Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members,

Plaintiff,

-against-

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

Defendants.

Case No. 17 Civ. 9536 (RA)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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"SHALL" MEANS "SHALL"

The Deputy Director of the Consumer Financial Protection Bureau "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). On November 24, 2017, CFPB Director Richard Cordray resigned. Leandra English was the Deputy Director.[1] Ms. English became the Acting Director. *Id.*

This is not a complicated case. A specific statute, governing only the CFPB, speaks directly to succession at the Bureau. It is clear. It is mandatory. None of defendants' legal contortions or doublespeak can change the law. Yet Donald Trump decided to violate the law anyway. He appointed his at-will employee in the White House, OMB Director Michael Mulvaney, to depose Ms. English and take over this independent Bureau.[2] Now, with Mr. Trump over his shoulder,[3] Mr. Mulvaney is trying to destroy it.

Mr. Mulvaney's decision to stop all new CFPB regulations is illegal. His decision to stop new contracting is illegal. His decision to stop new lawsuits is illegal. His apparent decision to stop all payments from the CFPB civil penalties fund is illegal. Every single thing he does at CFPB is illegal because he is *ultra vires*. Mr. Mulvaney has no more right to lead the agency than Santa Claus. And the Lower East Side People's Federal Credit Union, and every other credit union and bank regulated by CFPB, are left in regulatory limbo, not knowing who is in charge, or whether to follow any regulation, rule, or guidance from CFPB since November 25th.

Before defendant Mulvaney digs a regulatory hole from which no one can escape, this Court must set things right. The Court must end this regulatory chaos. It must grant the

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[1] Declaration of Leandra English, dated December 6, 2017 ("English Decl.") ¶¶ 5-6, attached as Exhibit 2 to the Declaration of Ilann M. Maazel, dated December 11, 2017 ("Maazel Decl."). All exhibits cited herein are attached to the Maazel Decl.

[2] Ex. 2 (English Decl.) ¶ 7 & Ex. C.

[3] Ex. 3.

preliminary injunction and reinstate the one and only person legally authorized to run the Bureau: Acting Director Leandra English.

BACKGROUND

The CFPB: an "Independent" Agency to Protect Consumers

The 2008 financial crisis almost caused a worldwide financial meltdown. "Millions of Americans saw their home values drop, their savings shrink, their jobs eliminated, and their small businesses lose financing. Credit dried up, and countless consumer loans . . . went into default."[4] In the face of the crisis, no single government agency was responsible for consumer financial protection, or for regulating consumer financial markets such as deposits, mortgages, credit cards, auto loans, payday loans, and debt collection. Thus, "[i]n June 2009, President Obama proposed to address failures of consumer protection by establishing a new financial agency to focus directly on consumers, rather than on bank safety and soundness or on monetary policy." *Id*. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Consumer Financial Protection Bureau. "The CFPB consolidates most Federal consumer financial protection authority" into a single independent agency with robust statutory powers and its own source of funding. *Id.* The CFPB exists, *inter alia*, to "protect consumers from unfair, deceptive, or abusive practices and take action against companies that break the law."[5]

In order to ensure the Bureau's independence, Congress determined that the agency would be headed by a single director with a five-year term, removable by the president only "for cause" (defined as "inefficiency, neglect of duty, or malfeasance in office"). 12 U.S.C.

[4] Consumer Financial Protection Bureau, *Creating the Consumer Bureau*, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/.

[5] Consumer Financial Protection Bureau, *The Bureau*, https://www.consumerfinance.gov/about-us/the-bureau/.

§ 5491(c). Again to ensure maximum agency independence, Congress gave the CFPB's Director the authority to appoint a Deputy Director, and provided that the "Deputy Director . . . shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B).

Trump's Takeover of the CFPB

The agency's first Director, Richard Cordray, was confirmed by a 66-34 vote in the Senate and took office on July 17, 2013.[6] At approximately 2:30 p.m. on November 24, 2017, Director Cordray announced that he had appointed Chief of Staff Leandra English as the Bureau's Deputy Director, to ensure she would become Acting Director under 12 U.S.C. § 5491(b)(5)(B) until the president appointed, and the Senate confirmed, a new Director. Ex. 2 (English Decl.) ¶ 5. "In considering how to ensure an orderly succession for this independent agency," he explained in a statement, "I have also come to recognize that appointing the current chief of staff to the deputy director position would minimize operational disruption and provide for a smooth transition given her operational expertise." *Id.*

Ms. English had an extensive history of service at the CFPB, having served as CFPB's Chief of Staff, Deputy Chief Operating Officer, Acting Chief of Staff, and Deputy Chief of Staff. Ms. English also served as the Principal Deputy Chief of Staff at the Office of Personnel Management, the Chief of Staff and Senior Advisor to the Deputy Director for Management at the White House Office of Management and Budget, and a member of the CFPB Implementation Team at the U.S. Department of the Treasury. *Id.* ¶¶ 2-3.

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[6] *U.S. Senate*, Roll Call Votes 113th Congress – 1st Session, Jul. 16, 2013, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00174.

At approximately 8:50 p.m. on November 24, the White House swooped in, announcing: "Today, the President announced that he is designating Director of the Office of Management and Budget (OMB) Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau (CFPB)." Ex. 2 (English Decl.) ¶ 7. Mr. Trump made no mention of the actual Acting Director, Ms. English.

Mr. Mulvaney Begins to Gut the CFPB

Mr. Mulvaney is the Director of the Office of Management and Budget, and an at-will employee in the White House. Mr. Mulvaney "serves the President of the United States in overseeing the implementation of his vision across the Executive Branch."[7] Unlike Ms. English, Mr. Mulvaney has never served in any capacity in a consumer-protection enforcement agency or a financial or banking regulatory agency.[8] He has described the CFPB as a "sad, sick joke," has co-sponsored legislation proposing to eliminate the agency, and said at a hearing in the House of Representatives: "I don't like the fact that CFPB exists, I'll be perfectly honest with you."[9]

Since he became the *ultra vires* CFPB Acting Director, defendant Mulvaney has already begun to dismantle the Bureau. He has placed a freeze on new regulations, enforcement actions,

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[7] The White House, *Office of Management and Budget*, https://www.whitehouse.gov/omb.

[8] Biographical Directory of the United States Congress, *Mulvaney, Mick, (1967-)*, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001182.

[9] Credit Union Times, *Rep. Mick Mulvaney: CFPB 'Sick, Sad Joke,'* YouTube, Sept. 10, 2014, https://www.youtube.com/watch?v=RaVeNafdyVA; Tara Siegel Bernard, *Dueling Appointments Lead to Clash at Consumer Protection Bureau*, N.Y. Times (Nov. 24, 2017), https://www.nytimes.com/2017/11/24/us/politics/consumer-financial-protection-bureau-cordray-leader-trump-mulvaney.html; U.S. Government Publishing Office, *Hearing Before The Subcommittee on Oversight and Investigations of the Committee on Financial Services* (June 25, 2015), https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg96998/html/CHRG-114hhrg96998.htm.

contracting, rulemaking, and hiring.[10] The agency has already reversed course in an ongoing enforcement action.[11] His goal, he admits, is to "limit as much as we can what the CFPB does."[12]

But it is defendant Trump running the show. Just last Friday, Mr. Trump confirmed his control in a tweet: "Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has incorrectly been reported, but will be pursued and, if anything, substantially increased." Ex. 3. The "fines and penalties" he was referring to are CFPB fines and penalties.[13] Absent Court intervention, Mr. Trump's takeover of the CFPB will be complete.

The Credit Union is Regulated by the CFPB and Supports its Mission

Plaintiff Lower East Side People's Federal Credit Union (the "Credit Union") is regulated by the CFPB. Declaration of Linda Levy, December 11, 2017 ("Levy Decl.") ¶ 6. The Credit Union is a not-for-profit community development financial institution that serves a majority low-income and immigrant membership in New York City and promotes economic justice and opportunity in New York City neighborhoods. *Id.* ¶ 3. Organized in 1986, the Credit Union has served more than 30,000 people and today serves approximately 8,500 members. *Id.*

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[10] Dave Boyer, *Mulvaney scrutinizing 125 CFPB cases opened by liberal predecessor*, Wash. Times (Nov. 30, 2017), https://www.washingtontimes.com/news/2017/nov/30/mick-mulvaney-seeks-more-trump-appointees-help-him/; Patrick Rucker and Richard Cowan, *Trump-installed consumer agency head sets hiring freeze, halts new rules*, Reuters (Nov. 27, 2017), https://www.reuters.com/article/us-usa-trump-cfpb-memo/trump-installed-consumer-agency-head-sets-hiring-freeze-halts-new-rules-; Ian McKendry, *Mulvaney's first days at CFPB: Payday, personnel and a prank*, American Banker (Dec. 4, 2017, 8:00 PM), https://www.americanbanker.com/news/cfpbs-mulvaney-backs-congressional-repeal-of-payday-lending-rule.

[11] Jessica Silver-Greenberg and Stacy Cowley, *Consumer Bureau's New Leader Steers a Sudden Reversal*, N.Y. Times (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/business/cfpb-mick-mulvaney.html.

[12] Bess Levin, *Mick Mulvaney Wonders If Wells Fargo Has Suffered Enough*, Vanity Fair (Dec. 7, 2017), https://www.vanityfair.com/news/2017/12/mick-mulvaney-wonders-if-wells-fargo-has-suffered-enough.

[13] Patrick Rucker and Pete Schroeder, *Exclusive: Wells Fargo sanctions are on ice under Trump official – sources*, Reuters (Dec. 7, 2017, 4:24 AM), https://in.reuters.com/article/usa-trump-wells-fargo-exclusive/exclusive-wells-fargo-sanctions-are-on-ice-under-trump-official-sources-idINKBN1E133P.

Approximately 90% of the Credit Union's members are low- or moderate-income; 65% are Latino. *Id.* The Credit Union has made approximately $100 million in housing, small business, and consumer loans. *Id.* The majority of the Credit Union's members are low-income and vulnerable to predatory lending practices and other misconduct the CFPB exists to prevent. *Id.*

ARGUMENT

A party may obtain a preliminary injunction by showing "that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest." *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Doe*, 868 F. Supp. 532, 536 (S.D.N.Y. 1994) ("Preliminary declaratory relief in this case should be conditioned on the same familiar standards that the Court of Appeals has instructed should be applied to motions for preliminary injunctions.").

I. PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The CFPB Deputy Director "Shall Serve as Acting Director"

The Deputy Director of the CFPB "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B).

A Director no longer serving in office is both "absent" and "unavailable." *See, e.g.*, *Absent*, Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/absent (defining "absent" as "not existing: lacking"); *Unavailable*, Merriam Webster Online Dictionary, https://goo.gl/MwSrpD (defining "unavailable" as "not available: such as . . . unable or unwilling to do something"); *see generally Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give

them their ordinary meaning."). The Department of Justice concedes that when Director Cordray resigned, he was "unavailable."[14]

"Shall" means "shall." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing "shall" is "mandatory" language that "normally creates an obligation impervious to judicial discretion"); *Barbieri v. RAJ Acquisition Corp.*, 199 F.3d 616, 619 (2d Cir. 1999) ("The term 'shall,' as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court." (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947))). Under a plain reading of this language, the Deputy Director automatically becomes the Acting Director when the Director leaves office.

It is undisputed that Director Cordray resigned on November 24. Ex. 2 (English Decl.) ¶ 9. It is undisputed that Ms. English was the Deputy Director when Cordray resigned. *Id.* ¶ 5. Therefore Ms. English is the Acting Director. 12 U.S.C. § 5491(b)(5)(B).

B. Defendants' FVRA Argument Is Wrong

1. Defendants Would Erase Section § 5491(b)(5)(B) From the U.S. Code

Notwithstanding the plain, mandatory language of the CFPB statute, President Trump purported to appoint Mr. Mulvaney as Acting Director. The appointment is unlawful.

To justify the president's actions, the government relies misguidedly upon the Federal Vacancies Reform Act, or FVRA, 5 U.S.C. §§ 3345–3349d.[15] But the FVRA does not help defendants.

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[14] *See Memorandum Re: Designating an Acting Director of the Bureau of Consumer Financial Protection*, U.S. Department of Justice Office of Legal Counsel (Nov. 25, 2017), http://www.wsj.com/public/resources/documents/dojmemo.pdf ("OLC Memo"), at 3.

Passed in 1998, FVRA is the default statute for temporarily filling vacant offices requiring presidential appointment and Senate confirmation ("PAS" offices). *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929 (2017). In such cases, "the first assistant to the office of such officer [in this case, Ms. English] shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). Notwithstanding this first default position, "the President (and only the President) may direct [an existing PAS officer, in this case Mr. Mulvaney] to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(2). *However*, the entire FVRA default statute does not apply if another "statutory provision [here, 12 U.S.C. § 5491(b)(5)(B)] expressly designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(B). In full, the FVRA is

> the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate, **unless**—
>
> (1) **a statutory provision expressly**—
>
> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) **designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity** . . .

Id. at § 3347(a). The Dodd-Frank Act, 12 U.S.C. § 5491(b)(5)(B), "expressly designates" the Deputy Director, Ms. English, "to perform the functions and duties of a specified office temporarily in an acting capacity." It says: the "Deputy Director . . . shall… serve as acting Director in the absence or unavailability of the Director." *Id.* This is as express as its gets.

[15] *See* OLC Memo at 1. In addition, the CFPB's General Counsel issued a hasty memo agreeing with OLC's conclusion. *See* Memorandum from Mary E. McLeod to The Senior Leadership Team, CFPB, Nov. 25, 2017, https://www.politico.com/f/?id=0000015f-fbe7-d90d-a37f-fff74f280000.

The FVRA and the Dodd-Frank Act are easy to harmonize. The FVRA default applies to the CFPB "unless" another statute expressly designates another officer or employee. The Dodd-Frank Act expressly designates former Deputy Director English. 12 U.S.C. § 5491(b)(5)(B). The Dodd-Frank Act controls.

Defendants' reading cannot be squared with the law. In their view, once there is a conflict between the FVRA and Dodd-Frank, the FVRA appointment process becomes a non-exclusive means, an option for the president, no matter what Dodd-Frank says. OLC Memo at 3. In defendants' view, 12 U.S.C. § 5491(b)(5)(B) simply disappears. Either (i) "shall" becomes "may," or (ii) the whole section is a nullity. Put another way, defendants would change the "Deputy Director . . . shall serve as acting Director in the absence or unavailability of the Director" to the "Deputy Director . . . shall serve as acting Director in the absence or unavailability of the Director, unless the President appoints someone else."[16]

Mr. Trump's desire to rewrite the law is understandable. He wants to control the CFPB. But he may not change the law.

Defendants' approach violates the two most vital principles of statutory construction. First, every section of a statute must have meaning. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal alterations and quotation marks omitted)); *Duncan v. Walker*, 533 U.S.

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[16] Congress certainly knew how to write such a provision when it wanted to. *See*, *e.g.*, 40 U.S.C. § 302 (General Services Administration) ("the Deputy Administrator is Acting Administrator . . . unless the President designates another officer of the Federal Government."); 38 U.S.C. § 304 (Veterans Affairs) ("Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs . . . in the event of a vacancy in the office of Secretary."); 42 U.S.C. § 902 (Social Security Administration) ("[t]he Deputy Commissioner shall be Acting Commissioner" in the event of a vacancy in the office of the Commissioner "unless the President designates another officer of the Government as Acting Commissioner.").

167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *United States v. Menasche*, 348 U.S. 528, 538 (1955) ("The cardinal principle of statutory construction is to save and not to destroy." (internal citation and quotation marks omitted)); *Puello v. Bureau of Citizenship and Immigration Servs.*, 511 F.3d 324, 330 (2d Cir. 2007) ("[A] statute must, if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless." (quoting *Allen Oil Co., Inc. v. Comm'r of Internal Revenue*, 614 F.3d 336, 339 (2d Cir. 1980))); *United States v. Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968) ("There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective"); *see also Great Lakes Comnet, Inc. v. F.C.C.*, 823 F.3d 998, 1003 (D.C. Cir. 2016) ("[W]hen construing a statute courts 'give effect, if possible, to every clause and word.'" (quoting *Duncan*, 533 U.S. at 174)).

Yet defendants would erase 12 U.S.C. § 5491(b)(5)(B) from the U.S. Code.

Second, wherever possible, different statutes must be read in harmony. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (internal quotations omitted)); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.").

But defendants' interpretation is statutory cacophony: one statute vanquishes the other.

The Court should follow the plain language of the Dodd-Frank Act. It is the only approach that does not rewrite the law. It is the only approach that harmonizes Dodd-Frank and

the FVRA. The "Deputy Director . . . shall… serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). Ms. English is the Acting Director.[17]

2. Even If Dodd-Frank Conflicted with the FVRA, Dodd-Frank Would Control

The Dodd-Frank Act and the FVRA do not conflict. They are easy to harmonize. *See* § I(B)(i), *supra*. But assuming they did conflict, the later, more specific, mandatory statute (Dodd-Frank) would control.

Imagine the FVRA did not contain the word "unless." *Cf.* 5 U.S.C. § 3347(a). Then there would be an arguable conflict between the FVRA ("exclusive means") and Dodd-Frank (the "Deputy Director . . . shall serve as acting Director.") Even in that hypothetical world, Dodd-Frank would plainly control, for five reasons.

First, Dodd-Frank was enacted **more recently** than the FVRA. The well-established rule for evaluating conflicts between two statutes is that "the more recent legal pronouncement controls." *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't. of Transp.*, 724 F.3d 230, 233 (D.C. Cir. 2013).

Second, Dodd-Frank's language is **more specific** than the default FVRA, focusing narrowly on the head of one particular agency, as opposed to supplying default rules for all executive offices. "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)

[17] The OLC memo cites *Hooks v. Kitsap Tenant Support Servs.*, 816 F.3d 550 (9th Cir. 2016), for the theory that the FVRA remains an "option" in this case. But *Hooks* involved another statute (the National Labor Relations Act) in another circuit. Unlike the CFPB statute, the NLRA provision was not mandatory. It simply gave the president an option to appoint certain officers as Acting General Counsel. *See* 29 U.S.C. 153(d); *Hooks*, 816 F.2d at 555. Second, the NLRA and the FVRA give authority to the same person to appoint an Acting General Counsel for the National Labor Relations Board. *Hooks*, 816 F.3d at 555–56 (discussing 29 U.S.C. § 153(d)). Where two statutes provide for the same person to fill the same vacancy, it makes sense that "the President is permitted to elect between these two statutory alternatives," both of which empower the president directly. *Hooks*, 816 F.3d at 556.

(internal quotations omitted); *see HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("a specific statute . . . controls over a general provision").

Third, the language in Dodd-Frank is **mandatory**. Even the FVRA would make Ms. English the default Acting Director, *see* 5 U.S.C. § 3345(a)(1), and only says the president "may" appoint someone else instead, 5 U.S.C. § 3345(a)(2). The mandatory, 12 U.S.C. § 5491(b)(5)(B) ("shall") trumps the permissive, 5 U.S.C. § 3345(a)(2) ("may").

Fourth, Dodd-Frank's **legislative history** makes clear that Congress decided that FVRA should *not* apply to the CFPB Acting Director. The early version of Dodd-Frank that passed the House of Representatives in December 2009 did not provide for a Deputy Director of the CFPB. Rather, when the Director's office became vacant, the FVRA governed. *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). But that version of Dodd-Frank did not survive. The Senate bill, introduced and passed months later, is the law. It uses the present, mandatory language in 12 U.S.C. § 5491(b)(5)(B). *See* S. 3217, 111th Cong. § 1011(b)(5)(B) (2010). This change makes plain that Congress considered the FVRA default, rejected it, and deliberately replaced it with the mandatory language that now makes Ms. English the Acting Director.

Fifth, the overall statutory scheme of Dodd-Frank was designed to "establish[] . . . an independent bureau," insulated from direct presidential management and control. 12 U.S.C. § 5491(a); S. Rep. No. 111-176, at 174 (2010) (discussing need for a "strong and independent Bureau"). The entire statutory scheme was designed to promote this independence. Congress placed the CFPB within the already-independent Federal Reserve System. 12 U.S.C. § 5491(a). Congress gave the CFPB an independent funding source within the Federal Reserve. 12 U.S.C. § 5497(a)(1). Congress protected the CFPB Director from removal except for good cause. *See* 12

U.S.C. § 5491(c)(3). And Congress provided that the Deputy Director—rather than a handpicked, unconfirmed White House employee—"shall" become Acting Director. 12 U.S.C. § 5491(b)(5)(B). The *ultra vires* appointment of Mr. Mulvaney turns all of this on its head. This defendant is not remotely independent of the president. To the contrary, his job is to "implement[] . . . [Trump's] vision,"[18] and we now know Mr. Trump is in control. *See* Ex. 3.

"A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). The legislative plan for the CFPB was to be independent. Requiring Senate confirmation of any presidential appointee to the CFPB is necessary to achieve that worthy statutory goal. *SW Gen.*, 137 S. Ct. at 935 ("The Framers envisioned [Senate confirmation] . . . as 'an excellent check upon a spirit of favoritism in the President' and a guard against 'the appointment of unfit characters.'" (quoting The Federalist No. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton))).

Defendants' interpretation of the relationship between the FVRA and Dodd-Frank violates Dodd-Frank's text, basic principles of statutory construction, legislative history, structure, and purpose. Under Dodd-Frank, Ms. English is the Acting Director.

C. The President "Shall Not" Appoint a Member of the FDIC Board (Including the CFPB Acting Director) without Senate Confirmation

The purported Mulvaney appointment is illegal for a second, independent reason: the president "shall not" appoint a board member of the Federal Deposit Insurance Corporation (FDIC) without Senate approval. The Acting Director of the CFPB is an FDIC board member, though Mr. Mulvaney has never received Senate approval.

The FVRA "shall *not* apply" to any members of an independent multi-member board or commission. 5 U.S.C. § 3349c(1) (emphasis added). The Acting Director of the CFPB "*shall* be"

[18] The White House, *Office of Management and Budget*, https://www.whitehouse.gov/omb.

a member of the board of the FDIC, an independent multi-member board or commission. 12 U.S.C. §§ 1812(a)(1)(B) (CFPB Director "shall be"), 1812(d)(2) (CFPB Acting Director "shall be"). Because Defendant Mulvaney "shall not" be on the FDIC board, 5 U.S.C. § 3349c(1), he cannot be the Acting Director of the CFPB.

Even the Department of Justice admits that the FVRA "shall not apply" to independent multi-member boards or commissions such as the FDIC. As OLC admits, "Congress has indeed determined that some positions with hallmarks of independence should not be filled on an acting basis through the Vacancies Reform Act."[19] It is undisputed that an FDIC board member is just such a position. Yet defendant Trump has just installed Mr. Mulvaney right on the FDIC board. That is plainly illegal. 5 U.S.C. § 3349c(1).

The stakes are particularly high here. Mr. Mulvaney is no ordinary appointee. He is a White House employee. *See* § I(D), *infra*. He works at the pleasure of President Trump and fulfils his "vision." He is anything but independent of the president. Yet he would now be one of only five board members of the FDIC. 12 U.S.C. § 1812(a)(1)(B).

The Mulvaney appointment is plainly illegal. It should be enjoined.

D. The President May Not Appoint His At-Will Employee to Run the "Independent" CFPB

Even if President Trump could appoint *someone* as CFPB Acting Director (he cannot), he cannot appoint a White House employee who serves at his whim and pleasure to run this independent agency. The president's purported appointment of Mr. Mulvaney is therefore illegal for a third reason: it violates Congress's requirement that the CFPB be "an independent bureau." 12 U.S.C. § 5491(a).

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[19] OLC Memo at 7.

The CFPB was designed to be "strong and independent." S. Rep. No. 111-176, at 174 (2010). As noted, the CFPB was created "in the Federal Reserve System," 12 U.S.C. § 5491(a), another branch of the executive whose independence is essential to its mission and required as a matter of both law and custom. *See generally* Peter Conti-Brown, *The Power and Independence of the Federal Reserve* (2016). The CFPB Director is removable only for cause. 12 U.S.C. § 5491(c)(3); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (noting that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause"). And it is independently funded via the Federal Reserve System, rather than the usual annual appropriations process in Congress. 12 U.S.C. § 5497(a)(1).

All of this is now in tatters. Mr. Mulvaney works within the Executive Office of the president. He is at-will, does not enjoy the statutory protections of a CFPB Director, and has no independence whatsoever, as made plain by Mr. Trump's December 8 tweet. Ex. 3.

The Dodd-Frank Act did not contemplate having the president's at-will employee run the CFPB on the side. *Cf.* 12 U.S.C. § 5491(a). As the Supreme Court has noted, in the context of protections for independent executive agencies, "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Defendant Trump can dangle the OMB position over Mr. Mulvaney to get him to serve his bidding at the CFPB. This makes a mockery of the entire statutory scheme—the placement and funding of CFPB within the Federal Reserve system and the requirement of a for-cause termination. If this is agency "independence," then "independent" has no meaning.

Dodd-Frank created a CFPB to be independent of the president. Now Mr. Trump is running the CFPB through Mr. Mulvaney. The president's appointment of his White House employee violates the law for this third reason.

E. The Appointment Violates the Constitution's Appointments Clause

The Constitution empowers the president to appoint "Officers of the United States," subject to "the Advice and Consent of the Senate." U.S. Const. Art. II, § 2, cl. 2. This provision "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (*per curiam*)). The Framers considered the appointment power "the most insidious and powerful weapon of eighteenth century despotism," and responded "by carefully husbanding the appointment power to limit its diffusion." *Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991) (internal quotation marks omitted). The Appointments Clause was designed to "ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660. Apart from the Appointments Clause itself, there is only one additional source of authority for the president to appoint an officer: Congress may pass a statute granting the president the authority to appoint "inferior Officers" without the Senate's advice and consent. U.S. Const. Art. II, § 2, cl. 2.

The president thus has two, and only two, means of appointing officers: with the advice and consent of the Senate, or pursuant to a statute. *See SW Gen.*, 137 S. Ct. at 945 (Thomas, J., concurring). "[A]ll persons who can be said to hold an office under the government . . . were intended to be included within one or the other of these modes of appointment." *United States v. Germaine*, 99 U.S. 508, 510 (1878). When no statute grants the president the power to appoint an officer, he has no constitutional authority to appoint without Senate approval. *See, e.g.*, *Williams v. Phillips*, 360 F. Supp. 1363, 1364 & 1371 (D.D.C. 1973) (enjoining Acting Director of the

Office of Economic Opportunity from "taking any action as Acting Director" because he was not appointed under a statute or with Senate confirmation).[20]

Here, the Court is faced with two statutes designed to *limit* the president's authority. Dodd-Frank was enacted to create an independent agency, and the FVRA was enacted to reinforce the Senate's advice-and-consent power. *See SW Gen.*, 137 S. Ct. at 935–36. Given the "separation-of-powers concerns" that naturally arise in this field, the Court should hesitate to "read[] legislation, absent clear statement, to place in executive hands authority to" appoint officers without the Senate's advice or consent. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010). Doing so risks improperly aggrandizing executive power at the direct expense of a co-equal branch.

Here, there is, to put it mildly, no clear statement in the FVRA that supplants Dodd-Frank. To the contrary, the FVRA does not apply, *see* § I(B)(i), *supra*, and even if did, Dodd-Frank controls, *see* § (I)(B)(ii), *supra*. The government's statutory arguments fail, and without a valid statutory basis, the president's unlawful appointment violates the Appointments Clause.

II. PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF AN INJUNCTION IS NOT GRANTED.[21]

A. Plaintiff's Constitutional Injury is *Per Se* Irreparable

"Because plaintiff[] allege[s] deprivation of a constitutional right, no separate showing of irreparable harm is necessary." *Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317,

[20] Mr. Mulvaney has not been confirmed by the Senate to the position of CFPB Director; his confirmation by the Senate to the position of OMB Director does not, on its own, allow the president to assign him additional duties in a position at another agency. *See Weiss v. United States*, 510 U.S. 163, 173–76 (1994); *Shoemaker v. United States*, 147 U.S. 282 (1893).

[21] Plaintiff is regulated by the CFPB. It has standing. *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015) (plaintiff Bank was regulated by the CFPB had standing to challenge President Obama's "recess appointment of the [CFPB's] Director, Richard Cordray").

322 (2d Cir. 1999). As the Second Circuit has held repeatedly, where there is an alleged constitutional violation, there is *per se* irreparable harm. *Conn. Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004)) ("[T]he alleged violation of a constitutional right triggers a finding of irreparable injury . . . Because violations of constitutional rights are presumed irreparable, the very nature of [the State's] allegations" satisfies the requirement of irreparable injury (citations and internal quotation marks omitted)); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court therefore properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights. In any event, it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm" (emphasis in original)).

Because plaintiff has alleged that the defendants violated the Appointments Clause, "no separate showing of irreparable harm is necessary." *Statharos*, 198 F.3d at 322.

B. Regulation by an *Ultra Vires* Acting Director Causes Irreparable Harm

But there is irreparable harm. An Acting Director with no lawful authority to regulate the Credit Union is now regulating the Credit Union. No money damage award can undo this harm.

A regulated entity is injured when its regulator was appointed unlawfully. Courts have repeatedly held, in analyzing standing, that regulated entities are "directly harmed by unconstitutional appointments." *Olympic Fed. Savs. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1189–90 (D.D.C.), *appeal dismissed and remanded*, 903 F.2d 837 (D.C. Cir. 1990) (injunctive relief granted was rendered moot by the subsequent, constitutional appointment of the OTS Director). In *Olympic*, a bank challenged the president's FVRA appointment of Salvatore Martoche as Acting Director of the Office of Thrift Supervision. The bank argued that "because Mr. Martoche was not properly appointed, he has no more right to exercise the Director's appointment powers than this court does." *Id.* at 1188. The court held that the appointment harmed the bank because, "under the Constitution and laws of

the United States, [the bank] is subject to regulation *only* by individuals with legal authority to act." *Id.* (emphasis in original).

The D.C. Circuit agreed, in a parallel case challenging the appointment of a CFPB Director. *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015), held that because the plaintiff bank was regulated by the CFPB, it had standing to challenge President Obama's "recess appointment of the [CFPB's] Director, Richard Cordray." *Id.* at 54. The bank was harmed even if it did not challenge a specific "agency rule"—it need not await "a future enforcement action." *Id.* at 53-54; *see also Free Enter. Fund*, 561 U.S. at 490 (challenge to Board's existence could be brought without requiring "petitioners to select and challenge a Board rule at random").

The Credit Union is regulated by the CFPB. It must follow rules and regulations the CFPB issues. For example, the Credit Union must follow the CFPB's mortgage disclosure rules, 12 CFR Part 1024; 12 CFR Part 1022, and CFPB rules to determine whether a member applying for a mortgage has the ability to repay, 12 CFR Part 1026. Levy Decl. ¶¶ 6-8. It complies with CFPB rules requiring collection and disclosure of mortgage lending data, 12 CFR Part 1003. *Id.* ¶ 9. And it complies with the CFPB's rules regulating international remittances, *i.e.*, transfers of money abroad, 12 CFR Part 1005. *Id.* ¶ 10.

But now, the Credit Union does not know who is validly in charge of the CFPB, who is authorized to make the rules, or whose rules to follow. Should the Credit Union comply with anything the CFPB requires after November 24, 2017? Assuming Mr. Mulvaney is an illegal Acting Director, the answer would seem to be no. If somehow the court ruled that he is a legal Acting Director, the answer would be yes. In the meantime, the uncertainty and the confusion are untenable, and make any planning and compliance impossible. *Id.* ¶¶ 13-14. The Court cannot

allow this regulatory chaos to continue over the multi-year course of a regular court calendar. The situation must be resolved through preliminary relief.

The Credit Union "is subject to regulation *only* by individuals with legal authority to act," and suffers an "injury . . . . when its government acts unconstitutionally against it." *Olympic Fed. Sav. & Loan Ass'n*, 732 F. Supp. at 1188 (emphasis in original). Mr. Mulvaney does not have "legal authority to act." Plaintiff is suffering injury. The motion should be granted.

C. Defendants Are Also Frustrating the Credit Union's Mission

The Credit Union is a non-profit financial corporative. Its corporate mission is to "promote economic justice and opportunity in NYC neighborhoods" and provide "high-quality financial services and community development investments in low income, immigrant and other underserved communities." Levy Decl. ¶ 5. The Credit Union's laudatory mission is being frustrated by defendants' conduct, harm also not reparable by monetary damages.

It is well established that, for non-profit or other mission-driven organizations, harm to the non-profit's mission and the community it serves can constitute irreparable harm warranting an injunction. *Caron Found. of Florida, Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1373 (S.D. Fla. 2012) ("Frustration of a rehabilitation provider's mission can cause irreparable harm."); *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield*, 790 F. Supp. 1197, 1209 (D. Conn. 1992) (irreparable harm established where plaintiff injured by "inability to achieve its purpose of providing housing in the Oldfield property to needy HIV-infected persons pending a final determination of this action"); *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) ("another mass removal of boarding students . . . thought to be a real possibility" poses "potential harm" and "threat to HCA and its mission," warranting preliminary injunction); *cf. Resolution Tr. Corp. v. Elman*, 949 F.2d 624,

629 (2d Cir. 1991) (irreparable harm established where "the essential statutory mission of the RTC would be frustrated").

President Trump's appointment of Mr. Mulvaney to gut the CFPB is frustrating the Credit Union's mission of promoting economic justice for its members. Mr. Mulvaney has described the CFPB as a "sad, sick joke" and "would advocate shutting it [the CFPB] down."[22] In fewer than two weeks in office, Mr. Mulvaney has, in his own words, "stopped a good many things," including:

- "stopped all new reg[ulation]s going out the door";
- "stopped all the new contracting";
- "stopping the filing of new lawsuits," including 14 lawsuits ready to be filed against financial services companies;
- implemented a 30-day hiring freeze;
- stopped distributions from the civil penalties fund; and
- installed political appointees with no experience in overseeing financial institutions or protecting consumers.[23]

His goal, he admits, is to "limit as much as we can what the CFPB does."[24]

These actions harm the Credit Union's mission and its members, approximately 90% of whom are low- or moderate-income, and who rely on the CFPB to protect them in the financial services market. *See* Levy Decl. ¶¶ 3, 15.

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[22] John Bowden, *Mulvaney: Authority I have at consumer bureau 'should frighten people*,' The Hill (Nov. 30, 2017, 9:31 PM), http://thehill.com/homenews/administration/362709-mulvaney-authority-i-have-at-consumer-bureau-should-frighten-people.

[23] Boyer, *supra* n.10; Rucker, *supra* n.10; McKendry, *supra* n.10.

[24] Levin, *supra* n.12.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST SUPPORT PLAINTIFF

The balance of the equities and the public interest strongly support a preliminary injunction. Defendants ask this Court to bless the lawless appointment of a man who is not independent of the president to run an independent agency. Worse, Mr. Mulvaney is trying to destroy the agency he now leads. *See* § II(C)), *supra*. His goal to limit "as much as we can what the CFPB does to sort of interfere with capitalism and with the financial services market"[25] is directly at odds with the CFPB's statutory mandate. It is in the public's interest that the CFPB "adhere[s] to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977).

Plaintiff, in contrast, asks this Court to preserve as Acting Director someone who has served in number of senior leadership roles at the CFPB (Deputy Chief Operating Officer, Acting Chief of Staff, and Deputy Chief of Staff), with experience in and commitment to financial regulation. Most important, Ms. English is the only person permitted under the law to be the Acting Director. If defendant Trump wants to replace her, he is free to nominate a Director for Senate confirmation anytime. "Temporary postponement of the President's" appointment "would not appear to cause any damage to his interest or to that of the United States." *Mackie v. Bush*, 809 F. Supp. 144, 146 (D.D.C. 1993).

Finally, the public has a strong interest in ensuring that the CFPB Acting Director is legitimate. CFPB is a major federal agency with regulatory and enforcement authority covering a wide array of consumer financial services—from mortgages and student loans to debt collection and credit reporting. An injunction undoing this unlawful takeover will restore order to the CFPB

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[25] Bowden, *supra* n.22.

and reinforce a vital concept in this presidency: no matter what Donald Trump says or does, the law still matters.

CONCLUSION

Plaintiff's motion for a preliminary injunction should be granted.

New York, New York
December 11, 2017

Respectfully submitted,

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