ORAL ARGUMENT NOT YET SCHEDULED
No. 18-5007

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

LEANDRA ENGLISH,
Plaintiff-Appellant,

v.

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

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

PLAINTIFF-APPELLANT'S BRIEF

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Certificate as to Parties, Rulings, and Related Cases

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

I. Parties and *Amici* Appearing Below

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

1. Leandra English, *Plaintiff-Appellant*.

2. Donald J. Trump and John M. Mulvaney, *Defendants-Appellees*.

3. Public Citizen, Inc., Americans for Financial Reform, Center for Responsible Lending, Consumer Action, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, National Fair Housing Alliance, Tzedek DC, Inc., and United States Public Interest Research Group Education Fund, Inc., *Amici Curiae*.

4. Consumer Finance Regulation Scholars, *Amici Curiae.*[*]

5. Credit Union National Association, *Amicus Curiae.*

6. Professor Peter Conti-Brown, *Amicus Curiae.*

7. District of Columbia, and States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, *Amici Curiae*.

8. States of Texas, West Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, and South Carolina, *Amici Curiae*.

9. Chamber of Commerce of the United States of America, *Amicus Curiae.*

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Warren, Elizabeth
Senator of Massachusetts

Waters, Maxine
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II. Parties and Amici Appearing in this Court

1. Leandra English, *Plaintiff-Appellant*.

2. Donald J. Trump and John M. Mulvaney, *Defendants-Appellees*.

III. Rulings under Review

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

IV. Related Cases

This case has not previously been filed with this Court or any other court. Counsel is aware of the following case qualifying as related under Circuit Rule 28(a)(1)(C): *Lower East Side People's Federal Credit Union v. Donald J. Trump and John M. Mulvaney*, 1:17-cv-9536-PGG (S.D.N.Y. 2017).

Respectfully submitted,

/s/ Deepak Gupta
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January 30, 2018

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
FVRA	Federal Vacancies Reform Act of 1988
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OMB	White House Office of Management and Budget
OLC	Office of Legal Counsel, U.S. Department of Justice
PAS	Presidential Appointments with Senate confirmation
TRO	Temporary restraining order

INTRODUCTION

Reacting to a history of regulatory capture and dysfunction that contributed to the 2008 financial crisis, Congress took pains to ensure that the new Consumer Financial Protection Bureau would function as a truly "independent bureau." 12 U.S.C. § 5491(a). To this end, the Dodd-Frank Act mandates that the Bureau be headed by a single director—appointed for a five-year term, confirmed by the Senate, and removable by the President only for cause. *Id.* § 5491(c).

To further safeguard the Bureau's independence, Congress included a mandatory succession plan. Dodd-Frank authorizes the Director to appoint a Deputy Director and mandates that he or she "shall serve . . . as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5)(B). This was a deliberate legislative choice: An earlier House bill omitted the Deputy Director and explicitly specified that vacancies would be filled "in the manner provided" by the Federal Vacancies Reform Act (FVRA). But the later Senate version opted for the present language and deleted any reference to the FVRA. As enacted, Dodd-Frank thus requires that the deputy serve as Acting Director in the event of a vacancy—but only until the Senate confirms the President's chosen replacement.

The Bureau's first Director, Richard Cordray, resigned his post "effective at the close of business (midnight) on Friday November 24, 2017." JA106. At that moment, the Bureau's Deputy Director, Leandra English, became Acting Director

by operation of law. President Trump, however, sought to bypass Dodd-Frank's mandate and remove Ms. English by ordering that his White House budget director, Mick Mulvaney, instead begin serving as the Bureau's Acting Director one minute later, "effective 12:01 a.m. eastern standard time, November 25, 2017." JA109. Under this unprecedented arrangement, Mr. Mulvaney would wear two hats: he would continue to occupy his White House post while simultaneously serving as the head of an independent agency.

The President maintains that he had the power to install Mr. Mulvaney under the FVRA. But Dodd-Frank, not the FVRA, controls here. The district court—agreeing with the Justice Department's Office of Legal Counsel—correctly concluded that Director Cordray's resignation triggered the Dodd-Frank succession plan. Because Mr. Cordray became "unavailable" upon his resignation, Dodd-Frank provides that Ms. English "shall" serve as Acting Director.

But the direct court incorrectly read this mandatory language as "implicitly qualified" by the FVRA's default rule authorizing the President to temporarily fill vacancies. That reading contradicts basic rules of statutory interpretation. "Shall" typically means "shall," and Dodd-Frank's succession language is no exception. It therefore conflicts with the FVRA. The right way to resolve that conflict is not to rewrite "shall" to mean "may," but to read the more specific provision as an exception to the general one. Moreover, the FVRA was enacted to limit—not to

enlarge—the President's authority, and to thereby preserve the Senate's role in the appointments process. *See N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017). Consistent with that purpose, the FVRA does not permit the President to supersede Dodd-Frank's later-enacted, more specific, and mandatory text.

Finally, even assuming that President Trump had the power under the FVRA to name an Acting Director of the CFPB, his appointment of Mr. Mulvaney cannot be squared with Congress's requirement that the Bureau be "independent." That designation incorporates a long tradition—especially in financial regulation—of agency insulation from direct presidential control. And Dodd-Frank specifically protects the CFPB Director from needing "to consult with or obtain the consent or approval of the Director of the Office of Management and Budget." 12 U.S.C. § 5497(a)(4)(E). Mr. Mulvaney, the OMB Director, holds the very position that Congress sought to separate from control over the CFPB, and he reports directly to the President in a job where he can be terminated at will, contravening one of the most important safeguards provided to independent agency heads. The President, meanwhile, has publicly tweeted about particular CFPB enforcement decisions as if he can directly control them. Under these circumstances, it should be impossible to claim with a straight face that Mr. Mulvaney's appointment as Acting Director is consistent with Congress's intentions for the CFPB's independence.

STATEMENT OF JURISDICTION

On December 6, 2017, Ms. English moved for a preliminary injunction in the U.S. District Court for the District of Columbia against President Trump and OMB Director Mick Mulvaney. The district court had jurisdiction under 28 U.S.C. § 1331 and denied her motion on January 10, 2018. Ms. English filed a notice of appeal two days later. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's decision denying a preliminary injunction.

STATEMENT OF THE ISSUES

When the Director of the CFPB is "absent or unavailable," the Dodd-Frank Act of 2010 mandates that the Deputy Director "*shall* . . . serve as the acting Director." 12 U.S.C. § 5491(b)(5)(B) (emphasis added). Richard Cordray resigned as Director of the CFPB on November 24, 2017, effective at midnight. At that point, Leandra English was Deputy Director. But rather than recognize her as Acting Director, President Trump purported to appoint OMB Director John M. Mulvaney, effective 12:01am on November 25, 2017. He based this appointment on the Federal Vacancies Reform Act of 1998, an older and more general statute than Dodd-Frank. Ms. English filed a suit seeking declaratory and injunctive relief, and requested a preliminary injunction. This appeal presents a single question: did the district court err in denying Ms. English's motion for a preliminary injunction?

STATEMENT OF THE CASE

I. Statutory Background

A. The Federal Vacancies Reform Act (FVRA)

The Constitution requires the President to obtain Senate approval before appointing "Officers of the United States." U.S. Const. Art. II, § 2, cl. 2. This advice and consent function is a "structural safeguard[ ] of the constitutional scheme." *Edmond v. United States,* 520 U.S. 651, 659 (1997). "The constitutional process of Presidential appointment and Senate confirmation, however, can take time." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017). To ensure the smooth functioning of government during such delays, Congress has long given the President "limited authority to appoint acting officials to temporarily perform the functions of a vacant [ ] office without first obtaining Senate approval." *Id.* This limited authority may be granted in two ways: statutes that apply to specific vacancies in particular federal agencies, and statutes creating default rules that apply across many agencies. *See id.* at 935–36.

The FVRA is an example of the latter kind of statute, and was designed by Congress "to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees." 144 Cong. Rec. S6413–14 (daily ed. June 16, 1998) (Statement of Sen. Thompson). In the face of the Executive's increasing tendency not to submit nominations "in a timely fashion," Congress decided that

legislative action was necessary "[i]f the Constitution's separation of powers is to be maintained." S. Rep. 105-250, 1998 WL 404532, at *5. Thus, the FVRA was passed not to expand the President's authority, but rather to vindicate the Senate's constitutional prerogatives. *See SW Gen.*, 137 S. Ct. at 935.

The FVRA carefully limits who can be appointed to offices that require presidential appointment and Senate confirmation ("PAS offices"). In general, an officer's "first assistant" takes over in the event that he "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). The President, however, may override that default rule by appointing a different officer from within the same agency or a PAS officer from a different agency. *See id.* § 3345(a)(1–3). Ordinarily, an acting officer appointed under § 3345 may not serve for "longer than 210 days beginning on the date the vacancy occurs." *Id.* § 3346(a)(1).

Under 5 U.S.C. § 3347(a), the FVRA is the "exclusive means" for filling a vacancy. But the FVRA is not exclusive where another statute expressly "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a)(1)(A). In such cases, the FVRA usually applies alongside the agency-specific statute, and the President may elect between the two appointment procedures. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016).

Consistent with Congress's desire to insulate independent agencies from political interference, the FVRA cannot be used to fill vacancies at any multi-member body that governs "an independent establishment or Government corporation." 5 U.S.C. § 3349c(1)(A-B).

B. The Dodd-Frank Act and the Consumer Financial Protection Bureau (CFPB)

Congress created the CFPB in the wake of the 2008 financial crisis. Before the CFPB's creation, consumer financial protection had been fragmented among seven federal agencies administering many different consumer protection statutes. *See* Public Citizen Brief, Dist. Ct. ECF No. 36, at 4. This meant that no single agency bore responsibility for regulating core consumer financial markets like deposits, mortgages, credit cards, auto loans, payday loans, and debt collection. *Id.* at 5. It also meant that the existing regulatory framework was subject to widespread dysfunction, ossification, and capture by regulated industries. *Id.* at 3–6.

Congress sought to solve that problem in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which consolidated regulatory authority in a single "independent bureau." 12 U.S.C. § 5491(a). To protect the agency's independence, Congress located it "in the Federal Reserve System," *id.* § 5491(a), ensured that it would be funded outside the usual budget and appropriations process, *see id.* § 5497(a), vested it with independent rulemaking authority, *see id.* § 5512(b), gave it "primary enforcement authority" over certain consumer finance laws, *see id.*

§ 5515(c), and shielded it from influence by OMB, *see id.* § 5497(a)(4)(E). Most important, Congress sought to safeguard the Bureau's independence by providing that it would be headed by a single director—who would serve a five-year term and be removable only "for cause" (defined as "inefficiency, neglect of duty, or malfeasance in office"). 12 U.S.C. § 5491(c)(3).

Consistent with its goal of maximizing independence, Congress also gave the CFPB's Director the authority to appoint a Deputy Director, and commanded that the Deputy Director "shall serve . . . as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5)(B). This rule ensured that the Bureau would remain independent even in the event of a vacancy in the Director position. Playing a key role in the agency's mandatory succession plan is the only substantive responsibility assigned by statute to the Deputy Director. It is no exaggeration to say that the Deputy Director position exists solely for the purpose of protecting the CFPB's independence when the Director is absent or unavailable.

This conclusion is confirmed by legislative history. In December 2009, the House passed a version of Dodd-Frank that did not provide for a Deputy Director of the CFPB. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). Instead, this version stated that vacancies in the Director position would be filled "in the manner provided" by the FVRA. *See id.* (stating that "an Acting Director shall be appointed in the manner provided in section 3345 of title 5, United States

Code."). But the Senate bill that passed months later eschewed this choice, instead opting for what would become the present statutory language. *See* S. 3217, 111th Cong. § 1011(b)(5)(B) (2010). The Senate bill not only deleted any reference to use of the FVRA appointment process, but also created the new Deputy Director position and mandated a line of succession in the event of a vacancy.

This method of protecting the CFPB's independence did not break new ground: nearly all independent agencies are covered by rules that deny the President any prerogative to unilaterally fill vacancies outside the advice-and-consent process. Most independent agencies are explicitly exempted from the FVRA under § 3349c(1)(A–B), as they are led by multi-member bodies; and most of these agencies' organic statutes do not permit the President to temporarily replace vacant officers. Similarly, the Federal Housing Finance Agency—another independent agency led by a single director—restricts the President to filling vacancies by selecting among three existing deputy directors. *See* 12 U.S.C. § 4512(f). Dodd-Frank's mandatory succession plan follows this well-trodden path by protecting the CFPB's independence even when a vacancy occurs.

II. Factual and Procedural Background

Richard Cordray served as the first Director of the CFPB. JA94. Nearly four-and-a-half years into his five-year term, Mr. Cordray resigned his position, "effective at the close of business (midnight) on Friday November 24, 2017." JA106.

At approximately 2:30 p.m. on the afternoon of November 24, before leaving office, Director Cordray publicly announced that he had appointed Leandra English—until then the Bureau's Chief of Staff—as the Bureau's Deputy Director. JA94. He did so to ensure that she would become the Acting Director under 12 U.S.C. § 5491(b)(5) until the Senate confirmed a new Director appointed by the President. *Id.* "In considering how to ensure an orderly succession for this independent agency," he explained, "I have also come to recognize that appointing the current chief of staff to the deputy director position would minimize operational disruption and provide for a smooth transition given her operational expertise." JA94. This belief had a solid foundation. In addition to serving as the CFPB's Chief of Staff, Ms. English has served in a number of senior leadership roles at the CFPB, including Deputy Chief Operating Officer, Acting Chief of Staff, and Deputy Chief of Staff. And in addition to her work at the CFPB, she has served as a senior staffer at several other federal agencies. JA94–95.

By virtue of Mr. Cordray's resignation, and by operation of law, Ms. English became Acting Director of the CFPB at the stroke of midnight of November 24. President Trump, however, sought to effectively remove Ms. English from the Acting Director position one minute after she acceded to it, instead ordering his White House budget director, Mick Mulvaney, to begin serving as Acting Director of the CFPB "effective 12:01 a.m. eastern standard time, November 25, 2017." JA109. The

White House issued the following press statement describing the President's order: "Today, the President announced that he is designating Director of the Office of Management and Budget (OMB) Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau (CFPB)." JA95. The White House statement did not refer to Director Cordray's appointment of Ms. English as Deputy Director. And it was not accompanied by any legal analysis concerning the President's claimed authority to appoint Mr. Mulvaney or to displace or remove Ms. English from her role as Acting Director. *Id.*

On Saturday, November 25, the Office of Legal Counsel of the U.S. Department of Justice released a memorandum providing legal arguments in support of Mr. Mulvaney's appointment. The memorandum acknowledges that the statutory scheme of the CFPB provides that the Deputy Director shall become the Acting Director when there is a vacancy in the position of the Director. But, the memorandum asserts, the President may instead choose to appoint someone from outside the agency to take the position of Acting Director via the FVRA, 5 U.S.C. §§ 3345–3349d. That same day, the CFPB's General Counsel issued a memorandum reaching the same conclusion. *See* JA122. Subsequently, the CFPB's senior management agreed to act consistently with the General Counsel's advice.

Ms. English filed this case on Sunday, November 26. She accompanied her complaint with an emergency motion for a temporary restraining order (TRO). On

November 28, following several hearings, the district court denied Ms. English's request for a TRO. It also denied her formal request that the motion for a TRO also be treated as a motion for a preliminary injunction.

In the interim, Mr. Mulvaney seized control of the CFPB. Since November 27, he has purported to exercise the powers of Acting Director and has implemented substantial changes at the Bureau. At the same time, he has functioned as the Director of OMB—in which capacity he is removable at will by the President and functions as a White House official. Reflecting President Trump's view that Mr. Mulvaney serves at his pleasure, including in his asserted role as Acting Director of the CFPB, the President issued a tweet on December 8, 2017, directly countermanding one of Mr. Mulvaney's decisions in a CFPB enforcement action against Wells Fargo Bank. *See* Donald J. Trump, @realdonaldtrump, Twitter, Dec. 8, 2017, 7:18am *available at* https://perma.cc/PUG5-SABU.

Even as Mr. Mulvaney has exercised the powers of Acting Director, Ms. English has held herself out as Acting Director and has been received in that capacity by numerous congressional leaders and other stakeholders. She has stood by her rights despite demands from Mr. Mulvaney that she cease, and despite e-mails in which he has improperly insisted that she perform duties at his direction. Mr. Mulvaney has not attempted to terminate Ms. English and his lawyers have declined to indicate whether he has imminent plans to do so. *See* JA50.

Consistent with a scheduling order entered by the district court, Ms. English filed an amended complaint and moved for a preliminary injunction on December 6. The district court held a hearing on December 22 and subsequently denied her motion on January 10, 2018.

The district court first concluded that Ms. English was not likely to succeed on her claim that Mr. Mulvaney's appointment is unlawful. Starting with § 5491(b)(5)(B)—which provides that the Deputy Director "shall . . . serve as acting Director" in the event of a vacancy—the district court held that Dodd-Frank's mandatory succession plan is "implicitly qualified" by the FVRA. JA269. This holding was accompanied by a few examples of other provisions where "shall" means "may." *Id.* And it was justified largely on the basis of a separate holding that Congress can exempt the CFPB from a host of generally applicable laws only by using magic words. JA264–66. After concluding that Dodd-Frank's mandatory language is actually permissive, the district court invoked the presumption against implied repeals to hold that Dodd-Frank's succession plan does not displace the FVRA. JA270–72. The district court also offered a constitutional avoidance analysis based on the penumbra of the Take Care Clause. JA274–78.

Next, the district court concluded that Mr. Mulvaney—a White House official—can serve as Acting Director of the CFPB, notwithstanding Dodd-Frank's command that the Bureau be "independent." 12 U.S.C. § 5491(a); *see* JA282–85. In this

analysis, the district court recognized that Dodd-Frank protects the Bureau's independence and erects shields against interference by OMB. *See* JA283. But it held that the text and structure of Dodd-Frank do not inform the meaning of the statute's requirement of independence. *See id.* It thus held that Dodd-Frank does not forbid the OMB Director from serving as Acting Director of the CFPB. *See id.*

Finally, the district court concluded that the remaining preliminary injunction factors did not support granting relief. It first stated that Ms. English cannot show irreparable injury, even if she is statutorily entitled to serve as Acting Director. *See* JA288–89. Here, the district court reasoned that her injury "can be remedied in the ordinary course of this case," adding that "it is entirely speculative how long it could take for the President to nominate and the Senate to confirm a permanent CFPB Director." *Id.* The district court then addressed the balance of the equities and the public interest. Here, too, it opined that Ms. English cannot prevail even if Mr. Mulvaney has illegally usurped her rightful position. It reasoned, without further elaboration, that "granting [her] an injunction would not bring about more clarity; it would only serve to muddy the water." JA292.

STANDARD OF REVIEW

A party seeking a preliminary injunction must make a "'clear showing' that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its

favor, and accord with the public interest." *Pursuing Am.'s Greatness v. F.E.C.*, 831 F.3d 500, 505 (D.C. Cir. 2016). On appeal from a preliminary injunction determination, this Court reviews the district court's legal conclusions as to each of the four factors *de novo*, and its weighing of the factors for abuse of discretion. *See, e.g.*, *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6–7 (D.C. Cir. 2016).

SUMMARY OF ARGUMENT

I.A. In Dodd-Frank, Congress mandated that the CFPB's Deputy Director "shall . . . serve as the acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). When Director Cordray resigned, he was both "absent" and "unavailable." By operation of Dodd-Frank's plain terms, then, the Deputy Director—Ms. English—"shall" serve as Acting Director.

The district court correctly concluded that Director Cordray's resignation triggered § 5491(b)(5)(B). Yet it misread this provision as being "implicitly qualified" by the FVRA's general default rule, which authorizes the President to fill vacancies. That construction contravenes fundamental principles of statutory interpretation. "Shall" is ordinarily mandatory, and there's no indication that Congress wanted it to mean something different in § 5491(b)(5)(B). The provision thus conflicts with the FRVA's default rule. That conflict should not be resolved by reading "shall" to mean "may," but by interpreting the more specific provision "as an exception to the

general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). The district court did the opposite.

The district court's interpretation cannot be salvaged by reference to the FVRA's exclusivity provision or § 5491(a) of Dodd-Frank. No one disputes that the FVRA usually applies alongside agency-specific statutes, or that preexisting federal law covers the CFPB unless Congress clearly indicates otherwise; the question is whether, in this context, Dodd-Frank creates the exclusive method for filling a vacancy, thereby displacing the FVRA. By using the mandatory "shall," Congress provided a clear answer. No more is needed.

The district court mistakenly believed that Congress must speak even more clearly given the presumption against implied repeals. But invoking that presumption "disregards the principle behind the specific/general canon"—that "[t]he specific provision does not negate the general one entirely," but "is treated as an exception to [it]" in "the situation that the specific provision controls." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183, 185 (2012).

B. This textual analysis is confirmed by Dodd-Frank's history and structure. After the House proposed a version of the bill without a Deputy Director position that explicitly incorporated the FVRA, the Senate responded by creating the Deputy Director position, adding the succession provision, and eliminating any reference to the FVRA.

The CFPB's independence further supports the conclusion that Dodd-Frank controls. Whereas the district court's reading would allow the President to exercise direct control over the agency, adhering to the text vindicates the CFPB's design by ensuring that the CFPB will remain independent.

Finally, the constitutional-avoidance canon has no role to play. It is properly invoked only to decide between two plausible constructions of an ambiguous statute. But there is no ambiguity here. Text, history, and purpose all point firmly in the same direction, and cannot be overridden by general statements about the Take Care Clause. The district court's reading, moreover, gives rise to constitutional concerns of its own, and fails to consider the Senate's constitutional prerogatives.

C. Even if the district court's reading were correct, Mr. Mulvaney's appointment is still invalid. Congress created the CFPB to be "an independent bureau" insulated from direct presidential control. 12 U.S.C. § 5491(a). Mr. Mulvaney's appointment flouts Dodd-Frank's language and the tradition of agency independence. As OMB Director, he holds the very position that Dodd-Frank sought to separate from control over the CFPB's affairs. And he reports directly to the President in a job where he can be terminated at-will, eliminating one of the most important safeguards for independent directors.

II. The District Court erred when it held that Ms. English has suffered no irreparable harm. The court analogized this case to a garden-variety employment

dispute, where irreparable harm is often hard to establish. But Ms. English isn't seeking money; she wants an injunction vindicating her statutory right to serve as Acting Director, a temporary post that disappears when the Senate confirms a nominee. She suffers an irreparable injury every day she is denied that right, and it is likely that she will never obtain *any* relief without a preliminary injunction.

III. Finally, the district court wrongly concluded that equity and the public interest weigh against preliminary relief. Mr. Mulvaney's appointment triggered an urgent need for public clarity about who runs the Bureau. Banks and industry experts have publicly stated their concerns about the murky legal status of the Bureau's leadership, casting a pall over the legitimacy of its daily activities. The public interest would be better served by a preliminary injunction establishing Ms. English as the lawful Acting Director.

ARGUMENT

I. Ms. English is likely to succeed on the merits.

Congress created the CFPB to be "an independent bureau." 12 U.S.C. § 5491(a). To preserve that independence and protect the Senate's constitutional prerogatives, Congress specified that the position of Director would have its own exclusive, mandatory line of succession. Specifically, Congress provided in Dodd-Frank that the CFPB's Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5)(B). At the moment that Director

Cordray's resignation took effect, at the stroke of midnight on November 24, 2017, Ms. English became the Acting Director by operation of law. This conclusion is powerfully supported by the overarching structure of Dodd-Frank and by legislative history that speaks directly to the question at hand.

In contrast, Mr. Mulvaney's claim to the Acting Director position lacks any valid basis. The district court committed two distinct legal errors in concluding otherwise. *First*, it violated elementary principles of statutory construction in holding that Dodd-Frank's mandatory language is "implicitly qualified" by the FVRA. JA269. That gets things backwards. When the natural meaning of two provisions brings them into conflict, it is "well established" that "the specific provision is construed as an exception to the general one"—not the other way around. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Rather than apply this settled rule here, the district court denied that Dodd-Frank and the FVRA conflict with each other in the first place. But that reasoning required it to impose an awkward and untenable interpretation on Dodd-Frank's statutory text—and to ignore highly probative evidence of congressional intent.

Second, even assuming that the President generally has the power to name an Acting Director under the FVRA, the district court nevertheless erred in upholding Mr. Mulvaney's appointment. Congress spoke clearly in commanding that the CFPB function as "an independent bureau." 12 U.S.C. § 5491(a). It is flatly inconsistent with

this statutory requirement to install a White House official—based in the Executive Office Building and otherwise removable at will by the President—as the part-time Acting Director of the CFPB. While the district court correctly observed that this rule is not stated explicitly in Dodd-Frank, it is inherent in the very concept of agency independence. And it is confirmed here by statutory provisions that specifically limit OMB's influence over the CFPB.

The district court's legal errors did not involve mere peripheral issues. They encompassed the dispute at the very heart of this litigation: who is statutorily entitled to lead the CFPB? In holding that Mr. Mulvaney may lead the Bureau, the district court fundamentally misinterpreted applicable provisions of Dodd-Frank, the FVRA, and the Constitution.

A. Dodd-Frank provides an exclusive, mandatory succession plan for when the Director of the CFPB resigns his position.

1. Resignation renders a Director "absent" and "unavailable."

Dodd-Frank provides that the CFPB's Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). When the Director leaves office, he becomes "absent" as well as "unavailable." Given their ordinary meaning, these terms plainly encompass a vacancy, in which the Director can aptly be described as "not existing," "lacking," or "not available." *See, e.g.*, *Absent*, Merriam Webster Online Dictionary,

https://www.merriam-webster.com/dictionary/absent (defining "absent" as "not existing: lacking"); *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"). This conclusion has been adopted by OLC, which recently concluded that § 5491(b)(5)(B)'s "reference to 'unavailability' is best read to refer both to a temporary unavailability (such as the Director's recusal from a particular matter) and to the Director's being unavailable because of a resignation or other vacancy in office." *See* JA133.

The question whether § 5491(b)(5)(B) applies to vacancies is a threshold issue that precedes the question whether Dodd-Frank's succession plan displaces the FVRA. If Dodd-Frank's reference to a Director's "absence or unavailability" *does not* encompass a resignation-related vacancy, then this case is over. If Dodd-Frank's succession plan *does* cover vacancies, then the remaining questions in the case must be addressed on their own terms. Both parties to this litigation have independently acknowledged that Dodd-Frank *does* apply when the CFPB Director resigns.

The district court, however, tried to have it both ways. On the one hand, it effectively concluded that § 5491(b)(5)(B) *does* cover vacancies. *See* JA267. On the other hand, it later insisted that residual doubt about this threshold issue must influence the analysis of how Dodd-Frank interacts with the FVRA. *See* JA267, JA274, JA281. This was incorrect. Either § 5491(b)(5)(B) covers vacancies or it does not. There is no

basis for concluding (or assuming) that it does and then repeatedly calling that premise into doubt while interpreting the rest of the provision. As explained below, this error infected key parts of the district court's analysis.

2. By mandating that the Deputy Director "shall . . . serve as acting Director," Dodd-Frank creates a discrete exception to the FVRA.

The FVRA establishes a broadly-applicable default rule that authorizes the President to fill vacancies. Dodd-Frank, in contrast, commands that the Deputy Director of the CFPB "*shall* . . . serve as acting Director" in the event of a vacancy. 12 U.S.C. § 5491(b)(5)(B) (emphasis added). The basic question here is how to reconcile these provisions. The district court sought to harmonize them by rewriting Dodd-Frank: in its interpretation, "shall" is replaced with "may." But "courts have no authority to rewrite the plain text of a statute." *Kay v. F.C.C.*, 525 F.3d 1277, 1279 (D.C. Cir. 2008). Accordingly, the proper approach is to give Dodd-Frank its natural meaning. On this view, "shall" means "shall"—and Dodd-Frank thus declares in unqualified terms what *must* happen when the Director resigns. Because it is not possible to follow that rule while also invoking the FVRA's process for filling vacancies, the two provisions are in conflict. "To eliminate the contradiction," the Supreme Court has instructed, "the specific provision is construed as an exception to the general one." *RadLAX*, 566 U.S. at 645. This principle confirms that Dodd-

Frank's specific succession plan operates as a discrete exception to the FVRA's general rule for the appointment of acting officials.

a. As used in § 5491(b)(5)(B), "shall" is mandatory and unqualified.

Interpretation of § 5491(b)(5)(B) must begin with "[t]he traditional, commonly repeated rule [] that shall is mandatory and may is permissive." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012). As the Supreme Court recently observed, "[u]nlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *see also Shapiro v. McManus*, 136 S. Ct. 450, 454 (2015). Put simply, "shall" is ordinarily "the language of command." *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). On its face, Dodd-Frank's provision addressing who "shall" serve as Acting Director during a vacancy is best read as mandatory.

To be sure, there are circumstances in which "shall" cannot reasonably be interpreted as imposing a command. This most often occurs when legal writers "use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). But courts usually do not assume that legislatures misuse words in statutes, and that is no less true when it comes to "shall." There is thus a powerful presumption—which the district court failed to acknowledge—that "when the word *shall* can be reasonably read as mandatory, it ought to be so read." Scalia & Garner, *Reading Law*, at 114; *see also Gutierrez de Martinez*, 515 U.S. at 438–39

(Souter, J., dissenting) ("Notwithstanding the Court's observation that some contexts can leave the word 'shall' a bit slippery, we have repeatedly recognized the normally uncompromising directive that it carries." (collecting cases)); *Black's Law Dictionary* 1499 (9th ed. 2009) (observing that the "mandatory sense that drafters typically intend" is the "only sense . . . acceptable under strict standards of drafting"). Here, there is nothing unreasonable about interpreting "shall" in Dodd-Frank to impose a mandatory rule rather than an option readily negated through use of the FVRA. Accordingly, there is a very strong presumption that "shall" carries its ordinary, obligatory meaning.

In an effort to prove otherwise, the district court deployed three examples in which "shall" is not mandatory. *See* JA269. One of them can be set aside at the outset:

> **[1]** The FVRA provides that the first assistant "shall perform" the duties of the vacant PAS office. 5 U.S.C. § 3345(a)(1). But "notwithstanding" this requirement, the President "may" appoint another PAS officer to perform those duties. *Id.* § 3345(a)(2).

JA269. In this example, the first provision's use of "shall" is directly and explicitly modified by the second provision's use of "notwithstanding." *See SW Gen.*, 137 S. Ct. at 939 (describing interaction of *shall* and *notwithstanding*); Scalia & Garner, *Reading Law*, at 126–27 (explaining that this word "shows which provision prevails in the event of a clash"). Because Dodd-Frank's mandatory succession plan is not modified by

any such explicit qualifier, there is no reason to view this example as relevant to interpreting § 5491(b)(5)(B).

That leaves the district court's other two examples, which actually illustrate why the court's reading of § 5491(b)(5)(B) is incorrect. Both examples are variations on a single theme:

> **[2]** Dodd-Frank provides that the Director "shall serve as the head of the [CFPB]." 12 U.S.C. § 5491(b)(1). At the same time, the President "may remove" the Director for cause. *Id.* § 5491(c)(3).
>
> **[3]** "[E]ach member [of the Nuclear Regulatory Commission] shall serve for a term of five years." 42 U.S.C. § 5841(c). But those members "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5841(e).

JA269. Both of these examples involve a single statutory scheme—enacted at a single moment in time—governing a single agency's leadership. In both examples, the statute uses "shall" to describe the officer's position or tenure, and "may" to authorize for-cause removal. And in both examples, it is the general/specific canon that explains why "shall" is properly seen as modified by "may."

"It is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That is particularly true when "the two [provisions] are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]." *RadLAX*, 566 U.S. at 645 (citation omitted). In such cases, where "a general authorization and a more limited,

specific authorization exist side-by-side," invocation of the general/specific canon avoids "the superfluity of a specific provision that is swallowed by the general one." *Id.* This approach accords with "'the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *Id.* (citation omitted).

These principles explain the district court's examples and make clear that they are inapposite here. In both examples, a general authorization (to hold office) coexists alongside a more limited, specific authorization (to remove the officeholder for cause). Moreover, both the general and specific authorizations are contained within a single statutory scheme. To avoid rendering the specific authorization superfluous—and to make sense of Congress's overarching statutory plan—the general provision (which uses "shall") is displaced under certain circumstances by the specific provision (which uses "may"). Thus, while the CFPB Director "shall" serve a five-year term, he "may" be removed for cause. *See* 12 U.S.C. § 5491(c)(1–3).

This case, by contrast, concerns separate statutory schemes enacted at different moments in time. The older statute creates a broad default rule and the more recent statute addresses our specific factual setting. Further, in a precise inversion of the district court's examples, here the general provision uses "may" and the specific provision uses "shall." In these circumstances, the general/specific canon does not support the district court's conclusion that Dodd-Frank's use of "shall" is

"implicitly qualified" by the FVRA's "may." JA269. To the contrary, this interpretive canon compels the opposite interpretation.

The conclusion that "shall" is mandatory in § 5491(b)(5)(B) is also supported by a related principle: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). This presumption applies to the differential use of "shall" and "may": "[W]hen a statutory provision uses both 'shall' and 'may,' it is a fair inference that the writers intended the ordinary distinction." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (citation omitted).

In 12 U.S.C. § 5491, the word "shall" appears ten times and "may" appears four times. In one subsection, both terms make an appearance—and are used in their presumptive mandatory and permissive senses. *See id.* § 5491(e) ("The principal office of the Bureau shall be in the District of Columbia. The Director may establish regional offices of the Bureau . . . ."). It is thus readily apparent that Congress made deliberate choices in selecting the words "shall" and "may" while establishing the CFPB. Those legislative judgments command respect. They also prove that the use of "shall" in § 5491(b)(5)(B) reflects a careful design choice.

The significance of this design is confirmed by reference to other agency organic statutes. Whereas Dodd-Frank's succession language is straightforward and admits of no exceptions, most other agencies work differently. Addressing the General Services Administration, for instance, Congress has provided that when there is a vacancy in the position of Administrator, "the Deputy Administrator is Acting Administrator . . . *unless the President designates another officer of the Federal Government*." 40 U.S.C. § 302 (emphasis added); *see also* 38 U.S.C. § 304 (similar rule for Acting Secretary of Veterans Affairs). Indeed, in the case of yet another single-director independent agency—the Social Security Administration—Congress provided that "[t]he Deputy Commissioner shall be Acting Commissioner" when the Commissioner position is vacant "unless the President designates another officer of the Government as Acting Commissioner." 42 U.S.C. § 902(b)(4). These succession provisions for other agencies demonstrate that Congress knows how to make mandatory language yield to an alternative decision by the President. It is therefore notable that Congress chose not to do so in Dodd-Frank, and instead did the opposite. *See Lukhard v. Reed*, 481 U.S. 368, 376 (1987) (plurality opinion).

In sum, all relevant principles of statutory interpretation support the conclusion that "shall" in § 5491(b)(5)(B) means what it says. Treating this provision as anything other than mandatory and unqualified would conflict with the statute's

plain language. When the Director of the CFPB is "absent or unavailable," the Deputy Director *must* serve as Acting Director.

b. Neither the FVRA's exclusivity provision nor Dodd-Frank itself supports the district court's reading of "shall" as permissive.

The district court devoted only three paragraphs of analysis to interpreting "shall." *See* JA268–69. Instead, it focused largely on the FVRA's exclusivity provision and § 5491(a) of Dodd-Frank. In its view, these provisions do most of the heavy lifting involved in rewriting "shall" as "may." On close inspection, however, neither supports the district court's holding.

That is most obviously true of the FVRA's exclusivity provision. All parties recognize that the FVRA usually applies alongside agency-specific statutes. *See* 5 U.S.C. § 3347(a)(1). The Ninth Circuit stated this rule correctly in *Hooks*. There, the National Labor Relations Board (NLRB) argued that the National Labor Relations Act (NLRA) provided the sole means for appointing an Acting General Counsel of the NLRB. *See* 816 F.3d at 555–56. The Ninth Circuit disagreed, holding that neither statute was exclusive and the President could therefore elect between the NLRA and the FVRA's appointment mechanisms. *See id.*

The question here is similar to the question in *Hooks*: whether an agency-specific statute provides the exclusive method of filling a vacancy. But as the district court recognized, this case is unlike *Hooks* in two respects. *See* JA263. *First*, the agency-

specific statute uses very different language. The NLRA states only that the President is "authorized" to fill a vacancy. 29 U.S.C. § 153(d). In stark contrast, Dodd-Frank states that the Deputy Director "shall" serve as Acting Director. § 5491(b)(5)(B). There is a world of difference between discretionary and mandatory language in assessing whether an agency-specific statute creates an exception to the FVRA. *Second*, whereas the NLRA was enacted before the FVRA, Dodd-Frank was enacted after it. Congress is always free to undo or amend its past acts. *See Lockhart v. United States*, 546 U.S. 142, 247–48 (2005) (Scalia, J., concurring). This principle explains both why the FVRA could modify mandatory language in prior statutes and why Dodd-Frank can use mandatory language to the exclusion of the FVRA. Notably, the Justice Department has not yet identified a single example of a post-FVRA, agency-specific statute with mandatory language that has been interpreted to preserve the FVRA as an alternative means of filling vacancies.

Accordingly, the Ninth Circuit's decision in *Hooks* and the FVRA's exclusivity provision shed little light on this case. The district court ultimately acknowledged as much, concluding only that Congress enacted Dodd-Frank "with the understanding that the FVRA often co-exists with other acting-official provisions." JA263. Yet it hardly follows from this generalized congressional "understanding" that Dodd-Frank's mandatory language should be interpreted as permissive. Indeed, the opposite inference makes more sense: Congress chose a presumptively mandatory

term because it aimed to displace the FVRA, not to describe an optional alternative to it. But even if the district court's reliance on the FVRA's exclusivity provision were justified, it provides—at most—minimal support for the view that "shall" is not mandatory here.

That leaves us with 12 U.S.C. § 5491(a). The district court characterized this provision as Dodd-Frank's "express-statement clause." JA264. Read in context, however, it is more appropriately denominated the "agency creation clause":

> **(a) Bureau established**
>
> There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection," which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws . . . Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, 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.

Relying on the final sentence of this provision, the district court effectively imposed a sweeping magic-words requirement on the rest of Dodd-Frank. *See* JA264–67. On this basis, it then concluded that "shall" in § 5491(b)(5)(B) must be read as permissive rather than mandatory, since that provision does not *explicitly* reference and displace the President's appointment authority under the FVRA.

As a matter of statutory structure and judicial precedent, the district court's analysis sets the bar far too high. By its terms, § 5491 applies to *all* CFPB operations

involving "contracts, property, works, officers, employees, budgets, or funds." There are many respects in which the CFPB varies from standard agency practice in these regards. To note just a few examples:

- 12 U.S.C. § 5497 creates an elaborate and highly unusual process for transferring funds to the CFPB from the Federal Reserve System's Board of Governors.
- 12 U.S.C. § 5584 designs a complex and unique procedure for transferring personnel and functions from other agencies to the newly-created CFPB.
- 12 U.S.C. § 5585 directs the Director of OMB, in consultation with the Secretary of the Treasury, to make certain incidental transfers of assets and liabilities to the CFPB.

Each of these bespoke CFPB provisions includes repeated use of "shall" to describe the manner in which the CFPB will operate. Yet none of these provisions contains an explicit exemption from all other background laws that govern agency operations. If this Court were to accept the district court's view—and were to insist that no provision concerning the CFPB may displace or qualify other federal laws without magical passwords—it is difficult to predict the mischief that would follow. While some sections of Dodd-Frank explicitly exempt the CFPB from generally-applicable federal laws, *e.g.*, 12 U.S.C. § 5493(a)(2), many other sections simply impose idiosyncratic requirements and use a mandatory term—"shall"—to clarify that the CFPB is meant to operate differently, *e.g.*, *id.* §§ 4497, 5584, 5585. In interpreting Dodd-Frank's agency-creation clause, it is appropriate to consider these features of

the broader statutory framework. They demonstrate that Congress often used "shall" in order to indicate "expressly" that the CFPB has unique rules.

In any event, the district court's interpretation of "expressly" is at odds with precedent. Across a wide array of contexts, courts have concluded that Congress need not use magic words to speak "clearly" or "expressly." For example, following the Supreme Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983), this Court has held that Congress may "expressly" delegate authority to Indian tribes by implication from a statutory scheme. *See Ariz. Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1290–91 (D.C. Cir. 2000). Similarly, in the context of assessing when a provision is jurisdictional, the Supreme Court has rejected the notion that "Congress must incant magic words in order to speak clearly." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). This principle has been invoked in cases about federalism, *see Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), state sovereign immunity, *see Sw. Power Admin. v. Fed. Energy Regulatory Comm'n*, 763 F.3d 27, 31 (D.C. Cir. 2014), and statutory interpretation, *see Ohio v. United States*, 849 F.3d 313, 321 (6th Cir. 2017). A clear-statement rule "does not require Congress to incant magic words but rather to speak clearly." *Merck Sharp & Dohme Corp. v. Lee*, 75 F. Supp. 3d 16, 23 (D.D.C. 2014).

Here, Congress enacted a provision stating what "shall" happen when the Director of the CFPB is absent or unavailable. It did so in a statute that carefully separates "shall" from "may," and in which every relevant presumption weighs in

favor of giving "shall" its usual, mandatory meaning. Under these circumstances, insisting that Congress didn't speak clearly enough verges on the absurd. That is particularly true in light of the legislative history, which shows a considered decision *against* making the FVRA available as an alternative.[3] The district court thus erred in holding that "shall" must be read as "implicitly qualified." JA269.

c. Because "shall" is mandatory and exclusive, it displaces the FVRA.

If § 5491(b)(5)(B) is given its natural meaning, it conflicts with the FVRA: a mandatory, agency-specific succession plan cannot coexist with an alternative method for filling vacancies. To harmonize these statutes, it is necessary to invoke the general/specific canon. As explained above, "[A] more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980); see also *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974).

[3] The district court expressed concern that if the Dodd-Frank Act's Deputy Director provision served to displace the FVRA here, the express-statement requirement would lack any meaning. *See* JA268 (discussing *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 691–92 (2003)). That anxiety is misplaced. If Dodd-Frank's succession provisions were structured like those in most other agencies—as merely *authorizing* succession—then Dodd-Frank's express-statement rule would control the analysis. But, here, the statutory text is mandatory, and there are many other structural and contextual indicia that it was meant to operate as an exclusive rule.

In addition, the district court suggested that Congress did not expressly displace the FVRA because § 5491(b)(5) refers to the Director's "absence or unavailability" rather than to his resignation. *See* JA266–67. But if Dodd-Frank's succession plan *does* cover vacancies resulting from a resignation, then there is no reason to think that Congress failed to "expressly" address this circumstance.

Dodd-Frank is more specific than the FVRA. Whereas the FVRA provides a general rule for many positions in many agencies, Dodd-Frank addresses succession for a single position in a single agency. *See RadLAX*, 566 U.S. at 645. Therefore, the mandatory succession provision in Dodd-Frank is properly interpreted as a narrow and discrete exception to the FVRA. *See Stewart v. Smith*, 673 F.2d 485, 492 (D.C. Cir. 1982) ("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." (citations omitted)).[4]

The district court held that displacing the FVRA here would violate the presumption against implied repeals. *See* JA270–71. That is incorrect: "The principle behind the general/specific canon [is that] the two provisions . . . can exist in harmony. The specific provision does not negate the general one entirely, but only its application to the situation that the specific provision covers." Scalia & Garner, *Reading Law*, at 185. As a result, the more specific provision is not seen as impliedly repealing the general rule, but rather "is treated as an exception to [it]." *Id.* at 183. Indeed, dozens of courts have rejected the argument that creating an exception

[4] Even though it concluded that the general/specific canon does not apply, the district court opined that the FVRA might be more specific because it "explicitly applies where [an office] becomes 'vacant' because the officer 'resigns.'" JA272. Dodd-Frank, in contrast, refers to "absence" and "unavailability." This conclusion is facially implausible. Further, the district court once again erred by relying on residual doubt about the applicability of Dodd-Frank's succession rules even after assuming that those rules *do* govern vacancies.

through the general/specific canon constitutes an implied repeal. *See, e.g.*, *Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc.*, 833 F.3d 1125, 1136 (9th Cir. 2016); *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002); *Greenless v. Almond*, 277 F.3d 601, 608 (1st Cir. 2002); *Harris v. Owens*, 264 F.3d 1282, 1296 (10th Cir. 2001). Further, this Court has held that application of the general/specific canon creates only an "exception" to the more general statute. *See Stewart*, 673 F.2d at 492; *Chem. Mfrs. Ass'n v. E.P.A.*, 673 F.2d 507, 512 (D.C. Cir. 1982).[5]

Accordingly, Dodd-Frank's mandatory succession plan displaces the FVRA's default process for filling vacancies. When the Director of the CFPB resigns, the Deputy Director immediately and automatically succeeds him as Acting Director. The district court's contrary holding was legal error.

3. Dodd-Frank's history and structure confirm that its succession plan is mandatory and exclusive.

A textual analysis of Dodd-Frank and the FVRA confirms that the district court erred. That conclusion is reinforced by Dodd-Frank's legislative history. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 459 (2012) ("[A]lthough we need not rely on legislative history given the text's clarity, we note that the history only supports our

[5] The district court cited *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007), for the proposition that alterations to statutes are disfavored regardless of whether they are characterized as amendments or partial repeals. Here, Ms. English does not seek to amend the FVRA. To the extent the district court views application of the general/specific canon as a partial repeal, its reasoning is foreclosed by precedent.

interpretation. . . ."). In December 2009, the House proposed a version of the bill that lacked a Deputy Director position and explicitly incorporated the FVRA's appointment process. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). The Senate responded with a bill creating the Deputy Director position and assigning it only a single function: succeeding as Acting Director when the Director is absent or unavailable. *See* S. 3217, 111th Cong. § 1011(b)(5)(B) (2010). Even as it created this succession plan and used mandatory language to describe its operation, the Senate erased all references to the FVRA. *Id.* Ultimately, the Senate's version of the legislation was enacted into law.

The district court dismissed this history as irrelevant, warning against "looking over a crowd and picking out your friends." JA280 (citation omitted). This crowd, however, consists *entirely* of friends: Dodd-Frank's legislative history offers nothing but support for Ms. English, while tending only to disprove the district court's conclusion. Moreover, the two principal architects of the statute, former Representative Frank and former Senator Dodd have filed an amicus brief explaining that Dodd-Frank's succession plan was intended to displace the FVRA. *See* Members of Congress Brief, Dist. Ct. ECF No. 34, at 15–21.[6]

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[6] The district court sought to evade this legislative history by speculating about other possible explanations for Congress's conduct. For example, the district court speculated that "Congress understood Dodd-Frank's express-statement requirement as sufficient to invoke the FVRA in this context, chose not to exempt the CFPB from the FVRA, and chose not to have the Deputy Director serve in the event of a vacancy

Ms. English's position is also supported by Dodd-Frank's statutory scheme, which "established . . . an independent bureau" and devised interlocking safeguards to protect that independence. 12 U.S.C. § 5491(a). In creating the CFPB, Congress determined that the agency needed to be an independent regulator to remain a vigilant guardian of consumers' interests. *See* S. Rep. No. 111-176, at 174 (2010). Congress therefore placed the CFPB within the already-independent Federal Reserve system, gave it an independent funding source, vested it with independent rulemaking power and primary enforcement authority, and shielded it from direct OMB influence. *See* 12 U.S.C. §§ 5491(a), 5491(c)(3), 5497(a)(1), 5512(b), 5515(c).

But these mechanisms of agency independence mean little if the President can exercise direct control over the agency's 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.'" (citation omitted)). Congress thus decided to protect the Director's independence in two related ways. First, Congress made the Director removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). And second, Congress directed in

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resulting from a resignation except as provided in the FVRA." JA281–82. This theory attributes some awfully subtle textual reasoning to the Senate. It also flies in the face of statements by Mr. Dodd and Mr. Frank about their own bill. *See* Members of Congress Brief, Dist. Ct. ECF No. 34, at 15–21.

advance that the Deputy Director would serve as Acting Director in the event of a vacancy. *Id.* § 5491(b)(5)(B).

Ms. English's interpretation of the statute thus vindicates its design. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)). The text, structure, and legislative history of Dodd-Frank indicate an overwhelming concern for the Bureau's continued independence from undue political pressure. Given their goals, it would be strange for the Bureau's creators to design an independence-preserving succession plan with mandatory language, but to intend that the President could elect to ignore it and appoint his own agent to serve as Acting Director of the Bureau.

The district court dismissed these concerns, pointing out that the agency's other forms of independence remain during a vacancy and that a newly-confirmed Director will have for-cause removal protection. *See* JA279. This reasoning is doubly flawed. First, the fact that other mechanisms of independence will persist throughout a vacancy is of little moment if the Acting Director—who controls the agency—is chosen unilaterally by the President and remains beholden to him.

Second, and more important, the district court's position invites perverse results that turn Dodd-Frank's concern for independence on its head. Following the district court's logic, the President could use the FVRA to appoint a political ally as

Acting Director and then stack a series of 210-day FVRA appointments atop each other, providing himself with ongoing control of the agency. In the alternative, the President could appoint an Acting Director under the FVRA; that Acting Director could appoint a Deputy Director who pleases the President; and when the 210-day clock expires, the President could then invoke Dodd-Frank's succession plan to let the new Deputy Director run the CFPB as Acting Director without any term limit.

The district court's view would thus allow the CFPB to be run—for years—by an Acting Director hand-picked by the President without the check of Senate confirmation. Again, it would be extraordinary if Congress had planted this kind of ticking time bomb in a statutory framework whose primary concern is agency independence. The more natural reading of Dodd-Frank, consistent with its structure, is that Congress meant what it said when it used "shall" in § 5491(b)(5)(B).

4. The constitutional-avoidance canon is inapplicable.

After stating that it need not reach any constitutional questions, the district court devoted four pages to a constitutional argument for its conclusion. *See* JA274–78. Relying on some broad language from *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010)—and citing the Take Care Clause, U.S. Const. art. II, § 3—the court speculated that accepting Ms. English's position would "pose[] a serious constitutional problem." JA278. The district court therefore concluded that the constitutional-avoidance canon supported its position.

That is incorrect. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them*." *Clark v. Martinez,* 543 U.S. 371, 385 (2005). "If, after applying ordinary principles of textual analysis, the statute is not genuinely open to two constructions, the 'canon of constitutional avoidance does not apply.'" *Al Bahlul v. United States*, 767 F.3d 1, 15 (D.C. Cir. 2014) (citation omitted).

For the reasons given above, ordinary principles of statutory interpretation require Ms. English's reading of Dodd-Frank. There is no ambiguity requiring resolution by resort to constitutional avoidance. Indeed, it would be improper to vary from Congress's plan solely on the ground that Congress legislated in an area fraught with atmospheric concerns about constitutional structure.

In any event, the district court's meditations about the Take Care Clause do not justify constitutional avoidance. There is no authority for the proposition that the President's ability to faithfully execute the nation's laws is meaningfully impaired when the head of an independent agency leaves before his term expires, and the President is required to obtain Senate confirmation before making his mark on the agency. This occurs frequently at independent agencies with multi-member boards, which are exempted from the FVRA. And it is in the nature of independence that Congress may impose reasonable limits on unilateral, direct control by the President

over agency leadership. *See Humphrey's Ex'r*, 295 U.S. at 629.

Moreover, the district court's analysis completely ignored the other half of the constitutional scale. On its view of how the FVRA and Dodd-Frank interact, the CFPB could be overseen indefinitely by presidential appointees who have *never* been confirmed by the Senate (and who split their time between running the Bureau and serving the President as White House officials). Interpreting a law in a manner that risks destruction of the Senate's advice-and-consent function raises grave constitutional concerns of its own. *See SW Gen.*, 137 S. Ct. at 935.

To reiterate: because the statutory text is clear, there is no need to reach any of these questions. But if separation-of-powers concerns are to play a role, the constitutional prerogatives of the Senate deserve substantial weight. In focusing solely on the President's interests, the district court privileged an abstract and novel theory of the Take Care Clause over the Senate's advice-and-consent power. This unbalanced analysis does not support rewriting Dodd-Frank.

B. Even if the FVRA were to apply to the position of Acting Director, the President's appointment of Mr. Mulvaney would still be invalid.

The President's attempt to appoint a still-serving White House official to the position of Acting Director is separately foreclosed by Congress's establishment of the CFPB as "an independent bureau." 12 U.S.C. § 5491(a). As explained above, ensuring the CFPB's durable independence was one of Congress's primary goals in

creating the agency. *See* S. Rep. No. 111-176, at 174 (2010). Congress implemented that vision in a series of design choices meant to sustain a measure of freedom from political control. Together, these features of Dodd-Frank's statutory structure illuminate what Congress meant in declaring the CFPB "independent" in § 5491(a).

Dodd-Frank's statutory structure is best understood by reference to Congress's historic practice of insulating financial regulatory agencies from direct presidential control. *See generally* Michael S. Barr, *Comment: Accountability and Independence in Financial Regulation*, 78 Law & Contemp. Probs. 119 (2015). Congress has insisted on such independence because direct control of financial regulation by the President invites improper interference with financial agencies' enforcement and supervision capacities. *See id.* at 120. Indeed, Congress has shielded many financial regulators other than the CFPB from presidential influence. *See*, 12 U.S.C. § 4512(b)(2); 12 U.S.C. § 16; 12 U.S.C. § 250.

It is therefore profoundly troubling that the President now seeks to subvert the CFPB's independence by selecting an Acting Director who will simultaneously serve him as an at-will employee in the White House. Defying over a century of Executive Branch precedent, Mr. Mulvaney has not resigned from his position with OMB, and has issued a public statement saying that he will continue to serve as the Director of

OMB while "wearing an additional hat as the Acting Director" of the CFPB.[7] OMB is an agency within the Executive Office of the President and works closely with the President to implement his policy priorities across the entirety of the Executive branch. In his capacity as OMB Director, Mr. Mulvaney does not enjoy the statutory protections given to the CFPB director. Instead, he may be fired at the President's whim. He is thus highly susceptible to the direct presidential influence that Congress has sought to avoid in financial regulators.

The President's purported appointment of Mr. Mulvaney is not only a stark departure from past practice; it is also illegal. Installing a still-serving White House staffer to lead the CFPB is a blatant violation of Congress's mandate that the agency be "independent." 12 U.S.C. § 5491(a). From Mr. Mulvaney's perspective, his job at the CFPB will be temporary, lasting only until the President nominates a Director. In contrast, his full-time, at-will job at OMB is one he will presumably retain throughout and after his tenure at the CFPB. As the Supreme Court has noted, in the context of protections for independent executive agencies, "it is quite evident that 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. Allowing Mr. Mulvaney to serve as Acting Director of the CFPB

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[7] *See* Statement from Director Mick Mulvaney on the CFPB, OMB Press (Nov. 24, 2017), https://perma.cc/D7BT-G9XM.

would thus violate Dodd-Frank and set a dangerous precedent for independent agencies throughout the executive branch.

Any doubt on this score was dispelled on December 8, 2017, when the President took to Twitter to proclaim his direct control over the CFPB:

> 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, 7:18am. In making this pronouncement, the President weighed in on a particular CFPB enforcement action against a particular regulated entity. He also made clear that he views Mr. Mulvaney as little more than a generic White House staffer, who serves at his pleasure and remains subject to direct commands. Regardless of whether Mr. Mulvaney follows the President's directive in this particular case, the precedent it sets is at odds with core premises of agency independence in financial regulation.

Mr. Mulvaney's appointment is even more clearly improper because Congress has enacted laws *specifically* to shield the CFPB's independence from the OMB. While the CFPB is required to provide information regarding its finances to OMB, Dodd-Frank contains a sweeping provision meant to guarantee that reporting requirements do not allow the OMB Director to have any control over the CFPB. Dodd-Frank thus disclaims "any obligation on the part of the [CFPB's] Director to consult with

or obtain the consent or approval of the Director of the [OMB] with respect to any report, plan, forecast, or other information [subject to the reporting requirement] or any jurisdiction or oversight over the affairs or operations of the [CFPB]." 12 U.S.C. § 5497(a)(4)(E).

Mr. Mulvaney's appointment would turn Congress's statutory scheme upside down. More than just requiring the CFPB Director to obtain the consent or approval of the OMB Director, the President wants the person in charge of the CFPB to *be* the OMB Director. By law, the President cannot require the OMB Director's approval with respect to "any jurisdiction or oversight over the affairs or operations of the [CFPB]." *Id.* But the President's action here would put the OMB Director at the helm of the entire jurisdiction of the Bureau, with daily oversight over its affairs and operations. Even if the President had the general power to appoint an Acting Director under the FVRA, appointing the OMB Director in particular violates provisions that safeguard the CFPB's independence from OMB. No matter how many times he claims to take one hat off and put another hat on, Mr. Mulvaney cannot be "depended upon to maintain [the] attitude of independence" required by Congress. *See Humphrey's Ex'r*, 295 U.S. at 629.

These considerations confirm that Mr. Mulvaney's appointment is invalid—and that the district court erred in concluding otherwise. In the district court's view, Ms. English seeks "new atextual ways" for the CFPB to be independent. JA283. To

be sure, Dodd-Frank does not explicitly state that the Director of OMB cannot serve as Acting Director (or Director) of the CFPB while remaining as a White House staffer. But Dodd-Frank does state that the CFPB is an "independent bureau." 12 U.S.C. § 5491(a). In giving meaning to this clause, the Court is not limited to a bullet-point list of other statutory provisions bearing on independence. Rather, it must give the word "independent" its plain meaning, informed by the overarching statutory plan and settled practice in the realm of federal financial regulation. Under that interpretation, it is hard to imagine any meaningful sense in which the CFPB is an "independent bureau" while controlled by the Director of OMB (with tweets from the President directing specific enforcement actions).

II. Ms. English has shown irreparable injury.

The district court also erred by concluding that, even if Ms. English is correct on the merits, Mr. Mulvaney may nonetheless serve as Acting Director because Ms. English cannot show irreparable harm. JA286.[8] The district court cited no case supporting this counterintuitive conclusion. Instead, it simply asserted (without elaboration) that Ms. English's irreparable-harm argument "cannot succeed because any such harm can be remediated in the ordinary course of this case," and "it is

[8] We assume for purposes of this section that Ms. English is likely to succeed on the merits of her claim. We do not contend that she is entitled to a preliminary injunction if she cannot establish a likelihood of success on the merits. *See Munaf v. Geren*, 553 U.S. 674, 689 (2008).

entirely speculative how long it could take for the President to nominate and the Senate to confirm a permanent CFPB Director." JA288–89.

This is a deeply flawed conception of irreparable harm. For starters, the correct question is not whether it is possible to imagine a scenario in which the President and Senate are so delinquent in nominating and confirming a replacement that Ms. English is somehow still able to obtain meaningful relief at the end of the case. Ms. English is currently suffering harm by being denied the position to which she has acceded by operation of law. Her statutory entitlement to run an independent agency, even temporarily, is a significant right, and the deprivation of it a significant injury. The only question is whether Ms. English "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The answer is yes. First, the statutory entitlement she seeks to vindicate concerns a temporary position at the head of a federal agency. Each day that passes between now and when the office is filled by a Senate-confirmed Director is one fewer day that she will be able to fill that role. And, the loss of her ability to fulfill her temporary statutory responsibility—a harm that is not just "likely," but certain and ongoing—is not something that can later be recompensed with money damages. Ms. English seeks only declaratory and injunctive relief, not backpay or other retrospective remedies. In a case like this one, then, the controversy is mooted the

minute the harm ends: when a permanent replacement is confirmed as CFPB Director, extinguishing Ms. English's right to the position. At that point, nothing "would provide an adequate remedy" for her lost time in office. *See Mackie v. Bush*, 809 F. Supp. 144, 147 (D.D.C. 1993), *vacated as moot sub nom. Mackie v. Clinton*, 10 F.3d 13 (D.C. Cir. 1993).

Second, there is a strong likelihood that she will *never* be able to exercise her statutory responsibility absent preliminary injunctive relief. That is because the entitlement she asserts will likely end before she could obtain a final judgment and all appeals were exhausted. The FVRA limits Mr. Mulvaney's time in office to 210 days, encouraging the President to speedily select a nominee. *See* 5 U.S.C. § 3346. The district court did not mention this fact, but it is unlikely that Ms. English will be able to litigate this case to conclusion before a replacement is nominated.

This case, in other words, is nothing like a garden-variety employment dispute where irreparable harm is usually difficult to satisfy. This is instead one of the "genuinely extraordinary situation[s]" where the loss of a position results in harm that is irreparable without preliminary relief. *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974). Again, Ms. English is not complaining about the loss of a salary; she's complaining about the loss of a "statutory right to function" in a position directly related to a federal agency's "ability to fulfill its mandate." *Berry v. Reagan*, 1983 WL 538, at *5 (D.D.C. Nov. 14, 1983) (finding irreparable harm necessary to support a

preliminary injunction in a case concerning the President's attempted removal of an agency head).

Rather than explain why this case isn't extraordinary, or why it's likely that Ms. English can wait until final judgment to remedy her injury, the district court devoted the bulk of its analysis to distinguishing *Berry* on its facts. The court seemed to think that Ms. English's case cannot be extraordinary—and she cannot show irreparable harm—because this case lacks the exact same feature that made *Berry* extraordinary. In that case, the court acknowledged, the members of a commission challenging the loss of their positions had "plainly [suffered] irreparable [harm] because the commission would have expired and they could not have been reinstated to it" without a preliminary injunction. JA286, JA288. But superficial factual distinctions aside, that is also true here. If Ms. English is not allowed to exercise her statutory responsibilities for the temporary period of time during which Mr. Mulvaney's purported appointment is in effect, that inability to perform her statutory role is just as irremediable as the harm identified in *Berry*.

At the end of the day, the district court's irreparable-harm analysis amounts to a ruling that a usurper may temporarily take control of a federal agency from the rightful acting head, and that a court—even if it concludes that the usurper plainly lacks legal authority—is powerless to issue any meaningful equitable relief. That is not the law.

III. Equity and the public interest weigh in Ms. English's favor.

The injunction that Ms. English seeks would provide clarity to the public as to who is in charge of the CFPB, a critically important federal agency whose actions affect many institutions and consumers throughout the country.[9] At the same time, the injunction would not prejudice the President's ability to appoint a Director of the CFPB, with the advice and consent of the Senate.

There is an urgent public need for clarity as to the Acting Director position. The CFPB is the primary federal regulator of many consumer financial products and services, issuing rules and taking enforcement actions affecting a large portion of the economy. The dispute between Ms. English, the President, and Mr. Mulvaney has generated substantial attention in the media, which has noted the public confusion over the agency's leadership. *See, e.g.*, Katie Rogers, *2 Bosses Show Up to Lead the Consumer Financial Protection Bureau*, N.Y. Times (Nov. 27, 2017), https://goo.gl/MbtyAU. At least one additional lawsuit seeking a resolution of the agency's leadership has already been filed. *See Lower East Side People's Federal Credit Union v. Trump et al.*, No. 1:17-cv-09536 (S.D.N.Y. 2017).

The district court dismissed this concern by noting that the CFPB has recognized Mr. Mulvaney as Acting Director. JA291. In its view, granting an

[9] Here, the last two factors of the preliminary injunction test "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

injunction to Ms. English would "only serve to muddy the waters." *Id.* But leading figures in the industry have disputed the district court's suggestion that the waters are currently clear. For example, Alan Kaplinsky—head of the consumer financial services group at Ballard Spahr—recently stated:

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

Jim Puzzanghera, *CFPB leadership remains uncertain despite another Trump administration court victory*, L.A. Times (Jan. 11, 2018), https://goo.gl/XCUNCh. Continuing debate over who may legitimately serve as Acting Director hurts the public by casting a pall over the Bureau's activities, as actions taken by an illegally appointed Director may themselves be unlawful. *See, e.g.*, *F.E.C. v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

More fundamentally, the district court's analysis is mistaken because it presumes that Mr. Mulvaney is likely to succeed on his claim. If that assumption is faulty, then granting relief to Ms. English would forestall even broader collateral damage. Mr. Mulvaney has publicly emphasized that he has a sweeping agenda to usher in change at the CFPB. *See* Jessica Silver-Greenberg and Stacy Cowley, *Consumer Bureau's New Leader Steers a Sudden Reversal*, N.Y. Times (Dec. 5, 2017), https://goo.gl/CN4Pdc. If Mr. Mulvaney makes big changes that end up being

invalid due to the illegality of his appointment, it may be difficult for anyone to unscramble those actions. It also may be unlawful for a subsequent Director to ratify Mr. Mulvaney's changes: the FVRA prohibits the ex-post ratification of actions by officials appointed outside of its parameters. *See* 5 U.S.C. § 3348(d).

Accordingly, on the premise that she is likely to succeed on the merits of her claim, equity and the public interest weigh decisively in Ms. English's favor.

CONCLUSION

The district court's decision should be reversed and this Court should enter an order instructing the district court to grant Ms. English's request for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I hereby certify that my word processing program, Microsoft Word, counted 12,748 words in the foregoing brief, exclusive of the portions excluded by Rule 32(f).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

STATUTORY ADDENDUM

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010:

12 U.S.C § 5491:

(a) Bureau established
There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of title 5. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, 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.

(b) Director and Deputy Director

(1) In general
There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment
Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) Qualification
The President shall nominate the Director from among individuals who are citizens of the United States.

(4) Compensation
The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of title 5.

(5) Deputy Director
There is established the position of Deputy Director, who shall—
(A) be appointed by the Director; and
(B) serve as acting Director in the absence or unavailability of the Director.

(c) Term

(1) In general
The Director shall serve for a term of 5 years.

(2) Expiration of term
An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause
The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

The Federal Vacancies Reform Act of 1988

5 U.S.C. § 3345

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only 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 the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer,

the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

(b)

(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(A) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)

(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

5 U.S.C § 3347:

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) 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—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.