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Brief of Amici Curiae Consumer Financial Regulation Scholars in Support of Plaintiff-Appellant, English v. Trump, No. 18-5007 (D.C. Cir.)

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In The

United States Court of Appeals for the District of Columbia Circuit

No. 18-5007

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

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

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

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

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

STATEMENT REGARDING CONSENT TO FILE AND AUTHORSHIP

All parties have consented to the filing of this brief.

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

TABLE OF CONTENTS

I. INTERESTS OF *AMICI CURIAE* AND SUMMARY OF THE ARGUMENT 1

II. ARGUMENT 3

A. The Text, Structure, Purpose, and Legislative History of the Dodd-Frank Act Show That It Provides the Exclusive Mechanism for the Succession of the Acting CFPB Director 3

1. "Shall" Means "Shall": Congress Unambiguously Mandated an Exclusive Succession Line for CFPB Director in the Dodd-Frank Act 3

2. Congress Rejected the Application of the FVRA to CFPB Director Succession, as the Legislative History Shows 3

3. The Dodd-Frank Act's CFPB Director Succession Provision is Key to the Agency Independence That Congress Ordained 4

a. Congress Designed the Bureau to Insulate It from Political Pressure 5

i. Independent Agency Status 7

ii. Term and Tenure of the CFPB Director 7

iii. Organizational Situs 9

iv. Independent Funding 10

v. Limitations on Executive Oversight 11

b. The Dodd-Frank Act's Directorship Succession Provision Is Critical to the CFPB's Independence 13

B. The FVRA Does Not Afford an Alternative Way of Appointing an Acting CFPB Director 14

1. When a Later Statute Expressly Mandates an Acting Officer, as the Dodd-Frank Act Does, the FVRA Does Not Apply 14

2. The FVRA Does Not Apply to Later Statutes that Expressly Mandate a Line of Succession 18

a. The Legislative History States That the FVRA Cannot Be Used to Fill a Vacancy If a Later Statute Expressly Mandates Another Mechanism 18

b. A Past Congress Cannot Bind a Future Congress 21

C. Appointment of the Sitting OMB Director as Acting CFPB Director Violates the CFPB Independence Mandated by Congress 23

III. CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Great N. Ry. Co. v. United States, 208 U.S. 452 (1908) 22

Hooks v. Kitsap Tenant Support Services, 186 F.3d 550 (9th Cir. 2016) 21

Lockhart v. United States, 546 U.S. 142 (2005) 16

Marcello v. *Bonds,* 349 U.S. 302 (1955) 15, 16

PHH Corp. v. Consumer Financial Protection Bureau, No. 15-1177, slip op. (D.C. Cir. Jan. 31, 2018) (en banc) 4, 5, 7, 8, 9, 10

Shannon v. United States, 512 U.S. 573 (1994) 20

Shoemaker v. United States, 147 U.S. 282 (1893) 23

United States v. Shull, 793 F. Supp. 2d 1048 (S.D. Ohio 2011) 22

Weiss v. United States, 510 U.S. 163 (1994) 23

Statutes and Regulations

5 U.S.C. § 3345(a) 1

5 U.S.C. § 3345(a)(1). 16, 17

5 U.S.C. § 3345(a)(1)-(a)(2) 17

5 U.S.C. § 3347. . . . . 14, 15, 16, 18, 19, 20

12 U.S.C. § 1. 9

12 U.S.C. § 5491(a) 7, 9, 17, 24

12 U.S.C. § 5491(b)(2) 7, 13

12 U.S.C. § 5491(b)(5) 17

12 U.S.C. § 5491(b)(5)(B) 1, 3

12 U.S.C. § 5491(c)(1) 7

12 U.S.C. § 5491(c)(3) 8

12 U.S.C. § 5492(c)(2) 10

12 U.S.C. § 5492(c)(3) 10

12 U.S. C. § 5492(c)(4) 24

12 U.S.C. § 5493(c)(4) 12

12 U.S.C. § 5497(a)(1)-(a)(2) 11

12 U.S.C. § 5497(a)(4)(A) 12

12 U.S.C. § 5497(a)(4)(E) 12, 24

12 U.S.C. § 5511(a) 23

31 U.S.C. § 321(c) 9

31 U.S.C. § 501. 23

31 U.S.C. § 505 25

44 U.S.C. § 3502(5) 13

Legislative Materials

Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) 1

Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. (2010) 4

S. Rep. 105-250 (1998) 20

S. Rep. No. 111-176 (2010) 5, 11

Statement of Senator Cardin, *Wall Street Reform and Consumer Protection Act—Conference Report*, Cong. Rec. S5870 (July 15, 2010) 5

Statement of Senator Kaufman, *Wall Street Reform and Consumer Protection Act—Conference Report*, Cong. Rec. S5870 (July 15, 2010) 5

Executive Branch and Other Administrative Materials

Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121 (2003) 21

Authority of the President to Name an Acting Attorney General, 31 Op. O.L.C. 208 (2007) 21

Executive Order 12866: Regulatory Planning and Review, 58 Fed. Reg. 51735 (1993) 12, 13, 25

Letter to Janet L. Yellen from Mick Mulvaney (Jan. 17, 2018), http://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf 24, 25

Memorandum from Mick Mulvaney (Jan. 23, 2018), http://bit.ly/2DZELLC . . . 25

Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i), *Consumer Financial Protection Bureau v. Golden Valley Lending, Inc., et al.*, Civil Case No. 2:17-cv-02521-JAR-JPO (D. Kan. Jan. 18, 2018) 27

The White House, *OMB Offices*, http://bit.ly/2B14gdL. 25

Tweet by @realDonald Trump, 7:18am, Dec. 8, 2017, http://bit.ly/2jv1m6u 26, 27

Other Authorities

KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2011) 6

THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011) 6

Yuka Hayashi, *New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, WALL ST. J., Dec. 5, 2017 26

Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 ANN. REV. BANKING & FIN. SERV. L. 321 (2013) 6

Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991 (2014) 6

Ian McKendry, *Mulvaney's first days at CFPB: payday, personnel and a prank,* AM. BANKER, Dec. 4, 2017 25

Renae Merle, *Consumer protection bureau changes direction, will reconsider rule that sets stricter limits on payday lending*, WASH. POST, Jan. 16, 2018 . . . 26

Renae Merle, *Dueling officials spend chaotic day vying to lead federal consumer watchdog*, WASH. POST, Nov. 27, 2017 23

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Mick Mulvaney, News Conference, C-SPAN, Nov. 27, 2017, http://cs.pn/2AxVT65 . . . . 24, 26

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

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

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

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

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

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

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

II. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i. Independent Agency Status

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

ii. Term and Tenure of the CFPB Director

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

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

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

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

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

iii. Organizational Situs

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

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

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

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

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

iv. Independent Funding

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

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

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

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

v. Limitations on Executive Oversight

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

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

12 U.S.C. § 5493(c)(4).

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

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

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

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

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

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

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

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

In Section 3347, the FVRA states that it is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency … for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—(1) a statutory provision expressly—…(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity…" 5 U.S.C. § 3347(a)(1). The Dodd-Frank Act's CPFB successorship provision is exactly such "a statutory provision expressly…designat[ing] an officer or employee to perform the functions and duties of [the CFPB Director] temporarily in an acting capacity." Consequently, the FVRA, by its express terms, does not apply to the CFPB Directorship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. A Past Congress Cannot Bind a Future Congress

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

III. Conclusion

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

Respectfully submitted,

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APPENIDX

APPENDIX A: LIST OF *AMICI CURIAE*

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

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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.

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF REGARDING SEPARATE BRIEF

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

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CERTIFICATE OF SERVICE

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

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