ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018

No. 18–5007

United States Court of Appeals for the D.C. Circuit

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the District of Columbia, Hon. Timothy J. Kelly

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and *Amici*. All parties and *amici* who appeared before the district court appear in Plaintiff-Appellant's brief. The parties appearing in this Court include those listed in Plaintiff-Appellant's brief and the *amici* listed in Defendants-Appellees' brief.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in Plaintiff-Appellant's brief.

C. Related Cases. The only related case of which counsel are aware is identified in Plaintiff-Appellant's Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.† The Chamber filed its notice of its intent to participate in this case as *amicus curiae* on March 1, 2018.

Pursuant to Circuit Rule 29(d), the Chamber certifies that a separate brief is necessary to provide the perspective of the businesses that the Chamber represents, including consumer financial services companies as well as the numerous other companies regulated by the Consumer Financial Protection Bureau, regarding the importance of resolving any uncertainty regarding the President's authority to appoint an individual on an acting basis when the position of Bureau Director becomes vacant.

† No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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GLOSSARY

Bureau / CFPB	Consumer Financial Protection Bureau
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
FTC	Federal Trade Commission
FVRA	Federal Vacancies Reform Act
NLRB	National Labor Relations Board
PCAOB	Public Company Accounting Oversight Board

STATUTES AND REGULATIONS

Pertinent materials are contained in Plaintiff-Appellant's addendum.

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members include numerous consumer financial services providers—and other businesses—subject to the regulatory and enforcement authority of the Consumer Financial Protection Bureau. Plaintiff-appellant's claim creates uncertainty about the status of the acting Director and the legality of his actions—eliminating the clarity that both regulated business and consumers need in order to conform their conduct to the law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff-Appellant Leandra English contends that she is the rightful acting Director of the Consumer Financial Protection Bureau ("CFPB")—and that the President's invocation of his authority under the Federal Vacancies Reform Act ("FVRA") to designate Mick Mulvaney as acting Director is unlawful. As the district court properly concluded, Plaintiff is wrong as a matter of statutory construction. Moreover, her arguments, if accepted, would raise serious questions about the constitutionality of the provision of the Dodd-Frank Act on which she relies.

There is no other independent agency whose head has the exclusive authority to designate a successor that Plaintiff claims for the CFPB Director. Members of multi-member commissions cannot designate a successor—their positions stay vacant when the incumbent departs. For the agencies headed by a single individual that this Court cited as relevant precedents in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), the Office of the Comptroller of the Currency and the Social Security Administration, relevant statutes grant the

President control over the designation of the individual who serves in an acting capacity when the position becomes vacant.

Our Constitution is founded on the principle that government power ultimately is subject to control by the people through their elected representatives. Indeed, the *PHH* Court relied on the President's authority to designate a replacement director in upholding the limit on the President's removal authority. An interpretation of the Dodd-Frank Act that would prevent the President from designating the acting Director of the Bureau after a Director's resignation—and could therefore prevent the President's choice from taking office for years in the event of a deadlock between the President and the Senate—would raise serious constitutional concerns.

The governing statutes do not permit that result. Congress in 1998 enacted the FVRA to establish the generally-applicable rules for appointment of officials on an "acting" basis. The FVRA's plain terms authorize the President to designate a Senate-confirmed officer to serve as acting Director.

Plaintiff's claim that the Dodd-Frank Act displaces the President's authority under the FVRA is similarly flawed. The Dodd-Frank Act

provision relied upon by Plaintiff empowers the Deputy Director to exercise the Director's authority on an "acting" basis only when the Director position is occupied, but the incumbent is not available. It does not apply in situations such as that presented here, where the Director position is vacant. The provision uses the words "absent" and "unavailable," but not the terms "vacant," "dies," or "resigns"—which are the terms that Congress consistently employs when it wishes to designate an official to serve in an "acting" capacity for a position that has become vacant.

Even if the Dodd-Frank provision applied here, its use of "shall" does not revoke the President's FVRA authority. The Supreme Court has recognized that in context "shall" can mean "may"—just so here. And Plaintiff's argument would eliminate the President's FVRA authority with respect to a large number of positions, including many as to which Congress specifically recognized the President's authority at the time it enacted the FVRA.

ARGUMENT

I. Plaintiff's Interpretation of the Dodd-Frank Act Would Impose an Unprecedented Limitation on the President's Constitutional Authority to Appoint the Acting Head of an Agency Exercising Article II Authority.

This Court held in *PHH Corp. v. Consumer Fin. Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), that the CFPB's structure—an agency not subject to the statutory appropriations process that is headed by a single director removable by the President only for cause—comports with the Constitution. The Court concluded that the Bureau's structure "fits comfortably within precedent and tradition supporting the independence of the financial regulators that safeguard the economy." *Id.* at 96.

Plaintiff English here advocates a further, unprecedented, limitation on the President's Article II authority. She asserts that the President's constitutional appointment authority is effectively eliminated with respect to the acting Director of the CFPB: the President may not designate the acting Director (only the Director may do so) and the President may remove the acting Director only for cause. (The latter point is not explicit in Plaintiff's argument, but if the

President could remove the Deputy Director at will, then the question of who appoints the acting Director would have little importance.)

That position is wrong as a matter of statutory construction. But it is wrong for the additional reason that it would raise grave constitutional concerns.

The *PHH* Court rested its holding in part on the conclusion that "in choosing a replacement [for the Director], the President is unhampered by partisan balance or *ex-officio* requirements; the successor replaces the agency's leadership wholesale." 881 F.3d at 93. The Court contrasted the President's plenary power to select a successor director who would fully control the CFPB with independent agencies headed by multi-member commissions, where the President must replace members one at a time and is subject to requirements of partisan balance—and therefore may face delays in conforming the agency to his or her policy preferences. *Id*. at 98.

Plaintiff's construction of the Dodd-Frank Act would impose an additional, unprecedented limitation on the President's temporary appointment authority that would again raise serious constitutional questions about the Bureau's structure.

First, there is no precedent for the restriction advocated by Plaintiff.

To begin with, most independent agencies are multi-member commissions and no one has authority to designate an "acting commissioner" when a commissioner position is vacant. Commissioners serve for a term of years. Once that period expires—or if a commissioner leaves before its expiration—the position simply cannot be filled on an acting basis. *See, e.g.,* 15 U.S.C. § 41; 15 U.S.C. § 78d(a); 19 U.S.C. § 1330(b); 46 U.S.C. § 301(b)(2); 47 U.S.C. § 154(c); 49 U.S.C. § 1111(c); *see also* 5 U.S.C. § 3349c (providing that these positions may not be filled on an acting basis under the authority conferred by the FVRA).

That reality has led to situations in which regulatory agencies lack a quorum, and are unable to function, because of the Senate's refusal to confirm a President's nominees. Such impasses have been resolved through the political process—with the Senate and President maintaining their constitutional prerogatives but reaching a compromise. *See, e.g.*, Julian Hattem, *NLRB at full strength as Obama appointees are sworn into office*, The Hill (Aug. 12, 2013),

http://thehill.com/regulation/labor/316677-nlrb-full-of-senate-confirmed-members-for-first-time-in-decade- (explaining that Republicans agreed not to oppose two NLRB members' confirmation in exchange for the withdrawal of two other nominations).

Plaintiff's approach would completely eviscerate the President's appointment authority in the event of such a stalemate—with the acting Director appointed by a Director, and not the President, permitted to stay in place for as long as the Senate refuses to confirm the President's nominee.

The nomination and confirmation process for a new Director could, even in the best of circumstances, take months or years after an incumbent's resignation. And in circumstances in which the Senate is controlled by a different political party from the President's, the Senate could refuse outright to confirm any new Director, allowing the Deputy Director to serve as acting Director for the President's entire term, and blocking the President's choice from ever taking office.

The President would have no leverage to encourage Senate action because, in contrast to the independent commission situation, the

Bureau would continue to operate in accordance with policy preferences more acceptable to the Senate than those of the President.[1]

Statutes governing the other agencies invoked as precedents by the *PHH* Court do not contain limitations on the President's authority to designate an acting head of the agency. Thus, the statute establishing the office of Comptroller of the Currency gives the Secretary of the Treasury—an official over whom the President exercises plenary authority—the power to designate an acting Comptroller (12 U.S.C. § 4).

The *PHH* Court also cited the Social Security Commissioner (*see* 881 F.3d at 103), but that statute (enacted prior to the FVRA) expressly preserves the President's authority, stating that "[t]he Deputy Commissioner shall be Acting Commissioner of the Administration

[1] The Dodd-Frank Act contains a provision permitting a CFPB Director to remain in office past the expiration of his or her term "until a successor has been appointed and qualified." 12 U.S.C. § 5491(c)(2). But that holdover provision gives no basis for limiting the President's appointment power when the office becomes vacant. And that provision itself raises serious constitutional concerns because it creates the possibility that a Director could remain in office through multiple presidential terms, and continue to exercise his broad statutory authority in a manner opposed by the President, as long as the Senate refused to confirm a successor.

during the absence or disability of the Commissioner and, *unless the President designates another officer of the Government as Acting Commissioner*, in the event of a vacancy in the officer of the Commissioner." 42 U.S.C. § 902(b) (emphasis added).[2]

In sum, there is no precedent for the exclusive self-perpetuating authority that Plaintiff claims here.

Second, this Court's *PHH* decision rested heavily on the history of independent agencies headed by officials subject to removal only for cause. *E.g.*, 881 F.3d at 93 ("[i]n every case reviewing a congressional decision to afford an agency ordinary for-cause protection, the Court has sustained Congress's decision, reflecting the settled role that

[2] The statute establishing the Federal Housing Finance Agency (FHFA) states that in the event of a vacancy in the office of Director, "the President shall designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director." 12 U.S.C. § 4512(f). That statute gives the President the power to make the designation—not the outgoing Director—and is therefore wholly distinguishable from Plaintiff's position here.

In addition, the constitutionality of that statutory limit on the President's authority has not been tested. And the constitutional standard likely would be different because the FHFA's authority is limited to government-sponsored enterprises, in contrast to the CFPB Director's broad regulatory and enforcement authority over private parties.

independent agencies have historically played in our government's structure"). As just discussed, not one of the statutes establishing those agencies grants the incumbent head exclusive authority to designate the individual who will occupy the office on an acting basis when the incumbent leaves.

Moreover, the Court relied on the President's authority to designate a successor in explaining why the CFPB's single-director structure did not violate the Constitution:

> when the President does get to replace the CFPB Director, he is not restricted by *ex-officio* requirements to appoint incumbent officeholders, or by a partisan-balance mandate to select individuals who do not even belong to his political party. At bottom, the ability to remove a Director when cause to do so arises and to appoint a replacement provides "ample authority to assure that the [Director] is competently performing his or her statutory responsibilities."

881 F.3d at 100 (citations omitted).

However, as explained above, Plaintiff's construction of the statute significantly limits the President's power "to appoint a replacement"—and could prevent a President from doing so for years. It also enables the Bureau to continue to exercise Article II authority based on the policy decision of the former Director (in choosing the

Deputy) rather than the policy preferences of the President. That is quite different from the situation that would obtain with respect to the vast majority of independent agencies that, because they are headed by multi-member commissions, would cease to operate.[3]

Were that the case, the President's authority to influence the Bureau and hold it accountable—and therefore the Bureau's accountability to the people who elected the President—would likely be attenuated past the constitutional breaking point.

Third, Plaintiff touts the Bureau's and the Director's insulation from political control as a virtue of the agency. *See, e.g.*, Br. 1, 3, 42-47. But similar arguments were made in favor of the two layers of removal protection for members of the Public Company Accounting Oversight

[3] Moreover, the President is generally empowered to designate the member of a commission who will serve as chair. *See, e.g.*, 15 U.S.C. § 41 (Fed. Trade Commission); 15 U.S.C. § 78d (Securities and Exchange Commission); 19 U.S.C. § 1330(a), (c) (U.S. International Trade Commission); 46 U.S.C. § 301 (Federal Maritime Commission); 47 U.S.C. § 154(a) (Federal Communications Commission); 49 U.S.C. § 1111 (National Transportation Safety Board). Because the chair exercises considerable authority in setting these agencies' agendas, that gives the President another means of conforming those agencies to his or her policy views that would be absent under Plaintiff's construction of Dodd-Frank. *See, e.g.*, Jennifer L. Selin, *What Makes an Agency Independent?* at 6 (Vanderbilt Univ. Working Paper 08-2013), https://www.vanderbilt.edu/csdi/research/CSDI_WP_08-2013.pdf.

Board (PCAOB) at issue in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, and the Supreme Court rejected them.

The dissenters in *Free Exercise Fund* defended the PCAOB's structure on the ground that the Board's functions called for "agency independence" and "technical expertise." 561 U.S. 477, 531 (2010) (Breyer, J., dissenting). But the Supreme Court majority rejected this rationale, because it left no "role for oversight by an elected President"—and thereby undermined the Constitution's "require[ment] that a President chosen by the entire Nation oversee the execution of the laws." *Id.* at 499 (majority opinion). The Court explained that "the Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty," and that "[c]alls to abandon those protections in light of [an] era's perceived necessity" must not be heeded, whatever that "necessity" might be. *Id.* at 501 (brackets and internal quotation marks omitted).

So too here. Plaintiff's concern about insulating the Bureau from "capture" (Br. 7)—a concern that could apply to *any* executive branch agency—provides no basis for rejecting the well-established principle

that the President must retain some control over agency heads in order to ensure the executive branch's accountability to the people.

Moreover, the Bureau in fact is not insulated from the political process. Director Cordray was appointed by President Obama, presumably because his policy views accorded with President Obama's. And Director Cordray designated Ms. English as Deputy Director presumably because her policy views are consistent with his. The arguments for "independence" are thus in reality arguments that the Bureau should continue to be administered indefinitely in accordance with Director Cordray's policy views, rather than in accordance with the policy views of the new President who took office as the result of the November 2016 election. That anti-democratic notion is squarely at odds with the Framers' vision of accountability to the people.

The Dodd-Frank Act must therefore be construed, if possible, to avoid an interpretation that would deny the President any ability to designate an acting head of the Bureau after the Director leaves office. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a

statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

II. The President May Designate An Acting Director Under 5 U.S.C. § 3345(a)(2).

The governing statutes plainly authorize the President to appoint a Senate-confirmed individual as acting Director of the Bureau when a Director resigns or the office otherwise becomes vacant. But even if the Court were to conclude that the statutory text is not clear, the Court should interpret the relevant laws to authorize the President's action to avoid the serious constitutional questions that would result from construing them to eliminate that Presidential authority.

A. The FVRA authorizes the President to appoint a Senate-confirmed individual as Acting Director.

The Supreme Court explained just last year that "the responsibilities of an office requiring Presidential appointment and Senate confirmation—known as a 'PAS' office—may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). "Congress has long accounted for this reality," the Court continued, "by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant PAS office in an acting capacity." *Id.*

The Supreme Court explained in *SW General* that there had been conflict between the President and Congress regarding the scope of the President's authority to appoint individuals on an acting basis. By 1998, a large percentage of offices were filled on an acting basis—long after the time period permitted under then-existing law. "Perceiving a threat to the Senate's advice and consent power," Congress enacted the FVRA. 137 S. Ct. at 936.

That statute provides three basic options for filling on an "acting" basis a position requiring Senate confirmation after the individual occupying the office "dies, resigns, or is otherwise unable to perform the functions and duties of the office" (5 U.S.C. § 3345(a)):

- "The general rule is that the first assistant to a vacant office shall become the acting officer" (*SW General*, 137 S. Ct. at 934-35)—in the words of the statute, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity" (5 U.S.C. § 3345(a)(1));
- "The President may override that default rule by directing" another Senate-confirmed individual to fill the position in an

acting capacity (*SW General*, 137 S. Ct. at 935)—"the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity" (5 U.S.C. § 3345(a)(2)); or

- The President may override the default rule "by directing . . . a senior employee within the relevant agency to become the acting officer" (*SW General*, 137 S. Ct. at 935)—"the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity" if the employee satisfies the criteria set forth in the statute (5 U.S.C. § 3345(a)(3)).

The FVRA makes clear that it was enacted to provide a comprehensive solution to the question of when and how it would be permissible to appoint individuals on an acting basis. The statute states that its provisions are "the exclusive means for temporarily authorizing

an acting official to perform the functions and duties of" an office requiring Senate confirmation unless another statute "expressly" authorizes the President or another officer to designate someone to perform the duties on an acting basis or "expressly" designates an officer or employee to do so. 5 U.S.C. § 3347(a).[4] This provision, as the district court concluded, "makes clear that [the FVRA] was generally intended to apply alongside agency-specific statutes, rather than be displaced by them." JA 312.

Congress exempted some offices from the FVRA, stating in pertinent part that the law did not apply to:

> (1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—
>
> (A) is composed of multiple members; and
>
> (B) governs an independent establishment or Government corporation;
>
> (2) any commissioner of the Federal Energy Regulatory Commission; [and]
>
> (3) any member of the Surface Transportation Board.

[4] We explain below (at 27-31) that the Dodd-Frank Act provision relied on by Plaintiff does not satisfy this test.

5 U.S.C. § 3349c.

The text of the FVRA leaves no doubt that—putting to one side the effect of Section 1011(b)(5) of the Dodd-Frank Act, discussed below—the FVRA authorizes the President to designate another Senate-confirmed individual to serve as acting Director of the CFPB. The general language of Section 3345(a)(2) encompasses the Director position: the statute applies to appointments to exercise on an acting basis the "functions and duties of any office of an Executive agency" for which Senate confirmation is required—the CFPB clearly qualifies as an "Executive agency" (*see* 5 U.S.C. § 105[5]); the CFPB is not a commission; and the FVRA's exclusions do not mention the CFPB.

Plaintiff and her *amici* argue that the FVRA does not apply because of the Bureau's status as an "independent bureau." Br. 42-47 (citing 12 U.S.C. § 5491(a)). But nothing in the FVRA precludes the statute's application to vacancies in independent agencies, and nothing limits the Senate-confirmed individuals whom the President may designate to serve in an "acting" capacity. Indeed, as discussed above

[5] The CFPB is an "independent establishment" (*see* 5 U.S.C. § 104) and Section 105 states that independent establishments qualify as executive agencies.

(*see* pages 5-15, *supra*), Plaintiff's interpretation would make the CFPB unique among independent agencies by enabling a director to choose a successor that would perpetuate his or her policy views, rather than giving the President authority to control the designation of a successor (as with the Comptroller of the Currency and the Social Security Administrator) or leaving the position vacant until the President and the Senate are able to resolve their differences.

Moreover, the President's designation of Mr. Mulvaney as acting Director does not undermine the "independence" of the Bureau. Regardless of which official the President designates—Mr. Mulvaney, or a Federal Reserve Governor, or an FTC Commissioner, or a Treasury Department official—the President retains the power to revoke that designation and choose another acting Director. The President therefore can use his FVRA authority to influence the policy direction of the Bureau regardless of whom he initially selects as acting Director. And that is entirely appropriate given the Constitution's design. Plaintiff's atextual reading of the statute—which would increase the Bureau's already-unusual level of independence and raise serious constitutional concerns—should therefore be rejected.

B. The Dodd-Frank Act does not eliminate the authority conferred on the President by the FVRA.

Plaintiff's principal argument is that the Dodd-Frank Act withdraws any authority granted by the FVRA with respect to appointing an acting Director. She relies on Section 1011(b)(5) of the Act, 12 U.S.C. § 5491(b)(5), which states:

> (5) DEPUTY DIRECTOR.—There is established the position of Deputy Director, who shall—(A) be appointed by the Director; and (B) serve as acting Director in the absence or unavailability of the Director.

That contention is wrong for two reasons.

1. Section 1011(b)(5) does not apply when the Director position is vacant.

The FVRA provides that it is the exclusive means of designating officials to serve on an acting basis unless another statute "expressly" designates an officer or employee to do so. 5 U.S.C. § 3347(a). Section 1011(b)(5)(B) does not qualify, because by its terms it applies only when there is an incumbent Director who is absent or unavailable. It does not apply when the Director position is vacant due to resignation or death of the incumbent. On the statute's face, Director Cordray could not be absent or unavailable when he resigned.

Plaintiff recognizes that "absence or unavailability" should be given their ordinary meaning (Br. 20), and the ordinary meaning of "absent" or "unavailable" is that an individual is not present or is incapable of performing his or her duties because of illness, incapacity, or other impediment. *See, e.g.*, *absent*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/absent (defining "absent" as "not present at a usual or expected place"); *unavailable*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unavailability (defining "unavailable" as "not possible to get or use" or "unable or unwilling to do something").

The two terms manifestly would *not* be applied, in ordinary usage, to describe a circumstance in which an office is vacant. Director Cordray was not "absent" or "unavailable" after he resigned. There was no Director—and therefore no one who could be either "absent" or "unavailable."

Plaintiff suggests that "absent" can mean "not existing" or "lacking" (Br. 20), but as the dictionary definition on which she relies demonstrates, the word "absent" is only used in that sense when

referring to nouns other than persons. *See id.* (referring to "a situation where power is absent" and "a gene that occurs in mammals but is absent in birds").

Other statutory provisions confirm this conclusion by including terms that explicitly refer to a vacancy in the office—terms other than "absent" or "unavailable"—to indicate that they apply when there is no incumbent occupying the office. The FVRA itself is applicable when the incumbent officer "*dies, resigns*, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a) (emphasis added); *see also* 12 U.S.C. § 4 ("[d]uring a vacancy in the office or during the absence or disability of the Comptroller"); 12 U.S.C. § 4512 (f) ("[i]n the event of the death, resignation, sickness, or absence of the Director" of the FHFA); 15 U.S.C. § 633(b)(1) ("[d]uring the absence or disability of the Administrator or *in the event of a vacancy* in the office of the Administrator" of the Small Business Administration) (emphasis added); 29 U.S.C. § 153(d) ("*[i]n case of a vacancy* in the office of the General Counsel" of the NLRB) (emphasis added). Indeed, the legislative history of the FVRA includes a list of dozens of such statutes,

all of which refer to either vacancy or resignation. *See* S. Rep. 105-250, at 16-17 (1998).

The absence from Section 1011(b)(5)(B) of the words used in these provisions to encompass the lack of an incumbent in the position—"dies," "resigns," "vacancy"—demonstrates that the Dodd-Frank provision only authorizes the Deputy Director to act if the incumbent occupying the Director position is temporarily unavailable. Congress employs particular terms when it wishes to encompass the situation in which there is no incumbent in the position, and Congress failed to include those terms here.

Indeed, the Dodd-Frank Act itself follows this approach, employing the term "vacancy" in addition to the terms "absence" and "disability" in provisions addressing the situation in which the office of Director is not occupied. *See* 12 U.S.C. § 1812(d)(2) ("[i]n the event of a vacancy in . . . the office of Director of the Consumer Financial Protection Bureau and pending the appointment of a successor, or during the absence or disability of . . . the Director of the Consumer Financial Protection Bureau, . . . the acting Director of the Consumer

Financial Protection Bureau, . . . shall be a member of the Board of Directors in the place of the . . . Director."); *id.* § 5321(c)(3) (same).

When Congress uses different words in the same statute, courts generally accord them different meanings. *See, e.g.*, *Abbott v. Abbott*, 560 U.S. 1, 33 (2010) ("In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning."); *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, Congress's use of "vacancy" in provisions of the same statute relating to the very same office makes clear that Section 1011(b)(5)(B)—in which that term is absent—does not apply when the office of Director is not occupied.

Moreover, the FVRA requires that another statute "expressly" designate the occupant of an office to serve in an "acting" capacity. Given the absence of any indication in the statutory text that the Dodd-Frank Act's provision applies when the office of Director is vacant, the only way it could apply in that situation would be to draw an inference from the term "unavailable." But an inference falls short of satisfying the FVRA's requirement of "express[]" authority.

The Office of Legal Counsel came to a different conclusion, opining that Section 1011(b)(5)(B) "is best read to refer both to a temporary unavailability . . . and to the Director's being unavailable because of a resignation or other vacancy in office." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 2017 WL 6419154, at *3 (O.L.C. Nov. 25, 2017).

Importantly, the Office did not address the provisions in the Dodd-Frank Act expressly employing the term "vacancy." It rested its view on provisions in other statutory schemes referring to officials who "have died, resigned, or otherwise become unavailable," concluding that such provisions equate "unavailab[ility]" with death or resignation—and that the term "unavailable" therefore always encompasses vacant positions. 2017 WL 6419154, at *3 (emphasis and internal quotation marks omitted).

But context matters, and the Supreme Court has long applied the principle of interpretation that "a word is known by the company it keeps" in order to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561,

575 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Thus, where a statute includes the phrase "died, resigned, or otherwise become unavailable," it is proper to interpret the word "unavailable" to encompass any situation in which the office is vacant.

Here, however, the statute contains the phrase "in the absence or unavailability of the Director." Because the phrase in the Dodd-Frank Act does *not* contain "died," "resigned," "vacancy," or any other term connoting an unoccupied office—but rather only the term "absence," which is most appropriately read to mean that there is an incumbent who is "not present"—there is no basis for giving "unavailable" a broader meaning. *See Federal Reserve Board –Vacancy With the Office of the Chairman – Status of the Vice Chairman*, 2 U.S. Op. O.L.C. 394, 395 (1978) (opining that "[t]he term 'absence' normally connotes a failure to be present that is temporary in contradistinction to the term 'vacancy' caused, for example, by death of the incumbent or his resignation").

2. Dodd-Frank does not displace the President's FVRA authority.

Even if Section 1011(b)(5)(B) could be interpreted to apply when the Director position is vacant, there is no basis for construing it to

displace the authority separately conferred by the FVRA. The President still retains the option of appointing an alternate official under the FVRA.

Plaintiff relies (Br. 23-36) entirely on Section 1011(b)(5)(B)'s use of "shall"—"[t]here is established the position of Deputy Director, who *shall* . . . (B) serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5) (emphasis added). She argues that "shall" by itself makes the Dodd-Frank provision the sole method for designating an acting Director. But that one word cannot bear the weight that Plaintiff places on it.

To begin with, as the district court noted (JA 318), the Supreme Court has explained that "[t]hough 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 & n.9 (1995); *see also id.*, quoting D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402–403 (1992) ("'shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context"); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("'[C]ourts in virtually every English-speaking jurisdiction have held—by

necessity—that *shall* means *may* in some contexts, and vice versa.'"). Moreover, the word "shall" can be "implicitly qualified" by other language. JA 319.

In *Lamagno*, the Supreme Court declined to interpret "shall" to mean "must" because the resulting preclusion of judicial review of an administrative determination would "run[] up against a mainstay of our system of government"—the principle that no person should be a judge in her own case. 515 U.S. at 428. Here, Plaintiff's interpretation of "shall" would lead to a similarly unacceptable result, the diminution of the President's constitutional authority and of the federal government's accountability to the people.

The insufficiency of the Dodd-Frank provision's use of "shall" is confirmed by Congress's use of much more explicit language when it wishes to eliminate the President's discretion. In creating the office of Director of the Federal Housing Finance Agency—in 2008, after enactment of the FVRA—Congress provided that "[i]n the event of the death, resignation, sickness, or absence of the Director, *the President shall designate* either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan

Bank Regulation, or the Deputy Director for Housing Mission and Goals, to serve as acting Director." 12 U.S.C. § 4512(f) (emphasis added). The absence from the Dodd-Frank provision of that language expressly limiting the President's discretion provides conclusive evidence that "shall" standing alone does not displace the President's FVRA authority—particularly because Section 4512(f) was enacted by Congress just two years earlier, and with respect to a financial services regulator, like the CFPB.

If Congress had intended to limit the President's discretion, it would have used the same language that it enacted just two years earlier. The absence of that phrase is fatal to Plaintiff's argument.

Moreover, deciding that "shall" alone is sufficient to displace the FVRA would broadly reduce the President's discretionary authority, because that word appears in a large number of statutes designating an agency head's deputy to serve in an acting capacity. *See, e.g.*, 12 U.S.C. § 4; 15 U.S.C. § 633(b)(1); 20 U.S.C. § 3412(a)(1); 29 U.S.C. § 552; 31 U.S.C. § 301(c); 44 U.S.C. § 2103(c); *see also* Appellees' Br. 28-31 (discussing large number of statutes using "shall").

That conclusion is bolstered by the inclusion within the Dodd-Frank Act of a provision stating that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with public or Federal . . . officers [or] employees . . . shall apply to the exercise of the powers of the Bureau." 12 U.S.C. § 5491(a). Plaintiff argues (Br. 31) that "shall" fulfills this requirement of an express exception. But "shall" standing alone does not expressly displace these other laws, including the FVRA. As the district court explained, Dodd-Frank says nothing at all about the President's ability to appoint an Acting Director. "This silence makes it impossible to conclude that Dodd-Frank 'expressly' makes the FVRA's appointment mechanisms unavailable." JA 317.[6]

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[6] The Supreme Court's interpretation in *Murphy v. Smith*, 2018 WL 987346 (U.S. 2018), of a different statute containing the word "shall" confirms this conclusion. The Court observed that "the word 'shall' usually creates a mandate," but looked to "the full field of textual, contextual, and precedential evidence" to determine the nature of that mandate. *Id.* at *2, *6. Assessing that "full field" here makes clear that "shall" in the Dodd-Frank Act does not negate the President's authority under the FVRA.

Plaintiff argues that the legislative history of the Dodd-Frank Act shows that the Act sets out the exclusive means for designating an acting Director because the version passed by the House expressly referred to the FVRA and the final legislation did not. Br. 8-9. The legislative history is beside the point here, because the text of the relevant statutes squarely resolves the question presented. *Ratzlaf v.*

CONCLUSION

The decision of the district court should be affirmed.

Dated: March 2, 2018

Respectfully submitted,

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United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). And in any event, the drafting history is equally consistent with the conclusion that Congress intended the FVRA to apply but wanted to make clear that the Deputy Director could assume the duties of acting Director if the incumbent was incapacitated or that the Deputy would serve as acting Director (under the FVRA provision relating to "first assistants") unless the President made a different choice under the FVRA. That is the conclusion reached by the Bureau's General Counsel in her Memorandum upholding the President's appointment of Mr. Mulvaney. *See* Memorandum from Mary E. McLeod, General Counsel, to The Senior Leadership Team, CFPB 3 (Nov. 25, 2017) ("to the extent this legislative history is . . . relevant in interpreting Section 5491(b)(5), one could just as easily argue it shows that Congress was aware that the FVRA generally applies, and chose not to preempt it by either expressly exempting the succession from the FVRA, or by expressly providing for the Deputy Director to serve in the event of a 'vacancy' or 'resignation.'"), https://assets.documentcloud.org/documents/4310651/McLeod-Memo-CFPB.pdf.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,166 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: March 2, 2018

/s/ *Andrew J. Pincus*
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on March 2, 2018, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: March 2, 2018

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