IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members,

Plaintiff,

v.

DONALD J. TRUMP and JOHN M. MULVANEY,

Defendants.

Civil Action No. 17-9536 (PGG)

MOTION OF FORMER SENATOR CHRIS DODD, FORMER REPRESENTATIVE BARNEY FRANK, SENATOR SHERROD BROWN, AND REPRESENTATIVE MAXINE WATERS FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Amici curiae respectfully move for leave to file the attached brief in support of the Plaintiff's motion for a preliminary injunction. In support of this motion, they state:

1. *Amici* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* either participated in drafting Dodd-Frank and were sponsors of the legislation or currently serve as Ranking Members of the committees with jurisdiction over the federal financial regulatory agencies and the banking industry. They are thus familiar with the critical role that the Consumer Financial Protection Bureau ("CFPB") plays in the legislative plan that Congress put in place when it enacted Dodd-Frank to prevent future financial crises like the Great Recession of 2008, as well as with Congress's considered decisions about how best to structure the CFPB so that it could play that critical role. Significantly, based on their experiences, *amici* know that Congress drafted Dodd-Frank to make clear that the

Bureau's Deputy Director would, in the event of a vacancy in the office of Director, serve as acting Director. Only that structure is consistent with the independence that was so central to Congress's design in establishing the Bureau as a primary protector for American consumers. *Amici* thus have an interest in this case.

2. This Court has "broad discretion" to allow third parties to file *amicus curiae* briefs. *Auto. Club of N.Y. v. Port Auth. of N.Y. and N.J.*, No. 11-6746, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011). "The filing of an *amicus* brief should be permitted if it will assist the judge 'by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.'" *Northern Mariana Islands v. United States*, No. 08-1572, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) (quoting *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)). Courts have permitted third parties to participate as *amici curiae* when they "are of aid to the court and offer insights not available from the parties," *United States v. El-Gabrowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994), and when they have "relevant expertise and a stated concern for the issues at stake in [the] case," *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011). "The primary role of the *amicus* is to assist the Court in reaching the right decision in a case affected with the interest of the general public." *Russell v. Bd. of Plumbing Examiners*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999).

3. The proposed, attached *amici curiae* brief plainly satisfies these standards. In purporting to designate an acting Director of the CFPB, President Trump has cited the general authority that Congress has given to presidents under the Federal Vacancies Reform Act ("FVRA"), Pub. L. No. 105-277 § 151, 112 Stat. 2681 (1998), to temporarily fill vacant executive offices. In support of that position, the Defendants argue that the FVRA allows the President to select an acting Director of the CFPB in the event of a vacancy. *See* Defs.' Opp'n to Pl.'s Mot.

for a TRO at 9-14, *English v. Trump*, No. 17-2534 (D.D.C. Nov. 27, 2017). As members of Congress who were involved in the drafting and enactment of Dodd-Frank, *amici* are well positioned to explain why the Defendants' position is at odds with the text, purpose, and history of that legislation, which provides—in mandatory terms—that the Bureau's Deputy Director "shall" serve as acting Director "in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Among other things, *amici* are particularly well positioned to explain Congress's statutory plan for the CFPB, the independence that the Bureau was meant to exercise, and how those purposes would be undermined by allowing presidents to hand-pick, without the check of Senate confirmation, an acting Director of the Bureau when a vacancy arises.

4. Counsel for the Plaintiff and counsel for the Defendants have consented to the filing of this brief.

For the foregoing reasons, leave to file the attached *amici curiae* brief should be granted. A proposed order is enclosed with this motion.

Respectfully submitted,

Dated: December 14, 2017

/s/ David H. Gans
David H. Gans

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Brian R. Frazelle
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, N.W., Suite 501
Washington, D.C. 20036
(202) 296-6889
david@theusconstitution.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: December 14, 2017

/s/ David H. Gans
David H. Gans

IN THE UNITED STATES DISTRICT COURT
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LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, v. DONALD J. TRUMP and JOHN M. MULVANEY, Defendants.	Civil Action No. 17-9536 (PGG)

BRIEF OF FORMER SENATOR CHRIS DODD, FORMER REPRESENTATIVE BARNEY FRANK, SENATOR SHERROD BROWN, AND REPRESENTATIVE MAXINE WATERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Brian R. Frazelle
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, N.W., Suite 501
Washington, D.C. 20036
(202) 296-6889
david@theusconstitution.org

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* either participated in drafting Dodd-Frank and were sponsors of the legislation or currently serve as Ranking Members of the committees with jurisdiction over the federal financial regulatory agencies and the banking industry. They are thus familiar with the critical role that the Consumer Financial Protection Bureau plays in the legislative plan that Congress put in place when it enacted Dodd-Frank to prevent future financial crises like the Great Recession of 2008, as well as with Congress's considered decisions about how best to structure the CFPB so that it could play that critical role.

Significantly, based on their experiences, *amici* know that Congress drafted Dodd-Frank to make clear that the Bureau's Deputy Director would, in the event of a vacancy in the office of Director, serve as acting Director. Only that structure is consistent with the independence that was so central to Congress's design in establishing the Bureau as a primary protector for American consumers. *Amici* thus have an interest in this case.

INTRODUCTION

On November 24, 2017, Richard Cordray resigned as Director of the Consumer Financial Protection Bureau ("CFPB"). Prior to resigning, and pursuant to his authority under Dodd-Frank, *see* 12 U.S.C. § 5491(b)(5)(A), he appointed the Bureau's Chief of Staff Leandra English (who had previously served in a number of leadership roles at the CFPB) as Deputy Director of the Bureau. Under Dodd-Frank, the Bureau's Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Notwithstanding this

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

clear and mandatory language, President Donald Trump has named Mick Mulvaney, currently head of the Office of Management and Budget, to serve as acting Director of the Bureau, purportedly pursuant to the Federal Vacancies Reform Act ("FVRA"), Pub. L. No. 105-277 § 151, 112 Stat. 2681 (1998).

The FVRA establishes procedures for temporarily filling vacant executive offices. It begins with a default rule, under which "the first assistant to the office" automatically assumes its functions and duties temporarily in an acting capacity. 5 U.S.C. § 3345(a)(1); *see N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 934-35 (2017) ("The general rule is that the first assistant to a vacant office shall become the acting officer."). This rule is "self-executing," but the same section of the FVRA supplies three mechanisms by which "[t]he President may override that default rule." *Id*. at 940, 935; *see* 5 U.S.C. § 3345(a)(2), (a)(3), (c)(1). As relevant here, one of those options is that the President "may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity," subject to certain time limits. *Id*. § 3345(a)(2).

The FVRA's procedures are generally "the exclusive means" by which vacant executive offices may be filled—but not when another statute "designates an officer or employee to perform the functions and duties of [the] specified office temporarily in an acting capacity." *Id.* § 3347(a)(1)(B). Dodd-Frank is just such a statute, as it designates the CFPB's Deputy Director as the officer who is to perform the functions and duties of the Director in an acting capacity when the Director is absent or unavailable. 12 U.S.C. § 5491(b)(5)(B). This alone, under the FVRA's plain terms, means that the FVRA is not the exclusive means by which someone may become acting Director of the Bureau. But Dodd-Frank does more. Unlike similar statutes governing

succession in other offices, it mandates that the Deputy Director "shall" serve as acting Director. *Id*. This mandatory and unqualified language means that a vacancy in the Director's office must be filled by the Deputy Director and no one else. In other words, Dodd-Frank's language displaces the FVRA entirely as the means by which a vacancy in the position of Bureau Director may be filled temporarily.

Congress drafted Dodd-Frank in this way for a reason. The legislation was a response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010); *see id.* ("the financial crisis has torn at the very fiber of our middle class"). After extensively studying the roots of this crisis, Congress determined that, despite an abundance of legal authority to combat the mortgage abuses that were largely responsible, the manner in which this authority was dispersed among numerous federal regulators led to inaction and delay.

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

Congress did something else, as well. To ensure that the Bureau would maintain its independence even when its Director position was vacant, Congress designated who would serve

as acting Director in the event of a vacancy: the Bureau's Deputy Director. By using mandatory language to inscribe this order of succession in statute, Congress supplanted the FVRA's procedures for temporarily filling vacancies. After all, as Congress recognized at the time, those procedures would permit the President to hand-pick an acting Director without the check of Senate confirmation, allowing that acting Director, no matter how close his ties to the President, to head the Bureau for many months. Such a result would plainly undermine the independence that was so critical to Congress's plan in designing the Bureau.

Thus, because Dodd-Frank's mandatory and unqualified successor provision displaces the FVRA as the means by which a vacancy in the position of Bureau Director may be filled temporarily, the President's purported appointment of Mulvaney is unlawful, and Deputy Director English is the lawful acting Director of the Bureau. This Court should grant the Plaintiff's motion for a preliminary injunction.

ARGUMENT

The CFPB's Successor Provision Supplants the Federal Vacancies Reform Act, Providing the Sole Means of Temporarily Filling a Vacancy in the Position of CFPB Director Until Senate Confirmation of a New Director

Dodd-Frank establishes for the CFPB "the position of Deputy Director, who shall . . . be appointed by the Director . . . and serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Under a plain reading of this language, Dodd-Frank requires the CFPB's Deputy Director to serve as acting Director of the Bureau when the Director leaves office and is thus "absen[t]" or "unavailab[le]." *See, e.g.*, *Absent*, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/absent (defining "absent" as "not existing: lacking" and as "not present at a usual or expected place: missing"); *Unavailable*, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unavailable

(defining "unavailable" as "not available: such as . . . unable or unwilling to do something"); *see generally Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.").

These ordinary definitions of "absent" and "unavailable" cover situations in which a Director has resigned, leaving the office of the Director vacant. As the Department of Justice's Office of Legal Counsel has acknowledged, the broad meanings of these terms must not be artificially narrowed simply because Dodd-Frank does not use the word "vacancy" or "resignation." While some statutes governing succession in office include those terms, *see, e.g.*, 12 U.S.C. § 4 (providing order of succession for the Comptroller of the Currency "[d]uring a vacancy in the office or during the absence or disability of the Comptroller"); *id.* § 4512(f) (providing for appointment of acting director of the Federal Housing Finance Agency "[i]n the event of the death, resignation, sickness, or absence of the Director"), the legislators who drafted and voted on Dodd-Frank relied upon expansive language—"absence or unavailability"—that naturally encompasses the resignation of a CFPB Director. *See Memorandum from Steven A. Engel, Assist. Att'y Gen., Office of Legal Counsel, to Donald F. McGahn II, Counsel to the President* 3 (Nov. 25, 2017) ("OLC Memo") ("the provision's reference to 'unavailability' is best read to refer both to a temporary unavailability . . . and to the Director's being unavailable because of a resignation or other vacancy in office").[2]

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

Notwithstanding Dodd-Frank's unambiguous successor provision, the President has ordered Mick Mulvaney to serve as acting Director of the Bureau pursuant to the FVRA. According to the Defendants, Mulvaney's appointment is lawful because the FVRA "remains available even when there are agency-specific succession statutes." Defs.' Opp'n to Pl.'s Mot. for a TRO at 2, *English v. Trump*, No. 17-2534 (D.D.C. Nov. 27, 2017) ("Def. TRO Opp."); *accord* OLC Memo at 3. This reasoning has a critical flaw: the FVRA remains available in the presence of an agency-specific statute *only when that statute's language is compatible with the FVRA's procedures*—not when its language plainly overrides those procedures. The latter is true here, as demonstrated by the text, structure, and history of Dodd-Frank.

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

As noted earlier, Dodd-Frank creates the position of CFPB Deputy Director, "who shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). This mandatory succession language expressly displaces any other procedures for filling the vacancy, including those established years earlier by the FVRA. The Defendants maintain otherwise only by dramatically downplaying the significance of Dodd-Frank's mandatory language—and by overlooking the distinction between this mandatory language and the permissive language used in other succession statutes.

The Defendants argue that the effect of Dodd-Frank's successor provision is not to displace the FVRA, but only to establish that the FVRA is not the *exclusive* means of providing for an acting Director of the CFPB. Thus, the Defendants acknowledge that Deputy Director English automatically serves as acting Director of the Bureau upon the resignation of the Director, pursuant to Dodd-Frank, but they maintain that the President may remove her from that role—or prevent her from ever assuming it—by naming his own acting Director under the FVRA.

The crux of this argument is that Dodd-Frank's successor provision is nothing more than the type of provision referred to in 5 U.S.C. § 3347, which governs the exclusivity of the FVRA. That section provides that the FVRA's procedures are not "the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of a vacant office when, as relevant here, "a statutory provision 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)(B). Pointing to this language, the Defendants argue that "the only consequence" of Dodd-Frank's successor provision "is that the VRA is not the '*exclusive* means' of filling the vacancy," and that therefore the President may still use the FVRA to name a different acting Director than the one provided for in Dodd-Frank. Def. TRO Opp. 10.

This might be correct if Dodd-Frank did nothing more than identify, in permissive terms, which particular CFPB employee may perform the Director's functions and duties in his absence. Indeed, many successor statutes are written in exactly that way. Unlike Dodd-Frank, they use permissive language that does not clash with the terms of the FVRA—and in some cases indicates that it is meant to work in conjunction with those terms. Such language allows those statutes to be read in tandem with the FVRA as merely providing an alternative mode of appointment. *See, e.g.*, 28 U.S.C. § 508(a) ("In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General."); 31 U.S.C. § 502(b)(2) ("The Deputy Director [of the Office of Management and Budget] . . . acts as the Director when the Director is absent or unable to serve[.]"); 29 U.S.C. § 153(d) ("In case of a vacancy in the office of the General Counsel [of the National Labor

Relations Board] the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy[.]").

On their face, these succession provisions pose no barrier to the operation of the FVRA. Read alongside 5 U.S.C. § 3347(a)(1), they supplement rather than supplant the FVRA process for filing vacancies. And significantly, these are *precisely* the statutes addressed by the OLC and Ninth Circuit opinions on which the Defendants chiefly rely, opinions in which agency-specific statutes were found compatible with the FVRA. *See* Def. TRO Opp. 10 (citing 31 Op. O.L.C. 208, 209-11 (2007) (regarding Attorney General); 27 Op. O.L.C. 121, 121 n.1 (2003) (regarding OMB Director); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016) (regarding NLRB General Counsel)).

Dodd-Frank is written differently. It does not say that the Deputy Director "may serve as acting Director," or identify her as the Director's "first assistant" for purposes of the FVRA, or simply allow her to perform the Director's functions in his absence—it says that she "shall" serve as acting Director. "Shall" is a mandatory term that is not interchangeable with "may" or other permissive words. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall[]' . . . normally creates an obligation impervious to judicial discretion"); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty. . . . Congress' use of the word 'shall' demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures."). Dodd-Frank's language, therefore, does more than simply fit the CFPB's successor provision within the exception to the FVRA's exclusivity in 5 U.S.C. § 3347(a)(1)(B). It requires the Deputy Director, and no one else, to serve as acting Director when there is a vacancy in the Director position.

To undermine this clear textual imperative, the Defendants (and OLC) repeatedly revert to legislative history—specifically one portion of a Senate committee report discussing an earlier version of the FVRA that was never enacted. *See* Def. TRO Opp. 1, 5, 10, 11 (citing S. Rep. No. 105-250, at 15-17 (1998)). This report notes that the bill would have "retain[ed] existing statutes that are in effect on the date of enactment of the Vacancies Act . . . that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee." S. Rep. No. 105-250, at 15. The report further states that, "with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office." *Id*. at 17.

Particularly because this report pertains to a bill that was modified significantly before passage, *see id.* at 25-29 (text of failed bill), the probative value of this lone sentence is slight when compared with the unambiguous text of Dodd-Frank. *See SW Gen.*, 137 S. Ct. at 942 ("'[A] period of intense negotiations' took place after Senators demanded changes to the original draft of the FVRA, and the final bill was 'a compromise measure.'" (quoting Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 9 (1998))); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."). Moreover, the quoted sentence from the Senate report makes a much more limited claim than the Defendants suggest—it says that the Vacancies Act will continue to provide an alternative procedure "with respect to the specific positions in which temporary officers *may* serve under the specific statutes this bill retains." S. Rep. No. 105-250, at

17 (emphasis added). As discussed above, that description characterizes many succession statutes, but not the one governing the Director of the CFPB.

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

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

Further attempting to dismiss the significance of Dodd-Frank's mandatory language, the Defendants unpersuasively equate Dodd-Frank with other statutes in which a command that is expressed using the word "shall" is subject to being overridden. For instance, they point to the FVRA's default rule in which the "first assistant" to an officer "shall perform" the functions and duties of the office temporarily when a vacancy occurs. 5 U.S.C. § 3345(a)(1). Because this provision and Dodd-Frank's successor provision both use the word "shall," the Defendants say, it would be wrong to interpret "one statute to be more mandatory than the other." Def. TRO Opp. 12. But the comparison actually undercuts the Defendants' own argument. In pointed contrast to Dodd-Frank, the section of the FVRA cited by the Defendants carves out three exceptions that explicitly qualify the "shall" language found in its first paragraph. These exceptions provide alternative options to the President "notwithstanding paragraph (1)." 5 U.S.C. § 3345(a)(2), (a)(3), (c)(1). The function of the word "notwithstanding" is to "show[] which provision prevails in the event of a clash." *SW Gen.*, 137 S. Ct. at 939 (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 126-27 (2012)). And thus, "[t]he 'notwithstanding' clause clarifies that the language of (a)(1) does not prevail if that conflict occurs." *Id.* at 940. The Defendants' comparison only highlights the absence of any similar carve-outs or qualifying language in the relevant section of Dodd-Frank. *See* 12 U.S.C. § 5491.

Indeed, the same section of Dodd-Frank that contains the CFPB Director's successor provision provides another illustration of how a statute can limit its own use of the word "shall." This section provides that the Director "shall serve for a term of 5 years," *id.* § 5491(c)(1), but qualifies this command in the same subsection by allowing the President to remove the Director

requirement, demanding such language before a later-enacted statute, like Dodd-Frank, could displace the FVRA. *See, e.g.*, Def. TRO Opp. 12.

for specified reasons, *id.* § 5491(c)(3). Again, this highlights the absence of any language qualifying the same section's command that the Deputy Director serve as acting Director. Had Congress wanted to qualify that command, it had no shortage of models. *Compare id.* § 5491(b)(5)(B) (the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director"), *with* 42 U.S.C. § 902(b)(4) ("The Deputy Commissioner [of Social Security] shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, *unless the President designates another officer of the Government as Acting Commissioner*, in the event of a vacancy in the office of the Commissioner." (emphasis added)).

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

Second, Dodd-Frank's CFPB successor provision is more specific than the FVRA, given that it applies only to vacancies in one particular office at one particular agency, rather than

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

While the Defendants suggest that the FVRA is actually the more specific statute, Def. TRO Opp. 12, that contention is unpersuasive. The FVRA certainly contains a more *detailed* scheme for the naming of acting officers, but complexity is different from specificity—indeed, the FVRA's complexity is necessary precisely because it establishes general background procedures that govern all executive offices in the absence of contrary legislation. Nor does the FVRA's use of the words "vacant office" and "resign[]" make it more specific than Dodd-Frank. 5 U.S.C. § 3345(a)(2), (a)(3)(A). A succession provision either applies to vacancies or it does not. As explained earlier, Dodd-Frank's provision applies to vacancies (as OLC has acknowledged) and therefore is no different from the FVRA in this regard. Indeed, the only reason to compare the two statutes' levels of specificity and dates of enactment is because both statutes apply to vacancies, and are thus in conflict. Moreover, the FVRA, like Dodd-Frank, covers more than just vacancies—it applies when an officer "dies, resigns, *or is otherwise unable to perform the functions and duties*

of the office." *Id.* § 3345(a) (emphasis added). Like Dodd-Frank, therefore, the FRVA is not limited to vacancies—and thus it is no more specific than Dodd-Frank in that respect either.[4]

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

The Defendants raise one last textual argument, but it fails to salvage their position. Dodd-Frank says that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with . . . Federal . . . officers . . . shall apply to the exercise of the powers of the Bureau." 12 U.S.C. § 5491(a). Because the FVRA is a federal law dealing with federal officers, the Defendants argue that its procedures apply by virtue of this subsection, and they further maintain that the CFPB's successor provision does not expressly provide otherwise. Def. TRO Opp. 12-13. But they fail to explain why that is so. As discussed above, the successor provision clearly "provides otherwise," because it sets forth a different and incompatible rule, and it does so "by law." It also does so "expressly," using language that is clear and unambiguous: it says the Deputy Director "shall . . . serve as acting Director." 12 U.S.C. § 5491(b)(5)(B). This is an explicit command regarding who "shall" serve as acting Director, not an implicit requirement or an inference gleaned from textual clues. The only possible basis for the Defendants' argument is that the successor provision does not cite the FVRA. But the Defendants offer no authority for the proposition that a requirement like that in Section 5491(a) is satisfied only by cross-referencing every federal law that a provision

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[4] Even if Dodd-Frank and the FVRA were deemed equally specific with regard to the temporary filling of the CFPB Director's office, Dodd-Frank is still the later-enacted statute, and it still uses the mandatory term "shall" without any exceptions or qualifications.

overrides. And Section 5491(a) does not purport to require that; it demands only that a statute provide otherwise and do so expressly.

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

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

As *amici* well know, there was a reason that Congress, acting against the backdrop of the FVRA, chose to include in Dodd-Frank a mandatory provision designating who would serve as the Bureau's acting Director in the event of a vacancy. The alternative approach—allowing the President to hand-pick someone without the check of Senate confirmation—would undermine Congress's overall statutory plan for the CFPB.

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

Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 17 (2010).

Heeding this imperative, Congress made the Bureau's leader removable by the President only for good cause: "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).[5] As *amici* well know, virtually all financial regulators are headed by officers with fixed terms who are removable only for cause, *see* Henry B. Hogue *et al.*, Cong. Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 15-17 (2017), and Congress appreciated that good-cause tenure would give the Bureau the independence necessary to regulate effectively, *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935)); Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 38 (2012) (removal limits "are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action").

To further promote a "strong and independent Bureau," S. Rep. No. 111-176, at 174, Congress also funded the CFPB outside "the opaque horse-trading of the appropriations process," Levitin, *supra*, at 341; *see* 12 U.S.C. § 5497(a)(1). Nearly all financial regulatory agencies have this feature, Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 951 (2012), and lawmakers explained that "the assurance of adequate funding, independent of the

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[5] Congress's choice to limit the grounds for removing the Director is presently the subject of a constitutional challenge. *See PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir.).

Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator," S. Rep. No. 111-176, at 163; *see id.* (citing the "hard learned lesson" of the precursor to the Federal Housing Finance Agency, whose "effectiveness" was "widely acknowledged" to have been harmed by its need for congressional appropriations).

Congress did even more to secure the Bureau's independence. It limited the executive branch's ability to control the Bureau's communications with Congress. 12 U.S.C. § 5492(c)(4). It allowed a Director whose five-year term expires to continue serving until Senate confirmation of a successor. *Id.* § 5491(c)(2). And—especially noteworthy in the context of this case—it ensured that the Bureau would have no obligation "to consult with or obtain the consent or approval of the Director of the Office of Management and Budget" with respect to its financial operating plans and forecasts, while clarifying that, apart from certain disclosure obligations imposed on the Bureau, OMB would not exercise "any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.* § 5497(a)(4)(E).[6]

Finally, to ensure that the Bureau would continue to enjoy independence even in the event of a vacancy in the Director position, Congress also chose to designate in advance the officer who would serve as acting Director, rather than allow the President to put in place a designee who has not been confirmed by the Senate to head the Bureau. In making this choice, Congress was not doing anything novel. Nearly all independent agencies are structured so as to prevent presidents from achieving what President Trump is attempting here. Most such agencies are headed by multi-

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

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

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

Moreover, the point here is not simply that the Bureau is an independent agency, which generally means only that an agency's leader cannot be removed at will. *See* Barkow, *supra*, at 16. Rather, the point is that Dodd-Frank took special care to ensure, in a variety of ways, that the CFPB would exercise a special degree of independence that Congress determined was necessary

if it were to fulfill its critical mission and help prevent another devastating financial meltdown.[7] Yet the Defendants' position would erode the Bureau's independence and undermine that statutory plan by allowing a President to fill a vacancy—as President Trump has done here—with a designee who reflects his policy agenda, serves at his pleasure, and has not been confirmed by the Senate for the position of Bureau Director. Thus, if there were any doubt about how to resolve the conflict between the FVRA and Dodd-Frank's successor provision, consideration of Congress's statutory plan would tip the balance in favor of the Plaintiff's interpretation. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quoting *Util. Air Regulatory Grp. v. EPA,* 134 S. Ct. 2427, 2441 (2014))).

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

Finally, as *amici* well know, the legislative history of Dodd-Frank also supports this conclusion. The bill that passed the House of Representatives in December 2009 did not provide for a Deputy Director of the CFPB. Instead, it explicitly stated that when the Director's office became vacant any temporary replacement would be appointed pursuant to the FVRA. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). The Senate bill

[7] To prevent overreach and ensure accountability, however, Congress incorporated other checks on the Bureau's authorities, some unprecedented among financial regulators. *See* Block-Lieb, *supra*, at 43-55; Levitin, *supra*, at 343-62; Wilmarth, *supra*, at 908-11. The CFPB, for instance, is the only financial regulator that is annually audited by the U.S. Government Accountability Office, forced to comply with key small-business requirements, and "whose regulations are subject to override by an appellate body composed of heads of other agencies." Wilmarth, *supra*, at 909-10.

introduced and passed months later, whose language prevailed in conference, was the origin of the present statutory language. *See* S. 3217, 111th Cong. § 1011(b)(5)(B) (2010); *see also* Transcript of the House-Senate Joint Conference on H.R. 4173, Wall Street Reform and Consumer Protection Act 161 (June 10, 2010). In making this change, Congress deliberately rejected the idea of allowing the President to use the FVRA to name an acting Director of the Bureau. Indeed, the change reflects Congress's considered decision that the FVRA should not govern succession in the event of a vacancy. Instead, as the language of the statute indicates, the Bureau's second-in-command should take over until a new Director is appointed by the President and confirmed by the Senate.

* * *

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

CONCLUSION

For the foregoing reasons, the court should grant the Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

Dated: December 14, 2017

/s/ David H. Gans
David H. Gans

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Brian R. Frazelle
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, N.W., Suite 501
Washington, D.C. 20036
(202) 296-6889
david@theusconstitution.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: December 14, 2017

/s/ David H. Gans
David H. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, v. DONALD J. TRUMP and JOHN M. MULVANEY, Defendants.	Civil Action No. 17-9536 (PGG)

ORDER

Upon consideration of the motion of former Senator Chris Dodd, former Representative Barney Frank, Senator Sherrod Brown, and Representative Maxine Waters for leave to file their proposed *amici curiae* brief in support of the Plaintiff, it is hereby

ORDERED that the motion is GRANTED.

Dated: ______________ ________________________________

Paul G. Gardephe
United States District Judge

AO 458 (Rev. 06/09) Appearance of Counsel

UNITED STATES DISTRICT COURT

for the

Southern District of New York

Lower East Side People's Federal Credit Union
Plaintiff
v.
Donald John Trump and John Michael Mulvaney
Defendant

Case No. 17 Civ. 9536 (PGG)

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

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 .

Date: 12/14/2017

/s/ Adam R. Pulver
Attorney's signature

Adam R. Pulver (AP-1222)
Printed name and bar number

Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
Address

apulver@citizen.org
E-mail address

(202) 588-1000
Telephone number

(202) 588-7795
FAX number

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, *Plaintiff*, v. DONALD JOHN TRUMP and JOHN MICHAEL MULVANEY, *Defendants*.	Case No. 17 Civ. 9536-PGG

UNOPPOSED MOTION OF 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. FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

For the reasons stated in the supporting memorandum of law, 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. hereby request leave to file the accompanying memorandum as amici curiae in support of Plaintiff's motion for a preliminary injunction. Counsel for all parties have consented to the filing of the proposed memorandum.

Respectfully submitted,

/s/ *Adam R. Pulver*
Adam R. Pulver
Rebecca Smullin
PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Movants
Public Citizen, Inc., et al.

Dated: December 14, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, *Plaintiff*, v. DONALD JOHN TRUMP and JOHN MICHAEL MULVANEY, *Defendants*.	Case No. 17 Civ. 9536-PGG

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF 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. FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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. respectfully request that the Court grant their motion for leave to file the accompanying memorandum as amici curiae in support of Plaintiff's motion for a preliminary injunction in the above-referenced case. Movants are 10 nonprofit consumer organizations whose work to protect and defend the rights of consumers through education, advocacy, policy, research, and litigation spans many decades combined. Movants' counsel has conferred with counsel for all parties, and they consent to the filing of the proposed memorandum as amici curiae.

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

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

Center for Responsible Lending (CRL) is a nonprofit, nonpartisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Since 1980, Self-Help has provided over $7 billion in financing to 131,000 families, individuals, and businesses underserved by traditional financial institutions. Through its credit union network, Self-Help's two credit unions serve over 130,000 people in North Carolina, California, Chicago, Florida, and Wisconsin and offer a full range of

financial products and services. Additionally, CRL's research and policy reports and recommendations have addressed numerous issues within the mission and activities of the CFPB, including auto loans, debt collection, mortgage lending, payday lending, and student loans. CRL also has advocated rules to be issued by the CFPB and commented on the agency's rulemaking. As a result, CRL has a direct and immediate interest in the independence and agility of the CFPB and its Director.

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

National Association of Consumer Advocates (NACA) is a nonprofit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by

maintaining a forum for information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

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

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

National Fair Housing Alliance (NFHA) is a national organization dedicated to ending discrimination in housing. NFHA is a consortium of private, nonprofit, fair-housing organizations, state and local civil rights groups, and individuals. NFHA engages in efforts to ensure equal

housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. NFHA and its members have undertaken important fair housing enforcement initiatives in cities and states across the country; those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

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

U.S. Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is an independent, non-partisan 501(c)(3) organization that works for consumers and the public interest. Founded in 1984, U.S. PIRG Education Fund advocated and worked for the creation of the CFPB, urging Congress to create "a robust, independent federal Consumer Financial Protection Agency to protect consumers from unfair credit, payment, and debt management products."[1] U.S. PIRG Education Fund now continues to collaborate with the CFPB to ensure that its mission is

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

fulfilled. For example, U.S. PIRG Education Fund has used the CFPB's Consumer Complaint Database to write in-depth reports (10, thus far) that uncover patterns in the problems that consumers are experiencing with financial products.[2] The most recent report, published in June 2017, examines complaints from servicemembers and documents financial companies' widespread mistreatment of servicemembers.[3] In addition, U.S. PIRG Education Fund has worked with the CFPB to protect students from unfair financial practices that have occurred when colleges and universities have partnered with financial institutions. Thus, in May 2012, U.S. PIRG Education Fund released a report that analyzed the campus card marketplace and surveyed practices at 120 colleges and universities.[4] Prompted in part by U.S. PIRG Education Fund's work, the CFPB released in December 2015 the Safe Student Account Scorecard, which is a resource to assist colleges and universities that are seeking to select college-sponsored financial accounts. U.S. PIRG Education Fund strongly supported the release of the Safe Student Account Scorecard.[5]

Movants' participation is desirable because of the depth of their expertise and the relevance of their arguments. Movants' memorandum focuses on the substantial public interest implicated by the dispute in this case, and thus speaks directly to the fourth prong of the test for assessing a motion for a preliminary injunction. Movants are particularly well qualified to help the Court

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

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

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

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

understand this aspect of Plaintiff's preliminary injunction motion. They have extensive knowledge of the history of the CFPB, the statutes that the CFPB enforces, and the consumer needs that the agency addresses. Since the CFPB was created, movants have engaged frequently with the agency and continually supported both its mission and its independence.

Furthermore, movants' consumer perspective is distinct from Plaintiff's perspective and thus may benefit the Court. Most of the movants were conducting consumer advocacy, research, and education for decades before the CFPB existed, and were heavily involved in the policy debates that led to the agency's creation. Movants also address a wide variety of consumer issues, including those under other regulators' purview. Movants' analysis thus reflects a rich understanding of the CFPB's place in history and the broader regulatory landscape.

CONCLUSION

For the foregoing reasons, the Court should grant the motion of 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. for leave to file the attached memorandum as amici curiae.

Respectfully submitted,

/s/ *Adam R. Pulver*
Adam R. Pulver
Rebecca Smullin
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Movants
Public Citizen, Inc., et al.

Dated: December 14, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, *Plaintiff*, v. DONALD JOHN TRUMP and JOHN MICHAEL MULVANEY, *Defendants*.	Case No. 17 Civ. 9536-PGG

MEMORANDUM OF AMICI CURIAE PUBLIC CITIZEN, INC., AMERICANS FOR FINANCIAL REFORM, CENTER FOR RESPONSIBLE LENDING, CONSUMER ACTION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMERS LEAGUE, NATIONAL FAIR HOUSING ALLIANCE, TZEDEK DC, INC., AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Adam R. Pulver
Rebecca Smullin
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Amici Curiae

December 14, 2017

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INTEREST OF AMICI

Amici are 10 nonprofit consumer organizations whose work to protect and defend the rights of consumers through education, advocacy, policy, research, and litigation spans many decades combined. Amici are particularly well qualified to help the Court understand the substantial public interest that Plaintiff's requested preliminary injunction would promote. Amici have extensive knowledge of the history of the Consumer Financial Protection Bureau (CFPB), the statutes that the CFPB enforces, and the consumer needs that the agency addresses. Since the CFPB was created, amici have engaged frequently with the agency and continually supported both its statutory mission and its independence. A description of each organization is included in the memorandum of law in support of amici's motion for leave to file this memorandum. All parties have consented to the filing of this amici curiae memorandum.

INTRODUCTION AND SUMMARY OF ARGUMENT

Inattention by federal regulatory agencies, along with limitations on their authority, contributed significantly to the 2008 financial crisis that destabilized the American economy and caused grave hardship to American families. Responding to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). As part of this reform, Congress sought to ensure that consumer financial protections would get undivided attention from an agency able to withstand political pressure and avoid capture by the industries whose practices it was charged with regulating. To achieve this objective, Congress created the CFPB. Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency "the authority and accountability to ensure that existing

consumer protection laws and regulations are comprehensive, fair, and vigorously enforced." H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.).

From the day of the agency's creation until the day that Defendant Mulvaney arrived at the CFPB, the CFPB has used its authority and accountability to serve the public interest. The CFPB's supervision and enforcement actions alone have resulted in nearly $12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity. *See* CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers* (July 2017);[1] Zixta Q. Martinez, *Six Years Serving You*, CFPB (July 21, 2017).[2]

Today, with the dispute over its acting director, the CFPB is at a turning point. Although Plaintiff's claims regard *who* can serve as acting director until the next Senate-confirmed director is seated, the Court, in considering the motion for a preliminary injunction, should also examine *how* CFPB Deputy Director Leandra English or Defendant Mulvaney would lead the CFPB. The answer to this question has great significance to the fourth prong of the Court's analysis of the preliminary injunction motion: where the public interest lies. The public has an overriding interest in the CFPB's continued pursuit of its statutory role, including both its consumer protection mission and the independence that Congress deemed critical to the agency's achievement of the objectives that the Dodd-Frank Act gave the CFPB. Deputy Director English, a long-time and full-time CFPB official, has a track record of preserving this mission and independence. By contrast, Defendant Mulvaney has an inherent conflict of interest with the agency's statutory mission as long as he serves in his White House leadership position, as Director of the Office of Management and Budget. Further, he is using his purported appointment at the CFPB to slow or halt execution

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

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

of the CFPB's core functions and to tie the independent agency to the current Administration's priorities. For this reason, the public interest weighs strongly in favor of Plaintiff's motion for a preliminary injunction.

ARGUMENT

I. The CFPB has vigorously served the public interest.

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

Congress created the CFPB in 2010 after more than 100 hearings and years of debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis from occurring in the future. *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010). When it did so, Congress charged the agency with a singular purpose: "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). To direct its work, Congress assigned the CFPB five key functions, in addition to support activities: (1) "collecting, investigating, and responding to consumer complaints"; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) "issuing rules, orders, and guidance" to implement consumer protection law; (4) "conducting financial education programs," and (5) researching and monitoring the markets for consumer financial products and services. 12 U.S.C. § 5511(c)(1)-(6).

Many of the CFPB's authorities to curb financial companies' abuses existed in other federal agencies before 2010. But Congress concluded that with a clear focus on consumers, the CFPB could serve American households more effectively than other regulators. Indeed, regulators in the

past had neglected the consumer protection aspects of their missions. Overall, the Financial Crisis Inquiry Commission concluded, "scant regulation" was a key contributor to the financial crisis, in which $11 trillion in household wealth vanished. Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* xv-xvi (2011).[3] The Senate explained: "Underlying [the] whole chain of events leading to the financial crisis was the spectacular failure of the prudential regulators to protect average American homeowners … ." S. Rep. No. 111-176, at 15. In the run-up to the crisis, "these regulators routinely sacrificed consumer protection for short-term profitability of banks." *Id.* (internal quotation marks omitted). The Federal Reserve, for example, "waited more than 14 years to implement rules Congress gave it to address unfair and deceptive trade practices in the mortgage lending market … ." Ctr. for Responsible Lending, *Neglect and Inaction: An Analysis of Federal Banking Regulators' Failure to Enforce Consumer Protections* 1 (July 13, 2009).[4] For 25 years, the Office of the Comptroller of the Currency never once used its authority to address unfair and deceptive practices at the large banks that it oversaw. *Id.* at 4. Further, that regulator exempted national banks from following state anti-predatory lending laws, helping "create[] an environment where abusive mortgage lending could flourish." S. Rep. No. 111-176, at 16-17.

Congress thus consolidated in the CFPB authorities that were previously dispersed among seven other agencies. 12 U.S.C. § 5581(b); S. Rep. No. 111-176, at 10-11. It also gave the CFPB important new authority. The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers' most important financial transactions.

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[3] Available at https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

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

See CFPB to Supervise Credit Reporting, CFPB (July 16, 2012);[5] *see generally* 12 U.S.C. § 5481(15)(A)(ix) (regarding financial products under the CFPB's jurisdiction). More generally, Congress made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders. *See* 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017).[6] With this "level playing field" approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market. S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4) (stating CFPB objectives including that consumer protection law be "enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition").

Congress also paid careful attention to the CFPB's structure. Vital to the new agency's success, Congress concluded, was its independence. *See* S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874.[7] Congress determined that failures of existing regulatory agencies were largely attributable to those agencies focusing on the interests and needs of the financial industry they regulated, while giving insufficient attention to the interests and needs of consumers. *See* S. Rep. No. 111-176, at 10-11, 15. As Senator Cardin put it, "This legislation will create a consumer bureau … that will be on the side of the consumer, that is independent, so the consumer

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

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

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

is represented in the financial structure." 156 Cong. Rec. S5871 (daily ed. July 15, 2010). To that end, the Dodd-Frank Act expressly designated the agency as independent, 12 U.S.C. § 5491(a), gave the CFPB its own source of funding from the Federal Reserve, *id.* § 5497(a), allowed the CFPB to make financial operating plans without OMB approval, *id.* § 5497(a)(4)(E), and placed the agency under a single director appointed by the President and confirmed by the Senate for a five-year term, removable by the President only for "inefficiency, neglect of duty, or malfeasance in office," *id.* § 5491(b)(1)-(2), (c)(1), (c)(3). The Dodd-Frank Act also allowed the CFPB to make independent recommendations to Congress, *id.* § 5492(c)(4), and represent itself in court, *id.* § 5564(b). Consistent with this independence, the CFPB has not had political appointee staff. *See* Zach Piaker, *Help Wanted: 4,000 Presidential Appointees*, Center for Presidential Transition (Mar. 16, 2016);[8] *see also* S. Comm. on Homeland Sec'y and Gov't Affairs, 114th Cong., 2d Sess., *United States Government Policy and Supporting Positions* 151 (Comm. Print 2016).[9]

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

Since its 2011 launch, the CFPB has advanced the public interest that Congress identified in the Dodd-Frank Act. By operating independently of the government's political branches, it has delivered on its mission to protect consumers and make the markets for consumer financial products fair, transparent, and competitive. On its opening day, for example, the agency started a consumer complaints program that responded to a detailed set of Dodd-Frank Act directives. *See* 12 U.S.C. §§ 5493(b)(3), 5511(c)(2), 5534(a); CFPB, *Monthly Complaint Report*, *Vol. 25*, at 2

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

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

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

Congress anticipated that the CFPB could also use consumer complaints like canaries in coal mines, to help federal agencies identify more widespread problems. *See* 12 U.S.C. §§ 5512(c)(4)(B)(i) (regarding the CFPB's use of complaints to monitor markets for risks to consumers), 5514(a)(1)(C) (giving the CFPB authority to supervise a nonbank financial company when the CFPB determines, based on consumer complaints, that a company's conduct poses risk to consumers); *see also id.* § 5493(b)(3)(D) (requiring the CFPB to share complaint data with other agencies). The agency has done just that. One set of complaints to the CFPB sparked a Department of Justice investigation of student loan companies for ignoring servicemembers' rights under consumer law. The matter ended with the companies agreeing to pay about $60 million in compensation to about 60,000 servicemembers. *See Justice Department Reaches $60 Million*

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

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

Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans, U.S. Dep't of Justice (May 13, 2014).[12]

Through its other key functions, the CFPB has likewise forcefully pursued the consumer protection mission that Congress required of it. The CFPB's enforcement and supervision actions have led to nearly $12 billion in ordered relief for more than 29 million consumers. *See Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra*; *Six Years Serving You*, *supra*. In one heavily publicized matter, the CFPB forced Wells Fargo to pay a $100 million fine in addition to refunds for opening millions of accounts without consumers' authorization. *See Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB (Sep. 8, 2016).[13] In dozens of other enforcement actions, the CFPB has halted myriad other abuses, such as "illegal debt collections tactics," "reselling sensitive personal information to lenders," "illegal redlining and discriminatory mortgage underwriting and pricing practices," and deception of students by a for-profit education provider. *See Testimony of Richard Cordray* 4-5 (Apr. 5, 2017);[14] *see also Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra*, at 77-100; *see generally* Am. for Fin. Reform, *CFPB Enforcement Actions (through April 2017)*.[15] In supervisory actions, the CFPB has rooted out illegal practices in auto loan servicing, credit card accounts, debt collection, deposit accounts,

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

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

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

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

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

The CFPB's regulations have brought important protections to the mortgage market, where abuses by lenders and federal agencies' weak oversight were widely viewed as key contributors to the 2008 financial crisis. *See* S. Rep. 111-176, at 11-14, 167. For instance, the agency's rules require lenders to determine that borrowers can afford their loans. *See Ability-to-Repay and Qualified Mortgage Standards*, *Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408 (Jan. 30, 2013). The CFPB also overhauled mortgage disclosures so that consumers receive two easy-to-use disclosures rather than four forms. *See* 12 U.S.C. § 5532(f); CFPB, *TILA-RESPA Integrated Disclosure Rule: Small Entity Compliance Guide* 15-16 (Oct. 2017).[17] More than 10 million consumers have now received the new disclosures. *See Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra*; *see also generally Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra*, at 59-69 (describing other rulemaking activities and the CFPB's initiatives to support companies in implementing new rules).

The CFPB's financial education programs have reached millions. By July 2017, the agency's "Ask CFPB" website had received over 13 million unique visitors. *See Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra*. Students at more than 3,200 colleges are now benefiting from a "financial aid shopping sheet" that the CFPB developed with the Department of Education, and that colleges are voluntarily adopting to help students understand college financing options. *Id.* Additional CFPB programs help consumers navigate

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

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

other critical financial decisions. The agency's online resources include "financial empowerment" materials for practitioners to use with the consumers they serve and consumer tools for: Owning a Home, Planning for Retirement, Managing Someone Else's Money, and Navigating the Military Financial Lifecycle. *See We're the CFPB*, CFPB.[18]

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

In short, by dedicating itself to its statutory mission, the agency has consistently and effectively advanced the public interest that Congress identified in the Dodd-Frank Act. To use its own words, the CFPB has

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

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[18] At https://www.consumerfinance.gov/ (navigate to "Consumer Tools" and "Practitioner Resources" menus) (last visited Dec. 4, 2017).

[19] At https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/research-markets-regulation/ (last visited Dec. 1, 2017).

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

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

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

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

The CFPB has maintained its commitment to the Dodd-Frank Act's mandates through turbulence in federal politics and under repeated pressure from elected officials and regulated entities to reduce, reverse, or stop the agency's operations. As Congress foresaw, the agency's independence appears central to its continued success.

Although the CFPB enjoys strong support from many members of Congress, other politicians and financial companies have regularly criticized the congressionally-mandated structure of the CFPB and the agency's implementation of Dodd-Frank Act directives. *See generally* Steve Eder, et al., *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y. Times (Aug. 31, 2017).[23] Political criticisms of the CFPB have intensified under the current Administration. Although the Dodd-Frank Act protects the CFPB's budgeting process and funding from control by the President and Congress, *see* 12 U.S.C. § 5497(a)(1), (a)(4)(E), the President used his budget documents to call for the agency to be funded through appropriations

[21] At https://www.consumerfinance.gov/about-us/the-bureau/ (last visited Nov. 29, 2017).

[22] At https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/consumer-education-engagement/ (last visited Nov. 29, 2017).

[23] At https://nyti.ms/2wVYGr5. Although industry groups have challenged the constitutionality of the CFPB's structure, *see, e.g.*, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. filed June 19, 2015), that issue is not presented here.

rather than the Federal Reserve, and to advocate for a dramatic reduction in the CFPB's budget. Office of Mgmt. and Budget, *Major Savings and Reforms: Budget of the U.S. Government, Fiscal Year 2018*, at 158-69 (2017);[24] *see also* Megan Leonhardt, *Buried in Trump's Budget: A New Attempt to Kill a Powerful Consumer Watchdog*, Money (May 23, 2017).[25] The President's Secretary of the Treasury evaluated the CFPB against Administration priorities, and branded the CFPB's congressionally-created structure "unaccountable," labeled as "unduly broad" its statutorily-granted authority over financial companies' unfair, deceptive, and abusive practices, and deemed "unnecessary" the supervisory authority that Congress expressly granted to the agency. U.S. Dep't of the Treasury, *A Financial System That Creates Economic Opportunities Banks and Credit Unions* 79, 81, 88 (2017).[26] The President labeled the CFPB a "total disaster." Donald J. Trump (@realDonaldTrump), Twitter (Nov. 25, 2017, 1:48 PM).[27]

Nevertheless, the CFPB has maintained both its financial stability and its focus on the commands of Congress in the Dodd-Frank Act. *See generally* CFPB, *Financial Report of the Consumer Financial Protection Bureau*, *Fiscal Year 2017*, at 13, 15-28 (Nov. 15, 2017) (showing the CFPB's continued funding and accomplishment of its performance goals).[28] In this year alone, for example, the CFPB issued rules regarding payday loans and arbitration agreements. In

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

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

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

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

[28] Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf.

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

That said, independence does not mean that the CFPB acts alone. The Dodd-Frank Act requires regular engagement with Congress, industry, and other external stakeholders.[30] *See, e.g.*, 5 U.S.C. § 609; 12 U.S.C. §§ 5493(b)(3)(C), 5496, 5512(b)(2), 5535(d), 5587(b); *see also Bureau Structure*, CFPB (Nov. 27, 2017) (with links to descriptions of outreach offices in the divisions of External Affairs and Research, Markets, and Regulations).[31] The overriding thrust of the Dodd-

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[29] Congress, of course, maintains the authority to change the CFPB's focus and structure. With regard to the CFPB's arbitration rule, it exercised this authority. In 2010, Congress expressly gave the CFPB the ability to restrict companies' use of mandatory pre-dispute arbitration agreements. 12 U.S.C. § 5518. In 2017, after the Vice President broke a tie vote in the Senate, a different Congress voted to vacate the CFPB's rule regarding such arbitration agreements. Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243 (2017), *with vote information at* https://www.congress.gov/bill/115th-congress/house-joint-resolution/111/actions (last visited Dec. 6, 2017).

[30] By March 2017, senior CFPB officials had testified before Congress 63 times. *Semi-Annual Report of the Consumer Financial Protection Bureau, supra*, at 166.

[31] At https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/ (last visited Dec. 5, 2017).

Frank Act, however, is that the agency should view external input through the lens of the law, not politics. *Cf. Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (describing the Federal Trade Commission, an independent agency, as "charged with the enforcement of no policy except the policy of the law"). Appropriately, former CFPB Director Richard Cordray instructed his staff earlier this year to "tune out the political noise." Eder, *supra*.

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

In considering Plaintiff's motion, the Court should significantly weigh the public interest in the CFPB's continued adherence to its statutory mission. *See generally Walling v. Brooklyn Braid Co.,* 152 F.2d 938, 940 (2d Cir. 1945) ("Good administration of the statute is in the public interest … ."); *Fed. Mar. Comm'n v. Austl./U.S. Atl. and Gulf Conf.*, 337 F. Supp. 1032, 1038 (S.D.N.Y. 1972) ("[C]rucial to the determination of the public interest is whether the grant of an injunction will further the statutory purpose."); *also Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (recognizing the "overriding public interest … in the general importance of an agency's faithful adherence to its statutory mandate"); *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 76 (D.D.C. 2006) ("If anything, the public's interest in this case is best assessed through the statutory provisions passed by the public's elected representatives.").

In this case, the public interest in the CFPB's ability to carry out its statutory mandate is particularly strong because the agency's focus is protecting consumers from harm. *See, e.g.,* 12 U.S.C. § 5511(b)(2), (4) (describing CFPB objectives including "ensuring that … consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination," and that "Federal consumer financial law is enforced consistently"). The laws that the CFPB implements and enforces, such as the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and the Dodd-Frank Act's prohibition on unfair, deceptive, and abusive practices, 12 U.S.C.

§§ 5481(12), (14), 5531(a), are fundamentally about the safety and fairness of consumer financial markets. Relaxation of the CFPB's efforts to implement and enforce these laws will irreparably harm consumers by increasing their risk of exposure to discrimination, deception, and other illegal actions. *See generally Chobani, LLC v. Dannon Co.*, 157 F. Supp. 3d 190, 205 (N.D.N.Y. 2016) ("It is self-evident that preventing false or misleading advertising is in the public interest. … If anything, this interest is heightened when the information pertains to serious issues, such as those concerning food safety."); *also Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 613 n.39, 616 (D.C. Cir. 1980) (regarding safety laws and the public interest).

The overriding public interest in the CFPB's statutory mission encompasses the public interest in the agency's congressionally-mandated independence. A basic management principle holds that an organization's strategy and structure should be "inextricably linked." *See* Steven Aronowitz, et al., *Getting Organizational Redesign Right*, McKinsey Q. (June 2015).[32] That principle could not be truer here. A reduction in the independence built into the CFPB's structure will create a very real risk to the CFPB's ability to pursue its statutory mission. The current Administration has already expressed interest in neutering the CFPB. *Major Savings and Reforms: Budget of the U.S. Government, Fiscal Year 2018*, *supra,* at 158-69; *A Financial System That Creates Economic Opportunities Banks and Credit Unions*, *supra*, at 79-92. If the boundaries that Congress drew between the CFPB and the Administration fall, the President will gain coercive authority to implement his vision and direct the agency away from the Dodd-Frank Act's commands. *Cf. Humphrey's Ex'r*, 295 U.S. at 630 (concluding that the President's authority to

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

remove FTC Commissioners at will would have "coercive influence" that "threatens the independence of [the] commission.").

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

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

The public interest lies strongly with Plaintiff's requested injunction because, absent the injunction, Defendants' actions risk slowing the agency to a halt. The CFPB's adherence to its statutory mandate will suffer dramatically. Deputy Director English is a full-time CFPB employee, prepared by her tenure at the agency to continue the CFPB's implementation of the Dodd-Frank Act. She has directed the CFPB to press forward with pending enforcement actions, for example. Patrick Rucker & Pete Schroeder, *U.S. Consumer Financial Watchdog Official Defies Trump from Within Agency*, Reuters (Dec. 1, 2017).[33] By contrast, Defendant Mulvaney has made clear that, if he leads the agency, he will drastically pare back the CFPB's mission work. As a member of Congress, Defendant Mulvaney co-sponsored legislation to eliminate the CFPB,[34] and his actions at the CFPB show his continued antipathy to the agency's work.

Defendant Mulvaney himself intends to give the CFPB only part-time leadership, working at the agency just three days per week. *Acting CFPB Director Mulvaney News Conference*, C-Span (Nov. 27, 2017).[35] This half-way commitment will slow any action requiring the acting director's review, input, or approval. *See, e.g.*, 12 C.F.R. § 1080.6(e)(4) (giving the Director

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

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

[35] Available at https://www.c-span.org/video/?437841-1/acting-cfpb-director-mick-mulvaney-speaks-reporters (video at approximately 4:27).

authority to rule upon a petition for an order modifying or setting aside a civil investigative demand, an investigative tool of the CFPB).

Defendant Mulvaney has attempted an even more drastic cut-back in the work of the CFPB staff. In his first week at the agency, he attempted to freeze hiring and contracting, and halt statutorily-mandated mission work: rulemaking and guidance, enforcement actions, and payments from the CFPB's Civil Penalty Fund, a fund that Congress required to provide relief to the victims of financial companies' abuses, 12 U.S.C. § 5497(d). *See Acting CFPB Director Mulvaney News Conference*, *supra* (video at approximately 2:38); Dave Boyer, *Mulvaney Scrutinizing 125 CFPB Cases Opened by Liberal Predecessor*, Wash. Times (Nov. 30, 2017).[36] Defendant Mulvaney also seeks to halt the agency's collection of personal information, a move that could reduce the CFPB's ability to enforce the law, address consumer complaints, and develop and implement rules. *See* Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, Wall St. J. (Dec. 4, 2017).[37] In sum, Defendant Mulvaney explained: "We stopped a good many things…. We stopped all new regs going out the door. We stopped all the new contracting. We're stopping the filing of new lawsuits." Boyer, *supra.*

With these actions, Defendant Mulvaney is not leading the CFPB to pursue its statutory mission of implementing and enforcing consumer protection law. His goal at the CFPB is to "limit as much as we can what the CFPB does to sort of interfere with capitalism and with the financial

[36] At https://www.washingtontimes.com/news/2017/nov/30/mick-mulvaney-seeks-more-trump-appointees-help-him/. Later, Defendant Mulvaney restarted Civil Penalty Fund payments. Stacy Cowley, *Consumer Bureau Lifts Freeze on Payments to Crime Victims*, N.Y. Times (Dec. 7, 2017), https://nyti.ms/2klKiTQ. Though the reversal will limit the irreparable harm that his actions are causing consumers, Defendant Mulvaney's initial freeze on Civil Penalty Fund payments is an example of his lack of commitment to the CFPB's statutory mandate.

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

services market." John Bowden, *Mulvaney: Authority I Have At Consumer Bureau 'Should Frighten People'*, Hill (Nov. 30, 2017).[38] This goal is fundamentally at odds with the consumer protection mission that Congress created for the CFPB. The agency's very purpose, as set forth by statute, focuses on changing markets, to make them more "fair, transparent, and competitive." 12 U.S.C. § 5511(a).

Further, if implemented, Defendant Mulvaney's commands to the CFPB will concretely harm consumers and businesses during the pendency of this litigation. When Defendant Mulvaney arrived at the CFPB, the agency had open about 100 pre-lawsuit investigations regarding companies such as Wells Fargo and Zillow. Boyer, *supra*; Matt Egan, *After Political Drama at Consumer Agency, What Happens to Its Open Investigations?*, CNN (Nov. 27, 2017).[39] A freeze on the agency's ability to take companies to court, even if temporary, means that companies violating the law will have more time to harm more consumers.[40]

A freeze on rules, regulations, and guidance also hurts consumers and businesses. One pending CFPB rulemaking proposal could amend a new prepaid card rule that is set to take effect on April 1, 2018. The CFPB proposed rule sought to address "unanticipated" issues and "facilitate

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

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

[40] Relatedly, if Defendant Mulvaney again stops Civil Penalty Fund payments, he will exacerbate the injury to consumers already harmed by companies' illegal acts. Congress required the CFPB to create the Civil Penalty Fund to hold penalties paid by companies and to use those funds to compensate the victims of companies' illegal practices. *See* 12 U.S.C. §§ 5497(d); 12 C.F.R. pt. 1075. A freeze on Civil Penalty Fund payments thus means that the victims of companies' wrongdoing will have to wait longer to receive compensation for their harms. When Defendant Mulvaney first froze payments from the fund, consumers injured by nine entities (or sets of entities) were potentially awaiting relief. *See Payments to Harmed Consumers by Case*, CFPB, https://www.consumerfinance.gov/about-us/payments-harmed-consumers/payments-by-case/ (last visited Nov. 27, 2017) (see links for each open matter with Civil Penalty Fund relief).

compliance and relieve burden on those issues." The proposal also sought comment on whether the CFPB should delay the effective date of the earlier rule. *Amendments to Rules Concerning Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*, 82 Fed. Reg. 29630, 29630 (June 29, 2017); *see generally Spring 2017 Rulemaking Agenda*, *supra* (discussing this and other CFPB rulemaking activities to implement statutory directives, address consumer harm, and modernize, streamline, and clarify regulations). Now, although the April 2018 effective date of the earlier prepaid card rule is approaching, industry participants and consumers may remain uncertain even longer about their legal responsibilities and protections—as well as the effective date of the existing rule.

Halting the CFPB's ability to issue guidance can also increase uncertainty and lead companies to unwittingly violate the law. CFPB guidance aims to reduce such unwitting violations and the consumer harm that can result. For example, one recent CFPB guidance bulletin alerted companies that certain "phone pay fees" could violate consumer protection laws. CFPB, *CFPB Compliance Bulletin 2017-01* (July 31, 2017).[41]

Defendant Mulvaney's intended hiring freeze exacerbates the harm to the public interest that his directives will cause. Unfilled positions mean vital mission work will go undone. The agency will have fewer resources to enforce the law, monitor markets for risk, or educate consumers on financial decision-making. The stress and uncertainty experienced by current employees and potential new hires can have lasting organizational effects. *Cf.* Beth Reinhard & Rebecca Ballhaus, *Impact of Federal Hiring Freeze Seen at Veterans Affairs, Prisons, Social*

[41] Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.

Security, Wall St. J. (Apr. 9, 2017);[42] Alissa Greenberg, *The Real-Life Consequences of the Federal Hiring Freeze*, Atlantic (Feb. 9, 2017).[43]

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

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

By the very nature of his OMB Director position, Defendant Mulvaney's presence at the CFPB will gut the agency's independence. OMB drives the President's budget agenda and is in charge, more generally, of "overseeing the implementation of [the President's] vision across the Executive Branch." *Office of Management and Budget*, White House.[44] Defendant Mulvaney's OMB responsibilities and role thus inherently conflict with those of the CFPB director, whom Congress intentionally divorced from the budget and policy processes that OMB drives. By statute, the CFPB and its Director are protected from OMB budgeting oversight, 12 U.S.C. § 5497(a)(4)(E), and allowed to make legislative recommendations that conflict with the President's, 12 U.S.C. § 5492(c)(4).

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

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

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

[44] At https://www.whitehouse.gov/omb (last visited Dec. 4, 2017).

funded through appropriations—a priority that *OMB itself* explained in the President's budget, with estimates of CFPB budget reductions so severe that they could amount to the agency's elimination. *Major Savings and Reforms: Budget of the U.S. Government, Fiscal Year 2018*, *supra,* at 158-69; Leonhardt, *supra*. With this Presidential priority at issue, Defendant Mulvaney cannot dutifully serve both the President as OMB Director and the CFPB. *See generally Major Savings and Reforms, supra*, at 1 (directing that the "Administration will build on [the listed] proposals in order to implement the President's charge."). As the Supreme Court has recognized, "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r*, 295 U.S. at 629.

Defendants have also left no doubt that they intend to work together to run the CFPB in accordance with the Administration's priorities, thus eliminating the CFPB's independence in practice. The President pronounced that he will "cut Regs" at the agency, a pronouncement made as he reacted to a news article about a CFPB investigation and also explained how he would impose penalties at the CFPB. Donald J. Trump (@realDonaldTrump), Twitter (Dec. 8, 2017, 7:18 AM) (in message also referencing fines against Wells Fargo);[45] *see also* Patrick Rucker & Pete Schroeder, *Exclusive: Wells Fargo Sanctions Are on Ice under Trump Official-Sources*, Reuters (Dec. 7, 2017) (news article regarding CFPB investigation of Wells Fargo, published prior to the President's tweet).[46] On his first day at the CFPB, Defendant Mulvaney expressed "fundamental principled misgivings" about the structure that Congress created for the CFPB, warned that "[e]lections have consequences," and promised a "new attitude" "in light of the fact that the Trump Administration is now in charge." *Acting CFPB Director Mulvaney News Conference*, *supra*

[45] At https://twitter.com/realDonaldTrump/status/939152197090148352.

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

(video at approximately 2:10, 2:19, 7:41). He quickly sought to put these principles into practice. While directing agency staff to stop their work for consumers, he dialed up the agency's collaboration with CFPB detractors in Congress. *See* Boyer, *supra*; *see also* Ian McKendry, *Mulvaney's First Days at CFPB: Payday, Personnel and a Prank*, Am. Banker (Dec. 4, 2017).[47] While freezing the agency's ability to hire career officials, he sought immediately to infuse the CFPB with political appointees—an approach that would mirror OMB's but be dramatically out of step with those of independent financial regulators, which typically have few political appointees. *See* McKendry, *supra*;[48] Kevin Wack, *Mulvaney's Plan to Embed Political Staffers in CFPB Sparks Backlash*, Am. Banker (Dec. 5, 2017).[49]

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

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

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

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

CONCLUSION

For the foregoing reasons, the public interest weighs strongly in favor of Plaintiff's motion for a preliminary injunction.

Dated: December 14, 2017

Respectfully submitted,

/s/ *Adam R. Pulver*
Adam R. Pulver
Rebecca Smullin
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Amici Curiae Public Citizen, Inc., et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION,

Plaintiff,

v.

DONALD J. TRUMP and
JOHN M. MULVANEY,

Defendants

Case No. 1:17-cv-09536

MOTION SEEKING LEAVE TO FILE BRIEF OF *AMICI CURIAE* CONSUMER FINANCE REGULATION SCHOLARS IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Courtney Weiner
LAW OFFICE OF COURTNEY WEINER, PLLC
1629 K Street, Northwest, Suite 300
Washington, DC 20006
(202) 827-9980
cw@courtneyweinerlaw.com

Counsel for Proposed Amici

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Local Rule 6.1, consumer finance regulation scholars Ethan S. Bernstein, Susan Block-Lieb, Mark E. Budnitz, Prentiss Cox, Benjamin P. Edwards, Kathleen C. Engel, Linda E. Fisher, Judith Fox, Robert Hockett, Edward Janger, Dalié Jiménez, Adam J. Levitin, Cathy Lesser Mansfield, Nathalie Martin, Patricia A. McCoy, Christopher Lewis Peterson, David J. Reiss, Jeff Sovern, Justin Steil, Jennifer Taub, and Arthur E. Wilmarth, Jr. (collectively, the "Proposed *Amici*") respectfully request leave to file the accompanying Brief as Amicus Curiae in Support of Plaintiff Lower East Side People's Federal Credit Union's Motion for a Preliminary Injunction.

Proposed *Amici* are scholars of consumer finance and financial regulation. The proposed brief will help inform the Court's resolution of the preliminary injunction motion because Proposed *Amici* regularly study the legal underpinnings of the Consumer Financial Protection Bureau and are well-positioned to assist this Court in interpreting them. Then-circuit judge Samuel Alito cogently explained the reasons why amicus briefs providing a unique perspective can benefit the appellate process:

> Even when a party is very well represented, an amicus may provide important assistance to the court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. APP. PRAC. & PROCESS 279 (1999). The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent . . . .
>
> If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then

> simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance. A restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination. Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable. A restrictive policy may also convey an unfortunate message about the openness of the court.

Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J.), *aff'd*, 299 F.3d 221 (3d Cir. 2002). The considerations identified by then-judge Alito strongly support admission of Proposed *Amici*'s brief.

Further, the proposed brief provides a more detailed discussion regarding the statutory independence of the Consumer Financial Protection Bureau mandated by Congress and the proper interpretation of federal succession statutes for leadership changes at the agency in light of Congress' intent. Proposed *Amici* have "'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Auto. Club of N.Y., Inc. v. Port Auth.*, 2011 U.S. Dist. LEXIS 135391, at *6 (S.D.N.Y. Nov. 22, 2011) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 1063 (7th Cir. 1997)). The more extensive discussion of the history of the Consumer Financial Protection Bureau, and Dodd-Frank Act, and the Federal Vacancies Reform Act will assist the Court by providing it with "insights not available from the parties" *Id.*

Proposed amici have sought and obtained consent from both parties.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief as amici curiae should be granted. If such relief is granted, Proposed *Amici* respectfully request that the accompanying brief be considered filed as of the date of this Motion's filing.

Dated: December 14, 2017

Respectfully submitted,

/s/ *Courtney Weiner*
Courtney L. Weiner
Counsel of Record
LAW OFFICE OF COURTNEY WEINER PLLC
1629 K St., NW, Suite 300
Washington, DC 20006
Telephone: (202) 827-9980
Fax: (202) 379-9749
cw@courtneyweinerlaw.com

Counsel for Proposed Amici Curiae Consumer Finance Regulation Scholars

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2017, a true and correct copy of the foregoing brief was served electronically on all counsel of record via the CM/ECF system.

Dated: December 14, 2017

Respectfully submitted,

/s/ Courtner L. Weiner
Courtney L. Weiner
LAW OFFICE OF COURTNEY WEINER PLLC
1629 K St., NW, Suite 300
Washington, DC 20006
Telephone: (202) 827-9980
Fax: (202) 379-9749
cw@courtneyweinerlaw.com
Counsel for Proposed Amici Curiae Consumer Finance Regulation Scholars

IN THE UNITED STATES DISTRICT COURT
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BRIEF OF *AMICI CURIAE* CONSUMER FINANCE REGULATION SCHOLARS IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Courtney Weiner
LAW OFFICE OF COURTNEY WEINER, PLLC
1629 K Street, Northwest, Suite 300
Washington, DC 20006
(202) 827-9980
cw@courtneyweinerlaw.com
Counsel for Amici

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INTEREST OF *AMICI CURIAE*

Amici are leading scholars of financial regulation and consumer finance who submit this brief to lend their expertise regarding the statutory independence of the Consumer Financial Protection Bureau mandated by Congress and the proper interpretation of federal succession statutes for leadership changes at the agency in light of Congress' intent. *Amici* and their affiliations are listed in Appendix A.[1]

SUMMARY OF THE ARGUMENT

The orderly succession of the leadership of regulatory agencies is a hallmark of American democracy. Regulated entities, such as Plaintiff Lower East Side People's Federal Credit Union (LESPFCU) rely on there being absolute clarity regarding who is duly authorized to exercise regulatory authority over them. Without such clarity, regulated entities cannot be certain if agency actions, including the promulgation or repeal of rules and informal regulatory guidance, are actual agency policy or mere *ultra vires* actions.

This case involves a controversy over who lawfully serves as the Acting Director of the Consumer Financial Protection Bureau (CFPB or the Bureau) following the resignation of the Bureau's first Senate-confirmed Director. The statute that created the CFPB, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), is clear: the Deputy Director of the CFPB "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Thus, upon the resignation of the Director, the CFPB's Deputy Director, Leandra English, became Acting Director and may serve in that role until a new Director has either been confirmed by the Senate or been recess appointed.

Despite the Dodd-Frank Act's clear statutory directive, Defendant Donald J. Trump

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

declined to follow either of the routes constitutionally permitted to him for appointing a Director for the Bureau. Instead, Defendant Trump opted to illegally seize power at the CFPB by naming the current Director of Office of Management and Budget (OMB), Defendant John Michael Mulvaney, as Acting CFPB Director. Defendants claim this appointment is authorized by the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345(a).

As scholars of financial regulation, we believe that Deputy Director English's is the rightful Acting Director of the CPFB for a simple reason: the only applicable statute to the succession question is the Dodd-Frank Act. In the Dodd-Frank Act, Congress expressly provided for a mandatory line of succession for the position of CFPB Director, stating that the Deputy Director "shall" serve as the Acting Director in the event of a vacancy. Congress selected this provision after considering and rejecting the FVRA during the drafting of the Dodd-Frank Act, and Congress's selection of this succession provision is an integral part of its design of the CFPB as an agency with unique independence and protection from policy control by the White House. The appointment of any White House official, but especially of the OMB Director as Acting CFPB Director is repugnant to the statutory design of the CFPB as an independent agency.

The FVRA has no application to the position of CFPB Director. By its own terms, the FVRA is inapplicable as it yields to subsequently enacted statutes with express mandatory provisions for filling vacancies at federal agencies. This is apparent from the text of the FVRA, from the FVRA's legislative history, and from the need to comport with the basic constitutional principle that a law passed by an earlier Congress cannot bind a subsequent Congress. Moreover, the FVRA does not apply to "any member who is appointed by the President, by and with the advice and consent of the Senate to any" independent agencies with a multi-member board. 5 U.S.C. § 3349c(1). The CFPB Director is such a "member," because the CFPB Director

also serves as a member of a separate multi-member independent agency: the Board of Directors of the Federal Deposit Insurance Corporation (FDIC).

Plaintiff LESPFCU is seeking a preliminary injunction against acts by Defendants Mulvaney and Trump to illegally seize control of the CFPB, and it should be granted. As will be shown, LESPFCU has a high likelihood of success on the merits given the strength of its statutory arguments that the Dodd-Frank Act controls the CFPB Directorship succession. Unless the Court grants LESPFCU's request for a preliminary injunction, LESPFCU will suffer irreparable harm because it will be subjected to regulation by a CFPB that would be under the direct political control by the White House that Congress took pains to forbid. Moreover, without a preliminary injunction, Defendant Mulvaney will continue to take actions that may place LESPFCU at a competitive disadvantage by creating an uneven regulatory playing field that favors certain types of institutions. *See, e.g.*, Jessica Silver-Greenberg & Stacy Cowley, *Consumer Bureau's New Leader Steers a Sudden Reversal,* N.Y.TIMES, Dec. 5, 2017. Nor will the President's rights be in any way limited by such a preliminary injunction: the President remains able to seek Senate confirmation of a nominee for CFPB Director. All the President is being asked to do is fish or cut bait and proceed through normal constitutional order. The granting of a preliminary injunction is also very much in the public interest as it enables the controversy over the rightful claim to the CFPB Directorship to be resolved through an impartial court and not through a naked grab of power by the President.

ARGUMENT

I. The Text, Structure, Purpose, and Legislative History of the Dodd-Frank Act Show That It Is the Exclusive Mechanism Governing the Succession of the CFPB Director

A. "Shall" Means "Shall": Congress Unambiguously Chose to Specify a Succession Line for CFPB Director in the Dodd-Frank Act

The Dodd-Frank Act expressly provides a mandatory line of succession for the CFPB

Director: in the event of the "absence or unavailability" of the Director—a phrase that Defendants concede are capacious enough to readily encompass vacancy—the Deputy Director "*shall*" serve as Acting Director. 12 U.S.C. § 5491(b)(5)(B) (emphasis added). By using the word "shall" Congress could not have been clearer: the Dodd-Frank Act provides a mandatory and therefore exclusive line of succession for the CFPB Director. The Dodd-Frank Act's language does not brook any alternative method of appointment of an Acting Director for the CFPB. Applying the FVRA to allow for Defendant Mulvaney's appointment would make a nullity of Congress's express command.

B. The Legislative History of the Dodd-Frank Act Shows that Congress Rejected the Application of the FVRA to the CFPB Director

The legislative history of the Dodd-Frank Act indicates that Congress deliberately rejected the FVRA as a line of succession in favor of the Deputy Director automatically becoming Acting Director. The version of the Dodd-Frank Act that passed the House envisioned a "Consumer Financial Protection Agency" that would initially be led by a single Director prior to the agency transitioning into a multi-member commission. H.R. 4173, 111th Cong. § 4102(b)(6)(B) (2010). The House Bill provided that the FVRA would apply during the period when there was only a single Director. *Id.* Notably, the House Bill did not include make the Director (or subsequent commission chair) a member of the FDIC Board. In contrast to the House Bill, the Senate Bill, S. 3217, contained the single Director structure and exact language regarding line of succession that were adopted by the Conference Committee and ultimately enacted as the Dodd-Frank Act.

The legislative history of the Dodd-Frank Act shows that Congress was fully aware of the FVRA as a possibility, at least when the agency's Director was not also going to serve on what is unquestionably a multi-member board of an independent agency, as discussed *infra* part II.B. In

the final legislation, Congress deliberately elected not to use the FVRA as a line of succession, instead making clear that the FVRA would not apply both by the use of mandatory "shall" language in the line of succession and by placing the CFPB Director on a multi-member board of an independent agency and thus outside the scope of the FVRA.

C. The Dodd-Frank Act's CFPB Director Succession Provision Is Integral to the Agency Independence Mandated by Congress

The Dodd-Frank Act's provision governing the succession of the CFPB Director is not happenstance, but is integral to the design of the CFPB as an agency with a unique structure (as reflected in the Senate Bill, the structure of which was ultimately adopted) whose goal is maximizing the agency's independence from the President while maintaining accountability to Congress and the public.[2]

1. Congress Designed the CFPB to Have Maximum Independence from Political Interference

Independence from political control by the White House has been a cornerstone of federal bank regulation since the 1863 enactment of the National Bank Act. Congress has endowed all federal bank regulators with independence to ensure the safety and soundness of our nation's banking system and the financial health of American citizens. *See, e.g.,* Arthur E. Wilmarth Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 907-908 (2012). Absent such independence from political interference, the President could readily goose the economy for short-term political gain via control of the credit channel or even direct financing to favored political groups and away from disfavored groups. The independence of federal bank regulators from daily political control by the White House is essential for ensuring financial stability and

[2] We note that there is controversy about the constitutionality of the CFPB's structure. These issues are not before the Court in this litigation, and need not be addressed; avoidance principles dictate that the agency's structure, although novel, should be presumed constitutional.

that financial institutions are not used for political ends.

When Congress created the CFPB in the Dodd-Frank Act in 2010, it was particularly concerned with ensuring the agency's independence. *See* S. REP. No. 111-176, at 11 (2010); *id.* at 174 (a "strong and independent Bureau with a clear mission to keep consumer protections up-to-date with the changing marketplace will reduce the incentive for State action and increase uniformity"); Statement of Senator Cardin, *Wall Street Reform and Consumer Protection Act—Conference Report*, Cong. Rec. S5870, S5871 (July 15, 2010) ("This legislation will create a consumer bureau . . . that is independent, so the consumer is represented in the financial structure"); Statement of Sen. Kaufman, *id.* at S5885 (stating that the Dodd-Frank Act "establishes an independent [CFPB] with strong and autonomous rulemaking authority . . ."). Congress created the CFPB in response to the 2008 financial crisis, which wreaked havoc in its wake. Rampant consumer abuses in the residential mortgage market precipitated the crisis, nearly destroying the global financial system, throwing millions of Americans out of work, and culminating in several million home foreclosures. *See, e.g.,* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 14-148 (2011); Christopher J. Goodman & Stephen M. Marice, *Employment loss and the 2007-09 recession: an overview*, MONTHLY LABOR REV. 3 (Bureau of Labor Statistics, April 2011), http://bit.ly/2ko7Es3. Post-mortems of the crisis revealed that conscious forbearance by the federal bank regulators, who had primary responsibility for consumer financial protection at the time, was a major contributing factor in the 2008 crisis. ENGEL & MCCOY, *supra*, at 149-205; THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xvii-xviii, xxi, xxiii (2011). These regulators were tasked with both ensuring bank profitability and consumer

protection and prioritized the short-term profitability of banks over consumer protection.

Part of the reason for the bank regulators' inaction was the conflict between their mission of ensuring bank safety and soundness and their consumer protection mission. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 ANN. REV. BANKING & FIN. SERV. L. 321, 329-31 (2013). To address this problem, Congress transferred primary federal authority for consumer financial protection from the existing federal bank regulators to the CFPB, which has one sole mission: protecting the financial well-being of American consumers.

Pre-2010 bank regulation was also plagued by "regulatory capture"—the phenomenon of agencies coming to serve the interests of regulated industries rather than those of the public. *See, e.g.*, Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2041-45 (2014) (hereinafter "Levitin, *Financial Politics*"). Concerns about capture animated the proposals for a consumer financial protection agency, *see* U.S. Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation* 29 (2009) (putting forth a proposal for a federal consumer financial protection agency and expressing concerns about regulatory capture); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 99 n.325 (2008) (proposing a consumer financial protection agency and noting that "minimizing the risk of capture is a main regulatory-design challenge in implementing our proposal."), and are reflected in the CFPB's unique structure. Levitin, *supra*, at 2056.

Congress sought to insulate the new CFPB from industry capture and partisan politics by vesting it with important mainstays of independence from the executive branch and the White House. Those safeguards include formal status as an independent agency, a Director appointed by the President and confirmed by the Senate who can be fired only for good cause, a locale

outside of the executive branch, independent funding, and exemption from reviews by OMB and the White House.[3] Dodd-Frank's directive on the appointment of the CFPB's Acting Director is integral to this statutory scheme of agency independence.

i. Formal Independent Status

The Dodd-Frank Act provision establishing the CFPB spells out the agency's independence: "There is established in the Federal Reserve System, *an independent bureau* to be known as the 'Bureau of Consumer Financial Protection' . . ." 12 U.S.C. § 5491(a) (emphasis added); *accord*, Joint Explanatory Statement of the Committee of Conference 874 (2011), http://bit.ly/2ntHMfa (the CFPB "will be an independent bureau within the Federal Reserve System").

ii. Term and Tenure of CFPB Director

The CFPB's leadership structure is fundamental to Congress's design of an agency free from independence from direct daily policy control by the President. The CFPB is headed by a Director, who "shall be appointed by the President, by and with the advice and consent of the Senate," 12 U.S.C. § 5491(b)(2), and "shall serve for a term of 5 years." 12 U.S.C. § 5491(c)(1). This provision protects the CFPB's autonomy by allowing the Director to serve past the four-

[3] Congress took care to balance the CFPB's independence with checks making the CFPB accountable to Congress, the courts, the President, and the public in multiple ways. Levitin, *Financial Politics, supra* at 2057. The CFPB's Director must appear at least twice a year before the relevant Congressional Committees and submit a comprehensive report on topics ranging from regulatory obstacles and objectives to budgetary justifications, as well as an analysis of past and anticipated agency actions. 12 U.S.C. §§ 5493(b)(3)(C), (d)(4), 5496, 5497(e)(4)(A). The Government Accountability Office conducts an annual audit of the CFPB, 12 U.S.C. §§ 5496a(b), 5497(a)(4)(D), (a)(5), and the Federal Reserve's Inspector General oversees the CFPB through reviews, 5 U.S.C. App. 3. Ultimately, Congress can also amend or repeal the authorizing legislation for the CFPB.

CFPB rulemakings are subject to the Administrative Procedure Act. 12 U.S.C. § 5491(a). The Dodd-Frank Act also made the CFPB one of only three agencies subject to the Small Business Regulatory Enforcement Fairness Act, which requires the CFPB to consult with, and gain direct input from, small businesses regarding proposed rulemakings. 5 U.S.C. § 609(d)(2). In addition, the CPFB is the only agency whose rulemakings are subject to a veto by the Financial Stability Oversight Council. 12 U.S.C. § 5513. The CFPB lacks independent litigation authority before the Supreme Court without leave of the Attorney General, 12 U.S.C. § 5564(e), and the CFPB's rulemakings and enforcement actions are subject to judicial review. 12 U.S.C. § 5491(a). Congress further has the power to overturn CFPB rules under the Congressional Review Act. 5 U.S.C. §§ 801 et seq.

year term of the President.

The Dodd-Frank Act further enhanced the independence of the CFPB by providing that that the President may only "remove the Director for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This provision augments the independence of the CFPB by shielding the Director from being fired because of a policy disagreement with the President. Without the for-cause removal provision, a President could credibly threaten the CFPB Director's removal unless the Director complied with the President's requests, and if the Director did not comply, the President could replace the Director with a new (and presumably compliant) Director. That, in turn, would allow a President to attempt to achieve a short-term boost to the economy by reducing consumer finance regulation and loosening credit, leaving the costs of unsustainable credit to a future administration. Likewise, if the President could replace the CFPB Director at will, the President could freely interfere with civil enforcement decisions.

In addition, without protection from termination at will, the concentrated and well-heeled financial services industry lobby could pressure a President to relax regulations through removal or the threat of removal of the Director. Consumer advocates cannot compete with such well-heeled lobbying. For-cause-only removal helps level the playing field between industry and consumer interests by ensuring that industry or select companies cannot forestall or undo regulation simply by persuading the President to threaten the removal of the CFPB Director. Instead, it is Congress that retains the ultimate oversight over CFPB policy.

iii. Organizational Situs

Congress located the CFPB within the Federal Reserve System as "an independent Bureau." 12 U.S.C. § 5491(a). Because the Federal Reserve System itself is outside of the executive branch, this decision helps insulate the CFPB from undue political influence.

This arrangement—locating the CFPB outside of the executive branch—is the norm for financial regulators: the Federal Reserve System is independently located, as are the FDIC, National Credit Union Administration, Federal Trade Commission, Federal Housing Finance Agency, Securities and Exchange Commission, and the Commodities Futures Trading Commission. Although the Office of the Comptroller of the Currency is located within the U.S. Department of the Treasury, it enjoys statutory freedom from interference from the Treasury Secretary. 12 U.S.C. § 1; 31 U.S.C. § 321(c). Even though the OCC is the only financial regulator located within a department, it is considered independent from the executive branch, as are all the other federal regulators. *See* Henry B. Hogue, Marc Labonte & Baird Webel, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 25 (Cong. Res. Serv. R43391, Feb. 28, 2017), http://bit.ly/2AWAfev ("Hogue").

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

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

decided to fund the CFPB's operations with Federal Reserve System funds, rather than appropriated funds, to bolster the agency's autonomy, as the next section discusses.

iv. Independent Funding

Industry capture of agencies can occur in various ways, but agency funding is a key pressure point. Congress has historically funded federal bank regulators independently of the appropriations process to shield bank oversight from political interference. *See* Hogue, *supra,* at 25 ("[T]he annual appropriation processes and periodic reauthorization legislation provide Congress with opportunities to influence the size, scope, priorities, and activities of any agency"). For this reason, Congress exempts all federal bank regulators from Congressional appropriations for their funding.[4] *Id.*

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

Congress specifically placed the CFPB on independent financial footing due to the danger of reliance on the appropriations process. S. Rep. No. 111-176, at 163 (2010) ("[T]he assurance of adequate funding [for the CFPB from the Federal Reserve Board], independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator"). As the Senate Report (*id.*) accompanying the Dodd-Frank Act

[4] The Federal Reserve System earns revenues from services to its members such as check-clearing, securities investments, and interest on loans. The OCC and the FHFA primarily fund themselves through fees on their regulated entities. The FDIC and the National Credit Union Administration generate revenue primarily through premiums paid by their insured entities for federal deposit and share insurance respectively. *See* Hogue, *supra*, at 26.

explained, Congress had observed the harm of political pressure on the predecessor to FHFA:

> This was a hard learned lesson from the difficulties faced by the Office of Federal Housing Enterprise Oversight (OFHEO), which was subject to repeated Congressional pressure because it was forced to go through the annual appropriations process. It is widely acknowledged that this helped limit OFHEO's effectiveness. For that reason, ensuring that OFHEO's successor agency—the Federal Housing Finance Agency—would not be subject to appropriations was a high priority for the Committee and the Congress in the Housing and Economic Recovery Act of 2008.

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

v. Limitations on Executive Oversight

Consistent with its treatment of other independent federal bank regulators, Congress further exempted CFPB actions from executive branch review. In one such measure, Congress provided that legislative recommendations, testimony, and comments by the CFPB are not subject to executive branch review, whether by OMB or any other federal officer or agency.

Specifically, Dodd-Frank states that:

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

12 U.S.C. § 5493(c)(4).

In another example of independence from executive oversight, Congress gave the CFPB a statutory exemption from budget review by OMB. Under the Dodd-Frank Act, the CFPB must

provide copies of the Director's financial operating plans, forecasts, and quarterly reports to the Director of OMB. 12 U.S.C. § 5497(a)(4)(A). In a companion provision, however, Congress stated that there is no "obligation on the part of the Director [of the CFPB] to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or" other information provided to OMB. 12 U.S.C. § 5497(a)(4)(E); *cf.* 12 U.S.C. § 1827 (extending similar protection to the FDIC). Similarly, nothing in the OMB reporting requirements may "be construed as implying . . . any jurisdiction or oversight over the affairs or operations of the Bureau." 12 U.S.C. § 5497(a)(4)(E).

Finally, the CFPB, like all federal bank regulators, is free from the usual requirement that agencies submit their rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review and cost-benefit analysis. Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Oct. 4, 1993). Executive Order 12866 contains an express exemption for agencies deemed to be "independent regulatory agencies" under the Paperwork Reduction Act. *Id.* § 3(b). The Paperwork Reduction Act's list of independent regulatory agencies includes the CFPB and other federal bank regulators. 44 U.S.C. § 3502(5). In this way, the CFPB and other federal bank regulators are exempt from White House review of their rules.

2. The Dodd-Frank Act's Directorship Succession Provision Is Integral to the Independence Congress Mandated for the CFPB

Dodd-Frank's provision on the appointment of the CFPB's Acting Director is a key pillar supporting the architecture of agency independence that defines the CFPB. Under Dodd-Frank, the White House's single most important role with respect to the CFPB—the appointment of the permanent CFPB Director—may only be made "by and with the advice and consent of the Senate." 12 U.S.C. § 5491(b)(2). In contrast, no federal statute requires Senate confirmation for appointment of an Acting Director for the CFPB. Thus, if the President had authority to name the

CFPB's Acting Director under the FVRA, the President could bypass Senate confirmation of the agency's head by appointing the CFPB's Acting Director for up to 210 days without nominating a permanent Director. 5 U.S.C. § 3346(a)(1). Conceivably, the President could stack back-to-back 210-day terms and delay a nomination until the end of a Presidency, resulting in up to 8 years of freely removable Acting Directors of the President's choice, followed by a 5-year term for a duly confirmed Director of the President's nomination. To avoid that scenario, Congress insisted that the CFPB's Deputy Director "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Because the CFPB's Deputy Director is a career civil servant who is appointed by the CFPB's Director, 12 U.S.C. § 5491(b)(5)(A), the President may not name a political appointee as CFPB Director without Senate confirmation.

II. The FVRA Does Not Provide a Standing Alternative Method of Appointing an Acting Director for the CFPB.

Defendants argue that the FVRA provides a standing alternative method of filling vacancies at federal agencies, even when another method is specified by statute. *See* White House Statement on Director Mulvaney's Status as Acting Director of the Consumer Financial Protection Bureau, Nov. 27, 2017, *at* http://bit.ly/2zIofxn. This claim is wrong because it ignores the text and legislative history of the FVRA and a fundamental constitutional principle.

A. The FVRA Does Not Apply When a Statutory Provision Expressly Designates an Acting Officer, as the Dodd-Frank Act Does.

The FVRA provides that it is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency … for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—(1) a statutory provision expressly—…(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347. The Dodd-Frank Act's CPFB succession provision is "a statutory provision

expressly…designat[ing] an officer or employee to perform the functions and duties of [the CFPB Director] temporarily in an acting capacity." 12 U.S.C. § 5491(b)(5)(B). Thus the FVRA, by its own terms, does not apply to the CFPB Directorship.

The Dodd-Frank Act's use of the word "shall" in the CPFB Director succession provision is as express a statutory provision as could be conceived without requiring the use of "magic words" directly referencing the FVRA. The Supreme Court has repeatedly made clear that "magic words" are not required for a provision to be express. *See Marcello* v. *Bonds,* 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the . . . Act are not lightly to be presumed in view of the statement . . . that modifications must be express[.] But . . . [u]nless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the . . . Act, we must hold that the present statute expressly supersedes the . . . provisions of that Act"); *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J. concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'") (emphasis in original). The Dodd-Frank Act's CFPB Director succession provision is an express provision opting out of the FVRA succession mechanism, so the FVRA has no applicability to determining who is the rightful Acting Director of the CFPB.

B. The FVRA Does Not Apply to Members of Boards of Independent Agencies, and the CFPB Director Is a Member of the Board of an Independent Agency

The FVRA not only has an exclusion for express opt-outs of its coverage, but it is also inapplicable to:

> [A]ny member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—
> (A) is composed of multiple members; and
> (B) governs an independent establishment or Government corporation.

5 U.S.C. § 3349c(1).

The CFPB Director is a member of the multi-member board of an independent Government corporation, namely the five-member Board of Directors of the Federal Deposit Insurance Corporation. 12 U.S.C. § 1812(a)(1)(B). Appointment as the CFPB Director, by and with the advice and consent of the Senate, is not only an appointment to lead the CFPB, but also to serve as a member of FDIC Board. As a multi-member board of an independent Government corporation, the FDIC Board is therefore clearly exempt from the FVRA.[5]

There is an important policy foundation for the exclusion of multi-member boards of independent entities from the FVRA's ambit. Multi-member boards of independent agencies and other entities frequently have partisan balance requirements or expertise requirements or geographic affiliation requirements. For example, the FDIC Board has a partisan balance requirement, and a requirement that one of its members have State bank supervisory experience. 12 U.S.C. § 1812(a)(1)-(2). If the President could use the FVRA to appoint acting members of multi-member boards of independent entities, he could circumvent the statutory qualification restrictions on these entities. Thus, if the FVRA applied to multi-member boards of independent agencies, the President could stack the FDIC Board solely with members of his own political party. The President does have considerable power to shape the membership of multi-member boards of independent agencies, but the exercise of this power is subject to the advice and consent of the Senate.

It is for this reason that the FVRA does not extend to vacancies on multi-member

[5] We note that the Office of Legal Counsel memorandum on which the Defendant President apparently relied in appointing Defendant Mulvaney did not mention the CFPB Director's role as an FDIC Board member, much less analyze how it affects the application of the FVRA. Memorandum from Assistant Attorney General Steven A. Engel to Donald F. McGahn II, Counsel to the President, Nov. 25, 2017, *at* http://bit.ly/2iSSZRQ. A post-controversy memorandum from the CFPB's General Counsel, allegedly sent to the Bureau's senior leadership, similarly failed to consider the CFPB Director's membership on the FDIC Board. *See* Memorandum from Mary McLeod, General Counsel to CFPB Senior Leadership Team, Nov. 25, 2017, *at* http://bit.ly/2k0pKfO.

independent agency boards. The appointment of an Acting CFPB Director is necessarily the appointment of an acting member of the FDIC Board. This role cannot be separated from the CFPB Director's role at the CFPB; it is a mandatory statutory package, and the service of an invalidly Acting CFPB Director on the FDIC Board would jeopardize the legality of the FDIC's actions. *See FEC v. Nat'l Rifle Ass'n Political Victory Fund,* 6 F.3d 821 (D.C. Cir. 1993). Accordingly, the President cannot use the FVRA to appoint the Acting CFPB Director. Instead, the *only* applicable statute to the succession of CFPB Director is the Dodd-Frank Act.

C. The FVRA Does Not Apply to Subsequently Enacted Statutes that Expressly Provide for a Line of Succession.

Defendants' argument that the FVRA provides a standing alternative method of filling vacancies at federal agencies stands on a selective reading of the FVRA's legislative history that does not comport with a basic constitutional principle—an earlier Congress cannot bind a later Congress. Defendants contend that section 3347 of the FVRA provides that the FVRA is either the exclusive or alternative succession provision for filling a vacancy; the FVRA is always an option no matter what another statute provides. Yet, Defendants recognize that section 3347 is open to another (correct) reading, namely that the word "exclusive" simply makes clear that the FVRA applies absent an express-out out provision that cause another statute to control. Accordingly, Defendants' position stands on the legislative history of the FVRA (and on a single reported decision that also relied on the FVRA's legislative history).

1. Legislative History Indicates That the FVRA Is Not an Alternative Method of Filling a Vacancy If a Subsequently Enacted Statute Expressly Provides for Another Mandatory Mechanism for Filling a Vacancy.

Defendants rely on the FVRA's legislative history to support their reading that the FVRA is either an exclusive possibility or an alternative possibility for filling vacancies at federal agencies. The problem with this claim is that it fails to note that the FVRA's legislative history

carefully distinguishes between the application of the FVRA to existing statutes and to subsequently enacted statutes. The FVRA's legislative history shows that the FVRA is *not* meant to serve as an alternative for the succession mechanisms in subsequent statutes, only for those in existing statutes.

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

> [Section 3347 of the FVRA] does allow temporary appointments to be made other than through the Vacancies Reform Act in three narrowly delineated exceptions. First, where Congress provides that a statutory provision expressly provides that it supersedes the Vacancies Reform Act, the other statute will govern. But statutes enacted in the future purporting to or argued to be construed to govern the temporary filling of offices covered by this statute are not to be effective unless they expressly provide that they are superseding the Vacancies Reform Act. Second, the bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official). The Committee is aware of the existence of statutes specifically governing a vacancy in 41 specific offices, 40 of which would be retained by this bill....

S. Rep. 105-250, 1998 WL 404532 at *15.

The Dodd-Frank Act clearly falls into the first exception contemplated in the legislative history: it is a statute enacted subsequent to the FVRA, and it has express language indicating that it supersedes the FVRA because it states that the Deputy Director "shall" serve as acting Director in the event of the Director's absence or unavailability.

Defendants' reliance on the FVRA legislative history is founded on a selective reading of

that legislative history. Defendants ignore the first exception to the FVRA discussed in the legislative history. That first exception is the one dealing with subsequently enacted statutes. Instead, the President focuses on the second exception mentioned in the legislative history, but that exception is expressly inapposite, as it deals with pre-existing statutes. Likewise, the sole reported case on the FVRA is also inapplicable as it dealt with the General Counsel of the National Labor Relations Board, one of the 40 offices specifically mentioned in the legislative history as under an existing statute. *Hooks v. Kitsap Tenant Support Services*, 186 F. 3d 550 (9th Cir. 2016). Similarly, the opinions issued by the Office of Legal Counsel on the FVRA deal with existing, rather than subsequent statutes. *See, e.g.*, *Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003); *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007). As a result, none of these precedents applies to the CFPB Directorship.[6]

2. A Law Passed by an Earlier Congress Cannot Bind a Future Congress

The FVRA's legislative history's distinction between the application of the FVRA for existing and subsequently enacted statutes is also the only reading that is consistent with a fundamental constitutional principle: a law passed by an earlier Congress cannot bind a future Congress. If Defendants' reading were correct, it would mean that an earlier Congress (the FVRA Congress in 1998) could bind a later Congress (the Dodd-Frank Congress in 2010) by requiring the later Congress to have the FVRA as an alternative method of filling vacancies for any statutory position created by the later Congress, notwithstanding the later Congress's express rejection of that alternative. The FVRA Congress could amend previously existing statutes, but it could not require the FVRA to always be an alternative method of appointment no matter what

[6] Notably, the OLC opinion on the CFPB on which the President claims to have relied did not address the part of the FVRA's legislative history dealing with subsequent statutes, only that with existing statutes, despite the Dodd-Frank Act being a subsequent statute.

actions a subsequent Congress would take.

It is axiomatic that one Congress cannot bind a subsequent one through legislation; were it otherwise, a Congress could exercise dead hand control even if the electorate had subsequently rejected it at the polls. *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); *United States v. Shull*, 793 F. Supp. 2d 1048, 1061 (S.D. Ohio 2011). The democratic edifice of American government cannot tolerate an earlier Congress binding a subsequent one through legislation. It is for this reason that the legislative history of the FVRA recognized that future statutes had to be treated differently than existing statutes. Accordingly, Defendants' position that the FVRA stands as a constant alternative line of succession is incorrect. The FVRA might be an alternative method for filling vacancies at agencies created under existing statutes, but it cannot be for agencies created after its enactment when a subsequently enacted statutory line of succession supersedes the application of the FVRA.[7]

D. Application of the FVRA Would Create a Perverse Incentive for the President to Delay Nomination of a Permanent CFPB Director.

Application of the FVRA would also create an incentive for the President to delay nomination of a permanent CFPB Director until the end of his term in office. Such strategic delay would allow this President, as well as future presidents, to effectively seize the equivalent to *two* CFPB Director appointments, when a President is entitled solely to *one*. Under the Defendant's interpretation, a President could install a string of Acting Directors, each for 210-day terms, and wait until the end of the Presidency to nominate a permanent Director, who would then be able to serve a full 5-year term that would extend past the next Presidency. In other words, instead of getting to select the CFPB Director for a single 5-year term, a President could manipulate the process and have as many as 8 years of Acting Directors of his choice (all

[7] For this reason, holding that the FVRA controls over the Dodd-Frank Act does not, in fact, further the goal of constitutional avoidance, contrary to the claim of certain other *amici*.

effectively subject to his removal power and thus control, unlike a regular CFPB Director) on top of a regular 5-year appointment for CFPB Director. Such an outcome would make a mockery of the statutory requirements of Senate confirmation for a 5-year term in office and for-cause only removal for the CFPB Director. The Defendants' position incentivizes the President to delay putting a nominee through the Senate confirmation process, whereas the Plaintiff's position incentivizes the President to move expeditiously with a nomination if he wishes to exercise influence over the Bureau.

III. The Appointment of the OMB Director as Acting CFPB Director Violates the Dodd-Frank Act's Requirement of Statutory Independence for the CFPB.

Even if the Court were to determine that the FVRA governs the CFPB Directorship succession, Defendant Mulvaney and any other OMB official should still be precluded from appointment to the Acting CFPB Director position. Defendant Trump's appointment of Defendant Mulvaney epitomizes the problem Congress sought to address by creating an exclusive mechanism in the Dodd-Frank Act for filling the post of Acting Director of the CFPB. Defendant Mulvaney is OMB Director. OMB "is an office in the Executive Office of the President," 31 U.S.C. § 501, which makes Defendant Mulvaney an official of the White House. Defendant Mulvaney has told the press that he is continuing to head OMB while claiming office as the CFPB's Acting Director. *See* Renae Merle, *Dueling officials spend chaotic day vying to lead federal consumer watchdog*, WASH. POST (Nov. 27, 2017) ("Mulvaney said he plans to work three days a week at the agency and three days at OMB"). Thus, the White House effectively has taken over the CFPB by appointing Defendant Mulvaney as CFPB Acting Director while he remains head of OMB. Indeed, in a press conference on November 27, 2017, Defendant Mulvaney confirmed this turn of events, declaring: "The Trump Administration is now in charge" of the CFPB. *See, e.g.,* http://cs.pn/2AxVT65.

Defendant Mulvaney's appointment as CFPB Acting Director is in blatant violation of Congress' repeated injunctions against OMB intrusion into CFPB decisions. Congress specified in the Dodd-Frank Act that the CFPB is to be an "independent bureau," 12 U.S.C. § 5491(a), yet a top White House official has now taken control of the agency, without opportunity for Senate confirmation. Furthermore, this violates Congress' directive denying the OMB "jurisdiction or oversight over the affairs or operations of the Bureau", 12 U.S.C. § 5497(a)(4)(E).

Defendant Mulvaney's actions as putative Acting Director of the CFPB contravene other important statutory provisions that wall off the CFPB from OMB. In Dodd-Frank, Congress prohibited officials from OMB and the White House from requiring the CFPB to submit "legislative recommendations, or testimony or comments on legislation" to them for prior review or approval. 12 U.S.C. § 5492(c)(4). Yet the sitting Director of OMB now wields ultimate power to review and approve any proposed recommendations, testimony, or comments by the CFPB to Congress. The same OMB Director will now sign off on the CFPB's financial operating plans, forecasts, and quarterly reports, in violation of 12 U.S.C. § 5497(a)(4)(E).

Defendant Mulvaney is also reviewing and acting on CFPB rules and rulemakings while serving as OMB Director. His involvement in CFPB rulemaking is especially problematic in light of E.O. 12866, which expressly exempts the CFPB from OIRA rulemaking review. OIRA is both an office of OMB, 31 U.S.C. § 505, and an arm of the White House. *See* The White House, *OMB Offices*, http://bit.ly/2B14gdL (viewed Dec. 5, 2017). OIRA staff report to Defendant Mulvaney in his capacity as OMB Director, and Defendant Mulvaney has ultimate authority over OIRA's rulemaking review.

As a result, CFPB rulemaking is effectively under OMB review as long as Defendant Mulvaney remains the OMB Director. In fact, *American Banker* quoted Defendant Mulvaney on

December 4, 2017—after he claimed to be serving as CFPB Acting Director—as saying: "You could imagine that the Office of Management and Budget under the Trump administration might look very cautiously, even cynically, against rules that were produced by" the previous CFPB Director, Richard Cordray. Ian McKendry, *Mulvaney's first days at CFPB: payday, personnel and a prank,* AM. BANKER, Dec. 4, 2017. As this demonstrates, Defendant Mulvaney is incapable of reviewing CFPB rulemakings independently; instead, he views them from the perspective of the White House and OMB. At his November 27 press conference, Defendant Mulvaney announced one of his first decisions was to institute a 30-day freeze on all new rules, regulations, and guidance issued by the CFPB. *See, e.g.,* http://cs.pn/2AxVT65. More recently, Defendant Mulvaney halted implementation of a new CFPB final rule expanding data collection on mortgages. *See* Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, WALL ST. J., Dec. 5, 2017. As this suggests, Defendant Mulvaney, while continuing as OMB head, has acted aggressively to put CFPB rulemaking under the White House's control.

Defendant Mulvaney's appointment as Acting Director allows OMB and the White House to stack the CFPB rulemaking process in another way. Under the Small Business Regulatory Enforcement Fairness Act (SBREFA), the CFPB must elicit feedback from small businesses regarding proposed rulemakings. 5 U.S.C. § 609(d)(2). SBREFA requires the CFPB to convene a review panel for the proposed rule "consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule [the CFPB], the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel" for Advocacy of the Small Business Administration. The purpose of the review panel is to issue a public report on "the comments of the small entity representatives" and the review panel's findings. 5 U.S.C. § 609(b).

The SBREFA panel's authorizing legislation gives room to Defendant Mulvaney to manipulate the composition of the review panel. Recently, he announced his intent to "add more political appointees to the [CFPB's] ranks . . . pairing them with senior civil servants in areas such as . . . regulations." Lydia Beyoud, *Mulvaney Wants More Political Appointees in Place at CFPB*, BNA BANKING DAILY, Dec. 4, 2017. This raises concerns that as Acting CFPB Director Defendant Mulvaney would appoint his political appointees at the CFPB who were aligned with OMB and the White House to serve on SBREFA review panels. This, in turn, would rig the SBREFA process and help ensure that rulemakings vital to the welfare of American consumers do not move forward.

The extent of White House direct policy control over the CFPB through Defendant Mulvaney is perhaps most clearly shown by Defendant Trump's tweet on December 8, 2017:

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

Donald J. Trump (@realDonaldTrump), Twitter (Dec. 8, 2017, 7:18 AM), *at* http://bit.ly/2jv1m6u. The President, of course, utterly lacks statutory authority to determine whether the CFPB, as an independent agency, pursues an enforcement action, much less the fines it imposes or the regulations it will pass or cut. The President's tweet is a boast of having such control over the CFPB through his control of Defendant Mulvaney as the freely-removable OMB Director. In other words, the President is boasting of the ability to do exactly what Congress has forbade.

In these myriad ways, Defendant Mulvaney's appointment as Acting Director of the CFPB while continuing to serve as OMB Director puts the White House in direct, day-to-day control of the CFPB. This sort of direct political control by the White House, unmediated by a

for-cause removal standard, a term in office that may outlast the President's, and Senate confirmation, is a direct threat to the CFPB's statutory independence and the stated will of Congress.[8] It is precisely these concerns that animated Congress's choice to reject the FVRA mechanism and have the Dodd-Frank Act control the CFPB's Directorship succession.

* * *

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

CONCLUSION

For these reasons, the court should grant Plaintiff's motion for a preliminary injunction.

Dated: December 14, 2017

Respectfully submitted,
/s/ Courtney Weiner
Courtney Weiner

Courtney Weiner
LAW OFFICE OF COURTNEY WEINER, PLLC
1629 K Street, Northwest, Suite 300
Washington, DC 20006
(202) 827-9980
cw@courtneyweinerlaw.com

Counsel for Amici

[8] We note that the CFPB is not the only federal bank regulatory body whose independence will be compromised. If Defendant Mulvaney can serve the Acting Director of the CFPB, he will also be a voting member of the board of directors of the FDIC, of the Financial Stability Oversight Council, and of the Federal Financial Institutions Examination Council. 12 U.S.C. §§ 1812(a)(1)(B), (d)(2); 3303; 5321(b)(1)(D), (c)(3). His concurrent tenure as Director of OMB will threaten the independence of these additional bank regulatory bodies by substituting a sitting White House official for a truly independent agency head.

APPENDIX OF *AMICI CURIAE*

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

Susan Block-Lieb is the Cooper Family Chair in Urban Legal Issues at Fordham Law School. She teaches and writes on consumer protection law.

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

Prentiss Cox is an Associate Professor of Law at the University of Minnesota Law School and previously was a member of the Consumer Advisory Board of the CFPB.

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

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

Linda Fisher is a Professor of Law and the James Boskey Research Scholar at Seton Hall Law School. Her recent research and publications address the subprime lending crisis and its consequences for communities.

Judith Fox is a Clinical Professor of Law and the Director Of the Economic Justice Project. She serves on the CFPB's Consumer Advisory Board (CAB); however, the views she expresses here are her own, not those of the CAB, the CFPB, or the United States.

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

Edward Janger is the David M. Barse Professor at Brooklyn Law School. He writes about bankruptcy, commercial law and consumer credit.

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

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

Cathy Lesser Mansfield is a Professor of Law and the Director of the Compliance and Risk Management Program at Drake University Law School. She teaches and writes in the areas of consumer finance and consumer protection.

Nathalie Martin is the Frederick M. Hart Chair in Consumer and Clinical Law at the University of New Mexico School of Law.

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

Christopher Lewis Peterson is the John J. Flynn Endowed Professor of Law at the University of Utah's S.J. Quinney College of Law. From 2012-2016, he was Special Advisor to the Director and Senior Counsel for Enforcement Policy & Strategy at the CFPB.

David J. Reiss is a Professor of Law at Brooklyn Law School and the Academic Program Director of its Center for Urban Business Entrepreneurship. He writes about real estate finance and consumer protection.

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

Justin Steil is an Assistant Professor of Law and Urban Planning at the Massachusetts Institute of Technology.

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

Arthur E. Wilmarth, Jr. is a Professor of Law at George Washington University Law School. In 2010, he served as a consultant to the Financial Crisis Inquiry Commission, the body established by Congress to report on the causes of the financial crisis of 2007-09.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: December 14, 2017

/s/ Courtney Weiner
Courtney Weiner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, *Plaintiff*, v. DONALD J. TRUMP and JOHN M. MULVANEY, *Defendants*	Case No. 1:17-cv-09536

PROPOSED ORDER

Upon review of Movant's Motion for Leave to File Brief of *Amici Curiae* Consumer Finance Regulation Scholars in Support of Plaintiff's Motion for a Preliminary Injunction, the motion for leave is hereby GRANTED, and *Amici*'s Brief is deemed filed as of December 14, 2017.

SO ORDERED.

Dated: December ___, 2017

____
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, v. DONALD J. TRUMP and JOHN M. MULVANEY, Defendants.	Civil Action No. 17-9536 (PGG)

PLEASE TAKE NOTICE that David H. Gans of CONSTITUTIONAL ACCOUNTABILITY CENTER hereby appears as counsel for *amici curiae* former Senator Chris Dodd, former Representative Barney Frank, Senator Sherrod Brown, and Representative Maxine Waters in the above-captioned matter.

I hereby certify that I am admitted to practice in this Court.

Dated: December 14, 2017

Respectfully submitted,

/s/ David H. Gans

David H. Gans
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, N.W., Suite 501
Washington, D.C. 20036
(202) 296-6889
david@theusconstitution.org

Counsel for Amici Curiae

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

December 14, 2017

Via ECF

The Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, N.Y. 10007

Re: *Lower East Side People's Federal Credit Union v. Trump, et al.*
No. 17-cv-9536 (PGG)

Dear Judge Gardephe:

The District of Columbia respectfully requests leave to file the attached brief as *amici curiae* in support of plaintiff's motion for a preliminary injunction on its own behalf and that of the States of Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, and Washington. The District contacted opposing counsel, Benjamin Takemoto, for his position on this request, but did not hear back as of the time of filing.

As explained in the attached brief, the *Amici* States have a significant interest in maintaining the independence of the Consumer Financial Protection Bureau ("CFPB") to ensure their own ability to enforce the many consumer financial laws that protect their residents. In creating the CFPB as an independent agency, the Consumer Financial Protection Act envisions that the CFPB and the States will work together to uphold consumer protections, and it authorizes the state attorneys general to enforce the Act and CFPB regulations. As enforcement partners with the CFPB, the *Amici* States rely on the CFPB's independence when cooperating and coordinating with the CFPB in their enforcement activities.

The *Amici* States respectfully submit that this brief will aid the Court in resolution of the issues presented in plaintiff's motion for a preliminary injunction. The signatory Attorneys General are the chief law officers of their respective states and bring a wealth of experience about consumer financial protection. The attached brief addresses not only the importance of CFPB's independence in this area but also the basis for that independence in the detailed statutory framework creating the CFPB, thus providing context and support for the plaintiff's position on the merits and assertions of harm.

For these reasons, the *Amici* States respectfully request that the Court grant leave to file the attached *amicus* brief.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Acting Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

/s/ Christina Okereke
CHRISTINA OKEREKE
Assistant Attorney General

Office of the Attorney General
441 4th Street, NW, Suite 630S
Washington, D.C. 20001
(202) 727-5173
christina.okereke@dc.gov

cc: All Counsel of Record (via ECF)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members,	)	
Plaintiff,	)	
-against-	)	No. 17-cv-9536 (PGG)
DONALD JOHN TRUMP, in his official Capacity as President of the United States of America; JOHN MICHAEL MULVANEY, in his capacity as the person claiming to be acting director of the Consumer Financial Protection Bureau,	)	
Defendants.	)	

BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF DELAWARE, HAWAII, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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

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

BACKGROUND

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

After extensive testimony and deliberations, Congress enacted the Consumer Financial Protection Act, which created the CFPB as an "independent bureau" within

[1] As just one concrete example, the CFPB coordinated with the States to investigate allegations that Chase Bank USA N.A. and Chase Bankcard Services, Inc. had committed a variety of deceptive and unlawful debt-collection practices for credit cards. This resulted in a joint settlement with the District of Columbia, 47 States, and the CFPB under which Chase agreed to reform those practices, pay $136 million, and cease collection actions against more than 528,000 consumers. *See* Press Release, Office of the Attorney General for the District of Columbia (July 18, 2015), *available at* https://oag.dc.gov/release/chase-bank-change-unlawful-debt-collection-practices-thanks-agreements-state-attorneys.

the Federal Reserve System, itself an independent entity, to regulate consumer financial products and services under federal consumer financial laws. 12 U.S.C. § 5491 (a); *see* S. Rep. No. 111-176, at 9-11.

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

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

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

Fourth, the Act gives the CFPB "primary enforcement authority" among federal agencies authorized to enforce the consumer financial laws with respect to certain covered entities. 12 U.S.C. § 5515(c)(1). Another federal agency may not bring its own enforcement action until 120 days after it recommends that the CFPB bring such action and the CFPB declines to do so. 12 U.S.C. § 5515(c)(2)-(3). In support of its strong enforcement powers, the Act provides the CFPB with independent litigation authority, such that it may "commence a civil action" and "act in its own name and through its own attorneys" in any suit. 12 U.S.C. § 5564(a)-(b).

Congress, of course, did not give the CFPB unbridled discretion, but struck a precise and intentional balance. For example, as mentioned, the President may remove the Director for cause before the end of his or her five-year term. 12 U.S.C. § 5491(c)(3). In addition, the Act directs the Government Accountability Office to conduct annual audits of the CFPB's financial transactions. 12 U.S.C. § 5497(a)(5).

The Act also permits the Financial Stability Oversight Council to set aside a CFPB regulation when it decides, by a two-thirds vote, that the regulation risks certain adverse impacts. 12 U.S.C. § 5513. As designed by Congress, the independence of the CFPB is not only robust but also carefully delineated.

ARGUMENT

I. Congress's Specific Direction In The Consumer Financial Protection Act That The Deputy Director Succeed To The Acting Director Is An Essential Component Of The Act's Comprehensive Scheme Creating An Independent Agency Structure.

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

In contravention of this statutory scheme, the defendants erroneously contend that the President can unilaterally designate another individual—not the Deputy Director—to serve as acting Director for an extended period. They posit that the 1998 Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq*., allows the President to make such a designation. Under this view, the President could select an acting Director who could serve for as long as the Vacancies Reform Act permits—seven months or much longer—but all the while presumably at the President's will. *See* 5 U.S.C. § 3346. Indeed, because defendants have contended that the Vacancies Reform Act is just "one means" of filling the Director's vacancy,[2] the President could choose an acting Director under that act and then select, as another successor, the Deputy Director that the acting Director has appointed. Taken to its logical conclusion, the defendants' interpretation would allow the CFPB to be headed indefinitely by individuals who are effectively just of the President's own choosing. This would not only circumvent the required process for Senate confirmation and the separation-of-powers doctrine, but also violate the Congressionally mandated independence of the agency director.[3]

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

[3] Raising further concerns about the President's ability to undermine the CFPB's independence, President Trump tweeted last week in response to news reports about an ongoing CFPB enforcement action: "Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has

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

The Vacancies Reform Act can and should be harmonized with the Consumer Financial Protection Act to effectuate its provision requiring that the Deputy Director serve as the acting Director. *See* Mot. for Prelim. Inj. 7-11. But if the two acts cannot be harmonized, the Consumer Financial Protection Act's successor provision must

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incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating!" https://twitter.com/realDonaldTrump/status/939152197090148352.

prevail. Not only is it the more recent enactment, but it is the more specific one. It is "a commonplace of statutory construction that the specific governs the general." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015). Notably, this principle is "particularly true" where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id.*; *accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

That precisely describes the situation here. Congress enacted a comprehensive scheme to ensure the CFPB's independence. It did not simply declare the CFPB independent and leave unresolved the bounds of that independence. Instead, the Consumer Financial Protection Act has numerous, detailed provisions that create a high degree of agency independence, while still striking a balance that carefully delineates its scope. As a direct response to the 2008 financial crisis, the establishment of the CFPB as an independent agency was a "specific solution" to "specific problems" of utmost national importance. By contrast, the Vacancies Reform Act was a statute enacted well before the devastating financial crisis in 2008, at a time when the CFPB was not even in existence. It would be unreasonable to conclude that, on the present question concerning the agency's structure and independence, such a statute would prevail over the act that created the CFPB to target the regulatory failures underlying that crisis. Such a conclusion would impermissibly

allow a general statute to fundamentally undermine Congress' comprehensive legislative solution to a critically important issue.

CONCLUSION

This Court should grant the motion for a preliminary injunction.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Acting Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

/s/ Christina Okereke
CHRISTINA OKEREKE
Assistant Attorney General

Office of the Attorney General
441 4th Street, NW, Suite 630S
Washington, D.C. 20001
(202) 727-5173
christina.okereke@dc.gov

MATTHEW P. DENN
Attorney General
State of Delaware
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

DOUGLAS S. CHIN
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

TOM MILLER
Attorney General
State of Iowa
1305 East Walnut Street
Des Moines, IA 50319

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

ERIC SCHNEIDERMAN
Attorney General
State of New York
120 Broadway, 25th Floor
New York, NY 10271

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, v. DONALD J. TRUMP and JOHN M. MULVANEY, Defendants.	Civil Action No. 17-9536 (PGG)

MOTION OF PETER CONTI-BROWN FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Amicus curiae respectfully moves for leave to file the attached brief in support of the Plaintiff's motion for a preliminary injunction. In support of this motion, they state:

1. Amicus Peter Conti-Brown is an assistant professor at the Wharton School of the University of Pennsylvania. He is a scholar of the structure, history, and evolution of financial regulatory institutions, including especially the U.S. Federal Reserve System. The interest of amicus is the sound development of laws relating to financial regulation. He offers no opinion on defendant John Michael Mulvaney as an individual or Mr. Mulvaney's perspective on consumer finance law or policy, and offers no opinion on the Consumer Financial Protection Bureau's institutional design beyond the legislative requirement of "independence" and its status within the Federal Reserve System.

2. This Court has "broad discretion" to allow third parties to file *amicus curiae* briefs. *Auto. Club of N.Y. v. Port Auth. of N.Y. and N.J.*, No. 11-6746, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011). "The filing of an *amicus* brief should be permitted if it will assist the judge 'by

presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.'" *Northern Mariana Islands v. United States*, No. 08-1572, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) (quoting *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)). Courts have permitted third parties to participate as *amici curiae* when they "are of aid to the court and offer insights not available from the parties," *United States v. El-Gabrowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994), and when they have "relevant expertise and a stated concern for the issues at stake in [the] case," *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011). "The primary role of the *amicus* is to assist the Court in reaching the right decision in a case affected with the interest of the general public." *Russell v. Bd. of Plumbing Examiners*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999).

3. The proposed, attached *amicus curiae* brief plainly satisfies these standards. In purporting to designate an acting Director of the CFPB, President Trump has cited the general authority that Congress has given to presidents under the Federal Vacancies Reform Act ("FVRA"), Pub. L. No. 105-277 § 151, 112 Stat. 2681 (1998), to temporarily fill vacant executive offices. In support of that position, the Defendants argue that the FVRA allows the President to select an acting Director of the CFPB in the event of a vacancy. *See* Defs.' Opp'n to Pl.'s Mot. for a TRO at 9-14, *English v. Trump*, No. 17-2534 (D.D.C. Nov. 27, 2017). As a historian and scholar of financial regulatory institutions, *amicus* is well positioned to explain why, even if the FVRA applies to the director of the CFPB, the President's decision to appoint an executive official to act as the Bureau's director eliminates the independence that Congress has required for the Bureau. *Amicus* is also particularly well positioned to discuss how this precedent may impact other institutions, especially the Federal Deposit Insurance Corporation and the U.S. Federal Reserve System, and the several legal alternatives available to the President.

4. Counsel for the Plaintiff and counsel for the Defendants have consented to the filing

of this brief.

For the foregoing reasons, leave to file the attached *amicus curiae* brief should be granted.

A proposed order is enclosed with this motion.

Respectfully submitted,

Dated: December 14, 2017

/s/ Anna Benvenutti Hoffmann
Nick Brustin
Anna Benvenutti Hoffmann
NEUFELD SCHECK & BRUSTIN, LLP
99 Hudson St, 8th Floor
New York, N.Y. 10013
(202) 965-9081
anna@nsbcivilrights.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: December 14, 2017

s/ Anna Benvenutti Hoffmann
NEUFELD SCHECK & BRUSTIN, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 965-9081
anna@nsbcivilrights.com

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LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, v. DONALD J. TRUMP and JOHN M. MULVANEY, Defendants.	Civil Action No. 17-9536 (PGG)

AMICUS BRIEF OF PETER CONTI-BROWN IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF AMICUS

Amicus Peter Conti-Brown is an assistant professor at the Wharton School of the University of Pennsylvania. He is a scholar of the structure, history, and evolution of financial regulatory institutions, including especially the U.S. Federal Reserve System. The interest of amicus is the sound development of laws relating to financial regulation. He offers no opinion on defendant John Michael Mulvaney as an individual or Mr. Mulvaney's perspective on consumer finance law or policy, and offers no opinion on the Consumer Financial Protection Bureau's institutional design beyond the legislative requirement of "independence" and its status within the Federal Reserve System.

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

SUMMARY OF ARGUMENT

Although the primary statutory question the parties dispute involves the Federal Vacancies Reform Act (FVRA) and its relationship to the Wall Street Reform and Consumer Protection Act (Dodd-Frank), this case in fact hinges on a different question. Congress established the Consumer Financial Protection Bureau (CFPB) as an independent bureau within the Federal Reserve System. Even if the FVRA applies to the director of the CFPB, President Donald J. Trump's decision to appoint a White House official to act as the Bureau's director eliminates the independence that Congress has required for that Bureau. The CFPB is today an executive bureau within the White House, in plain contravention of the statute. The President has many other options to avoid the illegality of Mr. Mulvaney's appointment, including by naming

a permanent director who will be subject to a public vetting and Senate confirmation. If the court interprets the "independence" required by statute to allow a White House official to direct every aspect of the CFPB's policies, the independence of other institutions, including especially the Federal Deposit Insurance Corporation and the U.S. Federal Reserve System, will face substantial threat.

ARGUMENT

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

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

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

I explain this argument in five brief parts. First, I explain the statutory framework as Congress developed it with respect to the CFPB. This part also discusses the statutory relationship between the CFPB and the Office of Management and Budget that Mr. Mulvaney continues to lead. Second, I discuss the law and scholarship associated with independence and

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

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

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

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

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

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

Although bipartisan efforts broke down, the Bureau structure remained. What Congress finally created and President Barack Obama signed into law was a guarantee: "There is established in the Federal Reserve System an independent bureau to be known as the 'Bureau of Consumer Financial Protection." 12 U.S.C. § 5491. The point for that structural innovation was not to put the new Bureau under the thumb of the Federal Reserve. The Fed would not have control over the new Bureau's budget, although that budget would originate with the Fed's own financial portfolio and would be determined by the CFPB Director subject to statutory limits. Nor would the Fed have any formal authority over the appointment of its personnel. The idea was to establish the bureau on its own footing, but with a connection to an institution known for its expertise and insulation from partisan politics. Indeed, that connection away from political meddling made it unpopular for some Senators from both parties.[3]

It is important to emphasize how tenuous the connection between the CFPB and the Fed has become in practice, exactly as envisioned by Congress. Besides the budget already mentioned, the Fed and CFPB share an inspector general: nothing more. The CFPB is placed within the Fed

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

not to increase the relationship between the entities, but to create a legal mandate aimed at changing public perceptions and, therefore, presidential behavior. The expectation of independence that the Fed enjoys largely by tradition is extended to the CFPB. This tenuous connection only highlights the CFPB's insulation, and how easily replaced the Fed is as the overarching administrative umbrella for the CFPB.

That connection has now been displaced by the purported appointment of Mr. Mulvaney as the Bureau's acting director. The White House now can dictate the CFPB's budget, since the director issues its budget request to the Federal Reserve System. The White House can dictate personnel decisions within the Bureau, as the Director has done.[4] The White House can control regulatory decisions, as it indeed has already done.[5] And the White House can control enforcement decisions, as it indeed has already done.[6]

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

The illegality of Mr. Mulvaney's appointment is even more apparent given the specific relationship—or lack of relationship—that Congress created between the Bureau and the Office

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[4] Andrew Restuccia, "Mulvaney imposes temporary hiring, regulations freeze on CFPB," Politico, November 27, 2017, available at https://www.politico.com/story/2017/11/27/mulvaney-hiring-freeze-consumer-protections-192306
[5] *Id*.
[6] Patrick Rucker and Pete Schroeder, "Wells Fargo sanctions on ice under Trump official – sources," Reuters, December 7, 2017, available at https://www.reuters.com/article/us-usa-trump-wells-fargo-exclusive/exclusive-wells-fargo-sanctions-are-on-ice-under-trump-official-sources-idUSKBN1E12Y5?il=0

of Management and Budget. In announcing how the CFPB would handle its budgetary and financial management, Congress announced a rule of construction in 12 U.S.C. § 5497(a)(4)(E). It is worth quoting in full:

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

It is difficult to imagine clearer statutory text than this. Not only does the CFPB Director have no obligation to consult with the OMB Director, the OMB has no jurisdiction or oversight over the affairs or operations of the Bureau. This provision provides even more flesh to the bones of independence that Congress required for the Bureau. It is to be independent of the White House—including the Office of Management and Budget. The White House has engaged in a rule of construction, in a sense, that puts the OMB in direct "oversight over the affairs or operations of the Bureau." *Id*.

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

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

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

Congress has mandated CFPB independence, but what "independence" means is often an elusive concept as a matter of political and historical practice. The idea that there should be administrative agencies as something other than the alter ego of the President is nearly as old as the U.S. Republic.[8] The U.S. Constitution itself outlines some kind of separation by creating "executive Departments" that are separate from the Presidency. U.S. Constitution Article 2, § 2. As a matter of law, however, the concept of "independence" is something very specific. As Harvard Law Professor Jacob Gersen has noted, agency independence is a "legal term of art in public law, referring to agencies headed by officials that the President may not remove without

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

cause. Such agencies are, by definition, independent agencies; all other agencies are not."[9] Thus, "agency independence" is not concerned with "independence" in some kind of colloquial sense, of pure autonomy with no possibility of outside interference. The question is only the President's ability to directly control the agency's agenda through top personnel.

Scholars have documented the removability focus in administrative law's historical development,[10] but the doctrinal gist is simple. Congress may not require the President to seek Senate advice and consent prior to firing an agency head, as the "reasonable construction of the Constitution" would forbid that kind of blending of legislative and executive functions. *Myers v. United States*, 272 U.S. 52, 116, 176 (1926). But Congress may condition presidential removal of an agency head to a more limited range of causes, depending on the nature of the office in question. For offices that are created to "perform . . . specified duties as a legislative or as a judicial aid," the Court deemed removability conditions on agency heads constitutionally permissible. *Humphrey's Executor*, 295 U.S. 602, 627-28 (1935). So too for lower-level executive appointees like the independent counsel, *Morrison v. Olson*, 487 U.S. 654 (1988), but not if the agency head and the lower-level appointee are both deemed to be protected by for-cause removability protection. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).

As a matter of black-letter law, then, agency independence has a laser-like focus on the relationship between the president and the head of the agency in question. Criticizing this narrow focus on personnel control has become something of a boom industry for scholars of

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

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

administration in the last decade. For example, the personnel focus looks at the wrong mechanisms of independence,[11] creates meaningless distinctions between executive and independent agencies,[12] is focused on the wrong problems[13] and the wrong parties,[14] reflects a misunderstanding of how the administrative state actually functions,[15] elides ways in which the President controls independent agencies beyond removability,[16] and gives to courts review of decisions that are fundamentally incompatible with judicial review.[17]

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

III. Independence is guaranteed by law, but implemented by norm and tradition. President Trump's appointment of Mr. Mulvaney risks a substantial assault on

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[11] *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 631-37 (2010).
[12] Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769 (2013).
[13] *See* Barkow, *supra* note 10.
[14] M. Elizabeth Magill and Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L. J. 1032 (2011).
[15] Jody Freeman and Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. (2012).
[16] Bressman and Thompson, *supra* note 11.
[17] Huq, *supra* note 10.
[18] PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016).

the norms of independence for other entities like the U.S. Federal Reserve System and the Federal Deposit Insurance Corporation.

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

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

nation's largest banks. The FDIC exercises staggering governmental authority over individual private actors.

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

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

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

The President's decision also directly influences the independence of the U.S. Federal Reserve System. The Fed's Board of Governors is not subject to the FVRA, so the precise issue of an interim director is not relevant. But for both the CFPB and the Fed, the question of *how* independence will be maintained is up for grabs. Indeed, while the Fed is sometimes held as the

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

paragon of independence, most of that "independence" comes not from legal guarantees but from tradition. The CFPB is on even stronger statutory footing: there is no parallel guarantee of "independence" in the Federal Reserve Act. The term is only used in reference to auditing requirements. *See, e.g.*, 12 U.S.C. § 225(b).[20]

President Trump, like presidents before him, has already attempted to push the Fed's independence to outer boundaries.[21] The CFPB is formally a part of the Federal Reserve System. If the President succeeds in eliminating the CFPB's independence through the temporary appointment of Mr. Mulvaney—despite the legislative guarantee of that independence—it will embolden him to violate the norms and traditions that insulate the Fed from partisan politics in other ways.

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

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

The most obvious choices would be the four currently serving Governors on the Fed's Board of Governors: Lael Brainard, Jerome Powell, Randal Quarles, or Janet Yellen. They are individuals "who serve[] in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate," as required by the FVRA. 5 U.S.C.

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[20] Peter Conti-Brown, The Power and Independence of the Federal Reserve (2016).
[21] Peter Conti-Brown, "Does the New Fed Governor Serve at the Pleasure of the President?" Yale Journal on Regulation Notice and Comment Blog, October 17, 2017, available at http://yalejreg.com/nc/does-the-new-fed-governor-serve-at-the-pleasure-of-the-president/.

§ 3345. Given the CFPB's formal status within the Federal Reserve System, a member of the Fed's Board of Governors is the most logical choice. Indeed, the Senate only recently confirmed Randal Quarles, President Trump's nominee to the Fed's Board of Governors as Vice Chair for Supervision. The Vice Chair for Supervision is also a new position created under Dodd-Frank and one anticipated to have an enormous influence on the way financial regulation and supervision are conducted.[22] He presumably passes muster with President Trump given the recent nomination and would pose none of the concerns raised by Mr. Mulvaney's appointment, even if his regulatory and supervisory priorities are likely to differ from a CFPB director appointed by Barack Obama.

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

The reason to insist on the preservation of the CFPB's independence from White House personnel is not to privilege one partisan agenda over another. Randal Quarles, Jerome Powell, Thomas Hoenig (Vice Chair of the FDIC), or Joseph Otting (Comptroller of the Currency) are all Republicans. The point is to prevent the administration of the CFPB's and FDIC's extraordinary powers from becoming, in appearance or in fact, the tools of political operatives who would reward their friends or penalize their enemies.

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

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

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

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

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

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

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

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

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

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

Requiring the President to honor the law and maintain the CFPB's independence is in fact *more* consistent with public accountability, not less. It is often asserted that independence and accountability exist on a kind of continuum, such that more of one results, reciprocally, in less of another. This is not so. Independence is about relationships among diverse individual and

institutional actors. We can have more independence for the CFPB to do the work Congress has instructed it to do and more accountability to Congress and the people for the choices the Bureau makes. Allowing President Trump to violate the law with respect to the CFPB's independence creates less of an opportunity for public input, exercised through public representatives in the U.S. Senate.

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

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

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

CONCLUSION

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

Dated: December 14, 2017

By /s/ Anna Benvenutti Hoffmann

Nick J. Brustin
Anna Benvenutti Hoffmann
NEUFELD SCHECK & BRUSTIN, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 965-9081
anna@nsbcivilrights.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, Anna Benvenutti Hoffmann, hereby certify that on December 14, 2017, I filed the foregoing AMICUS BRIEF OF PETER CONTI-BROWN IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION using the court's electronic filing system, causing it to be served on all counsel of record.

Dated: December 14, 2017

By /s/ Anna Benvenutti Hoffmann
NEUFELD SCHECK & BRUSTIN, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 965-9081
anna@nsbcivilrights.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, v. DONALD J. TRUMP and JOHN M. MULVANEY, Defendants.	Civil Action No. 17-9536 (PGG)

ORDER

Upon consideration of the motion of Peter Conti-Brown for leave to file his proposed *amicus curiae* brief in support of the Plaintiff, it is hereby

ORDERED that the motion is GRANTED.

Dated:_______________ ________________________________

Paul G. Gardephe
United States District Judge