONALD J. TRUMP; JOHN M. MULVANEY,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—All parties, intervenors, or amici who have appeared before the district court and so far in this Court are listed in the Brief for the Appellant.

B. *Ruling under review*.—References to the ruling at issue appear in the Brief for the Appellant.

C. *Related cases*.— This case has not previously been before this Court or any other court, and undersigned counsel is unaware of any related cases pending in this Court or any other court.

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Other Authorities

GLOSSARY

CFPB	Consumer Financial Protection Bureau

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are the District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, who seek to maintain the legislatively crafted independence of the Consumer Financial Protection Bureau ("CFPB") that is so essential to its mission. Through the Consumer Financial Protection Act ("Act"), Congress has authorized State Attorneys General to enforce the Act's consumer protection provisions and CFPB regulations. 12 U.S.C. § 5552(a). In bringing such enforcement actions, the States consult with the CFPB, which has the right to intervene in those suits. 12 U.S.C. § 5552(b). As enforcement partners with the CFPB, the *Amici* States have an interest in preserving the independence of the CFPB from short-term political pressures so that it can use its resources and expertise to pursue the long-term public interest, as Congress intended. The CFPB's independence is crucial to the effectiveness of the *Amici* States' enforcement efforts, as the CFPB and the *Amici* States make decisions about cooperating in parallel investigations, sharing information and documents collected, coordinating enforcement actions, and negotiating joint settlements. Attempts to dismantle Congress's careful and concerted efforts in structuring the CFPB as a truly independent agency would, if successful, harm the

Amici States' ability to enforce the many consumer financial laws that protect their residents.[1]

Current events reinforce the interest and concern of the *Amici* States. *See, e.g.*, Patrick Rucker, *Exclusive: U.S. Consumer Protection Official Puts Equifax Probe on Ice – Sources*, Reuters, Feb. 5, 2018, https://tinyurl.com/yaomzlea (reporting that the CFPB "has pulled back from a full-scale probe of how Equifax Inc. failed to protect the personal data of millions of consumers"); Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, Wash. Post, Feb. 1, 2018, https://tinyurl.com/ycnn836c (disclosing that Mr. Mulvaney "has stripped enforcement powers from a [CFPB] unit responsible for pursuing discrimination cases"); Press Release, CFPB, *CFPB Statement on Payday Rule* (Jan. 16, 2018), https://tinyurl.com/ybdwlpls (stating that the CFPB intends "to reconsider the Payday Rule," which aims to stop payday debt traps by requiring lenders to determine upfront consumers' ability to repay).

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[1] As just one concrete example, the CFPB coordinated with the States to investigate allegations that Chase Bank USA N.A. and Chase Bankcard Services, Inc. had committed a variety of deceptive and unlawful debt-collection practices for credit cards. This resulted in a joint settlement with the District of Columbia, 47 States, and the CFPB under which Chase agreed to reform those practices, pay $136 million, and cease collection actions against more than 528,000 consumers. *See* Press Release, D.C. Office of the Attorney General, *Chase Bank to Change Unlawful Debt-Collection Practices Thanks to Agreements with State Attorneys General* (July 18, 2015), *available at* https://tinyurl.com/ybfcukr4.

STATEMENT OF THE CASE

Congress established an independent CFPB to help prevent a repeat of the 2008 financial crisis, which devastated the nation's economy and was the worst such crisis since the Great Depression. S. Rep. No. 111-176, at 15, 39 (2010). More than 8 million American jobs were lost, 7 million homes entered foreclosure, and household wealth fell by $13 trillion. *Id.* at 39. As the Senate Committee on Banking, Housing, and Urban Affairs found, "it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166. The existing regulatory system had been a "spectacular failure," as regulators had "routinely sacrificed consumer protection for short-term profitability of banks" and other financial institutions. *Id.* at 15.

After extensive testimony and deliberations, Congress enacted the Consumer Financial Protection Act, which created the CFPB as an "independent bureau" within the Federal Reserve System, itself an independent entity, to regulate consumer financial products and services under federal consumer financial laws. 12 U.S.C. § 5491 (a); *see* S. Rep. No. 111-176, at 9-11. Congress determined that the new agency needed to be independent "to prevent problems that had handicapped past regulators." *PHH Corp. v. CFPB*, 2018 U.S. App. LEXIS 2336, No. 15-1177, Slip Op. 6 (Jan. 31, 2018) (en banc) (hereinafter, "*PHH Corp. II*"). That independence, which Congress has given to other financial regulators, "shields the nation's economy from manipulation or self-dealing by political incumbents." *Id*. at 7. It also "enables such agencies to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term." *Id.* at 7-8.

In the Act, Congress carefully calibrated the CFPB's structure to ensure a particularly high degree of independence. First, the Act establishes independent leadership of the agency. It provides for a Director, who "shall be appointed by the President, by and with the advice and consent of the Senate," and a Deputy Director "who shall be appointed by the Director . . . and serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b). The Director "shall serve for a term of 5 years," and may be removed by the President only "for cause," that is, "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c).

Second, the Act provides the CFPB a source of funding independent of the usual budget process. Specifically, "the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau," subject to an annually adjusted funding cap (but with a mechanism for additional appropriations). 12 U.S.C. § 5497(a)(1)-(2), (e). Such funds "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C).

Third, the Act gives the CFPB independent rulemaking authority. It provides: "The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws." 12 U.S.C. § 5512(b)(1). This rulemaking authority is "exclusive," and the judicial deference afforded the Bureau's interpretation "shall be applied as if the Bureau were the only agency" interpreting and administering those laws. 12 U.S.C. § 5512(b)(4).

Fourth, the Act gives the CFPB "primary enforcement authority" among federal agencies authorized to enforce the consumer financial laws with respect to certain covered entities. 12 U.S.C. § 5515(c)(1). Another federal agency may not bring its own enforcement action until 120 days after it recommends that the CFPB bring such action and the CFPB declines to do so. 12 U.S.C. § 5515(c)(2)-(3). Supporting its strong enforcement powers, the Act provides the CFPB with independent litigation authority, such that it may "commence a civil action" and "act in its own name and through its own attorneys" in any suit. 12 U.S.C. § 5564(a)-(b). In lieu of filing suit, the CFPB may also conduct "adjudication proceedings" to enforce compliance. 12 U.S.C. § 5563(a). "The court (or the Bureau, as the case may be) in an action or adjudication proceeding . . . shall have jurisdiction to grant any appropriate legal or equitable relief . . . ." 12 U.S.C. § 5565(a)(1).

Congress, of course, did not give the CFPB unbridled discretion, but struck a precise and intentional balance. For example, as mentioned, the President may remove the Director for cause before the end of his or her five-year term. 12 U.S.C. § 5491(c)(3). In addition, the Act directs the Government Accountability Office to conduct annual audits of the CFPB's financial transactions. 12 U.S.C. § 5497(a)(5). The Act also permits the Financial Stability Oversight Council to set aside a CFPB regulation when it decides, by a two-thirds vote, that the regulation risks certain adverse impacts. 12 U.S.C. § 5513. As designed by Congress, the independence of the CFPB is not only robust but also carefully delineated.

SUMMARY OF ARGUMENT

The *Amici* States agree with Ms. English, in support of her request for a preliminary injunction, that she is likely to succeed on the merits of her claim that the Consumer Financial Protection Act provides an exclusive, mandatory method for designating an acting CFPB Director. (*See* English Br. 18-47.) The *Amici* States file this brief to develop two additional points.

1. The Consumer Financial Protection Act's designation of the CFPB Deputy Director as acting Director, in the event of a vacancy, is essential to the purpose of the statutory scheme, which gives the CFPB a considerable amount of independence necessary, in Congress's view, to accomplish the agency's mission of consumer financial protection. The defendants' contrary position, which would allow the

Federal Vacancies Reform Act to control who succeeds as acting Director, would fatally undermine the independence that Congress so carefully and deliberately chose for the agency. Under the defendants' position, the President alone would select the individuals who could serve indefinitely as acting director, thereby destroying the CFPB's independence. Without independent leadership of the agency, the other statutory provisions designed to uphold an effective and independent agency—independent funding and rule-making authority and primary enforcement authority—would be all for naught.

The Consumer Financial Protection Act and the Federal Vacancies Reform Act can be reconciled through the canon of *lex specialis derogat legi generali*—that is, a specific law overrides a more general one. Aided by this canon, this Court should give effect to the Consumer Financial Protection Act's successor provision, as Ms. English requests, rather than the general, default provisions of the Federal Vacancies Reform Act. This interpretation would uphold Congress's comprehensive solution to the failures of consumer financial protection that, as Congress determined, helped lead to the 2008 financial crisis. Yet the district court ignored the canon by attempting to find some other method of reconciling the two statutes, no matter how much damage caused to the objectives of the Consumer Financial Protection Act. It failed to recognize that the canon is readily available to harmonize both statutes, so that the Consumer Financial Protection Act's successor provision is a narrow exception to the

Federal Vacancies Reform Act, which remains in effect and virtually untouched by Ms. English's interpretation.

2. The district court's reliance on the canon of constitutional avoidance was erroneous. Ms. English's interpretation of the Consumer Financial Protection Act does not raise any serious constitutional problem, especially given that this Court has upheld Congress's constitutional authority to bestow the CFPB's enforcement powers upon a single director, removable for cause. The district court's concern that the accession of the Deputy Director to acting Director would render the President "virtually powerless" over the agency is entirely misplaced. The President retains the ability both to appoint a new successor, subject to Senate confirmation, and to remove the acting Director for cause.

It is the defendants' position, in fact, that raises serious constitutional concerns. By arguing that the President has unfettered power to appoint an acting director, the defendants have removed the legislative branch from its constitutional role in the selection of executive branch officers. Congress's determination about the succession process for the acting CFPB Director should be respected, not ignored. At the least, the canon of constitutional avoidance does not provide courts guidance in this area. The intent of Congress in enacting the Consumer Financial Protection Act, as evidenced by its plain language, should be upheld, and Ms. English should be recognized as the lawful acting Director of the agency.

ARGUMENT

I. This Court Can, And Should, Give Effect To The Successor Provision In The Consumer Financial Protection Act, Because It Is Essential To The CFPB's Independence And Fully Capable Of Being Harmonized With The Federal Vacancies Reform Act.

A. By providing that the Deputy Director succeeds to the acting Director, the Consumer Financial Protection Act ensures the CFPB's independence.

The defendants' position—that the President may select an acting CFPB Director outside of the Consumer Financial Protection Act's provisions—violates the "independent" agency structure that Congress expressly created. 12 U.S.C. § 5491(a). Under the Act, once a Director has been appointed by the President with approval of the Senate, the Director serves a five-year term, which notably transcends the President's own four-year term. 12 U.S.C. § 5491(c)(1). To further ensure the Director's independence, the President's role during the Director's term is limited: the President can remove the Director only for cause. 12 U.S.C. § 5491(c)(3). And if the Director is removed, or resigns, then the Act provides that the Deputy Director "shall" serve as the acting Director until the President appoints (again with Senate approval) a new Director. 12 U.S.C. § 5491(b)(2), (5)(B). Thus, the text of the Act, on its face, forecloses the defendants' position.

In contravention of this statutory scheme, the defendants erroneously contend that the President can unilaterally designate another individual—not the Deputy Director—to serve as acting Director for an extended period. They posit that the

Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq*., enacted more than a decade before the CFPB's creation, allows the President to make such a designation. Under this view, the President could select an acting director who could serve for as long as the Vacancies Reform Act permits—seven months or much longer—but all the while presumably at the President's will. *See* 5 U.S.C. § 3346. Indeed, because defendants have contended that the Vacancies Reform Act is just "one means" of filling the Director's vacancy,[2] the President could choose an acting director under that act and then select, as another successor, the deputy director that the acting director has appointed. Taken to its logical conclusion, the defendants' interpretation would allow the CFPB to be headed indefinitely by individuals who are effectively just of the President's own choosing. This would not only circumvent the required process for Senate confirmation and thus the separation-of-powers doctrine, but also violate the Congressionally mandated independence of the agency director.[3]

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[2] Office of Legal Counsel, U.S. Dep't of Justice, Opinion on Designating an Acting Director of the Bureau of Consumer Financial Protection, Slip Op. 4 (Nov. 25, 2017), *available at* https://www.justice.gov/olc/file/1014441/download.

[3] Raising further concerns about the President's ability to undermine the CFPB's independence, President Trump tweeted several weeks ago in response to news reports about an ongoing CFPB enforcement action: "Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating!" @realDonaldTrump, Twitter (Dec. 8, 2017, 7:18 AM), https://twitter.com/realDonaldTrump/status/939152197090148352.

The defendants' approach demolishes a critical part of Congress's carefully constructed statutory scheme for the CFPB's independence. The independence of an agency means little without independent leadership. *See Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threat[en] the independence of [the] commission.'" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935))); *PHH Corp. II*, Slip Op. 25-26. Congress thus found it necessary to ensure independent leadership through the for-cause removal and succession provisions. 12 U.S.C. § 5491(b)-(c). These leadership provisions undergird other provisions of the Consumer Financial Protection Act that are also essential to a strong and independent CFPB, such as those that insulate it from the usual budget process and grant it exclusive rulemaking authority and primary enforcement powers. *See* 12 U.S.C. §§ 5497(a), 5512(b), 5515(c), 5564. This independence should be maintained, as Congress intended, even when the Director leaves office.

The Vacancies Reform Act can and should be harmonized with the Consumer Financial Protection Act to effectuate its provision requiring that the Deputy Director serve as the acting Director. This harmonization can readily be accomplished by recognizing that the Consumer Financial Protection Act's successor provision is not only the more recent enactment, but also the more specific one. It is "a commonplace of statutory construction that the specific governs the general." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015). Notably, this principle is "particularly true" where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id.*; *accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

That precisely describes the situation here. Congress enacted a comprehensive scheme to ensure the CFPB's independence. It did not simply declare the CFPB independent and leave unresolved the bounds of that independence. Instead, the Consumer Financial Protection Act has numerous, detailed provisions that create a high degree of agency independence, while still striking a balance that carefully delineates its scope. As a direct response to the 2008 financial crisis, the establishment of the CFPB as an independent agency was a "specific solution" to "specific problems" of utmost national importance. Indeed, this Court recognized as much when describing Congress's creation of the CFPB, explaining that the 2008 financial crisis was "surely such a situation" of "new problems calling for tailored solutions." *PHH Corp. II*, Slip Op. 54. The CFPB's establishment was a carefully crafted response to that crisis, "which Congress partially attributed to a colossal failure of consumer protection." *Id.*

By contrast, the Vacancies Reform Act was a statute enacted well before this devastating financial crisis, at a time when the CFPB was not even in existence. It would be unreasonable to conclude that, on the present question concerning the agency's structure and independence, such a statute would prevail over the act that created the CFPB to target the regulatory failures underlying that crisis. Such a conclusion would impermissibly allow an earlier, general statute to fundamentally undermine Congress's specific and comprehensive legislative solution to a critically important issue.

B. The district court's suggestion that the *lex specialis* canon is inapplicable, or even supportive of defendants, misapplies the canon and overrides Congress's intent.

The district court's analysis erroneously found inapplicable the canon that the specific governs the general. The court erred by concluding that there is no apparent contradiction between the two statutes, as it interpreted them, for the canon to help resolve. JA 322. In fact, though, there is such a contradiction given the court's interpretation of the Vacancies Reform Act as providing a non-exclusive means to temporarily fill a vacancy in the CFPB Director position. JA 312. As Ms. English correctly argues, the Consumer Financial Protection Act, on its face and by design, establishes the *exclusive* means of temporarily filling that particular vacancy: it provides that the Deputy Director "shall" serve as the acting Director. 12 U.S.C. § 5491(b)(5)(B). But it cannot be the exclusive means if the Vacancies Reform Act provides an alternative means. Thus, the conflict arises.

The court further erred by reconciling the two statutes before even considering the *lex specialis* canon. JA 322. The court correctly recognized its duty to try to harmonize the two statutes so as to give effect to each. JA 320. But the need "to harmonize and give meaningful effect to these seemingly contradictory provisions . . . can readily be accomplished by employing the well established canon of statutory interpretation that the specific governs the general." *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 306 (D.C. Cir. 2014) (internal quotation marks and ellipsis omitted). "When one statute speaks in general terms while the other is specific, conflicting provisions may be reconciled by carving out an exception from the more general enactment for the more specific statute." *Stewart v. Smith*, 673 F.2d 485, 492 (D.C. 1982); *accord RadLAX*, 566 U.S. at 645 ("To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

This canon best reconciles the statutes here. It recognizes that the acting-director provision in the Consumer Financial Protection Act is a narrow, agency-specific exception to the more general provisions of the Vacancies Reform Act. Despite that exception, the Vacancies Reform Act is still the default statute for filling vacancies across federal government agencies. Even under Ms. English's interpretation, the act remains in effect, with its basic purpose fulfilled and its application in the vast majority of instances unaffected. *See Mittleman*, 757 F.3d at

306 (harmonizing provisions by recognizing one as a specific exception to a general provision that still applies in "the broad run" of situations).

The *lex specialis* canon is thus not, as the district court conceived, a canon of last resort, applied when every other attempt at reconciliation has failed. The court thought that the canon is "not appropriately invoked" here because the two statutes "*can* be reconciled." JA 322. But there is no dispute about the possibility of reconciliation. As just shown, the Consumer Financial Protection Act and the Vacancies Reform Act can be reconciled, but through aid of the canon, which better effectuates congressional intent. The sound guidance that the canon provides cannot be ignored simply because some alternative form of reconciliation is possible regardless of how much that alternative would frustrate the accomplishment of Congress's objectives. "[E]ven when the literal terms of statutory provisions would allow the specific language to be controlled by the more general, we cannot ignore evidence that Congress intended to address a specific situation through special legislation." *Stewart*, 673 F.2d at 492.

The district court was also mistaken that the Vacancies Reform Act is "arguably more 'specific'" than the Consumer Financial Protection Act. JA 322. The court reasoned that the Vacancies Reform Act addresses a particular scenario: the occurrence of a vacancy in a position, like that of CFPB Director, requiring Presidential appointment and Senate confirmation. JA 322. There is no dispute, however, that the Consumer Financial Protection Act applies when a vacancy occurs in the specific position of CFPB Director (and no other such position). This clearly makes the act more specific. *See Edmond v. United States*, 520 U.S. 651, 656-57 (1997) (indicating that statutory provision for appointment of Coast Guard appellate judges would be more specific, for purposes of the canon, than a provision for appointment that included other Coast Guard officers). Another reason that the Consumer Financial Protection Act is more specific is that it was designed to address the specific problem of consumer financial protection, with the independent structure of the director position being essential to Congress's comprehensive solution. *See Howard*, 775 F.3d at 440-41 (relying on the canon to hold that the six-year statute of limitations for suits against the United States does not apply to federal employee claims under Title VII's comprehensive scheme).

II. The Canon Of Constitutional Avoidance Is Inapplicable And In Any Event Cannot Defeat Congress's Intent—As Evidenced Through The Plain Language Of The Consumer Financial Protection Act—That The Deputy Director Become The Acting Director.

The district court erroneously relied on the canon of constitutional avoidance. This canon "is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television*, 556 U.S. 502, 516 (2009). Its premise is a "presumption that Congress did not intend the alternative which raises [such] doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

This canon must be used with caution, though, since it should be "a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

The district court first erred by concluding that Ms. English's interpretation of the Act "poses a serious constitutional problem." JA 328. It explained that such interpretation "potentially impairs the President's ability to fulfill his obligations under the Take Care Clause" to ensure that the laws be faithfully executed. JA 325; *see* U.S. Const. art II, § 3. To the contrary, Ms. English's interpretation is fully consistent with the Constitution (and congressional intent).

The district court initially misstepped by doubting the constitutionality of placing CFPB's broad enforcement powers in the hands of single officer, removable only for cause, rather than a board of such officers. JA 327. While the court's doubts rested on the panel decision in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), this Court, reconsidering *en banc*, recently reversed that decision, *PHH Corp. II*, Slip Op. 67-68. In doing so, this Court affirmed that the CFPB's leadership structure "fully comports with the President's Article II executive authority and duty to take care that the consumer financial protection laws within the CFPB's purview be faithfully executed." *Id*. at. 18. This Court's decision in *PHH Corp. II* has negated the district court's constitutional doubts.

The district court further went astray by suggesting that the President would be "virtually powerless" to replace the Deputy Director upon her ascension to acting

Director. JA 327. This is incorrect. First, the President may appoint, subject to Senate confirmation, a new Director immediately or at any time thereafter. *See* U.S. Const. art. II, § 2, cl. 2; 12 U.S.C. § 5491(b). Second, there is no dispute that the acting Director remains subject to dismissal for cause: "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c); *see* JA 325. Indeed, by virtue of his power to immediately nominate a new Director, the President has a *greater* say in the leadership of the CFPB under an acting Director than under a Director who was appointed by a prior President but whose 5-year term has not yet expired. Because there is no suggestion that the latter situation is constitutionally problematic, Ms. English's interpretation is similarly free from constitutional concern.

Moreover, the defendants' position raises its own serious constitutional doubts. As the district court's analysis reflects, the defendants' interpretation relies almost entirely on a theory of unfettered executive power, to the exclusion of Congress's constitutional role in the selection of executive officers. *See* U.S. Const. art. II, § 2, cl. 2 (requiring that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States"). This is a serious oversight. "The Senate's advice and consent power is a critical structural safeguard of the constitutional scheme." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (internal quotation marks and brackets omitted). "The Framers envisioned it as 'an excellent check upon a spirit of favoritism in the President' and a guard against 'the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity.'" *Id.* (quoting The Federalist No. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton)). Any notion that the President can unilaterally install an agency head who requires Senate confirmation would contravene the constitutional structure.

Consistent with its constitutional role, Congress has long determined when, and under what circumstances, an officer will serve in an acting capacity. "Since President Washington's first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of [an office requiring Presidential appointment and Senate confirmation] without first obtaining Senate approval." *SW Gen., Inc.*, 137 S. Ct. at 935. Indeed, the very authority upon which defendants rely for the selection of Mr. Mulvaney as acting Director is the Vacancies Reform Act, an exercise of Congressional power that contains extensive restrictions on the President's ability to temporarily fill such vacancies. *See id.* at 936-37; 5 U.S.C. §§ 3345, 3346, 3348.

Thus, while there is nothing constitutionally suspect in Congress providing who may serve as an acting agency head, it *would be* constitutionally suspect to decline to give full recognition to Congress's choice in the matter. Here, Congress has spoken clearly by providing that, in the event of a vacancy in the CFPB Director position, the

Deputy Director "shall" serve as acting Director until a successor is appointed by the President and approved by the Senate. 12 U.S.C. § 5491(b).

At the least, the canon of constitutional avoidance provides no assistance to defendants. Especially in light of *PHH Corp. II*, Ms. English's interpretation of the Consumer Financial Protection Act has not been shown to raise "grave and doubtful" constitutional questions, and so the canon has no application. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Moreover, assuming that the Act's provisions for a highly independent CFPB might conceivably implicate executive power, that is the statutory scheme that Congress deliberately established, and so there is also no relevant ambiguity for the canon to address. Of course, courts can determine if what Congress intended through legislation is unconstitutional. *See PHH Corp. II,* Slip Op. 67-68. But it is entirely inappropriate to refuse to give effect to Congress's intent, as expressed in the plain language of the statute, simply because the legislation operates in an area of constitutional complexity or uncertainty. In this particular area, such concerns may well be unavoidable and, as explained, the defendants' position raises its own serious separation-of-powers questions.

Accordingly, the touchstone for discerning Congress's intent remains the language of the Consumer Financial Protection Act, which plainly establishes that Ms. English, as the Deputy Director, lawfully serves as acting Director of the CFPB.

CONCLUSION

This Court should reverse the district court's decision and direct the district court to grant Ms. English's request for a preliminary injunction.

Respectfully submitted,

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I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 4,805 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

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SCHEDULED FOR ORAL ARGUMENT ON THURSDAY, APRIL 21, 2018

In The

United States Court of Appeals for the District of Columbia Circuit

No. 18-5007

LEANDRA ENGLISH, Deputy Director and Acting Director, Consumer Financial Protection Bureau,

Plaintiff-Appellant,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America; JOHN MICHAEL MULVANEY, in his capacity as the person claiming to be Acting Director of the Consumer Financial Protection Bureau,

Defendants-Appellees,

On Appeal from the United States District Court for the District of Columbia, Case No. 1:17-CV-2534-TJK, The Honorable Timothy J. Kelly

BRIEF OF *AMICI CURIAE* CONSUMER FINANCIAL REGULATION SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1)(A), the undersigned certifies as follows:

(A) **Parties and Amici.** To *amici*'s knowledge, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Appellant in this case, No. 18-5007.

(B) **Ruling Under Review.** To *amici*'s knowledge, references to the ruling at issue appear in the Brief for Appellant in this case, No. 18-5007.

(C) **Related Cases.** To *amici*'s knowledge, references to any related cases appear in the Brief for Appellant in this case, No. 18-5007.

STATEMENT REGARDING CONSENT TO FILE AND AUTHORSHIP

All parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the amici curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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I. Interests of *Amici Curiae* and Summary of the Argument

Amici Curiae listed in Appendix A are scholars on financial regulation and consumer finance who regularly study the legal underpinnings of the Consumer Financial Protection Bureau (CFPB or the Bureau).

The orderly succession of government leadership, including of regulatory agencies, is a fundamental pillar of the rule of law in this country. This case involves one such controversy, over the rightful Acting Director of the CFPB following the resignation of the Bureau's first Senate-confirmed Director. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Dodd-Frank) is clear: the Deputy Director of the CFPB "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Thus, upon the Director's resignation, the CFPB's Deputy Director, Leandra English, became Acting Director and may serve in that role until a new Director has been confirmed by the Senate or recess appointed.

Despite this clear congressional directive, Appellee Donald J. Trump refused to abide by Section 5491(b)(5)(B). Instead, he illegally seized control of the CFPB by naming the current Director of Office of Management and Budget (OMB), Appellee John Michael Mulvaney, as Acting CFPB Director. Appellees assert that the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345(a), authorizes this appointment.

As scholars of financial regulation, we contend that Deputy Director English's claim is correct because the Dodd-Frank Act is the only statute that governs this succession dispute. In Dodd-Frank, Congress expressly decreed a mandatory line of succession for an Acting CFPB Director, stating that the Deputy Director "shall" serve as the Acting Director in the event of the Director's vacancy. Congress enacted this provision after considering and rejecting the FVRA during the drafting of the Dodd-Frank Act. Further, Congress's choice of this succession provision is intrinsic to the CFPB's design as an agency with unique independence from policy control by the White House. The appointment of any White House official, but particularly the OMB Director, as Acting CFPB Director is repugnant to the statutory CFPB independence that Congress ordained.

Nor does the FVRA apply to this case because it yields to subsequently enacted statutes with express mandatory provisions for filling vacancies at federal agencies. This is apparent from the text of the FVRA, from the FVRA's legislative history, and from the basic constitutional principle that an earlier Congress cannot bind a subsequent Congress.

For these reasons, Deputy Director English's request for a preliminary injunction should be granted.

II. Argument

A. The Text, Structure, Purpose, and Legislative History of the Dodd-Frank Act Show That It Provides the Exclusive Mechanism for the Succession of the Acting CFPB Director

1. "Shall" Means "Shall": Congress Unambiguously Mandated an Exclusive Succession Line for CFPB Director in the Dodd-Frank Act

In the Dodd-Frank Act, Congress explicitly mandated the order of succession for the Acting CFPB Director. In the event of the "absence or unavailability of the Director"—words sweeping enough to include resignation, which Appellees do not "squarely dispute[]" (JA267)—the Deputy Director "*shall*" serve as Acting Director. 12 U.S.C. § 5491(b)(5)(B) (emphasis added). By choosing the word "shall," Congress made its meaning unmistakable: the Dodd-Frank Act provides a mandatory and therefore exclusive line of succession for the Acting CFPB Director. This language in Dodd-Frank precludes any other method for appointing an Acting Director for the CFPB. Invoking the FVRA as authority for Appellee Mulvaney's appointment would override Congress's express directive.

2. Congress Rejected the Application of the FVRA to CFPB Director Succession, as the Legislative History Shows

The legislative history of the Dodd-Frank Act shows that Congress consciously rejected the FVRA as an authority on CFPB Director succession. The House version of Dodd-Frank contemplated a "Consumer Financial Protection

Agency" to be initially led by a single Director and who would later be replaced by a multi-member commission. H.R. 4173, 111th Cong. § 4102(b)(6)(B) (2010). The House Bill stated that the FVRA would govern while there was a sole Director. *Id.* In contrast to the House version, the Senate Bill, S. 3217, adopted the single Director structure, which Congress ultimately adopted. Nowhere in the sections of Dodd-Frank governing the CFPB did Congress mention the FVRA.

Contrary to the District Court's reasoning, JA 281-82, this legislative history shows that Congress knew how to invoke the FVRA when it wanted to and that it opted not to do so. In the final legislation, Congress deliberately rejected the FVRA as a succession method and made clear that the FVRA would not apply by using the mandatory word "shall" in the line of succession.

3. The Dodd-Frank Act's CFPB Director Succession Provision is Key to the Agency Independence That Congress Ordained

The Dodd-Frank Act's line of succession when the Director is unavailable or absent is intrinsic to Congress's overall design of the CFPB, which established a structure to preserve the agency's independence from the President while ensuring accountability to Congress and the public.[1]

[1] In the leading challenge to the constitutionality of the CFPB's structure, this Court recently held that "the for-cause protection shielding the CFPB's sole Director is fully compatible with the President's constitutional authority." *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177, slip op. at 34 (D.C. Cir. Jan. 31, 2018) (en banc).

a. Congress Designed the Bureau to Insulate It from Political Pressure

Independence from the White House has been a pillar of federal bank regulation since 1863, when the National Bank Act was enacted. Congress clothes all federal bank regulators with independence to ensure the solvency of the banking system and the financial health of Americans. *See PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177, slip op. at 30 (D.C. Cir. Jan. 31, 2018) (en banc) ("Financial regulation, in particular, has long been thought to be well served by a degree of independence"); *id.* at 31-34. Without that independence, the President could try to gain control of the credit channel or even direct lending to political cronies to juice the economy for near-term political gain. Freeing federal bank regulators from daily White House control is essential to the nation's financial stability and to ensure that banks are not used for political means.

When Congress created the CFPB in the Dodd-Frank Act, it was particularly concerned with ensuring the agency's independence. *See* S. REP. No. 111-176, at 11, 174 (2010); Statement of Senator Cardin, *Wall Street Reform and Consumer Protection Act—Conference Report*, Cong. Rec. S5870, S5871 (July 15, 2010); Statement of Senator Kaufman, *id.* at S5885.

Congress established the CFPB in response to the 2008 financial crisis and the consumer abuses that preceded it. Later investigations found that deregulation by federal prudential bank regulators, who were charged with consumer financial protection at the time, contributed to the 2008 crisis. *See, e.g.,* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 149-205 (2011); FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xvii-xviii, xxi, xxiii (2011). Regulators had put short-term profitability of banks over consumer welfare because their dual missions--bank solvency and consumer protection--conflicted. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 ANN. REV. BANKING & FIN. SERV. L. 321, 329-31 (2013).

"Regulatory capture"—in which agencies serve their regulated entities to the detriment of the public—also plagued federal bank regulation before 2010. *See, e.g.*, Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2041-45 (2014). To address these concerns, Congress transferred primary federal jurisdiction over consumer financial protection from the federal prudential bank regulators to the CFPB, which has one sole mission: protecting the financial health of American families.

Congress sought to insulate the new CFPB from industry capture and political interference by endowing it with structural safeguards of independence from the executive branch and the White House. These safeguards include statutory status as an independent agency, a Director appointed by the President and confirmed by the Senate who cannot be fired without cause, a situs outside of the executive branch, independent funding, and exemption from OMB and White House oversight.[2] Dodd-Frank's provision on the appointment of the Acting CFPB Director is pivotal to this agency independence.

i. Independent Agency Status

The Dodd-Frank Act expressly stipulates the CFPB's independence: "There is established in the Federal Reserve System, *an independent bureau* to be known as the 'Bureau of Consumer Financial Protection' . . ." 12 U.S.C. § 5491(a) (emphasis added).

ii. Term and Tenure of the CFPB Director

The CFPB's single Director structure is intrinsic to the agency independence that Congress mandated from ongoing policy control by the White House. The CFPB is led by a Director, who "shall be appointed by the President, by and with the advice and consent of the Senate," 12 U.S.C. § 5491(b)(2), and "shall serve for a term of 5 years." 12 U.S.C. § 5491(c)(1). This five-year term allows the Director

[2] The CFPB Director does not exercise "unchecked" authority, contrary to the District Court's assertion. JA 277. As this Court recently observed, "the CFPB's power and influence are not out of the ordinary for a financial regulator or, indeed, any type of independent administrative agency." *PHH Corp.*, *supra*, slip op. at 51; *see also id.* at 60.

to serve beyond the four-year term of the President and safeguards the CFPB's autonomy.

The Dodd-Frank Act further bolstered the independence of the CFPB by stating that that the President may only "remove the Director for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This provision—which this Court upheld as constitutional in *PHH Corp.* (*supra*, slip op. at 67-68)--protects the Director from termination due to a policy difference with the President. Without for-cause-only removal, a President could credibly threaten to fire the CFPB Director unless the Director acceded to the President's demands. If the Director refused, the President could replace him with a new (and presumably docile) Director. That, in turn, would allow exactly what bank regulation seeks to prevent: an attempt by the President to fire up the economy by relaxing consumer finance rules and thereby credit, leaving the aftermath of high-risk loans to a future White House. *Cf. PHH Corp.*, *supra*, slip op. at 34 (Congress has consistently conferred independence on financial regulators to permit short-run decisions that are unpopular but beneficial for the economy in the long run). Likewise, power to fire at will could allow the President to meddle in enforcement decisions.

Without for-cause-only protection from termination, the powerful financial services lobby could lean on the President to relax regulations through removal or the threat of removal of the Director. Consumer advocates cannot compete with such well-oiled lobbying. The for-cause-only termination clause helps ensures that firms cannot stop or reverse regulation simply by persuading the President to threaten the CFPB Director with removal.

iii. Organizational Situs

Congress placed the CFPB within the Federal Reserve System as "an independent bureau." 12 U.S.C. § 5491(a). Because the Federal Reserve System itself is outside of the executive branch, this decision helps cordon off the CFPB from political pressure.

The decision to locate the CFPB outside of the executive branch is the norm for financial regulators. The Federal Reserve System is independently located, as are the Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration, Federal Trade Commission, Federal Housing Finance Agency, Securities and Exchange Commission, and the Commodities Futures Trading Commission. While the Office of the Comptroller of the Currency sits within the U.S. Department of the Treasury, it is free from interference by the Treasury Secretary (12 U.S.C. § 1; 31 U.S.C. § 321(c)) and considered independent. *See PHH Corp.*, *supra*, slip op. at 32.

On top of independence from the President, Congress also walled off the CFPB from interference by the Board of Governors of the Federal Reserve. Under

Dodd-Frank, absent other statutory authority, the Federal Reserve Board may not: (1) "intervene in any matter or proceeding before the Director, including examinations or enforcement actions;" (2) "appoint, direct, or remove any officer or employee of the Bureau;" or (3) "merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks." 12 U.S.C. § 5492(c)(2). Similarly, the Federal Reserve Board "may not delay or prevent the issuance of any rule or order of the Bureau" and "[n]o rule or order of the Bureau shall be subject to approval or review by the Board of Governors." 12 U.S.C. § 5492(c)(3).

In sum, Congress took pains to assure the CFPB's independence by locating it outside of the executive branch and insulating it from Federal Reserve Board interference.

iv. Independent Funding

There are different ways for industry to capture agencies, but threats to funding are among the most effective. For this reason, Congress has historically funded federal bank regulators outside of the appropriations process. *See PHH Corp.*, *supra*, slip op. at 40 ("financial regulators ordinarily are independent of the congressional appropriations process"); *id*. at 13, 41.

While the CFPB, like all other federal bank regulators, is exempt from the appropriations process, unlike other federal bank regulators it does not generate its own funding. Instead, the CFPB's funding consists of transfers from the Board of Governors of the Federal Reserve, capped at twelve percent of the total operating expenses of the Federal Reserve System reported in the Federal Reserve Board's 2009 annual report, adjusted for inflation. 12 U.S.C. § 5497(a)(1)-(a)(2).

Congress gave the CFPB independent funding due to the risks of relying on the appropriations process. S. Rep. No. 111-176, at 163 (2010) ("[T]he assurance of adequate funding [for the CFPB from the Federal Reserve Board], independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator").

The CFPB is the only federal bank regulator with a cap on its budget and its budget is, as a result, modest compared to the budgets of other federal financial regulators. *See id.* at 163-164. Thus, while the CFPB is structured to be independent of the political horse-trading of the appropriations process, it is kept on a tighter budgetary leash than any other federal bank regulator.

v. Limitations on Executive Oversight

As it did with other independent federal bank regulators, Congress further exempted CFPB actions from executive branch approval. In one such measure, Congress provided that legislative recommendations, testimony, and comments by the CFPB shall not undergo executive branch review, whether by OMB or any other federal officer or agency:

> No officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress [as long as those CFPB documents indicate that the views expressed therein are the CFPB's own].

12 U.S.C. § 5493(c)(4).

In another important example, Congress exempted the CFPB from budgetary review by OMB. The Dodd-Frank Act requires the CFPB to provide copies of the Bureau's Director's financial operating plans, forecasts, and quarterly reports to the Director of OMB. 12 U.S.C. § 5497(a)(4)(A). In a companion measure, however, Congress provided that there is no "obligation on the part of the [CFPB] Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or" other information provided to OMB. 12 U.S.C. § 5497(a)(4)(E). Similarly, nothing in the CFPB's reporting requirements to OMB may "be construed as implying . . . any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.*

Finally, the CFPB, like all federal bank regulators, is excused from submitting its rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review and cost-benefit analysis. Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Oct. 4, 1993). This results from an exemption in Executive Order 12866 for agencies deemed to be "independent regulatory agencies" under the Paperwork Reduction Act, including the CFPB. *Id.* § 3(b); 44 U.S.C. § 3502(5) (listing the CFPB as an independent regulatory agency). Thus, the CFPB and other federal bank regulators are exempt from White House review of their rules. Instead, Congress retains the ultimate oversight over CFPB policy.

b. The Dodd-Frank Act's Directorship Succession Provision Is Critical to the CFPB's Independence

Dodd-Frank's provision on the appointment procedure for the Acting CFPB Director underpins the independence that is a hallmark of the CFPB. Under Dodd-Frank, the White House's most important role with respect to the CFPB—the appointment of the permanent CFPB Director—may only be made "by and with the advice and consent of the Senate." 12 U.S.C. § 5491(b)(2). In contrast, no federal statute mandates Senate confirmation for appointment of an Acting Director of the CFPB.

Application of the FVRA would encourage the President to drag out nomination of a permanent CFPB Director until the end of his term. Such strategic delay would allow this and future Presidents to deny their successors the right to appoint a permanent CFPB Director during their first term. Under Appellees' reading, a President could appoint a rotating cast of Acting Directors, each for 210-day terms, and then nominate a permanent Director at the end of the Presidency. If confirmed, that permanent Director would be able to outlast the first term of the next Presidency by serving a full 5-year term. In other words, a President could manipulate the process by having as many as 8 years of Acting Directors of his choice and then appointing a permanent CFPB Director for a five-year term. This outcome would circumvent Dodd-Frank's requirement that the Senate confirm a permanent CFPB Director for a 5-year term. The Appellees' position gives the President an incentive to delay putting a nominee through the Senate confirmation process, while the Appellant's interpretation incentivizes the President to swiftly announce a nomination if he wishes to shape the Bureau.

B. The FVRA Does Not Afford an Alternative Way of Appointing an Acting CFPB Director

According to Appellees, the FVRA provides an alternative method for filling top vacancies temporarily at federal agencies, even when Congress later specified a different method. Appellees are mistaken because they ignore both the text and legislative history of the FVRA and a fundamental constitutional principle. Together, these sources compel the conclusion that the Dodd-Frank Act is the sole mechanism for appointing an Acting CFPB Director.

1. When a Later Statute Expressly Mandates an Acting Officer, as the Dodd-Frank Act Does, the FVRA Does Not Apply

In Section 3347, the FVRA states that it is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency … for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—(1) a statutory provision expressly—…(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)(1). The Dodd-Frank Act's CPFB successorship provision is exactly such "a statutory provision expressly…designat[ing] an officer or employee to perform the functions and duties of [the CFPB Director] temporarily in an acting capacity." Consequently, the FVRA, by its express terms, does not apply to the CFPB Directorship.

Furthermore, the Dodd-Frank Act's express wording precludes using the FVRA as an alternative basis for appointing an Acting CFPB Director. Dodd-Frank states that the CFPB Deputy Director "shall" serve as Acting Director in case of the "absence or unavailability" of the agency's Director. By using the word "shall," Congress issued as express and unmistakable a command as imaginable without adding "magic words" rejecting the FVRA process. The Supreme Court has repeatedly made clear that "magic words" are not required for a provision to be express. *See Marcello* v. *Bonds,* 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the . . . Act are not lightly to be presumed in view of the statement . . . that modifications must be express[.] But . . . [u]nless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the . . . Act, we must hold that the present statute expressly supersedes the . . . provisions of that Act"); *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J. concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'") (emphasis in original).

The District Court sought to distinguish *Marcello* and *Lockhart* as involving "future-limiting rules" in prior legislation. The Court reasoned that the only issue here "is whether the CFPB's Deputy Director provision displaces a prior statute, the FVRA." JA 265. However, Appellees and the District Court effectively read a future-limiting rule into Section 3347 by interpreting that Section to create a perpetual alternative method for temporary appointments under the FVRA. If their construction were correct, Congress could never enact a separate succession provision that precluded application of the FVRA. That is the essence of a future-limiting rule.

The District Court also reasoned that "shall" in Dodd-Frank does not mean "shall." The District Court pointed to language in the FVRA stating that the first assistant "shall perform" the duties of the vacant office. 5 U.S.C. § 3345(a)(1); *see* JA 268. The Court then observed that the FVRA modified the word "shall" by proceeding to say that "notwithstanding" that requirement, the President "may" appoint another eligible official to perform those duties, thus making "shall" a nonabsolute imperative. *Id.* § 3345(a)(1)-(a)(2); *see* JA 268-69.

The Court's reasoning fails. Unlike the FVRA, the Dodd-Frank CFPB succession clause provides only one way for someone to become acting Bureau head. There is no equivalent "notwithstanding" language in the Dodd-Frank Act provision. Because that Dodd-Frank succession provision uses the word "shall" with no escape clause, it is couched as a "must" and brooks no exception. As such, it is an express clause overriding the FVRA succession procedure and supplants the FVRA in determining the rightful Acting Director of the CFPB.[3]

Dodd-Frank's language that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with . . . officers [or] employees . . . apply to the exercise of the powers of the" CFPB does not alter this result. 12 U.S.C. § 5491(a). The CFPB succession provision in Dodd-Frank is clear: the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5). By using the word "shall," Congress "provided expressly by law" that Section 5491(b)(5) controls appointment of the Acting CFPB Director and

[3] Furthermore, if the FVRA provided an alternative mechanism, the Dodd-Frank CFPB succession provision would be superfluous on these facts because the Deputy Director could become Acting Director under the "first assistant" option of the FVRA in 5 U.S.C. § 3345(a)(1) if the President did not appoint someone else. Contrary to the District Court's reasoning, JA 274-75, it is irrelevant that the Dodd-Frank provision might still be available in other circumstances such as the Director's temporary absence, since Appellees argue that it is not available here. Similarly, the lack of a time limit on the Deputy Director's service as acting head under Dodd-Frank is not a problem because the provision gives the President strong incentives to promptly nominate a permanent Director.

overrides the FVRA. Any other interpretation would render the verb "shall" meaningless and defy Congress's command.

2. The FVRA Does Not Apply to Later Statutes that Expressly Mandate a Line of Succession

In contending that the FVRA always provides an alternative method for temporarily filling vacancies at federal agencies, Appellees rely on a selective reading of the FVRA's legislative history that clashes with a bedrock constitutional principle—that an earlier Congress cannot bind a later Congress. According to Appellees, Section 3347 of the FVRA provides that the FVRA is either the exclusive or alternative succession provision for filling a vacancy; the FVRA is always available no matter what another statute provides. Yet, Section 3347 is open to another (correct) reading, namely that the word "exclusive" simply makes clear that the FVRA applies absent an express opt-out provision that causes another statute to control. Accordingly, Appellees' argument depends on the legislative history of the FVRA (and on a single reported decision that also relied on the FVRA's legislative history).

a. The Legislative History States That the FVRA Cannot Be Used to Fill a Vacancy If a Later Statute Expressly Mandates Another Mechanism

Appellees invoke the FVRA's legislative history as evidence that the FVRA is either the exclusive or alternative way of temporarily filling vacancies at federal agencies. The FVRA's legislative history, however, carefully distinguishes between the application of the FVRA to existing statutes and to subsequently enacted statutes. As that legislative history shows, Congress never meant for the FVRA to serve as an alternative for subsequent succession statutes that expressly supersede the FVRA. This removes any apparent conflict between the FVRA and the Dodd-Frank CFPB succession provision because Congress, when it drafted the FVRA, specifically contemplated that express, mandatory successorship clauses in subsequently enacted statutes would supplant the FVRA's mechanism. In the process, Congress honored a key canon of statutory construction: that recent enactments should be favored over older ones.

The Senate Report on the FVRA explains that that there are three exceptions to its application. The first deals with *subsequently enacted statutes*, which "govern" if they "expressly provide" that they supersede the FVRA. The second deals with *existing statutes*, for which the Vacancies Act stands as an alternative appointment method for acting officers, and the third, not relevant here, deals with recess appointments:

> [Section 3347 of the FVRA] does allow temporary appointments to be made other than through the Vacancies Reform Act in three narrowly delineated exceptions. First, where Congress provides that a statutory provision expressly provides that it supersedes the Vacancies Reform Act, the other statute will govern. But statutes enacted in the future purporting to or argued to be construed to govern the temporary filling of offices covered by this statute are not to be effective unless they expressly provide that they are superseding the Vacancies Reform Act. Second, the bill retains existing statutes that are in effect on the date of enactment

> of the Vacancies Act of 1998 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, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official). The Committee is aware of the existence of statutes specifically governing a vacancy in 41 specific offices, 40 of which would be retained by this bill....

S. Rep. 105-250, 1998 WL 404532 at *15. Because this legislative history is plainly "anchored" to the statutory text, *Shannon v. United States*, 512 U.S. 573, 583 (1994), it deserves great weight.

The Dodd-Frank Act clearly falls within the first exception described in the legislative history: it is a statute enacted by Congress after the FVRA, and it has express language indicating that it supersedes the FVRA because it states that the Deputy Director "shall" serve as Acting Director in the event of the Director's absence or unavailability. Nor does the Dodd-Frank provision result in an "implied repeal" of the FVRA, JA 270-71, 273-74, because Section 3347 yields to future statutes that expressly supersede the FVRA, as the legislative history makes clear.

The District Court overlooks this legislative history, JA 247-92, while Appellees twist its meaning through selective reading. Appellees ignore the first exception to the FVRA discussed in the legislative history. That is the exception applying to subsequently enacted statutes and covers the Dodd-Frank CFPB successorship provision. Instead, Appellees focus on the second exception mentioned in the legislative history, even though that exception is inapposite, because it is limited to pre-existing statutes. Likewise, the only reported case on the FVRA is inapplicable because it deals with the General Counsel of the National Labor Relations Board, one of the 40 offices specifically mentioned in the legislative history as under an existing statute. *Hooks v. Kitsap Tenant Support Services*, 186 F.3d 550 (9^{th} Cir. 2016). The District Court opinion did not acknowledge that the legislative history rendered *Hooks* distinguishable. JA 263-64. Similarly, opinions issued by the Office of Legal Counsel on the FVRA are confined to existing, rather than subsequent statutes. *See, e.g.*, *Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003); *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007). None of these precedents applies to the CFPB Directorship.[4]

b. A Past Congress Cannot Bind a Future Congress

The legislative history's distinction between the FVRA's applicability to existing and subsequently enacted statutes is also the only reading that comports with a fundamental constitutional principle: that a law passed by an earlier Congress cannot bind a future Congress. If Appellees' reading prevailed, an earlier

[4] Notably, the OLC opinion on the CFPB did not address this aspect of the FVRA's legislative history addressing subsequent statutes, only that concerning existing statutes, despite the Dodd-Frank Act being a subsequent statute.

Congress (the FVRA Congress in 1998) could bind a later Congress (the Dodd-Frank Congress in 2010) by requiring the later Congress to preserve the FVRA as an alternative method of filling vacancies for any statutory position that the later Congress created, despite the later Congress's express rejection of that alternative. This is wrong as a matter of constitutional law. While the FVRA Congress could amend previously existing statutes, it could not require the FVRA to always be an alternative method of appointment regardless what future Congresses decided to the contrary.

The democratic foundation of American government cannot tolerate an earlier Congress binding a subsequent one through legislation. Otherwise, a past Congress could exercise dead hand control even if voters later ousted it at the polls. *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); *United States v. Shull*, 793 F. Supp. 2d 1048, 1061 (S.D. Ohio 2011). Precisely for this reason, the legislative history of the FVRA acknowledged that future statutes had to be treated differently than existing statutes. Accordingly, Appellees' position that the FVRA stands as a constant alternative line of succession is incorrect. The FVRA might be an alternative method for filling vacancies at agencies created under existing statutes, but it cannot be for agencies created after its enactment when a subsequently enacted statutory line of succession expressly supersedes the application of the FVRA.

C. Appointment of the Sitting OMB Director as Acting CFPB Director Violates the CFPB Independence Mandated by Congress

Even if the Court held that the FVRA controls the CFPB Directorship succession, the President violated Dodd-Frank by designating Appellee Mulvaney, the sitting OMB Director, as Acting CFPB Director. His appointment flouted Congress's will by putting the CFPB under daily White House control. That is exactly what Congress sought to prevent by creating an exclusive mechanism in the Dodd-Frank Act for appointing an Acting CFPB Director.[5]

OMB "is an office in the Executive Office of the President." 31 U.S.C. § 501. Because Appellee Mulvaney is OMB Director, that makes him a White House official. Appellee Mulvaney told the press that he is continuing to head OMB while working as the Acting CFPB Director. *See* Renae Merle, *Dueling officials spend chaotic day vying to lead federal consumer watchdog*, WASH. POST (Nov. 27, 2017) (saying "he plans to work three days a week at the agency and three days at OMB"). By appointing the sitting OMB director as acting Bureau head, the White House effectively took over the CFPB. Indeed, on November 27, 2017,

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[5] Appellee Mulvaney's appointment is also invalid because his existing duties at OMB, which involve budgetary and management issues within the Executive Branch, are not germane to the CFPB Director's duty, which is to "enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products are fair, transparent, and competitive." 12 U.S.C. § 5511(a). *See Weiss v. United States*, 510 U.S. 163, 164 (1994); *Shoemaker v. United States*, 147 U.S. 282, 300-01 (1893).

Appellee Mulvaney confirmed this was the case, telling the press: "The Trump Administration is now in charge" of the CFPB. *See, e.g.,* Mick Mulvaney, News Conference, C-SPAN, http://cs.pn/2AxVT65.

This appointment of the OMB Director as Acting CFPB Director is a blatant violation of Congress's multiple directives against OMB intrusion into CFPB affairs. Congress decreed in Dodd-Frank that the CFPB will be "an independent bureau," 12 U.S.C. § 5491(a), yet a top White House official is now in charge, without opportunity for Senate confirmation, in direct contravention of Dodd-Frank's prohibition against OMB "jurisdiction or oversight over the affairs or operations of the Bureau," *id.* § 5497(a)(4)(E).

Appellee Mulvaney's actions to date violate other key statutory provisions that wall off the CFPB from OMB. The sitting OMB Director now reviews and approves any proposed "legislative recommendations, or testimony or comments on legislation" by the CFPB to Congress, in violation of 12 U.S.C. § 5492(c)(4). Similarly, Appellee Mulvaney, despite sitting as OMB Director, now signs off on the CFPB's financial operating plans, forecasts, and quarterly reports, contrary to 12 U.S.C. § 5497(a)(4)(E). While in his CFPB capacity, Appellee Mulvaney revealed his OMB hat in his recent letter to the Federal Reserve requesting $0 in funding for the Bureau for second quarter 2018, on grounds that this would "reduce the federal deficit…." Letter to Janet L. Yellen from Mick Mulvaney (Jan.

17, 2018), http://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf.

Appellee Mulvaney is also reviewing and acting on CFPB rules and rulemakings while serving as OMB Director. His involvement in CFPB rulemaking is especially problematic in light of E.O. 12866, which expressly exempts the CFPB from OIRA review.

OIRA, as an office of OMB, 31 U.S.C. § 505, is an arm of the White House. *See* The White House, *OMB Offices*, http://bit.ly/2B14gdL. Because OIRA reports to Appellee Mulvaney, CFPB rulemaking is effectively under OIRA scrutiny so long as Appellee Mulvaney holds both his current posts. In fact, *American Banker* quoted Appellee Mulvaney on December 4, 2017—after he claimed to be serving as Acting CFPB Director—as saying: "You could imagine that the Office of Management and Budget under the Trump administration might look very cautiously, even cynically, against rules that were produced by" the previous CFPB Director, Richard Cordray. Ian McKendry, *Mulvaney's first days at CFPB: payday, personnel and a prank,* AM. BANKER, Dec. 4, 2017. Later, in an email to CFPB staff, Appellee Mulvaney demanded even more quantitative cost-benefit analysis of proposed Bureau actions than already provided. Memorandum from Mick Mulvaney (Jan. 23, 2018), http://bit.ly/2DZELLC. As these pronouncements show, Appellee Mulvaney cannot review CFPB rulemakings impartially; instead, he views them through the lens of the White House and OMB.

Early on, Appellee Mulvaney announced one of his first decisions was to freeze all new rules, regulations, and guidance by the CFPB for 30 days. *See, e.g.,* Mick Mulvaney, News Conference, C-SPAN, http://cs.pn/2AxVT65. He also stopped implementation of new CFPB final rules on payday loans, prepaid cards, and expanded data collection on mortgages. *See* Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, WALL ST. J., Dec. 5, 2017; Renae Merle, *Consumer protection bureau changes direction, will reconsider rule that sets stricter limits on payday lending*, WASH. POST, Jan. 16, 2018; Evan Weinberger, *CFPB Gives Cos. More Time To Comply With Prepaid Rule*, LAW360 (Jan. 25, 2018). As this shows, Appellee Mulvaney, while OMB head, has moved aggressively to place CFPB rulemaking under White House control.

Appellee Trump's tweet on December 8, 2017 shows the degree to which the White House is exerting policy control over the CFPB through Appellee Mulvaney:

> Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating!

Donald J. Trump (@realDonaldTrump), Twitter (Dec. 8, 2017, 7:18 AM), http://bit.ly/2jv1m6u. Of course, the President lacks statutory authority to dictate whether the CFPB, as an independent agency, takes enforcement actions, imposes fines, or adopts or rescinds rules. Nevertheless, the President boasted about his ability to do exactly that.

Meanwhile, the CFPB has halted enforcement proceedings on Appellee Mulvaney's watch. The agency halted an investigation into an installment lender that had contributed to Appellee Mulvaney when he was a congressman. Renae Merle, *'The fish rots from the head down'; Former consumer protection bureau chief fires back at Trump successor*, WASH. POST, Jan. 24, 2018. CFPB attorneys also withdrew a pending enforcement action against payday lenders under his aegis without giving a reason. Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i), *Consumer Financial Protection Bureau v. Golden Valley Lending, Inc., et al.*, Civil Case No. 2:17-cv-02521-JAR-JPO (D. Kan. Jan. 18, 2018).

The District Court ignored both Dodd-Frank's strictures again OMB interference and the numerous ways Appellee Mulvaney's appointment abridges CFPB independence. JA 282-85. Indeed, the Court went so far as to suggest that any abridgement was immaterial because his appointment was "time-limited." JA 279. But OMB can only act through live individuals, and Appellee Mulvaney, as OMB's Director, is OMB's most powerful instrument of control. Furthermore, the temporary nature of his appointment is irrelevant, because his decisions as Acting CFPB Director to rescind enforcement actions or rules will allow new consumer abuses to flourish. If Dodd-Frank's multiple provisions cordoning off the CFPB from OMB mean anything, they mean that no OMB Director or employee may serve as Acting Director of the CFPB.

In short, Appellee Mulvaney's appointment as Acting CFPB Director while continuing to serve at OMB puts the CFPB under the day-to-day thumb of the White House. This sort of White House control, unmediated by Senate confirmation, undermines the CFPB's statutory independence and Congress's express decision to reject the FVRA mechanism and have the Dodd-Frank Act control the CFPB's Directorship succession.

* * *

For the reasons explained above, only the Dodd-Frank Act applies to determine the succession of the Acting CFPB Directorship in the event of a vacancy, which means that until and unless the Senate confirms a Presidential nominee (or one is installed through a recess appointment), the Deputy Director of the CFPB, Leandra English, is the only lawful Acting Director.

III. Conclusion

For these reasons, the Court should grant Appellant's appeal.

Respectfully submitted,

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APPENIDX

APPENDIX A: LIST OF *AMICI CURIAE*

Kathleen C. Engel is a Research Professor of Law at Suffolk University. She serves on the CFPB's Consumer Advisory Board (CAB); however, the views she expresses here are her own, not those of the CAB, the CFPB, or the United States.

Dalié Jiménez is a Professor of Law at the University of California, Irvine School of Law. From 2011-12, she served in the Research, Markets & Regulation division at the CFPB.

Adam J. Levitin is the Agnes N. Williams Research Professor of Law at the Georgetown University Law Center. He previously served on the CFPB's CAB and as counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program. He is currently engaged as an expert witness by the CFPB, but is not representing the Bureau in serving as *amicus curiae*.

Patricia A. McCoy is Professor of Law at Boston College Law School. In 2011, she founded the Mortgage Markets unit at the CFPB and oversaw the Bureau's mortgage initiatives.

Richard Alderman is a Professor Emeritus of Law and Director of the Consumer Law Center at the University of Houston Law Center.

Ethan S. Bernstein is an Assistant Professor in the Organizational Behavior unit and the Berol Corporation Fellow at the Harvard Business School. He previously served as the CFPB's Chief Strategy Officer and Deputy Assistant Director of Mortgage Markets.

Mark E. Budnitz is a Professor of Law, Emeritus, at Georgia State University College of Law and the former Executive Director of the National Consumer Law Center. He has written extensively about consumer financial services.

Prentiss Cox is an Associate Professor of Law at the University of Minnesota Law School. He was a member of the inaugural CFPB's CAB and previously was Manager of Consumer Enforcement at the Minnesota Attorney General's Office.

Benjamin P. Edwards is an Associate Professor of Law at the University of Nevada, Las Vegas William S. Boyd School of Law. He writes about financial regulation and consumer protection.

Judith Fox is a Clinical Professor of Law and the Director of the Economic Justice Project at Notre Dame Law School. She is a member of the CFPB's CAB; however, the views she expresses here are her own, not those of the CAB, the CFPB, or the United States.

Robert C. Hockett is the Edward Cornell Professor of Law at Cornell Law School, specializing in finance and financial regulation. He has previously worked at the Federal Reserve Bank of New York and the International Monetary Fund and is a Fellow of The Century Foundation.

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Jeff Sovern is a Professor of Law at St. John's University School of Law, where he has taught and written about consumer law for more than thirty years.

Jennifer Taub is a Professor at Vermont Law School and author of the financial crisis book *Other People's Houses* (Yale Press, 2014).

Arthur E. Wilmarth, Jr., is Professor of Law at George Washington University Law School. He has published many articles dealing with financial regulation, and he served as a consultant to the Financial Crisis Inquiry Commission in 2010.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 29(a)(5) and 32(a)(7), (g), the undersigned certifies that this brief has been prepared in a proportionally spaced typeface, Times New Roman, in 14-point font. According to the word processing system used to prepare the brief, Microsoft Word 2010, it contains 6487 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF REGARDING SEPARATE BRIEF

The undersigned certifies, pursuant to D.C. Cir. R. 29(d), a separate *amicus* brief by the Consumer Finance Scholars is necessary. In contrast to the other *amici* supporting Appellant who represent potential litigants, *Amici* here bring a scholarly perspective arising from their extensive study of the statutes underpinning this area of law.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2018, a true and correct copy of the foregoing Brief of *Amici Curiae* Consumer Financial Regulation Scholars in Support of Plaintiff-Appellant was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties will be served electronically by the Court's CM/ECF system.

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[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]
Case 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 (No. 17-cv-2534-TJK) (Hon. Timothy J. Kelly)

BRIEF OF *AMICUS CURIAE* PETER CONTI-BROWN IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus* states as follows:

(A) Parties and Amici: Except for any *amici* who had not yet entered an appearance in this case as of the filing of Plaintiff-Appellant's brief, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant.

(B) Rulings Under Review: Reference to the ruling under review is in Plaintiff-Appellant's Brief.

(C) Related Cases: Counsel for *amicus* is not aware of any pending related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* Peter Conti-Brown certify that a separate brief is necessary. *Amicus* is a scholar of the structure, history, and evolution of financial regulatory institutions, including especially the U.S. Federal Reserve System. His background and expertise are different than those of other *amici* who have participated in this appeal or the other district court *amici* in support of plaintiff. Mr. Conti-Brown offers no opinion on defendant John Michael Mulvaney as an individual or Mr. Mulvaney's perspective on consumer finance law or policy, and offers no opinion on the Consumer Financial Protection Bureau's institutional design beyond the legislative requirement of "independence" and its status within the Federal Reserve System.

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GLOSSARY

CFPB: Consumer Financial Protection Bureau

FVRA: Federal Vacancies Reform Act

OMB: Office of Management and Budget

INTEREST OF *AMICUS*

Amicus Peter Conti-Brown is an assistant professor at the Wharton School of the University of Pennsylvania. He is a scholar of the structure, history, and evolution of financial regulatory institutions, including especially the U.S. Federal Reserve System. The interest of *amicus* is the sound development of laws relating to financial regulation.

No party's counsel authored this brief, in whole or in part. Neither party nor any party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than *amici curiae* contributed money that was intended to fund the preparation of the brief.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Although the primary statutory question the parties dispute involves the Federal Vacancies Reform Act (FVRA) and its relationship to the Wall Street Reform and Consumer Protection Act (Dodd-Frank), this case in fact hinges on a different question. Congress established the Consumer Financial Protection Bureau (CFPB) as an independent bureau within the Federal Reserve System. Even if the FVRA applies to the director of the CFPB, President Donald J. Trump's decision to appoint a White House official to act as the Bureau's director eliminates the independence that Congress has required for that Bureau. This Court has recently concluded that Congress acted within its constitutional powers in granting the CFPB independence. *PHH Corporation v. CFPB*, No. 15-1177, 2018 WL 627055, (D.C. Cir. Jan. 31, 2018). The CFPB is today an executive bureau within the White House, in plain contravention of the statute. The President has many other options to avoid the illegality of Mr. Mulvaney's appointment, including by naming a permanent director who will be subject to a public vetting and Senate confirmation. If the court interprets the "independence" required by statute to allow a White House official to direct every aspect of the CFPB's policies, the independence of other institutions, including especially the Federal Deposit Insurance Corporation and the U.S. Federal Reserve System, will face substantial threat.

ARGUMENT

The parties ask the court to decide whether the FVRA of 1998 or Dodd-Frank applies to the CFPB. If Dodd-Frank applies, the plaintiff Leandra English is the rightful acting director. If the FVRA applies, the defendants argue, the rightful acting director is John Michael Mulvaney.

The FVRA, however important, does not in fact resolve this case. Even if the FVRA applies, President Trump does not have the legal authority to appoint a White House official to lead the CFPB. This brief explains why the statutory requirements that the CFPB be "independent" and "in the Federal Reserve System" trigger limits on the identity of those whom the President may appoint to serve as an acting director.

The independence of administrative agencies is a fraught concept as a matter of history and political theory. As a matter of law, though, it is clear. Whatever else it means, "independence" refers at least to the limits on presidential control over top agency personnel. The CFPB under Mr. Mulvaney is not independent, as required by Congress. And it is no longer within the Federal Reserve System, as required by Congress. As long as Mr. Mulvaney continues to assert this authority, he and President Trump openly flout Congress's legislative mandate.

I explain this argument in five brief parts. First, I explain the statutory framework as Congress developed it with respect to the CFPB. This part also discusses the statutory relationship between the CFPB and the Office of Management and Budget that Mr. Mulvaney continues to lead. Second, I discuss the law and scholarship associated with independence and why President Trump's decision to appoint Mr. Mulvaney disobeys the congressional mandate for CFPB independence, a legal concept that focuses exclusively on the President's relationship to top personnel. Third, I discuss how allowing President Trump to flout the legal requirement of independence can erode norms of independence for other institutions, including the U.S. Federal Reserve and more directly, the Federal Deposit Insurance Corporation. Fourth, I list the other candidates President Trump could select as acting director of the CFPB who would satisfy the legal demands of independence that Mr. Mulvaney cannot perform by virtue of his continued employment within the White House organization. And finally, I explain why those candidates and the obvious solution to this problem—that the President advance a nomination to be considered by the U.S. Senate for a permanent director—are not as appealing to a president who would seek to control legislative prerogatives more completely than the law allows him to do. This is not a personal accusation against President Trump: Through history, many presidents have sought to expand executive prerogatives at congressional expense. It is up to the judiciary to enforce that constitutional and legislative separation.

For these reasons, even if the court accepts the defendants' argument that the FVRA controls the appointment process, the defendants should still lose. In that event, President Trump must be required to choose an acting director without the conflicts that violate the congressional requirement of CFPB independence.

I. Congress created the Bureau to be insulated from the President.

The Bureau began its life as a proposed "Financial Product Safety Commission" from then Professor Elizabeth Warren.[1] By the time it became a legislative proposal, the entity was called the Consumer Financial Protection Agency, created by the House of Representatives to be "an independent agency in the executive branch" with a five-person structure. Consumer Financial Protection Agency Act

[1] Elizabeth Warren, "Unsafe at Any Rate," *Democracy*, Summer 2007, No. 5.

of 2009, H.R. 3126 § 111. Only during the final negotiations did Senate Republicans succeed in proposing the Consumer Financial Protection Bureau, located within the Federal Reserve System.[2] The proposal was met with some skepticism from liberal Democrats but was seen as a bridge to compromise with Republican colleagues in hopes of passing a bipartisan bill.

Although bipartisan efforts broke down, the Bureau structure remained. What Congress finally created and President Barack Obama signed into law was a guarantee: "There is established in the Federal Reserve System an independent bureau to be known as the 'Bureau of Consumer Financial Protection." 12 U.S.C. § 5491. The point for that structural innovation was not to put the new Bureau under the thumb of the Federal Reserve. The Fed would not have control over the new Bureau's budget, although that budget would originate with the Fed's own financial portfolio and would be determined by the CFPB Director subject to statutory limits. Nor would the Fed have any formal authority over the appointment of its personnel. The idea was to establish the bureau on its own footing, but with a connection to an institution known for its expertise and insulation from partisan politics. Indeed, that connection away from political meddling made it unpopular

[2] See the definitive history of the Dodd-Frank Act for more details, ROBERT KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS AND HOW IT DOESN'T, 250-255 (2012)

for some Senators from both parties.[3]

It is important to emphasize how tenuous the connection between the CFPB and the Fed has become in practice, exactly as envisioned by Congress. Besides the budget already mentioned, the Fed and CFPB share an inspector general: nothing more. The CFPB is placed within the Fed not to increase the relationship between the entities, but to create a legal mandate aimed at changing public perceptions and, therefore, presidential behavior. The expectation of independence that the Fed enjoys largely by tradition is extended to the CFPB. This tenuous connection only highlights the CFPB's insulation, and how easily replaced the Fed is as the overarching administrative umbrella for the CFPB.

That connection has now been displaced by the purported appointment of Mr. Mulvaney as the Bureau's acting director. The White House now can dictate the CFPB's budget, since the director issues its budget request to the Federal Reserve System. The White House can dictate personnel decisions within the Bureau, as the Director has done.[4] The White House can control regulatory decisions, as it indeed has already done.[5] And the White House can control enforcement decisions, as it

[3] *Id.*
[4] Andrew Restuccia, "Mulvaney imposes temporary hiring, regulations freeze on CFPB," Politico, November 27, 2017, available at https://www.politico.com/story/2017/11/27/mulvaney-hiring-freeze-consumer-protections-192306
[5] *Id.*

indeed has already done.[6]

Under Mr. Mulvaney, the Consumer Financial Protection Bureau is not "established in the Federal Reserve System an independent bureau." There instead is established an executive department of the White House, overseen by the White House Office of Management and Budget. President Trump has ignored the contrary congressional mandate. He has created a new law, not executed an old one.

The illegality of Mr. Mulvaney's appointment is even more apparent given the specific relationship—or lack of relationship—that Congress created between the Bureau and the Office of Management and Budget. In announcing how the CFPB would handle its budgetary and financial management, Congress announced a rule of construction in 12 U.S.C. § 5497(a)(4)(E). It is worth quoting in full:

> This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

Congress spoke here with clarity. Not only does the CFPB Director have no obligation to consult with the OMB Director, the OMB has no jurisdiction or

[6] Patrick Rucker and Pete Schroeder, "Wells Fargo sanctions on ice under Trump official – sources," Reuters, December 7, 2017, available at https://www.reuters.com/article/us-usa-trump-wells-fargo-exclusive/exclusive-wells-fargo-sanctions-are-on-ice-under-trump-official-sources-idUSKBN1E12Y5?il=0

oversight over the affairs or operations of the Bureau. This provision provides even more flesh to the bones of independence that Congress required for the Bureau. It is to be independent of the White House—including the Office of Management and Budget. The White House has engaged in a rule of construction, in a sense, that puts the OMB in direct "oversight over the affairs or operations of the Bureau." *Id*.

Congress only writes the laws; it is up to the President to execute them. Here the President has abrogated, rather than executed, the legal requirement of CFPB independence. By giving Mr. Mulvaney the two hats of OMB director and CFPB director, the CFPB is now squarely and literally under the management of the OMB, much more directly than any other agency of government. Indeed, Mr. Mulvaney's appointment takes the OMB at its most political and least technical, and imposes it on the CFPB. The OMB houses a large body of civil servants who prepare technical reports about the costs and benefits of regulations and other consultations required by legislation and regulation. President Trump has accomplished an end-run around this technical process and imposed only the political bottom line: the OMB head now has the unilateral veto over every aspect of the CFPB's decision-making.

There is a proposal to dramatically change the CFPB's governance structure, mandate, relationship to the White House (and the OMB), and funding structure:

HR 10 – Financial CHOICE Act of 2017, introduced April 26, 2017. That proposal has already passed the U.S. House of Representatives and awaits action in the U.S. Senate. I offer no opinion on whether a legislative change of the kinds anticipated here is sound as a policy matter. Policy decisions of these kinds are left for Congress to decide. But so far, Congress has reached the opposite conclusion and not passed this and many other repeated efforts at changing the Bureau's structure. Until Congress passes a law that abrogates that earlier determination, the President is not at liberty to do so himself. Appointing Mr. Mulvaney as acting director is precisely this kind of presidential legislation.

II. Independence as a legal category is about the extent of the President's control over personnel.[7]

Congress has mandated CFPB independence, but what "independence" means is often an elusive concept as a matter of political and historical practice. The idea that there should be administrative agencies as something other than the alter ego of the President is nearly as old as the U.S. Republic.[8] The U.S. Constitution itself outlines some kind of separation by creating "executive Departments" that are separate from the Presidency. U.S. Constitution Article 2, § 2. As a matter of law, however, the concept of "independence" is something very specific. As Harvard

[7] Sections of this portion of the brief are drawn from Peter Conti-Brown, "The Institutions of Federal Reserve Independence," 32 Yale J. on Reg (2015).
[8] *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

Law Professor Jacob Gersen has noted, agency independence is a "legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not."[9] Thus, "agency independence" is not concerned with "independence" in some kind of colloquial sense, of pure autonomy with no possibility of outside interference. The question is only the President's ability to directly control the agency's agenda through top personnel.

Scholars have documented the removability focus in administrative law's historical development,[10] but the doctrinal gist is simple. Congress may not require the President to seek Senate advice and consent prior to firing an agency head, as the "reasonable construction of the Constitution" would forbid that kind of blending of legislative and executive functions. *Myers v. United States*, 272 U.S. 52, 116, 176 (1926). But Congress may condition presidential removal of an agency head to a more limited range of causes, depending on the nature of the office in question. For offices that are created to "perform . . . specified duties as a legislative or as a judicial aid," the Court deemed removability conditions on

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[9] Jacob E. Gersen, *Designing Agencies*, RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347-48 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[10] *See* Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 23-31 (2013). Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15 (2010). Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163 (2013).

agency heads constitutionally permissible. *Humphrey's Executor*, 295 U.S. 602, 627-28 (1935). So too for lower-level executive appointees like the independent counsel, *Morrison v. Olson*, 487 U.S. 654 (1988), but not if the agency head and the lower-level appointee are both deemed to be protected by for-cause removability protection. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).

As a matter of black-letter law, then, agency independence has a laser-like focus on the relationship between the president and the head of the agency in question. Criticizing this narrow focus on personnel control has become something of a boom industry for scholars of administration in the last decade. For example, the personnel focus looks at the wrong mechanisms of independence,[11] creates meaningless distinctions between executive and independent agencies,[12] is focused on the wrong problems[13] and the wrong parties,[14] reflects a misunderstanding of how the administrative state actually functions,[15] elides ways in which the President controls independent agencies beyond removability,[16] and gives to courts

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[11] *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 631-37 (2010).
[12] Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769 (2013).
[13] *See* Barkow, *supra* note 10.
[14] M. Elizabeth Magill and Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L. J. 1032 (2011).
[15] Jody Freeman and Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. (2012).
[16] Bressman and Thompson, *supra* note 11.

review of decisions that are fundamentally incompatible with judicial review.[17]

I've also joined that scholarly criticism with respect to the U.S. Federal Reserve System.[18] But this collective criticism focuses on the practical realities that agencies confront: it is not the law. As the Supreme Court has instructed in a related context, this focus on personnel is not merely a matter of "etiquette or protocol," but "is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citing *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)). Whatever the criticism, the Supreme Court has held that the personnel focus is nearly exclusive. And here, President Trump has installed a member of the Executive Office of the President, under his direct control and supervision, to lead an entity Congress designated as "independent." By this action, the President has flouted the law.

III. Independence is guaranteed by law, but implemented by norm and tradition. President Trump's appointment of Mr. Mulvaney risks a substantial assault on the norms of independence for other entities like the U.S. Federal Reserve System and the Federal Deposit Insurance Corporation.

If the legislative mandate for "independence" and the judicial focus on personnel are clear, how courts guarantee that independence is not as clearly specified. Given that the informal concept of agency independence in

[17] Huq, *supra* note 10.

[18] Peter Conti-Brown, The Power and Independence of the Federal Reserve (2016).

administrative law is so difficult to define with precision and so dependent on context, it is unsurprising that the implementation of independence is governed by norms and traditions. The legal question the court must decide is whether a White House official acting as CFPB director guarantee the CFPB's required independence, but this question cannot be answered in a vacuum. If this court permits the President to override the legislative mandate of CFPB independence by installing a White House official to lead the Bureau, the norms and traditions associated with other independent agencies will also be under attack.

This attack is most direct for the Federal Deposit Insurance Corporation, a federal agency created in the aftermath of the banking crises of the Great Depression to guarantee bank deposits nationwide. The FDIC's power is extraordinary. In addition to certifying every recipient of federal deposit insurance—whether state banks, national banks, or foreign banks doing business in the United States, *see* 12 U.S.C. § 1816—the FDIC must take extraordinary actions with the banks who receive this insurance. This includes an involuntary termination of deposit insurance, 12 U.S.C. § 1818(a)(2), issuing cease-and-desist letters to individual banks covering a broad array of activities, *id.* § 1818(b); "remov[ing] . . . from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution" of any officer of any relevant bank, *id.* § 1818(e)(1); and seizing the assets, liquidating the interests, and running a bank that it deems in sufficient distress, *id.* § 1821. Dodd-Frank has only expanded the FDIC's role in the individual supervision and regulation of the nation's largest banks. The FDIC exercises staggering governmental authority over individual private actors.

That power requires significant insulation from those actors who would seek either to unjustly avoid its use or to deploy it against disfavored parties for reasons other than the safety and soundness of those depository institutions. For this reason, Congress took care in the FDIC's institutional design to ensure an insulation from partisan meddling, but with an appropriate level of political accountability.

The balance struck is clearest in the representation on the Corporation's Board of Directors. The Board consists of five members. Three are appointed specifically to that role, including a Chair and Vice Chair. The other two serve *ex officio*, as the Comptroller of the Currency and as the Director of the Consumer Financial Protection Bureau. All appointments are nominated by the president and confirmed by the Senate. None works in the White House.

None, that is, until President Trump appointed Mr. Mulvaney as acting director of the CFPB. The White House now has a vote to determine some of the most politically sensitive questions that face the banking industry, on individual cases. It is one of the most significant political changes to the FDIC's structure in the corporation's history.[19]

The President's decision also directly influences the independence of the U.S. Federal Reserve System. The Fed's Board of Governors is not subject to the FVRA, so the precise issue of an interim director is not relevant. But for both the CFPB and the Fed, the question of *how* independence will be maintained is up for grabs. Indeed, while the Fed is sometimes held as the paragon of independence, most of that "independence" comes not from legal guarantees but from tradition. The CFPB is on even stronger statutory footing: there is no parallel guarantee of "independence" in the Federal Reserve Act. The term is only used in reference to auditing requirements. *See, e.g.*, 12 U.S.C. § 225(b).[20]

President Trump, like presidents before him, has already attempted to push the Fed's independence to outer boundaries.[21] The CFPB is formally a part of the Federal Reserve System. If the President succeeds in eliminating the CFPB's independence through the temporary appointment of Mr. Mulvaney—despite the

[19] For more details on this relationship, *see* Aaron Klein, Why the CFPB showdown threatens the independence of financial regulators, Brookings Institution Blog, November 28, 2017, available at https://www.brookings.edu/blog/up-front/2017/11/28/why-the-cfpb-showdown-threatens-the-independence-of-financial-regulators/.

[20] Peter Conti-Brown, The Power and Independence of the Federal Reserve (2016).

[21] Peter Conti-Brown, "Does the New Fed Governor Serve at the Pleasure of the President?" Yale Journal on Regulation Notice and Comment Blog, October 17, 2017, available at http://yalejreg.com/nc/does-the-new-fed-governor-serve-at-the-pleasure-of-the-president/.

legislative guarantee of that independence—it will embolden him to violate the norms and traditions that insulate the Fed from partisan politics in other ways.

IV. There are other candidates the President could name who would not violate the law.

If the court concludes that Dodd-Frank dictates the process for controlling the Bureau in the absence of a permanent director, Ms. English is the Bureau's acting director. If the FVRA does, and the court agrees that Mr. Mulvaney's part-time status as an OMB director eliminates the CFPB's independence, President Trump has a number of other candidates he can tap to serve on this basis.

The most obvious choices would be the three currently serving Governors on the Fed's Board of Governors: Lael Brainard, Jerome Powell, or Randal Quarles. They are individuals "who serve[] in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate," as required by the FVRA. 5 U.S.C. § 3345. Given the CFPB's formal status within the Federal Reserve System, a member of the Fed's Board of Governors is the most logical choice. Indeed, the Senate only recently confirmed Randal Quarles, President Trump's nominee to the Fed's Board of Governors as Vice Chair for Supervision. The Vice Chair for Supervision is also a new position created under Dodd-Frank and one anticipated to have an enormous influence on the way financial regulation and supervision are conducted.[22] He presumably passes muster with President Trump given the recent nomination and would pose none of the concerns raised by Mr. Mulvaney's appointment, even if his regulatory and supervisory priorities are likely to differ from a CFPB director appointed by Barack Obama.

President Trump could also tap the many other Senate-confirmed financial regulators, whether on the FDIC Board, the Comptroller of the Currency, the Securities and Exchange Commission, or the Commodities Futures Trading Commission. None of these candidates would remove the Bureau's independent status within the Federal Reserve System. And none would violate the CFPB's independence by virtue of the office she holds.

The reason to insist on the preservation of the CFPB's independence from White House personnel is not to privilege one partisan agenda over another. Randal Quarles, Jerome Powell, Thomas Hoenig (Vice Chair of the FDIC), or Joseph Otting (Comptroller of the Currency) are all Republicans. The point is to prevent the administration from disregarding the congressional requirement of CFPB independence at the expense of the CFPB's and FDIC's extraordinary powers. Not only does the statute require it, but judicial enforcement of this plain

[22] Binyamin Appelbaum, *Randal Quarles Confirmed as Federal Reserve Governor*, New York Times, Oct 5, 2017.

statutory mandate will also prevent these two agencies from becoming, in appearance or in fact, the tools of political operatives who would reward their friends or penalize their enemies.

We are already seeing the direct effects of this violation of the CFPB's independence. On Thursday, December 7, 2017, *Reuters* reported that Mr. Mulvaney was pulling back on the fines and oversight that the CFPB had imposed on Wells Fargo following the bank's admission that it had committed fraud against hundreds of thousands of its customers.[23] On Friday, December 8, 2017, President Trump issued the following statement from his Twitter account:

> Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating![24]

Note the structure of this extraordinary statement. Congress did not give the White House control over these enforcement decisions. It gave that authority to the CFPB. President Trump does not misstate his relationship to Mr. Mulvaney and the CFPB following this purported appointment. President Trump is directing the firm-specific enforcement and supervision decisions. He will cut "Regs" that Congress placed out of his reach, but will also "make penalties severe when caught cheating," even

[23] *See* Rucker and Schroeder, *supra* note 6.
[24] Donald J. Trump, Twitter, December 8, 2017, 7:18am, available at https://twitter.com/realDonaldTrump/status/939152197090148352.

though the White House has not received this authority.

Elections have consequences, and the 2016 election will have a strong consequence in the future direction of the CFPB. The point is not to rerun that election, as the Wells Fargo example illustrates—the CFPB under Director Richard Cordray is the one that initially set Wells Fargo's enforcement penalties. It is instead to send the signal to those who would face the power of these agencies that they are not the tools of partisan politicians, Republican or Democrat.

V. President Trump, like other presidents before him, would prefer to maximize his freedom of movement at Congress's expense. The judiciary should not be party to that threat to the separation of powers.

Despite the availability of these alternatives, it was not an accident that President Trump selected someone within the Executive Office of the President rather than relying on even one of his own selections elsewhere in the federal government. The elimination of the CFPB's independence was not an afterthought, but the fastest way to assert control over the regulatory, enforcement, and policy agendas of the agency. It is that speed and the extent of that control that Congress sought to check by creating the CFPB as an independent bureau of the Federal Reserve System. If the President wishes to reorient or even eliminate the CFPB's activities, he must follow Congress's institutional design.

Independence is not an absolute value of constitutional or statutory law. As the Supreme Court has held, there are limits to what Congress can do in structuring how the administrative state will be structured. The claim that President Trump has violated the law by attempting to install Mr. Mulvaney as acting director is not to say that independence is some kind of hermetic seal around the CFPB into which no politician can tread.

Requiring the President to appoint as acting director individuals who can, by virtue of their office, maintain the CFPB's insulation from the White House does not erode the CFPB's public accountability. A permanent director must still be appointed by the President and confirmed by the U.S. Senate, a highly public and accountable process that extends far beyond the formality of a nomination, confirmation hearings, and Senate vote.

Requiring the President to honor the law and maintain the CFPB's independence is in fact *more* consistent with public accountability, not less. It is often asserted that independence and accountability exist on a kind of continuum, such that more of one results, reciprocally, in less of another. This is not so. Independence is about relationships among diverse individual and institutional actors. We can have more independence for the CFPB to do the work Congress has instructed it to do and more accountability to Congress and the people for the choices the Bureau makes. Allowing President Trump to violate the law with respect to the CFPB's independence creates less of an opportunity for public input, exercised through public representatives in the U.S. Senate.

President Trump will one day nominate a permanent director of the Bureau, but that is a costly exercise. The public gets to weigh in, critically or in support, on that choice. He will face political costs with various parts of his own electoral coalition and other citizens who were not part of that coalition. He will have to negotiate with his own and potentially other party leaders in making this selection and navigating it through the confirmation process. This cumbersome, politically costly process is precisely the one designed in the U.S. Constitution for officers of the United States. It is the costliness of the process that causes presidents of both parties to avoid it, whether through leaving positions vacant or by relying heavily on acting officials.

Permitting the President to use a White House official, even one confirmed to that position by the U.S. Senate, allows him to avoid that accountability until a time of his political choosing, subject only to the FVRA's time limits (which are, themselves, easily evaded). What the FVRA does not do, however, is give the President complete control over those appointments, including especially its inapplicability to multi-member commissions. 5 U.S.C. § 3349(c). While the CFPB itself is not a multi-member commission, the principle of preserving the independence of these kinds of agencies motivates the FVRA. Limiting the President's choices to those whose concurrent appointment wouldn't abrogate the CFPB's independence gives added incentive for him to move toward the constitutional, publicly accountable procedure.

Appointing a Fed Governor or another closely related presidential appointee within an independent financial regulator, for example, as interim CFPB director would not accomplish President Trump's goals of reorganizing the CFPB from within at the same rate. Whatever the personal similarities or differences between, say, Jerome Powell and Mr. Mulvaney, Mr. Powell is not an employee of the White House and is not answerable to the White House for policy decisions. This kind of insulation is precisely the agency that Congress designed and, is why the President does not have untrammeled authority in choosing interim directors of the independent CFPB.

CONCLUSION

Congress used its constitutional authority to design the CFPB. That legislative prerogative belongs to Congress, which can adjust or eliminate that design as it will, following the constitutional process. President Trump has attempted to eliminate the legislative requirement that the CFPB be an independent bureau in the Federal Reserve System. Should this court conclude that the FVRA governs this case, Ms. English should prevail, and the President should be instructed to choose an acting director that does not abrogate the legislative mandate.

Dated: February 6, 2018

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because excluding the material referenced in Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e), it contains 5,144 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

ADDENDUM: STATUTES

All pertinent statutes are contained in the addendum to Plaintiff-Appellant's Brief.

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 6, 2018

/s/ Hassan A. Zavareei
Hassan A. Zavareei

Case 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 (No. 17-cv-2534-TJK) (Hon. Timothy J. Kelly)

REPRESENTATION BY PETER CONTI-BROWN OF CONSENT OF PARTIES AND NOTICE OF INTENTION TO FILE BRIEF AS *AMICUS CURIAE*

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REPRESENTATION OF CONSENT AND NOTICE OF INTENTION

Pursuant to D.C. Circuit Rule 29, Peter Conti-Brown hereby notifies the Court of his intention to file a brief as *amicus curiae* in support of Plaintiff-Appellant in the above-captioned matter. All parties have consented to the filing of this brief.

Dated: February 6, 2018

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I hereby certify that on February 6, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 6, 2018

/s/ Hassan A. Zavareei
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[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]

No. 18-5007

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

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Plaintiff-Appellant,

v.

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Defendants-Appellees.

On Appeal from the United States District Court for the
District of Columbia (No. 17-cv-2534-TJK) (Hon. Timothy J. Kelly)

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* current and former members of Congress represents that both parties have been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the financial crisis that precipitated the passage of Dodd-Frank, as well as the legislative plan that Congress put in place to avoid similar financial crises in the future. *Amici* are thus particularly well-situated to provide the Court with insight into the succession plan for the position of Consumer Financial Protection Bureau Director that Congress put in place when it enacted Dodd-Frank. Significantly, based on their experiences, *amici* know that

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Congress drafted Dodd-Frank to make clear that the Bureau's Deputy Director would, in the event of a vacancy in the office of Director, serve as acting Director. Only that structure is consistent with the independence that was central to Congress's design in establishing the Bureau as a primary protector of American consumers. *Amici* therefore have a strong interest in preserving the scheme that Congress put in place when it enacted Dodd-Frank.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

I. PARTIES AND AMICI

Except for *amicus* Former Senator Tom Harkin and any other *amici* who had not yet entered an appearance in this case as of the filing of Plaintiff-Appellant's brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Plaintiff-Appellant.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Plaintiff-Appellant.

Dated: February 6, 2018

By: /s/ Elizabeth B. Wydra
Counsel for Amici Curiae

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* Authorities on which *amici* chiefly rely are marked with asterisks.

GLOSSARY

CFPB	Consumer Financial Protection Bureau
FVRA	Federal Vacancies Reform Act
OLC	Office of Legal Counsel
OMB	Office of Management and Budget

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to Plaintiff-Appellant's Brief filed with this Court on January 30, 2018.

INTEREST OF *AMICI CURIAE*

Amici are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, currently serve in the leadership, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the critical role that the Consumer Financial Protection Bureau ("CFPB") plays in the legislative plan that Congress put in place when it enacted Dodd-Frank to prevent future financial crises like the Great Recession of 2008, as well as with Congress's considered decisions about how best to structure the CFPB so that it could play that critical role. Significantly, based on their experiences, *amici* know that Congress drafted Dodd-Frank to make clear that the Bureau's Deputy Director would, in the event of a vacancy in the office of Director, serve as acting Director. Only that structure is consistent with the independence that was central to Congress's design in establishing the Bureau as a primary protector of American consumers. *Amici* thus have an interest in this case.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

A centerpiece of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was the establishment of the Consumer Financial Protection Bureau ("CFPB"), an independent agency led by a single Director and focused exclusively on protecting consumers from harmful financial practices. When drafting this legislation, Congress knew that it could, if it wished, empower the President to designate an acting Director of the Bureau in the absence of a Director. It knew, for example, that it could be silent on the matter, allowing the default rules of the Federal Vacancies Reform Act ("FVRA"), Pub. L. No. 105-277 § 151, 112 Stat. 2681 (1998), to govern the vacancy. It also knew that it could specify explicitly that a vacancy should be filled pursuant to the FVRA; indeed, a draft of what became Dodd-Frank that was passed by the House of Representatives did just that. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). Ultimately, however, Congress rejected those options and decided to take the opposite course—to *foreclose* the application of the FVRA to the Director's position. Adopting the approach of the Senate's bill, Congress omitted the provision incorporating the FVRA and replaced it with a new provision establishing the position of Deputy Director. That new provision specified in unambiguous terms 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)(B).

Congress established this mandatory order of succession to prevent a President from filling the Director's office with a designee who lacked the independence that Congress determined was essential for the Bureau to achieve its mission. Congress recognized that such a designee, installed as acting Director without Senate confirmation, could immediately and radically alter the Bureau's direction to suit the President's policy agenda. That is exactly what is happening here.

On November 24, 2017, Richard Cordray resigned as Director of the CFPB. Prior to resigning, and pursuant to his authority under Dodd-Frank, *see* 12 U.S.C. § 5491(b)(5)(A), he appointed the Bureau's Chief of Staff Leandra English (who had previously served in a number of leadership roles at the CFPB) as Deputy Director of the Bureau. Notwithstanding Dodd-Frank's clear language mandating that Deputy Director English "shall" serve as acting Director, President Donald Trump subsequently named Mick Mulvaney, head of the Office of Management and Budget, to fill that role. He purportedly did so pursuant to the FVRA, a statute whose "fundamental purpose" is "to limit the power of the President to name acting officials." S. Rep. No. 105-250, at 7-8 (1998). Since assuming the position of acting Director, Mulvaney has openly steered the Bureau in a new direction to advance the Trump Administration's financial deregulation agenda. And as he is making these changes, President Trump has still not nominated a permanent Director for the Bureau.

The FVRA establishes procedures for temporarily filling vacant executive offices. It begins with a default rule, under which "the first assistant to the office" automatically assumes its duties temporarily in an acting capacity. 5 U.S.C. § 3345(a)(1). The same section of the FVRA, however, supplies three mechanisms by which "[t]he President may override that default rule." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017); *see* 5 U.S.C. § 3345(a)(2), (a)(3), (c)(1). As relevant here, one option is that 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," subject to certain time limits. *Id.* § 3345(a)(2).

Dodd-Frank, however, sets forth a conflicting rule. In place of the FVRA's "self-executing" default rule, *SW Gen.*, 137 S. Ct. at 940, and the three mechanisms by which the President may override that rule, Dodd-Frank designates the CFPB's Deputy Director as the officer who "shall" perform the Director's functions and duties in an acting capacity. 12 U.S.C. § 5491(b)(5)(B). This mandatory and unqualified language means that a vacancy in the Director's office must be filled by the Deputy Director and no one else. In other words, Dodd-Frank's language displaces the FVRA entirely as the means by which a vacancy in the position of Bureau Director may be filled temporarily.

Congress drafted Dodd-Frank in this way for a reason, ensuring that even when the Director's office is vacant the Bureau retains the independence it needs to fulfill its vital role. Dodd-Frank was a response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010). As this Court recently recognized, Congress extensively studied the roots of this crisis, concluding that despite an abundance of legal authority to combat the mortgage abuses that were responsible, the manner in which this authority was dispersed among numerous federal regulators led to inaction and delay. *See PHH Corp. v. CFPB*, No. 15-1177, 2018 WL 627055, at *1 (D.C. Cir. Jan. 31, 2018).

To solve this problem and prevent similar crises in the future, Congress established the CFPB as a consolidated federal agency with the sole mission of protecting Americans from harmful practices of the financial services industry. In creating the Bureau, lawmakers determined that it needed to exercise independent judgment to achieve its mission. *See id.* ("Congress determined that, to prevent problems that had handicapped past regulators, the new agency needed a degree of independence"). Thus, Congress provided that the President could remove the Bureau's Director only for good cause—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—but not for policy differences alone; it provided the Bureau with independent funding outside the annual congressional appropriations process, *id.* § 5497(a)(1); and it established other features designed to promote the Bureau's independence, *see infra*.

That was not all. To ensure the Bureau would maintain its independence even while its Director position was vacant, Congress specified who would serve as acting Director in that circumstance: the Bureau's Deputy Director. By using mandatory language to inscribe this order of succession in statute, Congress supplanted the FVRA's default procedures. After all, as Congress recognized at the time, those procedures would permit the President to hand-pick an acting Director eager to advance the President's policy agenda without the moderating check of Senate confirmation—allowing that acting Director, no matter how close his ties to the President, to head the Bureau for many months. Such a result would plainly undermine the independence that was so critical to Congress's plan in designing the Bureau.

ARGUMENT

THE CFPB'S SUCCESSOR PROVISION SUPPLANTS THE FEDERAL VACANCIES REFORM ACT, PROVIDING THE SOLE MEANS OF TEMPORARILY FILLING A VACANCY IN THE POSITION OF CFPB DIRECTOR UNTIL SENATE CONFIRMATION OF A NEW DIRECTOR

Dodd-Frank establishes for the CFPB "the position of Deputy Director, who shall . . . be appointed by the Director . . . and serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Under a plain reading of this language, Dodd-Frank requires the CFPB's Deputy Director to serve as acting Director when the Director leaves office and is thus "absen[t]" or "unavailab[le]." *See, e.g.*, *Absent*, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/absent (defining "absent" as "not existing: lacking" and as "not present at a usual or expected place: missing"); *Unavailable*, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unavailable (defining "unavailable" as "not available: such as . . . unable or unwilling to do something"); *see generally Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.").

These ordinary definitions of "absent" and "unavailable" cover situations in which a Director has resigned and left the office vacant. As the Department of Justice's Office of Legal Counsel ("OLC") has acknowledged, the broad meanings of these terms may not be artificially narrowed simply because Dodd-Frank does not use the word "vacancy" or "resignation." While some statutes governing succession in office include those terms, *see, e.g.*, 12 U.S.C. § 4; *id.* § 4512(f), language varies from statute to statute, and there is no standard formulation across all such provisions. The legislators who drafted Dodd-Frank relied upon expansive language—"absence or unavailability"—that naturally encompasses the resignation of a CFPB Director. *See Memorandum from Steven A. Engel, Assist. Att'y Gen., Of-*

fice of Legal Counsel, to Donald F. McGahn II, Counsel to the President 3 (Nov. 25, 2017) ("OLC Memo").[2]

Notwithstanding Dodd-Frank's unambiguous successor provision, the President has ordered Mick Mulvaney to serve as acting Director of the Bureau pursuant to the FVRA. According to Defendants and the court below, this is lawful because the FVRA "remains available as an option for the President" even when there is an agency-specific succession statute. J.A. 257. This reasoning has a critical flaw: the FVRA remains available in the presence of an agency-specific statute only when that statute's language is compatible with the FVRA's procedures—not when its language plainly supersedes those procedures. The latter is true here, as demonstrated by the text, structure, and history of Dodd-Frank.

I. Dodd-Frank's Mandatory Language Displaces the FVRA

As noted earlier, Dodd-Frank creates the position of CFPB Deputy Director, "who shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). This mandatory succession language expressly displaces any other procedures for filling the vacancy, including those estab-

[2] The FVRA itself makes clear that such broad wording encompasses vacancies. *See* 5 U.S.C. § 3345(a) (establishing rules for when an officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office"); *see also* 144 Cong. Rec. S12823 (daily ed. Oct. 21, 1998) (Sen. Thompson) ("To make the law cover all situations when the officer cannot perform his duties, the 'unable to perform the functions and duties of the office' language was selected."); *id*. (citing "when the officer is fired" as one such situation).

lished earlier by the FVRA. In concluding otherwise, the court below dramatically downplayed the significance of Dodd-Frank's mandatory language—and overlooked the distinction between this mandatory language and the permissive language used in other succession statutes.

According to the court below, Dodd-Frank's successor provision is nothing more than the type of provision referred to in 5 U.S.C. § 3347, which states that when "a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," then the FVRA's procedures are not "the exclusive means" for authorizing an acting official to perform the duties of that office, *id.* § 3347(a)(1)(B). Pointing to this language, the Defendants argued below that the FVRA's procedures "continue to be available" alongside agency-specific provisions as "one of two available options for addressing the vacancy." Def. Prelim. Inj. Opp. 13.

This might be correct if Dodd-Frank did nothing more than identify which particular CFPB official is authorized to perform the Director's functions and duties in his absence—*i.e.*, which official "may" serve as acting Director. Indeed, many successor statutes are written in exactly that way. Unlike Dodd-Frank, they use permissive language that specifies which agency officials may take charge, but they do not foreclose other arrangements pursuant to different provisions of law. Thus, these statutes do not clash with the FVRA—and some are clearly intended to work in conjunction with it. *See, e.g.*, 28 U.S.C. § 508(a) ("In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General."); 31 U.S.C. § 502(b)(2) ("The Deputy Director [of the Office of Management and Budget] . . . acts as the Director when the Director is absent or unable to serve[.]"); 29 U.S.C. § 153(d) ("In case of a vacancy in the office of the General Counsel [of the National Labor Relations Board] the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy[.]").

These succession provisions pose no barrier to the operation of the FVRA. Read alongside 5 U.S.C. § 3347(a)(1), they supplement rather than supplant the FVRA process. And significantly, these are *precisely* the statutes addressed by the OLC and Ninth Circuit opinions on which the Defendants chiefly relied, opinions in which agency-specific statutes were found compatible with the FVRA. *See* Def. Prelim. Inj. Opp. 13 (citing 31 Op. O.L.C. 208, 209-11 (2007) (regarding Attorney General); 27 Op. O.L.C. 121, 121 n.1 (2003) (regarding OMB Director); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016) (regarding NLRB General Counsel)).

Dodd-Frank is written differently. It does not say that the Deputy Director "may serve as acting Director," or identify her as the Director's "first assistant" for FVRA purposes, or merely allow her to perform the Director's functions in his absence—it says that she "shall" serve as acting Director. "Shall" is a mandatory term that is not interchangeable with "may" or other permissive words. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall[]' . . . normally creates an obligation impervious to judicial discretion"); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Dodd-Frank's language, therefore, does more than simply fit the CFPB's successor provision within the exception to the FVRA's exclusivity in 5 U.S.C. § 3347(a)(1)(B). It requires the Deputy Director to serve as acting Director in the event of a vacancy until there is a new Senate-confirmed Director, unless the president removes the acting Director for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3).

According to the court below, Dodd-Frank's mandatory language should not be treated as mandatory because "shall" is "a semantic mess." J.A. 268 (quotations omitted). As the court puts it, "the structure of similar statutes often reflects that some official 'shall' serve, only to elsewhere qualify that apparently mandatory service in some way." *Id.* at 269. But tellingly, in every example cited by the district court, the term "shall" is qualified by another provision *in the same section of the same statute*, not a provision in a different part of the U.S. Code that derived from a previously enacted statue.

For instance, the court points to the FVRA's default rule in which the "first assistant" to an officer "shall perform" the officer's functions temporarily when a vacancy occurs. 5 U.S.C. § 3345(a)(1). But this comparison actually supports English's position. In pointed contrast to Dodd-Frank, this section of the FVRA carves out three exceptions that explicitly qualify the "shall" language found in its first paragraph. Those exceptions provide alternative options to the President "notwithstanding paragraph (1)." 5 U.S.C. § 3345(a)(2), (a)(3), (c)(1). The function of this "notwithstanding" clause is to "show[] which provision prevails in the event of a clash." *SW Gen.*, 137 S. Ct. at 939 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 126-27 (2012)). And thus, "[t]he 'notwithstanding' clause clarifies that the language of (a)(1) does not prevail if that conflict occurs." *Id*. at 940. But there are no similar carve-outs or qualifying language in the relevant section of Dodd-Frank. *See* 12 U.S.C. § 5491.

The court also points to another provision found in the same section of Dodd-Frank that contains the CFPB Director's successor provision. This section provides that the Director "shall serve for a term of 5 years," *id.* § 5491(c)(1), but qualifies this command in the same subsection by allowing the President to remove the Director for specified reasons, *id*. § 5491(c)(3). Again, this highlights the absence of any language qualifying the same section's command that the Deputy Director serve as acting Director. Had Congress wanted to qualify that command, it had no shortage of models. *Compare id.* § 5491(b)(5)(B) (the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director"), *with* 42 U.S.C. § 902(b)(4) ("The Deputy Commissioner [of Social Security] shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, *unless the President designates another officer of the Government as Acting Commissioner*, in the event of a vacancy in the office of the Commissioner." (emphasis added)).

Because Dodd-Frank does not qualify its statement that the Deputy Director "shall" serve as acting Director, and thus clashes with the FVRA, ordinary interpretive methods must resolve "which provision prevails." *SW Gen.*, 137 S. Ct. at 939. The result is straightforward. First, Dodd-Frank was enacted after the FVRA, and when two federal laws conflict, "the later of the two enactments prevails over the earlier." *Kappus v. Comm'r*, 337 F.3d 1053, 1057 (D.C. Cir. 2003). Of course, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Here, Dodd-Frank's use of the mandatory and unqualified "shall" cannot be given effect unless it displaces the FVRA, so this Court "would have to *distort* the plain meaning of [the] statute in an attempt to make it consistent with a prior [law]." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). "The Supreme Court has not extended the canon that far." *Id.*

Second, Dodd-Frank's CFPB successor provision is more specific than the FVRA, given that it applies only to vacancies in one particular office at one particular agency, rather than providing general default procedures for temporarily filling all executive offices. "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)); *see, e.g.*, *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("a specific statute . . . controls over a general provision"). As discussed in the next section, Congress took great care to structure the CFPB and the office of its Director so as to promote certain policy goals, and those goals are furthered in discernable ways by Dodd-Frank's exclusive and automatic successor provision for the Director. Clearly, Congress spoke with greater specificity in Dodd-Frank regarding who should serve as acting CFPB Director than it did in the FVRA.

While the court below suggested that the FVRA may actually be the more specific statute, J.A. 272, that position is unpersuasive. The FVRA certainly contains a more *detailed* scheme for the naming of acting officers, but complexity is different from specificity—indeed, the FVRA's complexity is necessary precisely because it establishes general procedures that govern all executive offices in the absence of contrary legislation. Nor does the FVRA's use of the words "vacant office" and "resign[]" make it more specific than Dodd-Frank. 5 U.S.C. § 3345(a)(2), (a)(3)(A). A succession provision either applies to vacancies or it does not. Dodd-Frank's provision does, as explained earlier and as acknowledged by OLC. Therefore it is no different from the FVRA in this regard. Indeed, the only reason to compare the two statutes' levels of specificity and dates of enactment is because both statutes apply to vacancies and are thus in conflict. Moreover, the FVRA, like Dodd-Frank, covers more than just vacancies—it applies when an officer "dies, resigns, *or is otherwise unable to perform the functions and duties of the office*." *Id.* § 3345(a) (emphasis added). Like Dodd-Frank, therefore, the FVRA is not limited to vacancies—and thus it is no more specific than Dodd-Frank in that respect either.

In sum, given its later enactment, its greater specificity, and its failure to include any exceptions to its successor provision—or to hint in any way that it is meant to work in tandem with the FVRA—Dodd-Frank's mandatory language must be taken at face value: the Deputy Director, and no one else, "shall" serve as acting Director.

To undermine this clear textual imperative, the Defendants (and OLC) repeatedly reverted to legislative history—specifically a portion of a Senate committee report construing an earlier version of the FVRA that was never enacted. *See* Def. Prelim. Inj. Opp. 15 n.2 (citing S. Rep. No. 105-250, at 15-17). This report notes that the bill would have "retain[ed] existing statutes that are in effect on the date of enactment of the Vacancies Act . . . that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee." S. Rep. No. 105-250, at 15. The report further states that, "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*. at 17. But because this report pertains to a bill that was modified significantly before passage, *see id.* at 25-29 (text of failed bill), the probative value of this lone sentence is slight when compared with the unambiguous text of Dodd-Frank. *See SW Gen.*, 137 S. Ct. at 942 ("[A] period of intense negotiations took place after Senators demanded changes to the original draft of the FVRA, and the final bill was a compromise measure." (citation and quotation marks omitted)); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.").

If anything, the FVRA's legislative history supports English here because the Administration's position would enhance the President's ability to delay the requirement of Senate confirmation for the office of Director—the very practice that the FVRA was meant to curtail. That Act was a direct response to perceived violations of the Constitution's Appointments Clause by the executive branch, adopted to prevent presidents from circumventing the Senate's advice-and-consent role, while at the same time ensuring that agencies could continue to function effectively while the Senate confirmation process was ongoing. *See, e.g.*, S. Rep. No. 105-250, at 5 (previous legislation "unfortunately has not succeeded in encouraging presidents to submit nominees in a timely fashion" and "the Senate's confirmation power is being undermined as never before"); *id*. at 7-8 ("the fundamental purpose of the Vacancies Act . . . is . . . to limit the power of the President to name acting officials, as well as the length of service of those officials"). The Defendants' view would *expand* the President's capacity to delay a Senate confirmation vote on the CFPB Director, while English's would encourage the President to quickly nominate someone to fill the vacancy—an action that President Trump has notably not yet taken, even though former Director Cordray announced in mid-November of last year that he would be resigning at the end of that month.[3]

The court below also relied on a provision in Dodd-Frank providing that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with . . . Federal . . . officers . . . shall apply to the exercise of the powers of the Bureau." J.A. 264 (quoting 12 U.S.C. § 5491(a)). According to the court, because the FVRA is a federal law dealing with federal officers, its procedures apply by virtue of this subsection, and the CFPB's successor provision does not expressly provide otherwise. *Id.* at 264-66. But the successor provision clearly "provides other-wise," because it sets forth a different and incompatible rule, and it does so "by law." It also does so "expressly," using language that is clear and unambiguous: the Deputy Director "shall . . . serve as acting Director." 12 U.S.C. § 5491(b)(5)(B). That decree is not a matter of "ambiguity, implication, or infer-

[3] Another aspect of the FVRA's legislative history also weighs in favor of English. The bill discussed in the Senate report—unlike the bill that was enacted—specified that the FVRA would apply to all relevant offices unless "another statutory provision expressly provides that the [*sic*] such provision supersedes sections 3345 and 3346." S. Rep. No. 105-250, at 26 (quoting the bill's proposed version of 5 U.S.C. § 3347); *see id.* at 10 (stating that Senator Strom Thurmond, as a hearing witness, advocated for "requiring statutes exempting particular positions from the Vacancies Act to specifically cite the Vacancies Act"). This requirement of an express reference to Sections 3345 and 3346 was eliminated from the FVRA before passage. Yet the Defendants' arguments in this case would, in effect, reinstate that requirement, demanding such language before a later-enacted statute, like Dodd-Frank, could displace the FVRA.

ence," J.A. 266 (quoting *Magone v. Heller*, 150 U.S. 70, 74 (1893))—it is an explicit command regarding who "shall" serve as acting Director. And while the successor provision does not cite the FVRA, Section 5491(a) does not purport to require that a provision cross-reference every contrary law it supersedes. It demands only that the statute provide otherwise and do so expressly, and that is what the successor provision does.

At bottom, the district court concluded that Dodd-Frank can "be read harmoniously" with the FVRA. J.A. 261. But the court "harmonized" the two statutes only by amending Dodd-Frank's successor provision to add a new clause resembling those found in other statutes. *See, e.g.*, 42 U.S.C. § 902(b)(4) (Deputy Social Security Commissioner shall be Acting Commissioner "unless the President designates another officer of the Government as Acting Commissioner"). "Of course, those are not the words that Congress wrote, and this Court is not free to 'rewrite the statute' to the Government's liking." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *10 (U.S. Jan. 22, 2018) (quoting *Puerto Rico v. Franklin Cal. Tax–Free Trust*, 136 S. Ct. 1938, 1949 (2016)).

Thus, Dodd-Frank's plain text dictates that its successor provision displaces the FVRA's procedures. That understanding of Dodd-Frank is also the most consistent with the statute's structure and history, as the next Section discusses.

II. Congress's Decision To Displace the FVRA Promoted Its Statutory Plan for the CFPB and Is Supported by Dodd-Frank's Legislative History

As *amici* well know, there was a reason that Congress, acting against the backdrop of the FVRA, chose to include in Dodd-Frank a mandatory provision designating who would serve as the Bureau's acting Director in the event of a vacancy. The alternative approach—allowing the President to hand-pick someone without Senate approval who could immediately reshape the Bureau to advance the President's agenda—would undermine Congress's overall statutory plan for the CFPB. Thus, if there were any doubt about how to resolve the conflict between the FVRA and Dodd-Frank, consideration of that statutory plan would tip the balance in favor of English. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014))).

In establishing the Bureau, lawmakers concluded that it needed the freedom to exercise independent and expert judgment to zealously protect consumers' interests. Before the financial crisis, the political branches intensely pressured the financial regulatory agencies at the behest of industry lobbyists to prevent robust oversight. *See, e.g.*, Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 53 (2011) (discussing industry-prompted congressional demands that discouraged regulations). After the crisis, in debates over the Bureau, "consumer advocates urged a more independent agency, fearing industry capture and heavy-handed political interference by Congress and the White House." Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 339 (2013); *see, e.g.*, S. Rep. No. 111-176, at 24 (recounting testimony recommending "improving regulatory independence"). Such independence "allow[s] an agency to protect the diffuse interest of the general public" that otherwise would be "outgunned" by "well-financed and politically influential special interests." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 17 (2010).

Heeding this imperative, and "consistent with a longstanding tradition of independence for financial regulators," *PHH Corp.*, 2018 WL 627055, at *13, Congress made the Bureau's leader removable by the President only for good cause: "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). As *amici* well know, virtually all financial regulators are headed by officers with fixed terms who are removable only for cause, *see* Henry B. Hogue *et al.*, Cong. Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 15-17 (2017), and Congress understood that good-cause tenure would give the Bureau the independence necessary to regulate effectively, *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935))); Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 38 (2012) (removal limits "are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action").

To further promote a "strong and independent Bureau," S. Rep. No. 111-176, at 174, Congress also funded the CFPB outside "the opaque horse-trading of the appropriations process," Levitin, *supra*, at 341; *see* 12 U.S.C. § 5497(a)(1). Nearly all financial regulatory agencies have this feature, Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest To Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 951 (2012), and lawmakers explained that "the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator," S. Rep. No. 111-176, at 163; *see id.* (citing the "hard learned lesson" of the precursor to the Federal Housing Finance Agency, whose "effectiveness" was "widely acknowledged" to have been harmed by its need for congressional appropriations).

Congress did even more to secure the Bureau's independence. It limited the executive branch's ability to control the Bureau's communications with Congress. 12 U.S.C. § 5492(c)(4). It allowed a Director whose five-year term expires to continue serving until Senate confirmation of a successor. *Id*. § 5491(c)(2). And—especially noteworthy here—it ensured that the Bureau would have no obligation "to consult with or obtain the consent or approval of the Director of the Office of Management and Budget [("OMB")]" with respect to its financial operating plans and forecasts, while clarifying that, apart from certain disclosure obligations imposed on the Bureau, OMB would not exercise "any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.* § 5497(a)(4)(E).[4]

Finally, to ensure that the Bureau would continue to enjoy independence even in the event of a vacancy in the Director position, Congress also chose to designate the officer who would serve as acting Director, rather than allow the President to put in charge of the Bureau a designee who had not been confirmed by the Senate to run the Bureau and who might not have the requisite independence from the President. In making this choice, Congress was not doing anything novel.

[4] For these reasons, the President's selection of the head of OMB to lead the Bureau underscores what is wrong with the Administration's position. As the director of an agency located within the Executive Office of the President, Mulvaney works closely with the President on a range of issues and serves at his pleasure. It is difficult to imagine a figure with less independence from the White House and its policy preferences at the helm of the Bureau. This is precisely the type of situation that Congress sought to avoid by designating who would serve as acting Director of the Bureau in the event of a vacancy.

Nearly all independent agencies are structured to prevent presidents from achieving what President Trump is attempting here. Most such agencies are headed by multi-member boards or commissions, with authorizing statutes that do not provide for the temporary replacement of board members or commissioners who leave office before the end of their terms. *See, e.g.*, 15 U.S.C. § 78d (Securities and Exchange Commission); 52 U.S.C. § 30106 (Federal Election Commission). The FVRA likewise withholds from the President the authority to temporarily replace board members and commissioners of multi-member independent agencies. 5 U.S.C. § 3349c(1). And the legislation creating the Federal Housing Finance Agency, one of the few independent agencies besides the CFPB led by a single director, similarly restricts the President's choice of a temporary replacement when the director leaves office: the President must select among three existing deputy directors of the agency. 12 U.S.C. § 4512(f).

To be sure, there are exceptions. With respect to a few leadership positions in independent agencies, Congress has authorized the President to appoint acting successors. *See, e.g.*, 42 U.S.C. § 902(b)(4) (Social Security Commissioner); 29 U.S.C. § 153(d) (National Labor Relations Board General Counsel). But that only highlights how Dodd-Frank differs. Not only did Congress decline to authorize the President to appoint an acting CFPB Director, or to specify that the FVRA would apply to a vacancy in that position, Congress instead took affirmative steps in the other direction, mandating that the Deputy Director "shall" serve as acting Director.

Moreover, the point here is not simply that the Bureau is an independent agency, which generally means only that an agency's leader cannot be removed at will. *See* Barkow, *supra*, at 16. Rather, the point is that Dodd-Frank took special care to ensure, in a variety of ways, that the CFPB would exercise a special degree of independence that Congress determined was necessary if it were to fulfill its critical mission and help prevent another devastating financial meltdown.[5] Yet the Defendants' position would erode the Bureau's independence and undermine that statutory plan by allowing a President to fill a vacancy—as President Trump has done here—with a designee who reflects his policy agenda, serves at his pleasure, and has not been confirmed by the Senate for the position of Bureau Director.

These considerations reinforce the natural reading of Dodd-Frank's clear language: the Deputy Director becomes acting Director in the event of a vacancy, and the President lacks authority under the FVRA to make his own choice instead.

According to the court below, allowing the President to name an acting Di-

[5] To ensure accountability, however, Congress incorporated other checks on the Bureau, some unprecedented among financial regulators. *See* Block-Lieb, *supra*, at 43-55; Levitin, *supra*, at 343-62; Wilmarth, *supra*, at 908-11; *see also PHH Corp.*, 2018 WL 627055, at *35-36 (Wilkins, J., concurring) (describing "extensive coordination, expert consultation, and oversight" requirements imposed on the Bureau).

rector pursuant to the FVRA does not deprive the Bureau of the independence that Congress intended because, among other things, "the duration of [Mulvaney's] appointment . . . is time-limited" and the Bureau's new Director, "once appointed by the President and confirmed by the Senate, will have for-cause removal protections." J.A. 279. But Congress's plan was not for the CFPB to be independent except during periods when the Director position was vacant. Mulvaney's actions since assuming the position of acting Director illustrate why. Already, he has sharply changed the Bureau's direction to reflect the Trump Administration's policy agenda, and it appears he will have many more months in which to make further changes.

Finally, Dodd-Frank's legislative history also supports this conclusion. The bill that passed the House of Representatives in December 2009 did not provide for a Deputy Director. Instead, it explicitly stated that when the Director's office became vacant any temporary replacement would be appointed pursuant to the FVRA. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). The Senate bill introduced and passed months later, whose language prevailed in conference, was the origin of the present statutory language. *See* S. 3217, 111th Cong. § 1011(b)(5)(B) (2010); *see also* Transcript of the House-Senate Joint Conference on H.R. 4173, Wall Street Reform and Consumer Protection Act 161 (June 10, 2010). By making this change, Congress rejected the idea of allowing the President to use the FVRA to name an acting Director. Indeed, the change reflects Congress's considered decision that the FVRA should not govern succession in the event of a vacancy. Instead, as the language of the statute indicates, the Bureau's second-in-command should take over until a new Director is appointed by the President and confirmed by the Senate.

* * *

In sum, the text, structure, and legislative history of Dodd-Frank all point to the same conclusion: the CFPB's Deputy Director serves as its acting Director when a vacancy occurs. Congress established this mandatory order of succession to prevent exactly what the Administration is attempting here: temporarily filling the role—and delaying the nomination of a permanent successor—with a designee who reflects the President's policy preferences but has not been subject to the check of Senate confirmation. President Trump is entitled to choose who the next Director of the Bureau will be, but he must nominate that person, and the Senate must agree to confirm him or her. Until that happens, Dodd-Frank makes clear who should be running the Bureau: its Deputy Director.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Dated: February 6, 2018

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Foster, Bill
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 6th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on February 6, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 6th day of February, 2018.

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[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]

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 (No. 17-cv-2534-TJK) (Hon. Timothy J. Kelly)

NOTICE OF INTENT OF CURRENT AND FORMER MEMBERS OF CONGRESS TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

NOTICE OF INTENT AND REPRESENTATION OF CONSENT TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to D.C. Circuit Rule 29 and the guidance set forth in Section IX.A.4 of the Court's *Handbook of Practice and Internal Procedure*, current and former members of Congress hereby give notice that they intend to file a brief as *amici curiae* in support of Plaintiff-Appellant in this matter. A full listing of *amici* are included in the appendix to this notice. All parties have consented to the filing of this brief.

Respectfully submitted,

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