[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]

No. 18-5007

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
Before the Honorable Judge Timothy J. Kelly

BRIEF FOR 113 CURRENT MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties And Amici Curiae

Except for the amici joining this brief and any other amici who had not yet entered an appearance in this case as of the filing of the appellees' brief, all parties, intervenors, and amici appearing before the district court and this Court are listed in the appellees' brief.

B. Rulings Under Review

References to the ruling at issue appear in the appellant's opening brief.

C. Related Cases

The only related case of which undersigned counsel is aware appears in the appellant's opening brief.

/s/ Daniel P. Kearney, Jr.
DANIEL P. KEARNEY, JR.

March 2, 2018

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.

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STATEMENT OF INTEREST AND SOURCE OF AUTHORITY

Amici are 38 Senators and 75 Representatives duly elected to serve in the 115th Congress of the United States. They have a strong interest in preserving Congress's constitutional prerogatives, including the power to provide (and require provision of) advice and consent regarding Executive Branch appointments. Amici offer their perspective, as Members of Congress, on the Constitution's careful balance between the respective roles of the President and Congress in Executive Branch appointments, on the legislative process as it relates to the Federal Vacancies Reform Act, and on the practical, statutory, and constitutional complications of Plaintiff-Appellant's position. Amici submit this brief as governmental entities, in an official capacity as officers of the United States, pursuant to Fed. R. App. P. 29(a) and D.C. Cir. Rule 29(b) and (d).

A full listing of amici appears in the Appendix.

INTRODUCTION

This case comes to the Court in false garb. In the telling of Plaintiff-Appellant Leandra English and her supporting amici, the dispute centers on a fundamental clash between the exercise of presidential power (the President's selection of Mick Mulvaney to serve as Acting Director of the Consumer Financial Protection Bureau ("CFPB")) and congressional prerogatives (which would have English serve in that position). But in truth it is English's argument—which would dispense with the requirements of the Federal Vacancies Reform Act ("FVRA" or the "Act")[1]—that threatens Congress's prerogatives by upsetting the Constitution's finely calibrated balance between the President's appointment power and Congress's role in that process, which the FVRA was designed to protect. While English acknowledges the FVRA's purpose (English Br. 6), her argument would lightly cast the Act aside in favor of a regime that would allow an agency official who was never selected by (and apparently cannot be removed by) the President, and who was never confirmed by the Senate, to function as the head of an Executive agency for an indefinite period of years. The principal basis for English's claim is the mere appearance of the word "shall" in a Dodd-Frank Act[2]

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[1] *See* Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 122 Stat. 2681 (1998).

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

provision that does not refer to a "vacancy" and her evident belief that, when it comes to the CFPB, all doubts must be resolved in favor of the interpretation that most insulates the agency from any form of "political" control. *Id.* at 7, 39, 43.

Neither the text nor the purpose of the relevant statutes invites such a result. For one, the Dodd-Frank provision on which English relies does not even apply here. The provision describes circumstances in which the CFPB Director is "absent" or "unavailable," not (as in the FVRA) how a position may be filled temporarily when an official "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a)(1). Even if the Dodd-Frank provision did apply, the FVRA *itself* contemplates situations where other agency-specific statutes address vacancies and provides only that, in such situations, the FVRA is no longer the "*exclusive* means" to fill a vacancy. *Id.* § 3347(a) (emphasis added). The Dodd-Frank provision would thus provide, at most, an alternative means for designating an Acting CFPB Director.

Further, English's interpretation undermines a core purpose of the FVRA—*i.e.*, to put general time limits on how long acting officials may serve in positions requiring Senate confirmation. On her view of the relevant statutes, an Acting CFPB Director who enjoys the President's support could remain in that position *indefinitely*, without Senate confirmation or even having her nomination submitted to the Senate, merely through presidential inaction. This is precisely the scenario

the FVRA's time limits were designed to prevent, and nothing in Dodd-Frank's text suggests Congress intended to revive the President's ability to evade the Senate confirmation process in this way.

English's arguments also raise significant constitutional concerns that should dissuade this Court from adopting her interpretation. Interpreting Dodd-Frank as the exclusive means for filling a CFPB Director vacancy would permit an individual not appointed by the President or confirmed by the Senate, and insulated from the President by "for cause" removal protection, to serve for a prolonged and indefinite period as a principal officer of the United States, contrary to the Appointment Clause. *See* U.S. Const. art. II, § 2. This Court should instead adopt an interpretation of the statutes that maintains the FVRA's careful balancing of the President's prerogative to ensure a functioning Executive Branch with Congress's role in the appointments process.

Finally, given that both Congress and the Executive Branch have recognized Mulvaney as the Acting CFPB Director, granting preliminary relief to English would impair the public's interest in consistent and predictable governance and would slight Congress's authority as an independent branch to resolve constitutional questions. Various members of Congress and congressional committees have formally recognized Mulvaney as Acting Director and begun to conduct business with him in that capacity based on their view that he was

rightfully designated Acting Director. A preliminary injunction against Mulvaney would have significant practical and constitutional implications for the operation of the federal government and would risk significant instability in the CFPB's operations by opening the door to a series of leadership changes in quick succession. For all these reasons, this Court should affirm the district court's ruling.

ARGUMENT

I. THE PRESIDENT PROPERLY RELIED ON THE FVRA TO DESIGNATE MULVANEY AS ACTING CFPB DIRECTOR

A. The FVRA Authorized The President To Designate Mulvaney

The FVRA, enacted in 1998, is Congress's latest effort to protect against Executive Branch encroachment on the Constitution's careful balancing of the President's appointment power and the Senate's power to provide advice and consent on those appointments. The Act was passed against a backdrop of extended "interbranch conflict" regarding the authority of Executive agency heads to fill vacant offices and amid congressional concerns that many interim officials were serving for extended periods in an acting capacity without submission of a nomination to the Senate. *See NLRB. v. SW Gen., Inc.*, 137 S. Ct. 929, 936-937 (2017); *see generally* Rosenberg, Congressional Research Service Report for Congress, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998) ("Rosenberg"). Through the FVRA, Congress

sought to curb Executive circumvention of the Senate's constitutional advice and consent power by creating "a clear and exclusive process" for designating officials to serve temporarily in an office requiring Presidential appointment and Senate confirmation ("PAS"). S. Rep. No. 105–250, at 1 (1998).

The FVRA carefully limits who may serve as an acting officer and places time limitations on an acting official's tenure. If a PAS officer of an Executive agency "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the Act provides as a general rule that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). Notwithstanding this provision, the President has two alternatives: (1) he "may direct" a person who currently serves in a PAS office "to perform the functions and duties of the vacant office temporarily in an acting capacity," *id.* § 3345(a)(2); or (2) he "may direct" a person to perform acting duties if the person served in a senior position in the relevant agency for at least 90 days in the 365-day period preceding the vacancy, *id.* § 3345(a)(3). Regardless of which mechanism is used, the acting officer's service is subject to a time limitation: the "acting officer" can serve in office "for no longer than 210 days beginning on the date the vacancy occurs," a period that is tolled while a nomination is pending and restarted if a nomination is "rejected, withdrawn, or

returned." *Id.* § 3346(a)-(b).[3] These constraints apply broadly to any PAS officer of an "Executive agency," subject to limited exclusions: the FVRA "shall not apply" to a PAS member of "any board, commission, or similar entity that is composed of multiple members and governs an independent establishment or Government corporation," any commissioner of the Federal Energy Regulatory Commission, any member of the Surface Transportation Board, and certain Article I judges. *Id.* § 3349c.

By default, the FVRA's provisions are the "*exclusive* means for temporarily authorizing an acting official to perform the functions and duties" of a PAS office "unless" an office-specific statute also exists. *Id.* § 3347(a) (emphasis added). Under the FVRA, any such alternative statutory mechanism for filling a vacancy must "expressly" authorize "the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity" or "expressly" designate "an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a)(1). This exclusivity provision was designed to definitively negate potential legal interpretations that would

[3] The 210-day period reflects the balance Congress and the President struck between ensuring the President makes timely nominations and the practical reality that in today's environment it takes time to both select and then vet a nominee worthy of a PAS position. *See* S. Rep. No. 105–250, at 13 (observing that the need for a timely appointment must be balanced against "the vagaries of the vetting and nomination process").

circumvent FVRA requirements, including the position, advanced at the time by the Department of Justice, that an agency head's general authority to delegate powers and functions to a subordinate included the power to fill vacant PAS offices for an indefinite period. *See* Rosenberg 4.[4]

The resignation of the CFPB Director is undoubtedly covered by the FVRA's terms. The Director is an "officer of an Executive agency" under the FVRA by the express terms of the Dodd-Frank Act, which states that the CFPB "shall be considered an Executive agency" for purposes of the FVRA and other provisions of title 5. 12 U.S.C. § 5491(a). Further, the office of CFPB Director is not included among the limited exceptions to the Act's coverage under in § 3349c, and nothing in the Dodd-Frank Act's text clearly disclaims the FVRA's applicability. This is significant not only because Congress legislated against the backdrop of the FVRA default rule when it created the CFPB, but also because the text of the Dodd-Frank Act *itself* reaffirmed that the default rules of title 5, including the FVRA, apply unless expressly disclaimed. *See* 12 U.S.C. § 5491(a) ("[A]ll Federal laws dealing with public or Federal contracts, property, works,

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[4] The exclusivity provision also illustrates the FVRA's importance to the legislative process. By creating a default rule that balances the competing interests of the Executive Branch and the Legislative Branch except where there is express language to the contrary, the FVRA establishes a clear baseline against which to draft future legislation. Rather than tailor a vacancy rule for every new PAS office, the FVRA provides guidelines that lend needed clarity and simplicity to the complex process of legislative drafting. *See* S. Rep. No. 105–250, at 5.

officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Bureau" except as "*otherwise provided expressly by law*." (emphasis added)). The President thus properly relied on the FVRA to designate Mulvaney as Acting CFPB Director. Director Cordray's resignation triggered the applicability of the FVRA. Before Cordray's resignation even became effective, President Trump adhered to FVRA requirements by promptly directing Mulvaney—a current PAS officer—to serve as Acting Director. That designation is now subject to the time-limitation and other provisions of the FVRA. Nothing more was required as a legal matter, and Mulvaney is now properly serving as Acting Director of the CFPB.

B. The Dodd-Frank Act Does Not Render The FVRA Inapplicable

English argues that the Mulvaney designation was unlawful because § 5491(b)(5)(B) renders the entire apparatus of the FVRA inapplicable—despite the FVRA's exclusivity provision and the Dodd-Frank Act's own confirmation that default rules like the FVRA apply to the CFPB unless expressly disclaimed. This argument fails for several reasons.

First, the provision on which English relies does not cover resignation of the CFPB director at all. By its terms, the provision applies to the "absence" or "unavailability" of the Director; unlike the FVRA, it says nothing about the Director's "resignation," nor for that matter about the Director's death or inability

to perform the functions of the office. As such, the Dodd-Frank provision *addresses an entirely different issue*: it only authorizes the Deputy Director to function as the acting Director if the Director is *temporarily* unavailable or absent, not when the office is vacant or the Director is disabled from performing the office. This accords not only with the ordinary meaning of the relevant terms, *see Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (internal quotation marks omitted)), but also with the use of those terms in the Dodd-Frank Act itself, which elsewhere distinguishes between a "vacancy" and "the absence or disability" of an agency head, *see* Dodd-Frank Act § 111(c)(2)-(3), 12 U.S.C. § 5321(c)(2)-(3) (2010); *see also* 12 U.S.C. § 1812(d)(2) (distinguishing between a "vacancy in the office of" Director of the CFPB and an "absence of" the Director of the CFPB). Courts "ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning." *Abbott v. Abbott*, 560 U.S. 1, 33 (2010). That presumption applies here, where Congress used entirely different terms in § 5491(b)(5)(B) than it used to denote a "vacancy" both in the FVRA and elsewhere in the Dodd-Frank Act itself.[5]

[5] Moreover, the version of the Dodd-Frank Act that originally passed the House specifically provided that in "the event *of vacancy* or during the absence of the Director (who has been confirmed by the Senate …), an Acting Director shall be appointed in the manner provided in [the FVRA]." H.R. 4173, 111th Cong. § 4102(b)(6)(B)(i) (engrossed version, Dec. 11, 2009) (emphasis added). This

Second, even if § 5491(b)(5)(B) did apply to vacancies, it cannot displace the availability of the FVRA. At most, Dodd-Frank would merely be an alternative mechanism to fill the vacant office of CFPB Director. The FVRA by its terms contemplates statutes that "expressly" provide alternative succession mechanisms and states only that, in such circumstances, the FVRA is no longer the "*exclusive* means" for designating an acting official. 5 U.S.C. § 3347(a) (emphasis added). The clear import is that Congress intended the FVRA and any alternative statutory mechanism to work in tandem, allowing the President discretion to rely on the FVRA in temporarily filling a vacancy. The Ninth Circuit's holding in *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016), is instructive. There, the court held that the FVRA remained available to the President despite an alternative statutory mechanism for designating an acting official. The presence of an agency-specific statute, the court of appeals explained, merely meant that neither the FVRA nor the statute at issue was "the *exclusive* means of appointing" the acting official and that "the President is permitted to elect between these two statutory alternatives." *Id.* at 556. As the district court recognized, *Hooks*

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further supports the presumption that Dodd-Frank's drafters used the word "vacancy" when they meant vacancies. While English argues that the eventual removal of this provision supports her argument that the FVRA does not apply, the more natural interpretation is that Congress ultimately recognized that the draft provision was superfluous because the FVRA would apply to vacancies by default. The final version of the bill therefore provided for the Deputy Director to serve in situations where the FVRA did *not* apply—namely when the CFPB Director was otherwise "absent" or "unavailable." 12 U.S.C. § 5491(b)(5)(B).

"supports the general proposition that where the appointment mechanisms of § 3345 of the FVRA are available but are not, under § 3347, *the* 'exclusive means' of appointing acting officials, they nonetheless typically remain *a* means of doing so alongside the agency-specific statute." Dist. Ct. Op. 17.

Indeed, in drafting the Dodd-Frank Act, Congress legislated against the backdrop of a consistent Executive practice of treating the FVRA as an alternative means to fill vacancies even where there was an agency-specific vacancy statute. Since the FVRA was enacted, the Department of Justice ("DOJ") has repeatedly concluded that the Act remains available in the face of agency-specific vacancy provisions. *See* Office of Legal Counsel Memorandum Opinion for the Counsel to the President, from Steven G. Bradbury Principal Deputy Attorney General, Re: Authority of the President to Name an Acting Attorney General (Sept. 17, 2007); Memorandum Opinion for the Deputy Counsel to the President, from M. Edward Whelan III, Acting Assistant Attorney General, Re: Designation of Acting Director of the Office of Management and Budget (June 12, 2003).[6] The Congress that enacted Dodd-Frank should be presumed to have known and understood DOJ's

[6] This view was not limited to Republican administrations. During the Obama Administration, the National Labor Relations Board advanced the same position, arguing that where there is independent statutory authority to fill a vacancy, the FVRA "is not the 'exclusive' means, but remains a nonexclusive option available to the President." Reply Brief for Petitioner-Appellant NLRB at 6, *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016).

interpretation when it drafted § 5491(b)(5)(B). *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here … Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law.").

Given that presumption, the word "shall" in § 5491(b)(5)(B), on which English hangs so much of her argument, cannot be read to foreclose the availability of the FVRA. While courts will not require "magical passwords" where a statute is displaced by the "unambiguous import of [a] subsequent statute," *Lockhart v. United States*, 546 U.S. 142, 147-148 (2005) (Scalia, J., concurring), it is equally true that a statute cannot be deemed displaced or repealed by a subsequent enactment "absent a clearly established congressional intention," demonstrated by "irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is *clearly intended as a substitute*," *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (emphasis added) (internal quotation marks and citation omitted); *see also Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (exemptions from the Administrative Procedure Act "are not lightly to be presumed" in light of the Act's statement that such modifications "must be express"). Even if it could be interpreted to cover vacancies, § 5491(b)(5)(B) does not *unambiguously* conflict with or displace the FVRA merely because it includes the word "shall"; no competent legislative drafter intending that result would have

produced § 5491(b)(5)(b) as written. That conclusion applies with especial force given that Dodd-Frank *itself* affirms that "all Federal laws dealing with … officers" apply to the CFPB "except as otherwise provided expressly by law." 12 U.S.C. § 5491(a).[7] Further, the FVRA's text makes no distinction between agency-specific vacancy statutes that operate automatically and those that operate permissively. Rather, the Act states that it is the "exclusive means for temporarily authorizing an acting official" unless another statutory provision expressly "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)(B). The text is agnostic as to how this "designat[ion]" occurs, and the FVRA thus remains available as an alternative vacancy-filling mechanism regardless of how the agency-specific statute operates. The use of "shall" in § 5491(b)(5)(B) accordingly cannot by itself alter the conclusion that the FVRA's text provides an alternative means to temporarily fill a CFPB Director vacancy.

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[7] Those who drafted Dodd-Frank knew full well how to exempt the CFPB from other statutes that set clear and well-established default rules. *See, e.g.*, 12 U.S.C. § 5497(a)(2)(C) and (c)(3) (using "notwithstanding any other provision of law" clauses to expressly exempt CFPB from baseline rules in the Anti-Deficiency Act governing the appropriations process). With respect to § 5491(b)(5)(B), in contrast, even former Representative Barney Frank, one of the co-authors of Dodd-Frank and a signatory of the Democratic Members of Congress amicus brief, conceded that the provision was "not as clear cut as I wish it was" when asked about the issue days after this litigation began. *See* Katelyn Caralle, Former Rep. Frank: Dodd-Frank Bill Vacancy Act "Not as Clear Cut as I Wish It Was," Washington Free Beacon (Nov. 27, 2017), http://freebeacon.com/politics/former-rep-frank-dodd-frank-bill-vacancy-act-not-clear-cut-wish/.

This conclusion is further supported by the legislative history of the FVRA. A relevant Senate Report at the time identified over forty existing organic agency statutes with their own vacancy provisions and noted that the FVRA "would continue to provide an alternative procedure for temporarily occupying the office." S. Rep. No. 105–250, at 17. Significantly, many of the statutes identified in the Report feature mandatory language just like the Dodd-Frank provision here. *See, e.g.*, 12 U.S.C. § 635a(b) ("There shall be a First Vice President of the [Export-Import] Bank … who *shall* serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of the President of the Bank." (emphasis added)); 44 U.S.C. § 2103(c) ("In the event of a vacancy in the office of the Archivist, the Deputy Archivist *shall* act as Archivist until an Archivist is appointed." (emphasis added)).

In sum, § 5491(b)(5)(B) cannot be read to displace the FVRA here and, at most, represents precisely the type of alternative vacancy mechanism contemplated by the FVRA. The President had ample authority to rely on the FVRA in designating Mulvaney as Acting CFPB Director.

II. ENGLISH'S POSITION RISKS PRESIDENTIAL ENCROACHMENT ON CONGRESS'S ROLE IN THE APPOINTMENTS PROCESS

English's position not only is at odds with the text of the relevant statutes, but also fundamentally undermines the purpose of the FVRA to protect Congress's constitutional role in the Presidential appointments process.

Congress enacted the FVRA in response to a "perceiv[ed] … threat to the Senate's advice and consent power" arising from the Executive Branch practice of permitting acting officials to serve in high-level positions for long periods without Senate confirmation. *SW Gen., Inc.*, 137 S. Ct. at 936. This concern persisted even where such officials assumed authority through a mechanism other than presidential designation. Indeed, the circumstances identified by a Senate Report as "necessitat[ing] legislative action" in the form of the FVRA are strikingly familiar: they involved a decision by this Court that an acting official designated by an outgoing agency head could remain in that position indefinitely without Senate approval until the President nominates a successor. S. Rep. No. 105–250, at 7 (explaining the need to correct this Court's decision in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), in which the acting official in question served for over four years).

To prevent prolonged evasion of the Senate's advice-and-consent power, the FVRA establishes a 210-day limit on the tenure of acting officials, regardless of whether such officials assume power through presidential designation or by virtue of their status as "the first assistant to the office" of a vacating officer. 5 U.S.C. § 3345(a). And while the FVRA recognizes that other statutes may provide alternative means for filling a vacancy, it restricts such alternatives only to those

statutes that permit an acting official to hold the position "temporarily."[8] *Id.* § 3347(a)(1).

English's position represents a marked and potentially dangerous departure from this framework. Unlike the FVRA, the Dodd-Frank Act contains no express limitation on the tenure of an Acting CFPB Director. *See* 12 U.S.C. § 5491(b)(5). Indeed, English states that, under her interpretation, when a Senate-confirmed CFPB Director resigns, the Deputy Director who automatically assumes office may serve "without any term limit." English Br. 40; *see also* 12 U.S.C. § 5491(c)(2) (permitting an individual to serve as Director "until a successor has been appointed and qualified"). Thus, on English's theory, the President could permit a Deputy Director to serve as Acting CFPB Director *indefinitely*—without ever submitting a nomination to the Senate—if it advanced the President's interests to do so.[9] This is

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[8] This provides yet another reason why Dodd-Frank cannot possibly be interpreted in the manner proposed by English: § 5491(b)(5)(B) does not provide for *temporary* appointment of an acting official. On English's apparent view, the Deputy Director could serve as the Acting Director indefinitely following a resignation. But the FVRA itself (including the requirement that any alternative means for filling a vacancy be "temporary") reflects Congress's judgment that acting officers should serve only on a temporary basis, so that the President is constrained to nominate a permanent successor who must be confirmed by the Senate.

[9] This possibility renders incoherent the Democratic Members of Congress amicus brief's assertion that "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." Democratic Members of Congress Br. 17. The designation of Acting

precisely the scenario the FVRA's time limits were designed to prevent, and nothing in Dodd-Frank's text suggests Congress intended to revive the President's ability to employ such a strategy.

Rather than acknowledge that her position undermines the Senate's advice and consent power, English posits a flawed hypothetical scenario in which a President might "stack a series of 210-day FVRA appointments atop each other, providing himself with ongoing control of the agency." English Br. 39. This argument misinterprets the FVRA, which does not permit such a scenario. In *Doolin*, this Court held that analogous provisions of the original Vacancies Act disallowed the use of "a series of temporary replacements" to evade the statute's time limitations. 139 F.3d at 208 (holding that the resignation of an acting officer "did not create a 'vacancy' enabling the President to invoke the Vacancies Act").[10] None of the FVRA's provisions affects this holding. To the contrary, even as it described the need to overturn other aspects of the *Doolin* decision, the Senate

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Director Mulvaney is subject to the FVRA's carefully considered time limitations, which Congress specifically designed to encourage the prompt nomination and confirmation of permanent officials. *See* S. Rep. No. 105–250, at 13 (observing that the need for a timely appointment must be balanced against "the vagaries of the vetting and nomination process"). Under English's view, in contrast, the President has no incentive to submit a nomination for Senate confirmation if the Deputy Director serving as Acting Director enjoys his support.

[10] This conclusion also aligned with two Opinions of the Attorney General, which had determined under similar statutes governing vacancies that the President could not adopt such a strategy. *See id.* (citing 16 Op. Att'y Gen. 596 (1880); 20 Op. Att'y Gen. 8, 9 (1891)).

Committee report praised this reasoning as a "reaffirmation of the long-standing operation of the Vacancies Act." S. Rep. No. 105–250, at 6.

Thus, while recognition that the FVRA governs a CFPB Director vacancy would encourage the prompt nomination of a permanent Director regardless of the President's preferences, English's position would open the door to prolonged evasion of the Senate's advice and consent power where a Deputy Director serving as Acting Director has the President's support. Mere use of the word "shall"—in a statutory provision that does not even clearly address vacancies—is no basis to invite this result. Nor can English's talismanic (and question-begging) invocation of the CFPB's "independence" (*see* English Br. 38) justify a conclusion that Dodd-Frank replaced a regularized vacancy procedure that encourages the timely nomination and confirmation of permanent officers with one that contemplates the indefinite insulation of an Acting Director from congressional control.

III. THE COURT SHOULD AVOID THE CONSTITUTIONAL ISSUES PRESENTED BY ENGLISH'S INTERPRETATION

Insulating the CFPB's Acting Director from the FVRA's requirements also raises constitutional concerns that should dissuade this Court from adopting English's interpretation of the relevant statutes. This Court has recognized that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which

the question may be avoided." *Janko v. Gates*, 741 F.3d 136, 145 n.9 (D.C. Cir. 2014). English's argument that Dodd-Frank overrides the FVRA raises "a serious doubt of constitutionality" because it would permit an individual not appointed by the President or confirmed by the Senate to serve for an indefinite period as a principal officer of the United States.

For the purpose of Executive Branch appointments, the Constitution "divides all its officers into two classes." *Morrison v. Olson*, 487 U.S. 654, 670 (1988) (quoting *United States v. Germaine*, 99 U.S. (9 Otto) 508, 509 (1879)). Congress may provide for the appointment of "inferior officers" by "the Courts" or "the Heads of Departments," but all "principal officers" must be "selected by the President with the advice and consent of the Senate." *Id.* Although the line is "far from clear," relevant factors in determining whether an officer is "inferior" include whether the officer is "subject to removal by a higher Executive Branch official," whether the officer may perform "only certain, limited duties," and the extent to which the office is limited in "jurisdiction" and "tenure." *Id.* at 671-672.

Under this framework, the Director of the CFPB (and thus the Acting Director) bears the hallmarks of a principal officer. Most importantly, the Director is removable only by the President. 12 U.S.C. § 5491(c)(3). In addition, rather than perform "certain, limited duties" within a limited jurisdiction, the Director has the authority to enforce nineteen federal consumer-protection statutes, either

through "adjudicative proceedings" (over which he ultimately presides) or via civil or criminal lawsuits. *Id.* §§ 5563(a), 5564(f). Prior to initiating such proceedings, the Director has a variety of tools at his disposal to examine and investigate entities for potential violations of the statutes he enforces. *See id.* §§ 5561, 5562. Finally, although by default the Director serves for a five-year term, he may hold the position indefinitely if a successor is not nominated and confirmed. *Id.* § 5491(c). All of these factors indicate that the CFPB is a "principal officer" under Article II of the Constitution.

English's interpretation would thus allow her and future Deputy Directors to indefinitely wield the authority of a principal officer despite never having been appointed by the President or confirmed by the Senate. Indeed, such a situation could arise when *either* the President *or* the Senate wished to keep a Deputy Director in power. If the Deputy Director enjoyed the President's support, the President could evade the Senate's role merely by declining to nominate a successor. But if instead a majority (or sufficient minority) of the Senate supported a Deputy Director, the Senate could indefinitely frustrate the President's appointments power by rejecting all nominations to replace her, without the typical pressure to fill high-level Executive Branch offices promptly.

In passing the FVRA, the Senate Committee identified the prolonged service of acting officials as "constitutionally suspect" even when the situation arose in the

context of an inferior officer. *See* S. Rep. No. 105–250, at 7. It poses still greater constitutional issues when the official in question functions as a principal officer of the United States. This Court can and should avoid this constitutional problem by rejecting English's interpretation of Dodd-Frank. Instead, the Court should adopt an interpretation that recognizes the careful allocation of constitutional responsibilities reflected in the FVRA, which properly reconciles the President's prerogative to ensure a functioning Executive Branch with the Senate's advice and consent power.

IV. ENGLISH'S REQUESTED PRELIMINARY RELIEF IS NOT IN THE PUBLIC INTEREST

In considering English's motion for a preliminary injunction, the Court must assess whether "the harm to the opposing party" and "the public interest" weigh in favor of granting relief. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These two inquiries are merged where the Government is a party. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). Here, given Congress's recognition of Mulvaney's role as Acting Director, granting English preliminary relief would impinge on Congress's role in the resolution of constitutional questions and would impair the public's interest in consistent and predictable governance by raising the prospect that the CFPB could undergo multiple leadership changes in a span of a few months.

It "has long been the case that developing constitutional meaning" is a "power and duty shared by all three branches." *United States v. Graham*, 824 F.3d 421, 439 (4th Cir. 2016) (internal quotation marks omitted). Along with the President and the Judiciary, Congress plays a meaningful and active role in resolving constitutional questions. Here, Congress has consistently dealt with Acting Director Mulvaney in a manner that reflects his position as the duly-authorized Acting Director of the CFPB. For example, the day after Mulvaney began his work as Acting Director, the United States Senate Committee on Banking, Housing, and Urban Affairs sent a letter congratulating Mulvaney on his designation and asking that he keep the Committee updated "on what you expect your priorities will be and how you think the CFPB can be improved."[11] The House of Representatives Committee on Financial Services has likewise written several formal letters to Acting Director Mulvaney requesting that he implement reforms at the CFPB, including voluntarily complying with certain Executive orders, revising the CFPB's enforcement policies, and releasing data on payday lending.[12] Perhaps most significantly, the Committee also issued a letter to Acting

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[11] Letter from Hon. Mike Crapo, Chairman, United States Senate Committee on Banking, Housing, and Urban Affairs, to Hon. Mick Mulvaney, Acting Director, Consumer Financial Protection Bureau (Nov. 28, 2017).

[12] *See* Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Dec. 1, 2017) (Executive

Director Mulvaney formally transferring to him the obligation to comply with subpoenas duces tecum previously issued to Director Cordray in his official capacity.[13] Congress has therefore recognized—and participated in—a status quo in which Mulvaney is in charge of the CFPB as Acting Director. Of course, this Court is empowered to make an ultimate determination on the merits of English's claim, *see, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but to disrupt the status quo on a preliminary basis would accord too little consideration to Congress's role in resolving constitutional questions and overseeing the conduct of the Executive Branch.

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orders); Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Dec. 1, 2017) (payday rule); Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Dec. 15, 2017) (regulation by enforcement); Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Dec. 18, 2017) (payday rule); Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Jan 9, 2018) (payday rule); Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Feb. 22, 2018) (building renovations).

[13] *See* Letter from Hon. Jeb Hensarling, Chairman, United States House of Representatives Committee on Financial Services, to Hon. Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection (Dec. 1, 2017) ("Pursuant to the precedents of the House, the subpoenas issued to former Director Cordray in his official capacity, are now operative upon you as Acting-Director.").

Apart from Congress's judgment on the issue, Mulvaney has been serving as a practical matter as Acting CFPB Director for more than three months now. In that time, he has promulgated various official actions, taking deliberate steps to support the CFPB's consumer protection mission while exploring reforms to the agency. Further, from the first day of his tenure, Acting Director Mulvaney has enjoyed the recognition of CFPB staff, consistent with the direction of the CFPB's General Counsel that "all Bureau personnel act consistently with the understanding that Director Mulvaney is the Acting Director of the CFPB." Memorandum from Mary E. McLeod, General Counsel to CFPB Senior Leadership Team, Re: Acting Director of the CFPB (Nov. 25, 2017).

Affording English preliminary relief would disrupt this stable and practical status quo and undermine the public's interest in consistent and predictable governance. An injunction against Acting Director Mulvaney could result in *four* CFPB leadership changes in quick succession—in a matter of months—if Acting Director Mulvaney ultimately prevails (*i.e.*, Cordray to Mulvaney to English to Mulvaney to permanent Director). Such instability serves neither the interest of Congress nor that of the public at large, and invites regulatory whiplash and significant uncertainty as to CFPB policies. This Court should instead preserve the status quo until either a full hearing on the merits or the nomination and confirmation of a permanent Director.

CONCLUSION

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

Respectfully submitted.

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March 2, 2018

APPENDIX: LIST OF AMICI

Representative Jeb Hensarling of Texas, 5th Congressional District

Senator John Barrasso of Wyoming

Senator Roy Blunt of Missouri

Senator John Boozman of Arkansas

Senator Shelley Moore Capito of West Virginia

Senator Bill Cassidy of Louisiana

Senator Susan Collins of Maine

Senator Bob Corker of Tennessee

Senator John Cornyn of Texas

Senator Tom Cotton of Arkansas

Senator Ted Cruz of Texas

Senator Steve Daines of Montana

Senator Michael B. Enzi of Wyoming

Senator Lindsey Graham of South Carolina

Senator Orrin Hatch of Utah

Senator Dean Heller of Nevada

Senator John Hoeven of North Dakota

Senator Jim Inhofe of Oklahoma

Senator Johnny Isakson of Georgia

Senator Ron Johnson of Wisconsin

Senator Mike Crapo of Idaho

Senator John Kennedy of Louisiana

Senator James Lankford of Oklahoma

Senator Mike Lee of Utah

Senator Mitch McConnell of Kentucky

Senator Jerry Moran of Kansas

Senator David Perdue of Georgia

Senator Rob Portman of Ohio

Senator Jim Risch of Idaho

Senator Pat Roberts of Kansas

Senator M. Michael Rounds of South Dakota

Senator Marco Rubio of Florida

Senator Ben Sasse of Nebraska

Senator Tim Scott of South Carolina

Senator Richard Shelby of Alabama

Senator Dan Sullivan of Alaska

Senator Thom Tillis of North Carolina

Senator Pat Toomey of Pennsylvania

Senator Roger Wicker of Mississippi

Representative Jodey Arrington of Texas, 19th Congressional District

Representative Brian Babin of Texas, 36th Congressional District

Representative Andy Barr of Kentucky, 6th Congressional District

Representative Joe Barton of Texas, 6th Congressional District

Representative Diane Black of Tennessee, 6th Congressional District

Representative Marsha Blackburn of Tennessee, 7th Congressional District

Representative Dave Brat of Virginia, 7th Congressional District

Representative Ted Budd of North Carolina, 13th Congressional District

Representative Michael C. Burgess, M.D. of Texas, 26th Congressional District

Representative Bradley Byrne of Alabama, 1st Congressional District

Representative Earl L. "Buddy" Carter of Georgia, 1st Congressional District

Representative Chris Collins of New York, 27th Congressional District

Representative Paul Cook of California, 8th Congressional District

Representative Warren Davidson of Ohio, 8th Congressional District

Representative Ron DeSantis of Florida, 6th Congressional District

Representative Scott DesJarlais of Tennessee, 4th Congressional District

Representative Daniel M. Donovan, Jr. of New York, 11th Congressional District

Representative Sean P. Duffy of Wisconsin, 7th Congressional District

Representative Jeff Duncan of South Carolina, 3rd Congressional District

Representative Tom Emmer of Minnesota, 6th Congressional District

Representative John Faso of New York, 19th Congressional District

Representative Matt Gaetz of Florida, 1st Congressional District

Representative Bob Gibbs of Ohio, 7th Congressional District

Representative Bob Goodlatte of Virginia, 6th Congressional District

Representative Paul A. Gosar D.D.S. of Arizona, 4th Congressional District

Representative Trey Gowdy of South Carolina, 4th Congressional District

Representative Sam Graves of Missouri, 6th Congressional District

Representative Tom Graves of Georgia, 14th Congressional District

Representative H. Morgan Griffith of Virginia, 9th Congressional District

Representative Karen C. Handel of Georgia, 6th Congressional District

Representative Andy Harris, M.D. of Maryland, 1st Congressional District

Representative Jody Hice of Georgia, 10th Congressional District

Representative French Hill of Arkansas, 2nd Congressional District

Representative Trey Hollingsworth of Indiana, 9th Congressional District

Representative Bill Huizenga of Michigan, 2nd Congressional District

Representative Randy Hultgren of Illinois, 14th Congressional District

Representative Duncan D. Hunter of California, 50th Congressional District

Representative Mike Kelly of Pennsylvania, 3rd Congressional District

Representative David Kustoff of Tennessee, 8th Congressional District

Representative Raul R. Labrador of Idaho, 1st Congressional District

Representative Barry Loudermilk of Georgia, 11th Congressional District

Representative Mia Love of Utah, 4th Congressional District

Representative Frank Lucas of Oklahoma, 3rd Congressional District

Representative Blaine Luetkemeyer of Missouri, 3rd Congressional District

Representative Tom MacArthur of New Jersey, 3rd Congressional District

Representative Patrick T. McHenry of North Carolina, 10th Congressional District

Representative David B. McKinley, P.E. of West Virginia, 1st Congressional District

Representative Mark Meadows of North Carolina, 11th Congressional District

Representative Luke Messer of Indiana, 6th Congressional District

Representative Alex Mooney of West Virginia, 2nd Congressional District

Representative Ralph Norman of South Carolina, 5th Congressional District

Representative Pete Olson of Texas, 22nd Congressional District

Representative Steve Pearce of New Mexico, 2nd Congressional District

Representative Scott Perry of Pennsylvania, 4th Congressional District

Representative Robert Pittenger of North Carolina, 9th Congressional District

Representative Bruce Poliquin of Maine, 2nd Congressional District

Representative Bill Posey of Florida, 8th Congressional District

Representative John Ratcliffe of Texas, 4th Congressional District

Representative David P. Roe, M.D. of Tennessee, 1st Congressional District

Representative Todd Rokita of Indiana, 4th Congressional District

Representative Dennis A. Ross of Florida, 15th Congressional District

Representative Keith Rothfus of Pennsylvania, 12th Congressional District

Representative Ed Royce of California, 39th Congressional District

Representative John Shimkus of Illinois, 15th Congressional District

Representative Adrian Smith of Nebraska, 3rd Congressional District

Representative Steve Stivers of Ohio, 15th Congressional District

Representative Claudia Tenney of New York, 22nd Congressional District

Representative Scott Tipton of Colorado, 3rd Congressional District

Representative Dave Trott of Michigan, 11th Congressional District

Representative Ann Wagner of Missouri, 2nd Congressional District

Representative Roger Williams of Texas, 25th Congressional District

Representative Steve Womack of Arkansas, 3rd Congressional District

Representative Ted Yoho of Florida, 3rd Congressional District

Representative Lee Zedlin of New York, 1st Congressional District

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,229 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Daniel P. Kearney, Jr.
DANIEL P. KEARNEY, JR.

March 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Daniel P. Kearney, Jr.
DANIEL P. KEARNEY, JR