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
CASE NO. 1:17-CV-2534-TJK (THE HON. TIMOTHY J. KELLY)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

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

I. Parties and Amici Appearing Below

All parties, intervenors and amici curiae appearing before the district court are listed in the appellant's opening brief.

II. Parties and Amici Appearing in this Court

1. Leandra English, *Plaintiff-Appellant*.
2. Donald J. Trump and John M. Mulvaney, *Defendants-Appellees*.
3. Public Citizen, Inc., Americans for Financial Reform, Center for Responsible Lending, Consumer Action, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, National Fair Housing Alliance, Tzedek DC, Inc., and United States Public Interest Research Group Education Fund, Inc., *Amici Curiae*.
4. Consumer Finance Regulation Scholars, *Amici Curiae.*[*]
5. Professor Peter Conti-Brown, *Amicus Curiae.*
6. District of Columbia, and States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, *Amici Curiae*.

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[*] Richard Alderman, Ethan S. Bernstein, Mark E. Budnitz, Prentiss Cox, Benjamin P. Edwards, Kathleen C. Engel, Judith Fox, Robert C. Hockett, Edward Janger, Dalie Jimenez, Adam J. Levitin, Cathy Lesser Mansfield, Nathalie Martin, Patricia A. McCoy, Christopher L. Peterson, Heidi Mandanis Schooner, Norman I. Silber, Jeff Sovern, Jennifer Taub and Arthur E. Wilmarth, Jr.

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

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

9. Current and Former Members of Congress, *Amici Curiae:*

   Beatty, Joyce
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   Brown, Sherrod
   Senator of Ohio

   Capuano, Michael
   E. Representative of Massachusetts

   Cortez Masto,
   Catherine Senator of Nevada

   Delaney, John K.
   Representative of Maryland

   Foster, Bill
   Representative of Illinois

   Frank, Barney
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   Green, Al
   Representative of Texas

   Harkin, Tom
   Former Senator of Iowa

   Heck, Denny
   Representative of Washington

   Hirono, Mazie K.
   Senator of Hawaiʻi

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Menendez, Robert
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Merkley, Jeff
Senator of Oregon

Miller, Brad
Former Representative of North Carolina

Moore, Gwen
Representative of Wisconsin

Pelosi, Nancy
Representative of California

Schatz, Brian
Senator of Hawai'i

Sherman, Brad
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Vargas, Juan
Representative of California

Velázquez, Nydia M.
Representative of New York

Warren, Elizabeth
Senator of Massachusetts

Waters, Maxine
Representative of California

10. 113 Current Members of Congress, *Amici Curiae*

III. Rulings under Review

The rulings under review are stated in the appellant's opening brief.

IV. Related Cases

Related cases are stated in the appellant's opening brief.

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA

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March 6, 2018

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Donald J. Trump,
@realdonaldtrump, Twitter, Dec. 8, 2017, 7:18am, *available at*
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GLOSSARY

CFPB	Consumer Financial Protection Bureau
CIA	Central Intelligence Agency
DNI	Director of National Intelligence
FVRA	Federal Vacancies Reform Act of 1988
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OMB	White House Office of Management and Budget
OLC	Office of Legal Counsel, U.S. Department of Justice

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court recently explained, "Congress's decision to provide the CFPB Director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will." *PHH Corp. v. CFPB*, 881 F.3d 75, 110 (D.C. Cir. 2018) (en banc). The same concerns that led Congress to shield the CFPB's Director from direct presidential control also led it to address vacancies in that office. Specifically, in the Dodd-Frank Act, 12 U.S.C. § 5491(b)(5)(B), Congress created a mandatory succession scheme that would apply when the Director is "absent or unavailable." This scheme plays an integral role in Dodd-Frank's broader structure of independence. It ensures that when a vacancy arises, the Deputy Director takes the helm until the President nominates and the Senate confirms a new Director. Without that rule, presidents could ensure that "leaders of the [bureau]" are "their men" for prolonged periods of time, thus destroying the measure of independence that Congress sought to protect. *PHH*, 881 F.3d at 86.

The defendants disagree with this conclusion. They maintain that the President can name as Acting Director any Senate-confirmed officer based anywhere in the executive branch. This individual can be forced to report directly to the President and can be terminable at will in his main position. While running the CFPB, he can also spend most of his time based in the White House. He can even

preside over another agency that Congress specifically prohibited from exercising undue influence over the CFPB.

The defendants base their position on two untenable readings of Dodd-Frank. First, they seek to drown Dodd-Frank's mandatory text in a sea of statutory presumptions and context. *See* Defs. Br. 17. Only by doing so can they contend that Dodd-Frank does not displace the FVRA. But this effort leads them to an unsupportable account of Dodd-Frank's meaning and purpose. Second, the defendants contend that Dodd-Frank's establishment of the CFPB as "an independent bureau," § 5491(a), is not violated when the President selects a still-serving White House staffer as the Acting Director. *See* Defs. Br. 39. Much like their account of § 5491(b)(5)(B), this interpretation rejects Congress's vision of agency independence.

These errors in the defendants' position confirm that Ms. English is likely to prevail on the merits of her claim. Under Dodd-Frank, Ms. English is lawfully entitled to serve as the Acting Director of the CFPB until the President nominates and the Senate confirms a new Director. Depriving her of her statutory right to function inflicts irreparable injury and is contrary to the public interest.

ARGUMENT

I. Dodd-Frank's succession plan is exclusive and mandatory.

All parties agree that the FVRA creates a broad default rule that authorizes the President to fill vacancies in executive agencies. *See* 5 U.S.C. § 3345(a). All parties also agree that the FVRA usually applies alongside agency-specific statutes that govern succession. *See id.* at § 3347. The dispute here centers on how clearly Congress must speak in order to displace the FVRA. Despite their protestations to the contrary, the defendants ultimately insist that nothing less than magical words will suffice. *See* Defs. Br. 20. But the law does not require talismanic incantations. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). And here, Congress unambiguously commanded that the Deputy Director "*shall* . . . serve as acting Director" in the event of a vacancy. 12 U.S.C. § 5491(b)(5)(B) (emphasis added).

Giving § 5491(b)(5)(B) its natural meaning, "shall" means "shall"—rather than "may"—and Dodd-Frank leaves no doubt about what must happen when the Director resigns. That conclusion is only confirmed by statutory structure and legislative history. By virtue of this direct conflict between the FVRA and Dodd-Frank, "the specific provision [must be] construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Applying that principle, there can be no doubt that Dodd-Frank's mandatory succession plan for a single position in a single agency creates a discrete exception to

the FVRA's broad succession scheme. In arguing otherwise, the defendants commit a series of legal errors that lead them to rewrite the text rather than apply it as written.

A. Section 5491(b)(5)(B) is mandatory and displaces the FVRA through operation of the specific/general canon.

The statutory dispute here hinges largely on whether the term "shall" in § 5491(b)(5)(B) is mandatory or permissive. It is therefore telling that the defendants have almost nothing to say about that question until page 24 of their brief, where they caution against a "myopic" focus on the statutory text at the heart of this appeal. They then discuss a few other cases—none of which they attempt to analogize to this one—where "shall" was read as non-mandatory. *See* Defs. Br. 25–26; *see also* English Br. 25 (agreeing that in circumstances different than those present here, "shall" can be used "in other ways").[1]

This delayed and abbreviated discussion of "shall" departs from the admonition that "in any statutory construction case," courts "start, of course, with the statutory text." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). It also fails to address the "traditional, commonly repeated rule [] that shall is mandatory and may is permissive." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012). Whereas the defendants suggest that the meaning of "shall" is always up for grabs, that is incorrect: there is a powerful presumption that "when the word

[1] The defendants do not defend any of the examples given by the district court to demonstrate that "shall" in § 5491(b)(5)(B) is properly read as "may." *See* JA269.

shall can be reasonably read as mandatory, it *ought to be so read*." *Id.* at 114 (emphasis added); *see also Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). This conclusion is bolstered by a related principle: "[W]hen a statutory provision uses both 'shall' and 'may,' it is a fair inference that the writers intended the ordinary distinction." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (citation omitted). Given that Congress used "shall" ten other times and "may" four times in 12 U.S.C. § 5491—and used each word in its ordinary sense—it must be presumed that Congress's use of "shall" in § 5491(b)(5)(B) reflects a deliberate choice. The defendants simply ignore these established canons of statutory interpretation.[2]

A mandatory reading of "shall" is also consistent with Dodd-Frank's purpose. As this Court recently recognized, "Congress validly decided that the CFPB needed a measure of independence" to achieve its mission. *PHH*, 881 F.3d at 92. To ensure this independence, Congress made a series of careful design choices when it established the agency's funding, location, rulemaking authority, enforcement power, and interactions with OMB. *See* 12 U.S.C. §§ 5491(a), 5497(a), 5497(a)(4)(E), 5512(b), 5515(c). But Congress also knew that these protections would mean nothing if the

[2] In addition, as Ms. English explained in her opening brief, the succession provisions for other agencies show that Congress knows how to make mandatory language yield to an alternative decision by the President. *See* English Br. 28. The defendants' response (at 34) misses the point: Congress treated "shall" as mandatory in a series of analogous agency-specific statutes and deemed it necessary to create an explicit carve-out to preserve the President's appointment discretion.

President could assert direct control over the CFPB's Director. Congress therefore declared that the Director would be removable only "for cause," *id.* § 5491(c)(3), authorized the Director to appoint a Deputy Director, *id.* § 5491(b)(5)(A), and commanded that the Deputy Director "shall serve . . . as acting Director in the absence or unavailability of the Director," *id.* § 5491(b)(5)(B).

Construing § 5491(b)(5)(B) as mandatory thus respects the harmony of Congress's statutory plan. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). As current and former members of Congress explain in their amicus brief (at 23), "to ensure that the Bureau would continue to enjoy independence even in the event of a vacancy . . . Congress also chose to designate the officer who would serve as acting Director." Given that Congress devoted extraordinary attention to the CFPB's independence from direct presidential control, it is unsurprising that Congress anticipated and addressed vacancies in the Director position. Indeed, it would have been an astonishing oversight for Congress to draft Dodd-Frank in a manner that could effectively destroy the agency's independence during vacancies.

Yet that is what the defendants suggest. If accepted, their position "would erode the Bureau's independence and undermine [the] statutory plan by allowing a President to fill a vacancy . . . 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." *Id.* at 25. The defendants do not even attempt to explain how this outcome

is consistent with Dodd-Frank's architecture of agency independence—much of which hinges on the Director position. Instead, they remain conspicuously silent on the subject of how their interpretation accords with Dodd-Frank's structure.

Dodd-Frank's legislative history also supports a mandatory reading of "shall": whereas the House passed a bill that lacked a Deputy Director position but incorporated the FVRA, the final version deleted any reference to the FVRA and instead created the Deputy position. *See* Congress Br. 26–27. The defendants suggest (at 21) that the House bill invoked the FVRA only to "clarify" that it *would* apply while the agency had a single director (whereas it *would not* apply after the CFPB converted to a multi-member commission). But this explanation is hard to credit, as there was no lack of clarity. Under the House bill, before the CFPB converted from a single-person directorship, there would have been no conceivable basis for thinking that the single director was exempt from the FVRA under § 3349c's exemption for officers appointed to commissions with multiple members. The only reason for the House to cite the FVRA was to confirm that it would apply to the CFPB's single director, even though the FVRA generally does not apply to independent agencies. It is therefore significant that Congress ultimately stripped out that language and instead added a mandatory succession plan for vacancies.

In short, Dodd-Frank's text, structure, and history leave no doubt that § 5491(b)(5)(B) creates a mandatory succession plan. As a result, there is no avoiding

the conclusion that § 5491(b)(5)(B) would conflict with the FVRA if both were to control. While courts properly seek to read statutes in harmony, they will "not distort the plain meaning of a statute in an attempt to make it consistent with [other laws]." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). Here, Dodd-Frank and the FVRA are properly harmonized through the canon that "a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980); *see also* Scalia & Garner, *Reading Law*, at 185 ("The principle behind the general/specific canon [is that] the two provisions . . . can exist in harmony.").

The defendants say that the FVRA is the more specific statute. But the FVRA was enacted long before Dodd-Frank and provides a series of default rules for filling many kinds of vacancies across the entire executive branch. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938 (2017). In contrast, Dodd-Frank established a single succession plan aimed at a single vacancy in a single agency, and is plainly more specific. *See RadLAX Gateway Hotel*, 566 U.S. at 645 (applying the general/specific canon where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions"). The defendants seek to evade that conclusion by emphasizing that § 5491(b)(5)(B) addresses "absence or unavailability," rather than "vacancies." *See* Defs. Br. 27. But as Ms. English has explained, this argument rests on two errors: first, "absence or unavailability" necessarily includes vacancies; and

second, the question whether § 5491(b)(5)(B) covers vacancies precedes the other issues in this case and must be resolved at the very outset. *See* English Br. 20–22.

Dodd-Frank's displacement of the FVRA is confirmed by a related interpretive principle: in the event of an apparent conflict between two laws, "the later of the two enactments prevails over the earlier." *Kappus v. Comm'r*, 337 F.3d 1053, 1057 (D.C. Cir. 2003). As the Supreme Court has explained, a "more recent and specific" law "would apply were [it] to conflict with [an older] statute." *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998). Here, Dodd-Frank was passed by a Congress that was aware of the existing FVRA process and nonetheless decided to create an exclusive succession plan.

The defendants, however, maintain that the presumption against implied repeals—rather than the general/specific canon—should control. In their view, that presumption requires the court to rewrite "shall" as "may." But this argument goes awry at the very first step. Where two statutes conflict as to a single application, the more specific provision does not repeal the general rule, but rather "is treated as an exception to [it]." Scalia & Garner, *Reading Law*, at 183. Even though Ms. English's opening brief cited (at 35) a half-dozen cases applying that principle, the defendants do not address them. Instead, they rely (at 21–22) on dicta from a footnote in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007), the irrelevance of which Ms. English has already explained (at 36 n.5).

B. The defendants offer no good reason to read "shall" as permissive in § 5491(b)(5)(B).

The defendants offer three arguments why "shall" should be read as "may." *First*, they assert (at 13–21) that the FVRA's exclusivity provision and Dodd-Frank's agency-creation clause effectively create a magical-words requirement for displacing the FVRA. *Second*, relying almost entirely on agency-specific statutes passed before the FVRA, they contend (at 28–35) that "shall" generally does not displace the FVRA. Finally, the defendants argue (at 35–39) that "shall" must be interpreted as "may" based on policy reasons and constitutional concerns. None of these arguments withstands scrutiny.

1. The FVRA's exclusivity provision and Dodd-Frank's agency-creation clause

Rather than turn directly to the meaning of "shall" in § 5491(b)(5)(B), the defendants open by analyzing two other provisions: the FVRA's exclusivity provision, 5 U.S.C. § 3347, and Dodd-Frank's agency-creation clause, 12 U.S.C. § 5591(a). The defendants contend that these statutes serve as context that transforms the natural meaning of "shall," and overcomes the overlapping textual, structural, purposive, and legislative indications that the ordinary meaning applies in § 5491(b)(5)(B). Although context matters, it must be approached with "great wariness lest . . . attempted interpretation of legislation become[] legislation itself." *Burwell*, 135 S. Ct. at 2495–96. The defendants cross that line here.

First consider the FVRA's exclusivity provision. The FVRA is usually exclusive, but it applies alongside (not in lieu of) enumerated classes of agency-specific succession statutes. *See* 5 U.S.C. § 3347(a). The FVRA also identifies circumstances under which it does not apply at all. *See id.* § 3349c. From these premises, the defendants infer (at 14) a "critical flaw" in Ms. English's position: "Had Congress wanted to make the FVRA inapplicable to offices for which an office-specific statute designated an acting official, it would have listed such statutes in Section 3349c, not Section 3347." Yet Ms. English has not advanced the broad proposition about the FVRA attributed to her by the defendants. The only question she has raised is whether the particular text and structure of Dodd-Frank reveal that Congress meant to establish a mandatory-succession scheme, thereby displacing the FVRA with respect to a single office. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress."). The fact that a magic-words exception for the CFPB was not added to § 3349c does not answer that question, which turns on the meaning of relevant provisions of Dodd-Frank.[3] And in assessing why Congress used "shall" in § 5491(b)(5)(B), it is most logical to

[3] The defendants also rely on *Hooks v. Kitsap Tenant Support Services,*, 816 F.3d 550 (9th Cir. 2016). But *Hooks* addressed *permissive* language in the National Labor Relations Act, whereas Dodd-Frank uses a *mandatory* term. While it's true that *Hooks* didn't focus on the NLRA's language, that's because there was no serious argument that the NLRA displaced the FVRA. The only question there—which is undisputed here—concerned run-of-the-mill operation of the FVRA alongside agency-specific succession statutes. *See* 816 F.3d at 555–63. *Hooks* thus has little bearing here.

believe that Congress chose a mandatory term because it aimed to displace the FVRA, not to describe an optional alternative to it.

The defendants also place heavy reliance on § 5591(a), Dodd-Frank's agency-creation clause. As they read it, the final sentence of that clause requires the CFPB to satisfy an exceptionally demanding magical-words requirement to depart from any federal law involving "contracts, property, works, officers, employees, budgets, or funds." § 5591(a). Nowhere do the defendants respond to Ms. English's explanation of the mischief this would produce. *See* English Br. 31–33. Instead, they argue (at 18–19) that § 5491(b)(5)(B) does not qualify as an "express" statement about Director "vacancies," since it refers only to an "absence or unavailability."

In making this argument, the defendants twist themselves in knots. On the one hand, it is now the official position of the United States that § 5491(b)(5)(B) covers vacancies. The defendants would therefore allow a Deputy Director to become Acting Director and exercise the powers of the office in the event of a vacancy. *See* JA133 (OLC opinion). On the other hand, the defendants simultaneously insist that there is *just* enough ambiguity in their own position to conclude that § 5591(a) does not "expressly" address vacancies. Respectfully, that is a distinction only a lawyer could love. And it is a distinction that no lexicographer would accept: given their ordinary meaning, the terms "absence" and "unavailability" plainly encompass a vacancy, in which the Director can aptly be described as "not existing," "lacking,"

or "not available." *See* English Br. 20–21. Any doubt is dispelled by statutory structure and legislative history, which confirm that Congress sought to address periods of vacancy—and did not limit § 5491(b)(5)(B) to non-vacancy circumstances in which the CFPB lacks a present, available Director.

Simply put, Congress sought to achieve a particular goal when it enacted § 5491(b)(5)(B): protecting the CFPB's independence from direct presidential control even when the Senate-confirmed Director was not at the helm. Refusing to effectuate Congress's plan on the ground that it did not use magical words—even though it *did* use mandatory words—would constitute an unwarranted triumph of formalism over common sense.

2. The use of "shall" in other succession provisions

As a fallback, the defendants argue that Congress would have understood "shall" as permissive when it enacted Dodd-Frank because the FVRA had previously been interpreted to apply alongside other agency-specific statutes that also use "shall" in their succession provisions. *See* Defs. Br. 28–33. But nearly all the statutory provisions cited by the defendants pre-date the FVRA. *See* Defs. Br. 28–30, n.4 & n.5. Congress is free to undo or amend its past acts. *See Newton v. Mahoning County Com'rs*, 100 U.S. 548, 559 (1879); *Lockhart v. United States*, 546 U.S. 142, 147–48 (2005) (Scalia, J., concurring). And that is what Congress did when it enacted the FVRA in 1998: it reviewed the landscape of agency-specific statutes, as well as executive and judicial

interpretations of those statutes, and decided to alter the status quo by enacting an all-encompassing statute to govern agency vacancies. *See SW Gen.*, 137 S. Ct. at 935–37.

As the accompanying Senate Report made clear, Congress specifically intended that the FVRA would apply alongside extant agency-specific statutes, "some of [which] may have been passed without knowledge" of the Vacancies Act. *See* S. 2176, 105th Cong. at 17 (July 15, 1998); *see also id.* ("[E]ven with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the [FVRA] would continue to provide an alternative procedure for temporarily filling the office.").[4] Put differently, for all pre-FVRA statutes, Congress made a judgment that mandatory terms would not displace the FVRA.

It does not follow, however, that the use of "shall" in laws enacted *after* the FVRA is subject to the same qualification. Just as Congress could globally amend and displace extant succession statutes by passing the FVRA, so can Congress create discrete exceptions to the FVRA in subsequent legislation. *See, e.g.*, *Lockhart*, 546 U.S.

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[4] The defendants assert that "Congress considered, but did not ultimately enact, a version of Section 3347 that would have preserved only extant office-specific statutes." Defs. Br. 17. This is incorrect. The Senate Report accompanying that version of Section 3347 stated explicitly that Congress expected the FVRA to apply alongside extant office-specific statutes. *See* S. 2176, 105th Cong. at 16–17 (July 15, 1998). Thus, Congress never believed that the FVRA would affect only agencies created in the future. Instead, Congress focused primarily on extant laws and made clear that the FVRA applied to them.

at 147 (Scalia, J., concurring). Indeed, given Congress's awareness of the FVRA, its use of categorical, mandatory language in a post-FVRA statute would strongly suggest a desire to displace—not supplement—the default rule for agency succession. While this would mean that "shall" is permissive in pre-FVRA statutes and mandatory in post-FVRA statutes, "in law as in life . . . the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." (citation omitted)).[5]

This fundamental distinction between pre- and post-FVRA statutes almost entirely resolves the defendants' parade of horribles. *See* Defs. Br. 28–33.[6] The

[5] The defendants thus err in arguing that "shall" must be read uniformly across all agency-succession statutes, without regard to when they were enacted or their broader statutory structure. *See* Defs. Br. 24–25 (relying on *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 759 n.2 (1989), which held that language should be read uniformly across a series of similar fee-shifting statutes that were deliberately patterned on each other).

[6] The defendants suggest (at 33) that their position is rooted in OLC's "well-established precedent regarding the intersection of office-specific vacancy statutes with the FVRA." That claim suffers from a touch of puffery: neither of the OLC opinions that they cite addressed mandatory language in the agency-specific statute,

defendants identify only three positions subject to post-FVRA succession provisions that use the word "shall": Director of the CFPB, § 5491(b)(5)(B); Director of National Intelligence (DNI), 50 U.S.C. § 3026(a)(6); and Director of the CIA, 50 U.S.C. § 3037(b)(2). As this case makes clear, there is no one-size-fits-all answer to whether "shall" is mandatory in all three of these post-FVRA statutes. That question can be answered only through an analysis of each statute's text, structure, and legislative history. While there is a presumption that "shall" is mandatory, presumptions can be rebutted. *See* Scalia & Garner, *Reading Law*, at 112. Here, however, all relevant principles confirm that Dodd-Frank creates a mandatory succession plan.[7]

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and neither OLC opinion addressed an agency-specific succession provision enacted after the FVRA.

[7] To our knowledge, no binding judicial or executive branch authority squarely addresses whether the President may rely on the FVRA to appoint an acting DNI or CIA director. The defendants contend (at 36) that Ms. English's position would conflict with President Obama's succession plan for the DNI. *See Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence*, 78 Fed. Reg. 59, 159 (Sept. 20, 2013). Not so. Citing § 3026(a), President Obama's plan stated: "This memorandum shall not supersede the authority of the Principal Deputy Director of National Intelligence to act for, and exercise the powers of, the DNI . . . during a vacancy in the position of the DNI." *Id*. Consistent with that limitation, the "Order of Succession" addressed only who would succeed the Director "during any period in which the DNI *and the Principal Deputy Director of National Intelligence* have died, resigned, or otherwise become unable to perform the functions and duties of the DNI." *Id*. (emphasis added). If it were to be determined that "shall" in § 3026(a)(6) is mandatory, that conclusion would not conflict with the order of succession.

3. Policy considerations and constitutional concerns

The defendants conclude by asserting that Ms. English's position raises "serious practical consequences and constitutional concerns." Defs. Br. 35. Many of these policy arguments, however, are simply misplaced—and the remainder reflect an unbalanced accounting of constitutional values.

The main "practical consequence[]" identified by the defendants is the risk of confusion regarding vacancies that arise under pre-FVRA statutes. *See* Defs. Br. 35–36. But as we have already explained, that concern is illusory. This leaves only the question whether § 5491(b)(5)(B) precludes the President from naming an Acting Director under the FVRA even when there is no Deputy Director. *See* Defs. Br. 35–37. In a word, *no*. The only reference to an "acting Director" of the CFPB appears in § 5491(b)(5)(B), which states that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." When there is no Deputy Director, this provision cannot be triggered and thus cannot displace operation of the FVRA. Nothing about the text or structure of Dodd-Frank suggests that Congress has required a headless agency in that scenario.

Anticipating this argument, the defendants contend that it cannot be accepted because it fails to protect the CFPB's independence. According to them, the President could immediately fire the Deputy Director (serving as Acting Director) and then appoint a new Acting Director under the FVRA. *See* Defs. Br. 38. But this

rejoinder assumes—incorrectly—that the Acting Director is not shielded by Dodd-Frank's for-cause removal provision. *See* 12 U.S.C. § 5491(c)(3). Although this provision refers to the "Director," not the "Acting Director," that is entirely characteristic of the statutory scheme: the *only* reference to an "acting Director" in all of Dodd-Frank is § 5491(b)(5)(B). The clear implication is that the "acting Director" is expected to step into the shoes of the "Director," and to enjoy all of the powers, duties, and protections afforded to whoever holds that position. This includes protection against removal without cause under § 5491(c)(3).

Finally, the defendants contend that this case raises constitutional concerns and warns that Ms. English's position "threatens to undermine the President's ability to ensure the faithful execution of the law." Defs. Br. 39. This part of the defendants' brief does not cite any precedent. That is unsurprising. As Ms. English explained in her opening brief—without any direct response from the defendants—there is no authority for the proposition that the President's duties are meaningfully impaired when the head of an independent agency leaves before his term expires and the President is required to obtain Senate confirmation before making his mark on the agency. *See* English Br. 41–42. This is a run-of-the-mill occurrence at independent agencies with multi-member boards, and it is consistent with the fundamental premise of agency independence from direct presidential control. *See PHH*, 881 F.3d at 78–80.

If anything, separation-of-powers concerns cut against the defendants' position. The FVRA and the Deputy Director provision of Dodd-Frank were both enacted to limit "the manipulation of official appointments." *Freytag v. CIR*, 501 U.S. 868, 883 (1991). The FVRA protects Congress's advice-and-consent prerogatives under Article II, *see SW Gen.*, 137 S. Ct. at 935–37, while Dodd-Frank guards the CFPB from becoming subject to presidential command during vacancies, *see PHH*, 881 F.3d at 93–102. The defendants' position would eviscerate both objectives. On their view, the President could appoint a political loyalist as Acting Director under the FVRA and then use a series of FVRA appointments to control the agency. Or, instead, he could appoint an Acting Director and have that individual appoint a loyal Deputy Director, who would then serve as Acting Director indefinitely under § 5491(b)(5)(B).

The defendants thus ask this Court to read the FVRA and Dodd-Frank in a manner that defeats both of their constitutionally-grounded objectives, all in service to maximizing direct presidential control over an independent agency. This is not a reasonable account of how Dodd-Frank and the FVRA interact. The more natural reading of Dodd-Frank—consistent with its text, structure, and legislative history—is that Congress meant what it said when it used "shall" in § 5491(b)(5)(B).

II. The President's appointment of Mr. Mulvaney is separately foreclosed by Dodd-Frank's requirement of independence.

As Ms. English explained in her opening brief (at 42-47), the President's attempt to appoint his still-serving White House budget director as the CFPB's

Acting Director independently violates Dodd-Frank's requirement that the CFPB operate as "an independent bureau." 12 U.S.C. § 5491(a). The defendants largely choose not to respond to Ms. English's statutory independence argument. Instead, they note, correctly, that Dodd-Frank does not explicitly forbid the OMB Director from serving as Director of the CFPB (or as Acting Director). *See* Defs. Br. 39–42. They also note, again correctly, that Dodd-Frank contains many other specific provisions designed to implement Congress's vision of agency independence. *See id.* On this basis, they dismiss Ms. English's position as "atextual." *See id.*

But that assertion is mistaken. Dodd-Frank unambiguously establishes the CFPB as an "independent bureau." § 5491(a). This statutory language is not mere window dressing. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute."). It affirmatively requires that the CFPB function at all times in accordance with well-settled rules of agency independence. And no such rule is more fundamental than the requirement that the President not directly control the agency's operations by virtue of unfettered authority to select, oversee, and fire its leadership. *See PHH*, 881 F.3d at 85–96; *see also* Conti-Brown Br. 11 ("As a matter of black-letter law, then, agency independence has a laser-like focus on the relationship between the president and the head of the agency in question.").

In interpreting Dodd-Frank's textual requirement of independence, the Court must respect this plain meaning, informed by Dodd-Frank's statutory plan and settled historical practice. The fact that the CFPB is designed to be independent in many other particular respects only heightens the importance of ensuring that the agency's head is herself independent. Otherwise, the CFPB's multi-layered defense system against direct presidential control will serve only to maximize the agency's dependence on presidential will and whim.

The President violated the statutory limitation set forth in § 5491(a) by appointing Mr. Mulvaney, who reports directly to the President and is terminable at will in his capacity as Director of OMB. It is no exaggeration to say that this appointment transformed the CFPB from an "independent bureau" into an executive department of the White House. Indeed, the President has already purported to exercise direct control over the CFPB in a pending enforcement action against Wells Fargo Bank. *See* Donald J. Trump, @realdonaldtrump, Twitter, Dec. 8, 2017, 7:18am, *available at* https://perma.cc/PUG5-SABU. If "independence" here means anything, it means independence from "presidential will." *PHH*, 881 F.3d at 110. And there is hardly a better illustration of an impermissible exercise of presidential will than the President's direction of specific enforcement actions via Twitter.

Especially given the long tradition of political independence among financial regulators—and given the walls that Dodd-Frank erected between OMB and the CFPB—the President's selection of Mr. Mulvaney offends § 5491(a). At a minimum, Congress's insistence on independence must be read to reflect the principle, long ago established by the Supreme Court, that "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Whatever the merits of Mr. Mulvaney's appointment as a policy matter, the defendants do not explain how he can be "depended upon to maintain" the "attitude of independence" that Congress required while at the same time serving in the White House, at the pleasure of the President.

III. Assuming that Ms. English is likely to succeed on the merits, equitable factors weigh in favor of preliminary injunctive relief.

On the remaining preliminary-injunction factors, the defendants hold fast to their position: Even assuming that Ms. English is lawfully the CFPB's Acting Director—and Mr. Mulvaney is not—Mr. Mulvaney should nonetheless be allowed to remain in control of this independent federal agency. The defendants' position, in other words, is that the equities somehow favor the usurper over the rightful officeholder. That counterintuitive stance would serve neither the agency, nor the

public, nor the plaintiff in this case. And it would subject every action that Mr. Mulvaney takes in office to challenge and presumptive invalidation.[8]

In an effort to defend this upside-down approach, the defendants principally seek refuge in precedents concerning run-of-the-mill "government employment" actions, in which injunctive relief is generally unavailable because money damages are available down the road. *See* Defs. Br. 42–49. This framing lets the defendants invoke the general rule that, in government-personnel cases, "the [g]overnment has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson v. Murray*, 415 U.S. 61, 83 (1974).

But this is no everyday employment dispute. The question in this case is who gets to claim the mantle of "the government." Ms. English isn't complaining about "loss of earnings" or "damage to reputation." *Id.* at 89. Instead, she is asking this Court to decide who is lawfully in charge of an independent federal agency. The

[8] At the end of their brief (at 49), the defendants argue that preliminary relief is "inappropriate" under the de-facto-officer doctrine because Ms. English hasn't brought a quo warranto action under District of Columbia law. But this Court has "rejected the traditional version of the de facto officer doctrine," and the "Supreme Court has limited the doctrine, declining to apply it when reviewing Appointments Clause challenges and important statutory defects." *SW Gen. v. N.L.R.B.*, 796 F.3d 67, 81 (D.C. Cir. 2015). The doctrine's modern form encourages the enforcement of "legal norms concerning appointments and eligibility to hold office" by permitting timely challenges with adequate notice, and this Court has recognized that "quo warranto is too cumbersome" for these goals. *Id.* There is no doubt that Ms. English acted promptly and notified the defendants. Her case is not barred by the de-facto-officer doctrine.

defendants argue that the answer doesn't matter now—that even if Ms. English ultimately prevails, she will find her house just as she left it.

They base this contention on their observations that the position of Acting Director "will not evaporate absent an injunction," and "it is far from clear that a new Director will be confirmed before a final judgment is reached in this case." Defs. Br. 45. But that argument misapprehends both the nature of Ms. English's injury and the very concept of irreparable harm. The position of Acting Director—which Ms. English is entitled to hold by virtue of the Dodd-Frank Act's mandatory succession plan—exists only for the finite term between the resignation of Mr. Cordray and the confirmation of his successor. This period gets shorter every day, and no "compensatory or other corrective relief" will be able to restore Ms. English's foregone days in office. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The defendants' vague gesturing (at 46) toward "a declaratory judgment" or "[f]urther necessary or proper relief" only highlights the problems with conceiving of any relief that would be satisfactory after this case ends.

The defendants criticize Ms. English for relying on the most analogous case: one that also involved a federal official seeking a preliminary injunction to prevent the President from removing her from the head of an independent agency. *See Berry v. Reagan*, 1983 WL 538 (D.D.C. Nov. 14, 1983). But the defendants don't themselves identify any other case that's remotely in the ballpark of our admittedly unusual

situation—much less any precedent that undermines *Berry*'s holding that a government official in charge of an agency may invoke "the deprivation of their statutory right to function" as an injury worthy of preliminary relief. *Id.* at *5.

Nor do the defendants offer a persuasive account of why the public interest would benefit from denying this office to its rightful occupant, while allowing a usurper to remain. As Ms. English's opening brief explains (at 50–52), there is an urgent need for clarity here. If Mr. Mulvaney continues to run the agency under a cloud of legal uncertainty, it would put in doubt every action taken by the Bureau in the meantime. *See, e.g.*, *F.E.C. v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). One prominent banking-industry lawyer, for example, has publicly declared that he is "very reluctant to enter into any kind of agreement with the CFPB right now because I can't be assured that the director has authority." English Br. 52. The "overriding public interest" in "the general importance of an agency's faithful adherence to its statutory mandate," *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977), is not served by allowing this uncertainty to fester.

CONCLUSION

For the foregoing reasons, Ms. English respectfully requests that the decision of the District Court be reversed, and that this Court enter an order instructing the District Court to grant Ms. English's request for a preliminary injunction.

Respectfully submitted,

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

I hereby certify that my word processing program, Microsoft Word, counted 6,349 words in the foregoing brief, exclusive of the portions excluded by Rule 32(f).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2018, I electronically filed the foregoing reply brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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