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

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

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiff's direct attack on the President's designation of Mr. Mulvaney to serve temporarily as Acting CFPB Director under the FVRA fails both on threshold grounds and on the merits. Defendants respectfully request that the Complaint be dismissed.

The case should be dismissed at the outset because Plaintiff has failed to carry its burden to establish standing. Plaintiff's claim that every CFPB-regulated entity would have standing to bring this case finds no support in Supreme Court precedent or in the law of this circuit; it rests largely on a lone D.C. Circuit opinion, which Plaintiff misreads in a manner that is inconsistent with later D.C. Circuit case law. Although Plaintiff tries to shore up its standing argument by asserting that the CFPB caused Plaintiff a cognizable injury on December 21, 2017, when it issued a statement concerning implementation of the Home Mortgage Disclosure Act (HMDA), this new theory also fails. Even if post-Complaint developments establish standing, Plaintiff misunderstands the agency's statement, offers an impermissibly speculative and attenuated theory of injury, and cannot establish standing based on how the CFPB exercises its enforcement discretion against third parties.

Plaintiff's claims are barred for a second reason as well. Because the federal quo warranto statute bars Plaintiff's direct attack on Mr. Mulvaney's designation, Plaintiff must wait to raise its claims in a collateral attack on some particular final agency action taken by the CFPB under Mr. Mulvaney. Plaintiff's response on this point confuses the distinct requirements for direct attacks such as Plaintiff's (governed by the quo warranto statute) and collateral attacks (governed by the de facto officer doctrine). No authority supports Plaintiff's invitation to ignore the mandatory quo warranto statute, and the prudential and constitutional problems raised by Plaintiff's direct action against the President counsel in favor of enforcing that law.

On the merits, Plaintiff's mantra-like repetition of "'shall' means 'shall'" does not suffice to resolve this case. Statutes must be read in context. The relevant context for § 5491(b)(5) includes the existence of the generally applicable FVRA; the preexisting understanding of how the FVRA (and the Vacancies Act before it) interact with office-specific statutes like § 5491(b)(5); and

§ 5491(a)'s instruction that statutes like the FVRA apply to the CFPB absent an express provision to the contrary. With this context in mind, the FVRA and Dodd-Frank should be read to operate alongside each other, each offering alternative means of identifying an Acting CFPB Director, without Dodd-Frank impliedly repealing the FVRA. In short, the FVRA's procedures were available to the President, and he lawfully exercised his authority to designate Mr. Mulvaney as Acting CFPB Director. None of Plaintiff's challenges to that conclusion are sound, so its Complaint would fail on the merits even if its claims were properly before this Court.

ARGUMENT

I. PLAINTIFF HAS FAILED TO ESTABLISH STANDING.

Although Plaintiff defers standing to the end of its brief, the Court must determine whether Article III standing exists before addressing any of the other issues in this case, *see, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), and it is Plaintiff's burden to establish that it meets this jurisdictional requirement, *see, e.g.*, *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). Plaintiff has not done so.

As an initial matter, Plaintiff has abandoned any argument that it has standing to sue on behalf of its members. Plaintiff cannot satisfy any of the requirements for associational standing, and, in particular, has entirely failed to establish that Mr. Mulvaney's designation as Acting CFPB Director is causing any cognizable Article III injury to Plaintiff's members. Def. Br. at 13-15.

Plaintiff instead doubles down on its claim (footnoted in its opening brief) that it has standing merely because it is regulated by the CFPB, Pl. Opp. at 20-24, and introduces a new argument that it has standing because of an action taken by the CFPB since Plaintiff filed its Complaint, *id.* at 24-28. Both contentions are meritless.

A. Plaintiff's Status as a Regulated Entity Does Not Suffice for Standing.

Plaintiff still offers no controlling authority in support of its contention that its status as a regulated entity, without more, satisfies standing requirements. Plaintiff instead relies on cherry-picked language in two out-of-circuit cases, neither of which stands for the broad proposition

Plaintiff advances here, and neither of which is the law in the Second Circuit.

The isolated sentences that Plaintiff pulls from *State National Bank of Big Spring v. Lew*, Pl. Opp. at 20-22, must be understood in their context. *See* Def. Br. at 10-11. The D.C. Circuit did not hold that the bank had standing to challenge Mr. Cordray's appointment merely because the bank was regulated by the Bureau. Rather, the court concluded that a particular regulatory action by the CPFB under Mr. Cordray's direction had "cause[d] [the bank] to incur costs," which it would not incur if it were to prevail on its claims. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015). The bank could satisfy Article III's injury, causation, and redressability requirements because prevailing on the merits would allow it to avoid these costs, not merely because it was a regulated entity. *See id.*

Indeed, that is how the district court read the D.C. Circuit's decision on remand, and the D.C. Circuit reaffirmed this understanding of Article III's requirements approximately two years later in *John Doe Co. v. CFPB*, 849 F.3d 1129, 1132 n.1 (D.C. Cir. 2017). As Plaintiff admits in a footnote, Pl. Opp. at 25 n.1, on remand in *State National Bank*, the district court understood the D.C. Circuit to have held that the bank's "Remittance Rule compliance costs create[d] standing to challenge both the Bureau's constitutionality and Director Cordray's recess appointment." *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 181 (D.D.C. 2016). And in *John Doe*, the court rejected a regulated entity's contention that it had standing to challenge the structure of the CFPB where the plaintiff's only claimed injury was that it had received a non-self-executing Civil Investigative Demand from the CFPB. 849 F.3d at 1130-32.

Plaintiff's attempts to explain away *John Doe* fall flat. To be sure, *John Doe* applied an abuse-of-discretion standard of review, Pl. Opp. at 23, but within the abuse-of-discretion framework, legal issues—including standing—are reviewed de novo. *See In re Navy Chaplaincy*, 697 F.3d 1171, 1175, 1178 (D.C. Cir. 2012). And the fact that the district court denied preliminary injunctive relief on multiple grounds, including that the plaintiff should have raised its claim in a different forum, Pl. Opp. at 23, does not change the substance of the D.C. Circuit's standing analysis. Nor does the fact that the author of *State National Bank* dissented in *John Doe* from the majority's reading of the court's prior holding. *See id.* at 23-24.

Likewise, Plaintiff cannot distinguish *John Doe* on the ground that it "objects to a host of regulatory measures taken by the CFPB under Mr. Mulvaney[]." *Id.* at 23. *John Doe* should not be read to suggest that mere "objection" to a policy is enough to establish standing. Article III requires that a party's "objection" be directed at an agency action that causes it a cognizable injury that would be redressed by judicial relief. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992). Those standards may be satisfied in the context of pre-enforcement challenges to agency rules, *see* Pl. Opp. at 23, where the plaintiff faces a "Hobson's choice" between incurring the costs of complying with an allegedly unlawful regulation and risking penalties for non-compliance in order to obtain judicial review. *See, e.g.*, *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 695 (D.C. Cir. 2015). But a regulated entity that does not face such a choice cannot establish standing based on ideological objections to the manner in which an agency regulates third parties.

Plaintiff's only other case is a district court decision granting a preliminary injunction that was stayed pending appeal. *See Olympic Fed. Savs. & Loan Ass'n v. Dir., Office of Thrift Supervision ("OTS")*, 732 F. Supp. 1183 (D.D.C.), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990) (noting prior stay). Setting aside the weight that such an opinion should carry, the plaintiff in *Olympic* did not merely claim that the Director of OTS had been unlawfully appointed, but rather alleged that it was injured because it faced the appointment by OTS of a receiver or conservator with the power to liquidate it. *Id.* at 1185, 1188. Moreover, in *Olympic*, only the redressability element of standing was at issue, and the court did not hold that the plaintiff's mere status as a regulated entity would be sufficient to establish injury in fact. *See id.* at 1188-89.

Thus, the non-controlling cases cited by Plaintiff stand only for the proposition that a regulated entity has standing to challenge the appointment of an agency's director when it alleges a concrete and particularized injury that stems from its regulation by the agency under that director and that would likely be redressed by a favorable decision. The fact that Plaintiff is subject to CFPB rules generally would not confer standing. Plaintiff must have a concrete and particularized injury caused by actions taken by the CFPB under Mr. Mulvaney's direction.

B. The Bureau's HMDA Statement Does Not Give Plaintiff Standing.

Apparently seeking to shore up its standing argument, Plaintiff now attempts to add a new allegation of injury, asserting that it is harmed by a recent CFPB statement concerning HMDA implementation. Pl. Opp. at 24-28.[1] Specifically, Plaintiff points to a December 21, 2017, statement that offered guidance regarding the CFPB's implementation of a 2015 HMDA rule requiring collection and reporting of additional mortgage information by financial institutions beginning on January 1, 2018, and that advised the public that the CFPB intends to engage in a rulemaking to reconsider aspects of the rule. *Id.* at 25; Supp. Levy Decl. Ex. A (ECF No. 36) ("HMDA Statement"). This argument has no more merit than Plaintiff's original standing theory.

At the outset, standing must be determined "on the facts *as they exist when the complaint is filed*." *Defs. of Wildlife*, 504 U.S. at 569 n.4. The HMDA Statement was issued 16 days after Plaintiff filed suit. Plaintiff cannot cure its lack of standing when the Complaint was filed with allegations of such post-Complaint events.

In any case, Plaintiff does not identify any cognizable injury stemming from the HMDA Statement. As an initial matter, Plaintiff misunderstands this announcement, and mischaracterizes its substance. The HMDA Statement related to a rule imposing certain new reporting requirements, which was first published in 2015, 80 Fed. Reg. 66,128 (Oct. 28, 2015), and then was tweaked and clarified in a rule promulgated in September 2017, 82 Fed. Reg. 43,088 (Sept. 13, 2017). Most of these changes went into effect on January 1, 2018. 80 Fed. Reg. at 66,128; 82 Fed. Reg. at 43,088. The HMDA Statement announced two policies regarding the implementation of those changes and also announced the Bureau's intent to engage in a rulemaking to reconsider various aspects of the 2015 HMDA rule. *See* HMDA Statement. Neither policy announced on December 21 changes the obligation of entities supervised by the Bureau to comply with the HMDA and its implementing regulation. The first policy addresses the circumstances in which entities supervised by the Bureau will be required to resubmit HMDA data that they collect in 2018 and submit in 2019, advising

[1] Plaintiff also alleges other actions by the CFPB, Pl. Opp. at 24-25, but does not identify any cognizable injury stemming from these alleged acts.

that the CFPB will require such entities to resubmit their data only if the errors are "material." HMDA Statement. The second policy announced on December 21 is that the CFPB does not intend to assess penalties for errors in data collected in 2018 and reported in 2019. *Id.* But lack of penalties does not mean errors will go unaddressed. As the statement specifically notes, the CFPB's examination of 2018 HMDA data will be "diagnostic"—that is, the Bureau will work with entities to identify and fix problems. *See id.* And the statement says nothing about the Bureau's intent to assess penalties in future years. Thus, contrary to Plaintiff's contention, the policies reflected in the recent HMDA Statement do not "effectively gut the HMDA rules." Pl. Opp. at 26.

Even setting aside this fundamental misreading, however, Plaintiff's new theories of injury do not withstand scrutiny. Plaintiff's first theory is that, due to the planned suspension of penalty assessments for errors in data collected in 2018 and reported in 2019, a series of future events will lead to third-party entities making fewer deposits at the Credit Union. But courts have long held that no standing exists "where a complainant challenges only an Executive Branch decision not to impose costs or penalties upon some third party." *Branton v. FCC*, 993 F.2d 906, 910–11 (D.C. Cir. 1993); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998).

Here, moreover, Plaintiff does not allege that the CFPB even has made any such decision with respect to any particular entity. Rather, it argues that it is injured by a statement that merely identifies the agency's present intent. Plaintiff's argument appears to be that if the CFPB does not impose penalties for "errors" in HMDA data collected in 2018 and reported in 2019, the banks that are currently making below-market deposits at the Credit Union will start falsifying their HMDA records—in violation of federal law—and rely on that erroneous data to demonstrate Community Reinvestment Act ("CRA") compliance, enabling them to reduce their deposits with the Credit Union. Pl. Opp. at 26-27. To call such an assertion speculative would be generous.

By the same token, Plaintiff's theory not only depends on speculated future actions of unspecified third parties, but assumes that those third parties will act in violation of the law. *See id.* Plaintiff cites no authority suggesting that such a theory satisfies Article III standing requirements. Indeed, the governing precedent precludes any such finding. *See Clapper v. Amnesty*

Int'l USA, 568 U.S. 398, 410 (2013) (theory of standing that "relie[d] on a highly attenuated chain of possibilities" did "not satisfy the requirement that threatened injury must be certainly impending"); *see also id.* at 414 (declining to abandon the Supreme Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

In addition, while Plaintiff prefaces this attenuated theory of financial injury by suggesting that it need not demonstrate a "pocketbook injury" for standing, and asserting that it is not required to "desire *less burdensome* regulations" to advance "its corporate mission of improving economic opportunity in NYC neighborhoods and underserved communities," Pl. Opp. at 26, it identifies no concrete and particularized "non-pocketbook" injury to this mission caused by the announcement regarding the CFPB's implementation of the 2015 HMDA regulations.

Plaintiff's second theory of injury based on the HMDA Statement is that it has standing because the HMDA Statement creates "uncertainty" about the fate of the HMDA regulation in some future rulemaking. Pl. Opp. at 27. But Defendants have already explained why such uncertainty is not an Article III injury, Def. Br. at 11-12, and Plaintiff points to no cases holding that uncertainty based on the prospect of future regulatory changes constitutes a cognizable injury. Such a holding would be inconsistent with the requirement that the plaintiff's injury be concrete and particularized. *See Defs. of Wildlife*, 504 U.S. at 560. Plaintiff cannot rely on its speculation regarding the fate of the rule to avoid this requirement. *See Clapper*, 568 U.S. at 410. Indeed, "[a] plaintiff generally lacks standing to challenge a document that . . . is 'merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings,'" even where such a document, unlike the HMDA Statement, sets forth the substance of that prospective policy. *Nat'l Multi Hous. Council v. Jackson*, 539 F. Supp. 2d 425, 431 (D.D.C. 2008) (quoting *Utility Air Regulatory Grp. v. EPA*, 320 F.3d 272, 278 (D.C. Cir. 2003)). Plaintiff also fails to explain how relief from this Court, which would not limit the CFPB's future rulemaking discretion, could resolve any uncertainty. None of the cases cited by Plaintiff (Opp. at 28) found standing based on a plaintiff's inability to predict future regulatory changes.

Finally, to the extent Plaintiff now seeks to collaterally attack Mr. Mulvaney's designation by challenging the HMDA Statement, it faces an additional bar: Any such challenge would be governed by the Administrative Procedure Act (APA), which limits judicial review to "final agency action." 5 U.S.C. § 704. To be "final," an action "must mark the 'consummation' of the agency's decisionmaking process" and "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The HMDA Statement does not qualify because it merely offers guidance on how the CFPB plans to exercise its enforcement discretion and informs the public of its intent to initiate future rulemaking proceedings. *See, e.g.*, *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 809 (D.C. Cir. 2006); *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015). Thus, Plaintiff has no cause of action under the APA, and has still cannot identify any other statute that provides a cause of action. *See* Def. Br. at 15 n.2.[2]

II. STATUTORY, PRUDENTIAL, AND CONSTITUTIONAL CONSIDERATIONS ALSO SUPPORT DISMISSAL ON THRESHOLD GROUNDS.

Plaintiff's case also must be dismissed because Plaintiff cannot satisfy the requirements of the quo warranto statute, which provides the sole means for launching a "direct attack" on the authority of another person to perform the duties of a federal office. Def. Br. at 35. The quo warranto statute would *not*, however, bar Plaintiff from raising the same claims that Plaintiff raises here in a subsequent "collateral attack" on a specific action taken by the CFPB under Mr. Mulvaney. *Id.* at 36. By requiring Plaintiff to challenge a specific agency action, dismissing Plaintiff's complaint under the quo warranto statute also would make it unnecessary to consider the significant issues raised by Plaintiff's demand for relief against the President himself. *See id.*

First, it is undisputed that Plaintiff cannot satisfy the requirements of the federal quo warranto statute. And because the quo warranto statute provides the sole avenue for direct

[2] "[W]hether the APA's 'final agency action' requirement, 5 U.S.C. § 704, is jurisdictional is an open question" in this circuit. *6801 Realty Co., LLC v. USCIS*, --- F. App'x ---, 2018 WL 258791, at *1 n.1 (2d Cir. Jan. 2, 2018) (summary order) (quoting *Sharkey v. Quarantillo*, 541 F.3d 75, 87-88 (2d Cir. 2008)). But it is at least "a question of 'statutory standing' that permits 'resolving the case on threshold, non-merits grounds.'" *Id.*

challenges to the authority of another person to perform the duties of a federal office, Plaintiff's direct challenge to Mr. Mulvaney's designation as Acting CFPB Director should be dismissed.

Plaintiff largely ignores the quo warranto statute and instead discusses the de facto officer doctrine, which Defendants' brief does not mention. *See* Pl. Opp. at 15-17. That response misses the mark. In attempting to side-step the quo warranto issue in this manner, Plaintiff elides a critical distinction between "direct" and "collateral" attacks on an official's authority.

As explained in passages of *SW General* that Plaintiff overlooks, the de facto officer doctrine, in its traditional form, barred only *collateral* attacks: challenges to "government *action* on the ground that the officials who took the action were improperly in office." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015) (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984)). The de facto officer doctrine never barred direct attacks—challenges to "the *qualifications* of the officer, rather than the actions taken by the officer," *id.* (quoting *Andrade*, 729 F.2d at 1496)—although direct attacks could "be brought via writ of quo warranto only." *Id.* (citing *Andrade*, 729 F.2d at 1496-97).

Courts have limited the de facto officer doctrine, as Plaintiff notes, but they have done so by relaxing the judicially developed restrictions on *collateral* attacks, not by ignoring the statutory requirements for *direct* attacks. The Supreme Court did not "reject[]" a "*quo warranto* defense" in *Ryder v. United States*, as Plaintiff claims. Pl. Opp. at 16. The quo warranto statute was not at issue—and not even mentioned by the Court—because *Ryder* involved a *collateral* attack. *See* 515 U.S. 177, 179 (1995) ("Petitioner . . . challenges his conviction by a court-martial."). Similarly, the D.C. Circuit has "rejected the traditional version of the de facto officer doctrine" by holding that "*collateral attacks* on an official's authority are permissible when two requirements are satisfied," *SW Gen.*, 796 F.3d at 81 (citing *Andrade*, 729 F.2d at 1498-99)—not by ignoring the quo warranto statute, which continues to govern direct attacks. *See, e.g.*, *Sibley v. Obama*, 866 F. Supp. 2d 17, 20 (D.D.C. 2012), *aff'd*, No. 12-5198, 2012 WL 6603088, at *1 (D.C. Cir. Dec. 6, 2012). None of the cases limiting the de facto officer doctrine have altered the quo warranto statute's requirements for direct attacks like Plaintiff's.[3]

Thus, whether Plaintiff can satisfy the D.C. Circuit's two requirements for *collateral* attacks, *see* Pl. Opp. at 16-17, is of no moment when Plaintiff has launched a *direct* attack on Mr. Mulvaney's designation as Acting CFPB Director. The de facto officer doctrine may pose no obstacle to appropriate subsequent collateral attacks on specific actions taken by Mr. Mulvaney as Acting Director, *see* Def.'s Br. at 36, but the quo warranto statute bars Plaintiff's direct attack.[4]

Second, dismissing Plaintiff's direct challenge to Mr. Mulvaney's designation would leave open the possibility of a future collateral challenge if Plaintiff is aggrieved by final agency action taken under Mr. Mulvaney. Such an APA action would not raise the prudential and constitutional concerns presented by Plaintiff's current demand for relief against the President directly.

Plaintiff attempts to brush aside these concerns as "highly formalistic" in light of courts' ability to issue relief against subordinate executive officers, Pl. Opp. at 19, but "[t]he reasons why courts should be hesitant to grant such relief [against the President himself] are painfully obvious." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). The Supreme Court spoke clearly in *Mississippi v. Johnson* when it said that courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." 71 U.S. (4 Wall.) 475, 501 (1866). In *Franklin v. Massachusetts*, five Justices revisited and agreed with this point "in general," and without dissent on this issue, emphasized that such relief would be "extraordinary, and should have raised judicial eyebrows." 505 U.S. 788, 802-03 (1992) (plurality); *id.* at 826 (Scalia, J., concurring); *see also id.* at 807-23 (Stevens, J., concurring). Yet Plaintiff ignores *Franklin* altogether.

Moreover, Plaintiff believes that its alleged "injury may be at least partially remedied by

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[3] In much the same way, Plaintiff's observation (Opp. at 15-16) that the D.C. Circuit did not address the quo warranto statute in *State National Bank* overlooks the procedural posture of *State National Bank*: an appeal from an order granting a motion to dismiss for lack of subject matter jurisdiction on Article III standing and ripeness grounds. The D.C. Circuit's unsurprising silence regarding the non-jurisdictional requirements of the quo warranto statute in such an appeal sheds no light on the statute's relevance here.

[4] To the extent Plaintiff seeks to void the agency's HMDA statement, rather than Mr. Mulvaney's designation itself, that belated collateral challenge is not properly before the Court.

an injunction against" someone other than the President. Pl. Opp. at 18. Plaintiff seeks relief against the President directly only because the President "could illegally attempt to appoint another Acting Director under the FVRA." *Id.* Plaintiff's speculation about an event that has not occurred, and which it offers no basis to believe is imminent, provides no basis for such extraordinary relief. *Cf. Swan*, 100 F.3d at 976–81 & nn.1–2. In fact, one of Plaintiff's own cases rejects Plaintiff's contention (Opp. at 18) that an injunction against the President is necessary when the validity of a Presidential appointment or removal is at issue. *See Swan*, 100 F.3d at 979.

In any event, the Court would not need to consider these issues if it were to dismiss Plaintiff's Complaint under the quo warranto statute, leaving Plaintiff to challenge Mr. Mulvaney's designation in a later collateral attack on a specific CFPB action, if appropriate.

III. PLAINTIFF'S COMPLAINT FAILS ON THE MERITS.

Even if Plaintiff's Complaint did not suffer from these threshold defects, it would still fail on the merits. In designating Mr. Mulvaney to serve as Acting CFPB Director, the President lawfully exercised his authority under the FVRA, which, on its face, applies to the CFPB Director. *See* Def. Br. at 16-18. The Dodd-Frank Act does not supersede the President's authority under the FVRA. *Id.* at 18-30. Rather, § 5491(b)(5) operates alongside the FVRA—providing an alternative way to identify an Acting Director—just as other office-specific statutes supplement the FVRA rather than superseding it. *Id.* at 19-22. Section 5491 makes explicit that statutes (like the FVRA) dealing with federal officers apply to the CFPB, except as otherwise provided expressly. 12 U.S.C. § 5491(a). Dodd-Frank's statement that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director," *id.* § 5491(b)(5), does not demonstrate "clear and manifest" intent to repeal the FVRA by implication, *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995), and does not contain the kind of "expressly" contrary statement that § 5491(a) requires. Finally, there is no legal basis for Plaintiff's argument that Mr. Mulvaney is not among those eligible for designation to serve as Acting CFPB Director under the FVRA, *see* Def. Br. at 31-32, and Plaintiff's Appointments Clause challenge fails with its statutory arguments, *id.* at 33-34.

A. The FVRA Applies on Its Face.

The FVRA applies on its face to vacancies in the office of the CFPB Director. Def. Br. at 16-18. The CFPB is "an Executive Agency," 5 U.S.C. § 3345(a); 12 U.S.C. § 5491(a); its Director is "an officer . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate," 5 U.S.C. § 3345(a); 12 U.S.C. § 5491(b)(2); and the office does not fall within any of the FVRA's exceptions, 5 U.S.C. § 3349c.

Plaintiff's opposition brief backpedals from the argument in its opening brief that the Director falls within the exception codified in § 3349c(1) due to the Director's *ex officio* service on the FDIC board. *Compare* Pl. Br. at 13-14, *with* Pl. Opp. at 13-14. As Defendants have explained, that argument lacks support in the text of § 3349c(1), which applies only to "any member who is appointed . . . to" a multimember board, not to *ex officio* members, like the CFPB Director, who serve as members by virtue of their appointment to a different office. *See* Def. Br. at 17. And, if accepted, Plaintiff's position would lead to the implausible conclusion that § 3349c(1) excludes most of the Cabinet from the FVRA. *Id.* at 18.

Plaintiff does not dispute these points, *see* Pl. Opp. at 13-14, but still asserts (without explanation) that § 3349c(1) excludes from the scope of the FVRA "'any member' of a multi-member board that 'governs an independent establishment or Government corporation.'" *Id.* at 12. That is not what § 3349c(1) says. And Plaintiff cannot argue otherwise simply by omitting the "appointed . . . to" language from its quotation of the statute.

Plaintiff gets it right when it concedes "that the FVRA did not specifically carve out the CFPB from its scope." *Id.* at 13 n.13. Notwithstanding that admission, Plaintiff imagines that, if the CFPB had existed at the time of the FVRA's enactment, Congress would have excluded the Director from the FVRA in order to protect the agency's independence. *Id.* But Plaintiff does not—and cannot—explain why, if that were so, Congress did not exclude the two pre-FVRA independent agencies that, like the CFPB, are headed by a single principal officer (the Social Security Administration and the U.S. Office of Special Counsel). Congress was aware of these "independent establishments headed by a single officer," S. Rep. 105-250, at 21-22 (1998), yet authorized the President to designate their acting heads anyway. *Infra* at 18 n.5. Nor can Plaintiff explain why, if Congress was intent on making the FVRA inapplicable, it did not simply add the CFPB Director to the list of exclusions in § 3349c when it enacted Dodd-Frank. That would have been the clearest, most logical way for Congress to achieve the result Plaintiff seeks.

B. Office-Specific Statutes Operate Alongside the FVRA in the Absence of "Clear and Manifest" Intent to Render the FVRA Inoperative.

Because the FVRA applies on its face to vacancies in the office of the CFPB Director, the FVRA and Dodd-Frank must be read to give effect to both statutes unless there is an "irreconcilable" conflict between them. Def. Br. at 22. And Plaintiff must demonstrate "clear and manifest" intent to supersede the FVRA to establish that § 5491(b)(5) of Dodd-Frank provides the exclusive means of identifying an Acting CFPB Director. *See id.* at 22-23; *see, e.g.*, *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) ("[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest."); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 300 (2d Cir. 2006) ("[T]he strong judicial policy disfavoring the inference that a statute has been repealed *sub silentio* by subsequent legislation applies with equal force to claims of implied amendment.").

Plaintiff does not even argue that § 5491(b)(5) clears this high bar. Instead, Plaintiff contends that the canon against implied repeals is irrelevant here because § 3347(a)(1)(B) of the FVRA provides that "the FVRA *does not apply* if another 'statutory provision expressly designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." Pl. Opp. at 6 (emphasis added). Section 5491(b)(5)(B) "expressly designates" the Deputy Director to serve as Acting Director, Plaintiff continues, so the FVRA "does not apply" to the Director position and "there is nothing to 'repeal.'" *Id.*

Again, Plaintiff's argument turns on a selective quotation of the statutory language that distorts its plain meaning. Section 3347 does not say that the FVRA "does not apply" if an office-specific provision exists. In contrast with another section of the FVRA, which actually does state that the Act's provisions "shall not apply to" certain entities, § 3347 says that where an office-specific provision exists, the FVRA is not the "exclusive means" of identifying an acting officer. 5 U.S.C. § 3347(a). Thus, an office-specific provision makes the FVRA *non-exclusive*, not *inapplicable*. *See* Def. Br. at 19.

Consistent with the text of § 3347(a), courts and the Executive Branch have long understood that the FVRA (like its predecessor, the Vacancies Act) operates alongside other statutory authorities that designate a specific official to serve as an acting officer for a vacant office or that authorize the President, a court, or the head of an Executive department to designate an acting officer. *See id.* at 19-22; *see also id.* at 21 n.4 (explaining that the legislative history of the FVRA also supports this understanding). Plaintiff continues to ignore nearly all of these precedents, mentioning only the Ninth Circuit's recent holding in *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016). Defendants already rebutted Plaintiff's attempts in its opening brief to distinguish *Hooks*. *See* Def. Br. at 20-21; *see also* Pl. Br. at 11 & n.17. Plaintiff does not defend them in its second brief. Instead, Plaintiff attempts to distinguish *Hooks* on the new ground that § 153(d) of the NLRA, unlike § 5491(b)(5), "is not mandatory." Pl. Opp. at 3 n.5. That is a questionable reading of § 153(d), which provides (yet again, in language that Plaintiff omits from its brief) that the President is authorized to designate an official who "shall act as General Counsel during [a] vacancy." 29 U.S.C. § 153(d). In any event, whether an office-specific provision is "mandatory" or "permissive" is irrelevant to whether it fits within § 3347(a)'s exceptions to the FVRA's exclusivity. *See* 5 U.S.C. § 3347(a).

In keeping with the plain language of § 3347 of the FVRA, office-specific statutes generally must be read to supplement, rather than displace, the FVRA's procedures for designating an acting officer. If Congress intends an office-specific statute to be exclusive, in contrast, it must make its intent "clear and manifest."

C. The Dodd-Frank Act Is Best Read to Operate Alongside the FVRA.

The Dodd-Frank Act does not clearly and manifestly demonstrate Congress's intent to make the FVRA inapplicable to the CFPB Director. Instead, § 5491(a) of Dodd-Frank reinforces the general applicability of laws like the FVRA. And the statement in § 5491(b)(5) that the Deputy CFPB Director "shall . . . serve as acting Director in the absence or unavailability of the Director," 12 U.S.C. § 5491(b)(5), is not clear enough to override § 5491(a), let alone to overcome the canon against implied repeals. Section 5491(b)(5), like other office-specific statutes, operates alongside the FVRA without superseding it.

(1) Plaintiff seeks to dismiss as "boilerplate" § 5491(a)'s rule that all federal laws dealing with officers apply to the CFPB absent an express provision to the contrary. Pl. Opp. at 7. It is not boilerplate. Section 5491(a) offers an instruction for how to read the rest of the statute. Other provisions of Dodd-Frank illustrate that Congress knew how to expressly provide that a portion of Title 5 would not apply to the CFPB. Def. Br. at 28 (citing 12 U.S.C. §§ 5493(a)(1)(C)(i), 5584(c)(2)). That it did not do so for the FVRA cannot be written off as insignificant.

(2) Plaintiff claims that § 5491(b)(5) overrides § 5491(a) because it "provide[s] expressly" that the Deputy Director shall serve as the Acting Director when the Director is absent or unavailable. *See* Pl. Br. at 7. But this provision does not suffice to override § 5491(a). Rather, the most Plaintiff can possibly claim is that it is ambiguous in two respects: (1) whether this provision applies when the Director's resignation gives rise to a vacancy; and (2) if so, whether this provision entirely displaces the FVRA instead of simply supplementing it.

Such an ambiguous provision can neither override § 5491(a) nor rebut the canon of construction disfavoring implied repeals. "[I]f an ambiguous term . . . qualified as an express provision . . . , then the requirement of an 'expres[s] provi[sion]' would call for nothing more than a 'provision,' pure and simple, leaving the word 'expressly' with no consequence whatever. '[E]xpres[s] provi[sion]' must mean something more than any verbal hook for an argument." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695–96 (2003).

On the first point, Plaintiff's opposition brief offers no substantive response to Defendants' argument that the term "absence" in § 5491(b)(5) does not clearly apply to a resignation giving rise to a vacancy. *See* Def. Br. at 23-24; Pl. Opp. at 2-5. With respect to the term "unavailability," Plaintiff argues against a straw man by claiming that Defendants' argument is inconsistent with

OLC's conclusion that "the provision's reference to 'unavailability' is best read" to apply when a Director resigns. *See* Pl. Opp. at 3-5 & nn. 7-8. Not at all. Defendants have argued that the term "unavailability" does not so clearly apply in this context that § 5491(b)(5) should be read to override § 5491(a) and displace the FVRA. *See* Def. Br. at 23-25. That view is entirely consistent with OLC's assessment that the meaning of the "unusual" phrasing in § 5491(b)(5) is "not free from doubt," OLC Op. at 2, 3, and the CFPB General Counsel's view that its meaning is "debatable," McLeod Memo at 1-2. Such ambiguous language cannot qualify as an express override of § 5491(a) and cannot demonstrate "clear and manifest" intent to supersede the FVRA.

On the second point, even if § 5491(b)(5) clearly applied to resignations giving rise to vacancies, its use of the word "shall" does not make clear that it supersedes the FVRA instead of supplementing it. As Defendants have shown, "shall" is a term of too many meanings to bear the weight Plaintiff places on it, *see* Def. Br. at 25-26, and § 5491(b)(5) is no more mandatory than the FVRA's default rule that the first assistant "*shall* perform the functions and duties" of the office subject to the FVRA's time limits and other strictures, *id.* at 26 (quoting 5 U.S.C. § 3345(a)).

Plaintiff repeats "'shall' means 'shall'" like a mantra, *see* Pl. Br. at 1, 7; Pl. Opp. at 1, 2-3, 9, but that tautology cannot resolve this case. A "cardinal rule" of statutory construction requires that "statutory language must be read in context." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *see Doscher v. Sea Port Grp. Secs., LLC*, 832 F.3d 372, 381-82 (2d Cir. 2016). And the relevant context here includes the statutory backdrop against which Dodd-Frank was enacted—*i.e.*, the existence of the FVRA and the historic relationship between the FVRA (and the Vacancies Act) with other office-specific statutes—as well as the language of § 5491(a).

Particularly in light of this context, one would expect Congress to have done something more than use the word "shall" in § 5491(b)(5) if it meant for Dodd-Frank to supersede the FVRA. Indeed, multiple statutes specific to Cabinet offices similarly designate an official who "shall" serve when the office of the Secretary is vacant, and it is apparently undisputed that the FVRA remains available to address vacancies in these offices. *See, e.g.*, 10 U.S.C. § 132(b) (Secretary of Defense); 20 U.S.C. § 3412(a)(1) (Secretary of Education); 31 U.S.C. § 301(c) (Secretary of the

Treasury); 29 U.S.C. § 552 (Secretary of Labor); *see also* S. Rep. 105-250, at 15-17. Plaintiff has not explained why Congress would have used indistinguishable language in these statutes and in § 5491(b)(5) if it intended them to operate differently.

(3) While Plaintiff's reading of § 5491 would work an implied repeal of the FVRA as it relates to the CFPB Director, Defendants' reading of the statutes gives effect to both. Plaintiff asserts that "Defendants have no meaningful answer" to Plaintiff's unsubstantiated assertion that § 5491(b)(5)(B) "vanishes from the U.S. Code" under Defendants' reading of the statute. Pl. Opp. at 7. But Defendants have identified at least two purposes served by § 5491(b)(5)(B) under their reconciliation of the statutes: allowing a Deputy Director to serve as Acting Director beyond the FVRA's time limits and when the FVRA itself would not authorize the Deputy's acting service. Def. Br. at 26. Plaintiff simply overlooks these points.

(4) Plaintiff's assertion that Congress could have spoken more clearly if it had wanted to ensure that the President had the option of designating an Acting CFPB Director, *see* Pl. Opp. at 7, fares no better. True, some statues provide that a specific official shall serve as an acting officer "unless the President designates another officer." *See id.* (citing three examples); Pl. Br. at 9 n.16 (same). Yet, as Defendants have shown, Plaintiff's argument that Congress could have spoken more clearly is a double-edged sword. Plainly, Congress could have spoken more clearly if it had intended to codify Plaintiff's position; it could have expressly provided that § 5491(b)(5) applies to vacancies in the office of the Director and that the FVRA does not, or it could have added to the FVRA's list of excluded positions. Instead, it codified a provision that is not distinguishable from others that operate alongside the FVRA without superseding it.

(5) Plaintiff offers some other arguments, which Plaintiff agrees come into play only if the FVRA and the Dodd-Frank Act are in conflict. *See* Pl. Opp. at 8-10. Because Defendants' reading of the statute gives effect to both, these arguments are beside the point. At most, two (both of them addressed in Defendants' opening brief) warrant further comment.

First, Defendants have already shown that Dodd-Frank's legislative history does not supply the clear statement—absent in the statute's text—that § 5491 supersedes the FVRA. *See* Def. Br.

at 27-28. Plaintiff does not engage with Defendants' explanation of the legislative history, instead resting on the fact that the statute's namesakes have signed an amicus brief in support of Plaintiff. *See* Pl. Opp. at 9-10. Whatever weight one gives legislative history, however, a brief filed years after enactment of the statute at issue "does not qualify as legislative 'history.'" *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010). The post hoc position advanced by former Senator Dodd and former Representative Frank in this litigation "is consequently of scant or no value." *Id.*

Second, Plaintiff asserts that Defendants have no response to Plaintiff's argument that allowing the President to designate an Acting CFPB Director is inconsistent with the Bureau's independence. *See* Pl. Opp. at 10. Defendants did in fact address this point in their opening brief. As Defendants explained, the fact that Congress has authorized the President to select acting heads for other independent agencies vitiates any argument that allowing the President to select an Acting CFPB Director would conflict with the agency's independence. *See* Def. Br. at 26-27. Indeed, Congress has allowed the President to select the acting head of *every* independent agency headed by a single principal officer.[5] In addition, Plaintiff's argument turns on the assumptions that the President lacks the power to remove an Acting CFPB Director from that post at will and would have less sway over such an Acting Director than over one designated under the FVRA. *See* Def.

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[5] The others are the Social Security Administration, 42 U.S.C. § 902(a); the U.S. Office of Special Counsel, 5 U.S.C. § 1211(b); and the Federal Housing Finance Agency, 12 U.S.C. § 4512(b)(2). The Social Security Act expands upon the President's discretion under the FVRA by allowing the President to choose *any* "officer of the Government" to serve as Acting Commissioner of Social Security, 42 U.S.C. § 902(b)(4), and the Special Counsel statute offers no alternative to the FVRA for designating an Acting Special Counsel.

With respect to the FHFA, the statute authorizes the president to choose an Acting Director from among the three Deputy Directors. 12 U.S.C. § 4512(f). Contrary to Plaintiff's contention, Pl. Opp. at 3, this provision, like § 5491(b)(5), supplements the FVRA without superseding it. The FHFA and the United States both have interpreted the two statutes to operate alongside each other, just like Dodd-Frank and the FVRA. *See, e.g.*, Def. Mot. for Summ. J. at 4-5, 8-9, *Ohio Pub. Emps. Retirement Sys. v. FHFA*, No. 1:11-cv-01543 (D.D.C.), ECF No. 21 (filed Jan. 18, 2012) (explaining that both the FVRA and the FHFA statute apply to vacancies in the office of the FHFA Director); Statement of Interest of the United States at 10-11, *Ohio Pub. Emps. Retirement Sys. v. FHFA*, No. 1:11-cv-01543 (D.D.C.), ECF No. 33 (filed Mar. 29, 2012) (similar).

Br. at 31-32; *infra* at 20 & n.7. Those assumptions are still incorrect and unexplained by Plaintiff.

In sum, Plaintiff's arguments suggest at most a lack of clarity in § 5491 as it relates to the FVRA. Whatever ambiguity Plaintiff has been able to identify in the two statutes only underlines the absence of the clear and manifest statement of legislative intent that would be necessary for § 5491(b)(5) to repeal the FVRA as it relates to the CFPB Director, especially in light of § 5491(a).

D. Mr. Mulvaney Is Eligible to Serve as Acting CFPB Director.

Plaintiff has argued in the alternative that Mr. Mulvaney is somehow ineligible to serve as Acting CFPB Director even if the FVRA generally applies to the CFPB Director position. In its Complaint and opening brief, Plaintiff asserted that Mr. Mulvaney was ineligible because he is a White House employee. Compl. ¶¶ 7, 45; *id.* at p.14 (¶ c); Pl. Br. at 14-16. Plaintiff now claims that, in fact, no officer removable at will may serve as Acting Director. Pl. Opp. at 12-14.

Plaintiff's broadened argument is equally without merit. Even Plaintiff does not dispute the point that there is no basis in the FVRA for its position. *See id.* at 31. Nor can Plaintiff explain why its argument is not really just an attempt to sneak through the backdoor an extra-textual exemption for independent agencies into the FVRA. *See* Def. Br. at 31-32.

The text of Dodd-Frank is no more helpful to Plaintiff. Although this case involves only Mr. Mulvaney's eligibility to serve as Acting CFPB Director, it bears noting that Congress spoke directly to the kinds of conflicts of interest that may disqualify someone from serving as an appointed CFPB Director. Section 5491(d) of Dodd-Frank prohibits anyone from "hold[ing] any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider" while serving as Director. 12 U.S.C. § 5491(d); *see also id.* §§ 5481(6), 5481(26) (defining, respectively, "covered person" and "service provider"). Congress did not prohibit someone who holds another at-will position in the Government from serving as Director. This is significant because Congress has generally prohibited the appointed head of a different independent agency, the Special Counsel, from simultaneously holding another office. *See* 5 U.S.C. § 1211(b) ("The Special Counsel may not hold another office or position in the

Government of the United States, except as otherwise provided by law or at the direction of the President."). If Congress had intended to impose a similar restriction here, it would have said so.

Moreover, Plaintiff cannot show that the CFPB's independence would be affected by allowing someone who is removable at will from another office to serve temporarily as Acting Director. This argument would only begin to make sense if Acting Directors enjoyed the same statutory protection from removal as Senate-confirmed Directors. But, as Defendants have explained, Dodd-Frank Act does not confer such for-cause removal protection on Acting Directors. And because such protection would raise significant constitutional questions, the Court should not "infer such protection absent clear evidence that Congress intended it." Def. Br. at 32.

Contrary to Plaintiff's contention, Pl. Opp. at 12, conferring tenure protection on an Acting Director would indeed raise constitutional problems above and beyond those raised by conferring that protection on a Senate-confirmed, term-limited Director.[6] The D.C. Circuit identified some of those problems in rejecting removal protection for holdover members of independent agencies, *see Swan*, 100 F.3d at 986-88, and similar problems would arise if acting agency heads were insulated from removal. In either case, the official in question has "potentially unlimited tenure," and prohibiting his or her removal except for cause "arguably might 'impede the President's ability to perform his constitutional duty' under Article II to take care that the laws be faithfully executed." *Id.* at 987 (quoting *Morrison v. Olson*, 487 U.S. 654, 672 (1988)).[7]

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[6] The CFPB and DOJ took different positions on the constitutionality of § 5491(c)(3) as it applies to Senate-confirmed CFPB Directors last year in a case pending before the *en banc* D.C. Circuit. But they agree that an Acting Director may be removed from that post without cause.

[7] At least one of Plaintiff's amici would seem to share Defendants' view that § 5491(c)(3) does not insulate Acting Directors from removal and that significant constitutional questions would arise if it did. When the New York Attorney General disapproved of the Acting Director of the FHFA, he urged President Obama to remove him. *See* Eric T. Schneiderman, *Obama's Underwater Rescue*, N.Y. DAILY NEWS (May 8, 2013). Around that time, a memorandum from the Attorney General's office was published, explaining that the Acting Director of the FHFA did not enjoy the same removal protection as a Senate-confirmed Director and that "an open-ended 'for cause' limitation that lasts until the Senate acts on the President's nomination might well be unconstitutional." Mem. from Barbara D. Underwood to Eric T. Schneiderman, *Whether the President Can Remove the Acting Director of the [FHFA] At Will and Replace Him with a Deputy*

If, as Defendants have explained, Ms. English would enjoy no more protection from removal from the Acting Director post than anyone whom the President might designate under the FVRA, there is no basis for Plaintiff's claims that adopting its interpretation of § 5491(b)(5) is necessary to protect the agency's independence.

E. Plaintiff's Position Presents Practical and Constitutional Problems Avoided by Defendants' Interpretation of the Statutes.

Plaintiff's position also raises serious problems insofar as it may require that the CFPB go without a Director for an extended period if the position becomes vacant when there is no Deputy.

Plaintiff shrugs off this possibility as "hypothetical" but does not deny that situations may arise under its position when "the Bureau will not have an Acting Director for some period" and the Director position must remain vacant until the Senate confirms a nominee. Pl. Opp. at 11. That the CFPB could be without even an Acting Director for an extended period could give rise to questions about the agency's ability to carry out its functions. Plaintiff's blithe acceptance of that possibility is particularly remarkable given Plaintiff's theory that it is suffering an Article III injury because the CFPB under Mr. Mulvaney might adopt a less aggressive enforcement posture than it might under Ms. English.

Plaintiff also states that the FVRA "arguably" might apply and allow the President to designate an Acting Director when both the Director and Deputy Director positions are vacant. *Id.* How that point squares with every other argument in Plaintiff's briefs goes unexplained.

In any event, requiring that the CFPB go headless indefinitely may raise yet another constitutional issue. Such an arrangement would at least arguably impair the President's Article II responsibility to take care that the consumer financial protection laws are faithfully executed, while aggrandizing Congress's powers at the President's expense. *See* Def. Br. at 29-30. And courts "refuse[] to tolerate" such statutory schemes "no matter how 'innocuous' these arrangements

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Director, at 3 (Feb. 25, 2013), *available at* http://online.wsj.com/public/resources/documents/NYAGdemarco0411.pdf; *see* Nick Timiraos, *Legal Memo Says Obama Could Replace FHFA's DeMarco*, WALL STREET JOURNAL (Apr. 11, 2013).

might be in practice." *Id.* at 30 (quoting *Swan*, 100 F.3d at 987).

Plaintiff complains that the real constitutional danger is allowing an acting officer designated by the President under the FVRA to remain in place for up to the FVRA's time limits, which Plaintiff claims impairs the Senate's role in the appointments process. *See* Pl. Opp. at 11 (citing 5 U.S.C. § 3346(a)(2)). But Plaintiff does not explain why Congress would have enacted a statutory scheme that unconstitutionally limits the Senate's role. Defendants only ask the Court to respect the balance struck between the political branches in the FVRA. Plaintiff, by contrast, asks the Court to upend it. *See* Def. Br. at 30.

F. Plaintiff's Constitutional Challenge Lacks Merit.

Plaintiff does not deny that its Appointments Clause challenge is entirely dependent on its statutory arguments. If, as Defendants have shown, the FVRA authorized the President to designate Mr. Mulvaney as Acting CFPB Director, Plaintiff has no Appointments Clause claim.

In any event, to prevail on its Appointments Clause challenge, Plaintiff would need to show not only that the President lacked statutory authority to designate Mr. Mulvaney as Acting CFPB Director—a showing Plaintiff cannot make—but also (1) that the Appointments Clause applies to acting-officer designations and (2) that the President lacks inherent authority to designate an Acting CFPB Director under the circumstances presented here. Plaintiff has shown neither.

With respect to both points, Plaintiff fails entirely to address the authorities presented by Defendants. *See* Def. Br. at 29 n.5; *id.* at 33-34 & nn.7-8. Plaintiff cites only a single district court decision, which itself did not rule out that the President might have some inherent authority to make certain appointments, *Williams v. Phillips*, 360 F. Supp. 1363, 1369 (D.D.C. 1973), and Plaintiff ignores the decision on appeal, which suggested that the President may have even broader inherent appointment authority. *See* Def. Br. at 29 n.5.

Notwithstanding Plaintiff's inability to muster significant authority for its position, it suggests that acting-officer designations must amount to constitutional appointments because the FVRA was "framed as a reclamation of the Congress's Appointment Clause Power." Pl. Opp. at

14 (quoting *SW Gen.*, 796 F.3d at 70). Plaintiff misses the point. The FVRA bolstered the Senate's role in the appointments process by strengthening the President's incentives to send nominations to the Senate instead of relying on acting officers. That the FVRA was adopted in part to promote the filling of vacant offices with Senate-confirmed nominees says nothing about the constitutional status of temporary acting-officer designations.

* * *

For all of these reasons, Plaintiff's claims fail on the merits. While Plaintiff attempts to generate conflict between the FVRA and Dodd-Frank, the statutes can (and therefore must) be read to operate alongside each other. Read together, they allow the President to designate an Acting CFPB Director. And the President validly exercised that authority to designate Mr. Mulvaney.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

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Respectfully submitted,

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