[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]

No. 18-5007

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

LEANDRA ENGLISH,

Plaintiff-Appellant,

v.

DONALD J. TRUMP and JOHN M. MULVANEY,

Defendants-Appellees.

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

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

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

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

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

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

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

CORPORATE DISCLOSURE STATEMENT

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

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

II. RULINGS UNDER REVIEW

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

III. RELATED CASES

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

Dated: February 6, 2018

By: /s/ Elizabeth B. Wydra
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GLOSSARY

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

STATUTES AND REGULATIONS

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

INTEREST OF *AMICI CURIAE*

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

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

SUMMARY OF ARGUMENT

A centerpiece of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was the establishment of the Consumer Financial Protection Bureau ("CFPB"), an independent agency led by a single Director and focused exclusively on protecting consumers from harmful financial practices. When drafting this legislation, Congress knew that it could, if it wished, empower the President to designate an acting Director of the Bureau in the absence of a Director. It knew, for example, that it could be silent on the matter, allowing the default rules of the Federal Vacancies Reform Act ("FVRA"), Pub. L. No. 105-277 § 151, 112 Stat. 2681 (1998), to govern the vacancy. It also knew that it could specify explicitly that a vacancy should be filled pursuant to the FVRA; indeed, a draft of what became Dodd-Frank that was passed by the House of Representatives did just that. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). Ultimately, however, Congress rejected those options and decided to take the opposite course—to *foreclose* the application of the FVRA to the Director's position. Adopting the approach of the Senate's bill, Congress omitted the provision incorporating the FVRA and replaced it with a new provision establishing the position of Deputy Director. That new provision specified in unambiguous terms that the CFPB's Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B).

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

CONCLUSION

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

Respectfully submitted,

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APPENDIX:

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CERTIFICATE OF COMPLIANCE

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

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

Executed this 6th day of February, 2018.

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CERTIFICATE OF SERVICE

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

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

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