[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]

No. 18-5007

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

LEANDRA ENGLISH,

Plaintiff-Appellant,

v.

DONALD J. TRUMP and JOHN MICHAEL MULVANEY,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies the following.

A. Parties and Amici

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

The following amici have appeared in this Court:

- Consumer Financial Regulation Scholars: Kathleen C. Engel, Dalié Jiménez, Adam J. Levitin, Patricia A. McCoy, Richard Alderman, Ethan S. Bernstein, Mark E. Budnitz, Prentiss Cox, Benjamin P. Edwards, Judith Fox, Robert C. Hockett, Edward Janger, Cathy Lesser Mansfield, Nathalie Martin, Christopher L. Peterson, Heidi Mandanis Schooner, Norman I. Silber, Jeff Sovern, Jennifer Taub, Arthur E. Wilmarth, Jr.
- Current and Former Members of Congress: Joyce Beatty, Sherrod Brown, Michael E. Capuano, Catherine Cortez Masto, John K. Delaney, Bill Foster, Barney Frank, Al Green, Tom Harkin, Denny Heck, Mazie K. Hirono, Dan Kildee, Stephen F. Lynch, Carolyn B. Maloney, Gregory W. Meeks, Robert Menendez, Jeff Merkley, Brad Miller, Gwen Moore, Nancy Pelosi, Brian Schatz, Brad Sherman, Juan Vargas, Nydia M. Velázquez, Elizabeth Warren, Maxine Waters

- District of Columbia, and the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington
- Peter Conti-Brown
- Public Citizen, Inc., Americans for Financial Reform, Center for Responsible Lending, Consumer Action, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, National Fair Housing Alliance, Tzedek DC, Inc., United States Public Interest Research Group Education Fund, Inc.

B. Rulings Under Review

References to the ruling at issue appear in the appellant's opening brief.

C. Related Cases

The only related case of which undersigned counsel is aware appears in the appellant's opening brief.

/s/ Melissa N. Patterson
MELISSA N. PATTERSON

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STATEMENT OF JURISDICTION

Plaintiff Leandra English sued Defendants Donald J. Trump and John Michael Mulvaney claiming that they had unlawfully prevented her from serving as Acting Director of the Consumer Financial Protection Bureau (CFPB) under 12 U.S.C. § 5491(b)(5). JA.91. English invoked the district court's authority under 28 U.S.C. §§ 1331, 1361, 1651, 2201, and 2202. JA.92. The district court denied English's motion for a preliminary injunction on January 10, 2018. JA.247. English appealed that order on January 12, 2018. JA.293. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Whether the district court correctly concluded that: (1) the Federal Vacancies Reform Act (FVRA) permits the President to designate certain individuals other than the Deputy Director to serve as Acting Director of the CFPB; and (2) English has not satisfied the equitable requirements necessary to secure a preliminary injunction.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory Background

A. The Federal Vacancies Reform Act

In 1998, Congress enacted the FVRA, which provides comprehensive procedures to designate an acting officer to perform the duties of an executive officer

whose appointment is subject to Senate confirmation whenever the incumbent "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). By default, the FVRA provides that the first assistant to the office "shall" perform such duties on a temporary basis. *Id.* § 3345(a)(1). However, "notwithstanding" that provision, the FVRA expressly provides that the President "may" instead designate any official "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." *Id.* § 3345(a)(2); *see also id.* § 3345(a)(3) (identifying other officers and employees the President may designate). An acting official designated under the FVRA can serve no longer than 210 days, subject to certain extensions depending on the Senate calendar and the status of nominations to fill the position. *See id.* § 3346.

The FVRA applies to any Senate-confirmed office at any "Executive agency," except that Congress specified a short list of particular offices at particular agencies to which the FVRA "shall not apply." 5 U.S.C. §§ 3345(a), 3349c. The FVRA is inapplicable to commissioners of the Federal Energy Regulatory Commission, members of the Surface Transportation Board, judges of Article I courts, and Senate-confirmed members of entities "composed of multiple members" that "govern[] an independent establishment or Government corporation." *Id.* § 3349c.

Congress also set forth the general rule that the FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [Senate-confirmed] office of an Executive agency." 5 U.S.C. § 3347(a). Congress

recognized exceptions for recess appointments and also for other federal statutes that "expressly" either "authorize[] the President, a court, or the head of an Executive department, to designate," or directly "designate[,] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* Congress did not provide that such statutes make the FVRA's designation methods inapplicable, *id.*, nor did it include such statutes in the list of offices to which the FVRA "shall not apply," *id.* § 3349c. Instead, Congress provided that the FVRA is non-exclusive when such an office-specific statute exists. *Id.* § 3347(a) (FVRA is "the exclusive means" for designating an acting official "unless" an office-specific statute exists).

B. The Dodd-Frank Act

In 2010, Congress established the CFPB to enforce consumer financial protection laws. *See* Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). Congress specified that the CFPB "shall be considered an Executive agency." 12 U.S.C. § 5491(a); *see also* 5 U.S.C. § 105. Congress further provided that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with … officers …, shall apply to the exercise of the powers of the Bureau." 12 U.S.C. § 5491(a).

The CFPB is headed by a single Director appointed by the President, with the Senate's advice and consent, for a five-year term. 12 U.S.C. § 5491(b), (c)(1). The Director is statutorily removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). Congress specified that the Director

may not simultaneously "hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider." *Id.* § 5491(d). The CFPB's organic statute creates a Deputy Director, who "shall[] be appointed by the Director" and shall "serve as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5) (the Deputy-Director provision).

II. Factual and Procedural Background

On Friday, November 24, 2017, the CFPB's then-Director Richard Cordray resigned. JA.94. On his final day in office, he designated plaintiff Leandra English, his chief of staff, as the Deputy Director, a previously vacant position. *Id.* English did not, however, become the Acting Director. That same day, the President, using his FVRA authority, designated John "Mick" Mulvaney, Director of the Office of Management and Budget (OMB), as the Bureau's Acting Director, effective upon Cordray's resignation. JA.252. On Saturday, November 25, the Department of Justice's Office of Legal Counsel (OLC) and the CFPB's General Counsel issued separate memoranda advising that the FVRA permitted the President to designate an Acting Director. *Id.* "[I]n a conference call on Sunday, November 26, the Associate Directors of the CFPB's six divisions agreed that they would act consistently with the understanding that Mulvaney was the acting Director." *Id.* Mulvaney arrived at CFPB headquarters as Acting Director on November 27, and "the record evidence suggests that CFPB operations have continued with the understanding that Mick Mulvaney is the Acting Director." JA.252-53 (quotation marks omitted).

On Sunday, November 26, 2017, English filed this action. Dkt. 1. She alleged that as Deputy Director, she became the Acting Director under 12 U.S.C. § 5491(b)(5). English sought a temporary restraining order, asking the district court to remove Mulvaney as Acting Director, install her in his stead, and enjoin the President from appointing any other Acting Director. Dkt. 3. The district court denied this request. JA.74-75 (transcript of hearing).

English then sought a preliminary injunction providing similar relief. Dkt. 23, 26. The district court denied that motion on January 10, 2018. JA.247-92. The court issued a lengthy opinion that carefully examined the text, structure, and history of the FVRA and the Dodd-Frank Act provision English invoked. *See* JA.257-82. The court explained that, "on its own terms," the FVRA "clearly" authorized "the President's appointment of the CFPB's acting Director." JA.258. The FVRA applies to Senate-confirmed offices at "an Executive agency," and Congress made the CFPB "an Executive agency." *Id.* (citing 5 U.S.C. § 3345(a) and 12 U.S.C. § 5491(a)). Nor is the CFPB an independent entity to which the FVRA does not apply, since it "is not a multi-member body." JA.258-59 (citing 5 U.S.C. § 3349c(1)).

The court next examined whether the Dodd-Frank Act displaced the authority provided by the FVRA. JA.261-75. It concluded that, under "a fair reading of the entirety of these statutes," they "can, and therefore must, be read harmoniously" to permit the President to use his FVRA authority to designate the CFPB's Acting Director. JA.261. The court based this conclusion on a number of considerations.

The court explained that the exception to the FVRA's exclusivity provision "can only mean" that Congress intended the FVRA to remain "a nonexclusive means for appointing officers" where a separate statute "designates" an acting official. JA.262 (citing 5 U.S.C. § 3347(a)(1)). The court also emphasized that the Dodd-Frank Act itself provides that laws such as the FVRA apply to the CFPB unless another provision "expressly" displaces them. JA.264 (citing 12 U.S.C. § 5491(a)). The court observed, moreover, that "there is reason to doubt whether the Deputy Director provision [English relies on] even covers a vacancy created by a resignation," since it "does not use the word 'vacancy.'" JA.266. The court also noted the Dodd-Frank Act's "silen[ce] regarding the President's ability to appoint an acting Director," JA.267 (emphasis omitted); the fact that even where mandatory, the term "shall" is not "always understood to be *unqualified*," JA.268; and the canons of statutory construction requiring statutes to be reconciled where possible and counseling against partial implied repeals absent clear and manifest congressional intent, JA.270-71. Finally, although the court indicated that its statutory analysis did not turn on this concern, the court noted that English's interpretation "potentially impairs the President's ability to fulfill his obligations under the Take Care Clause." JA.275.

The court further rejected English's arguments that the FVRA could not apply to the CFPB because the agency is in some respects independent. JA.278-79. "[H]osannas to the CFPB's independence cannot override the force of the statute's text." JA.278.

Finally, the court held that English had failed to demonstrate that she would suffer irreparable harm absent injunctive relief. JA.285-90. The court noted that the declaration she submitted "include[d] no factual allegations about any harm that she has suffered as a result of the events at issue here." JA.287. Instead, English relied solely on a "statutory right to function" recognized only in an unpublished district court case. *Id.* (citing *Berry v. Reagan*, Civ. No. 83-3182, 1983 WL 538, at *5 (D.D.C. Nov. 14, 1983)). The district court explained that here, unlike in *Berry*, "[t]he CFPB is not and will not be shuttered" absent injunctive relief. JA.288. And even if other parties might be harmed "if it is later determined that Mulvaney has not been lawfully the acting Director," that possibility could not demonstrate any irreparable harm to English herself. *Id.*

SUMMARY OF ARGUMENT

English asks this Court to take the extraordinary step of unseating the acting head of a federal agency and turning over control of the agency to her. She requests a preliminary injunction based on her contention that only the CFPB's Deputy Director may serve as Acting Director until the Senate confirms a presidentially nominated Director. English's claim rests on a fundamental misreading of the relevant statutes, and the district court properly concluded that she cannot establish a likelihood of success on the merits.

In the FVRA, Congress enacted a comprehensive scheme for designating acting officers to temporarily serve in vacant offices requiring Senate confirmation.

This scheme applies at any "Executive agency" and is by default the "exclusive" means to select an acting officer. 5 U.S.C. §§ 3345(a), 3347. Here, the CFPB is an Executive agency, and the office of Director of the CFPB is not one of those few offices to which Congress has made the FVRA inapplicable. As a result, the President permissibly exercised his FVRA authority to designate Mulvaney, a Senate-confirmed official, as the Acting Director when the office became vacant.

English's contrary position invokes a provision of the Dodd-Frank Act providing that the Deputy Director "shall" serve as the Acting Director in the Director's "absence or unavailability." 12 U.S.C. § 5491(b)(5)(B). English's assertion that Congress intended this provision to render the FVRA inapplicable to the CFPB's Directorship is untenable. First, Congress provided that the FVRA's options for filling vacancies are not "exclusive"—rather than inapplicable—with respect to positions covered by such office-specific statutes. 5 U.S.C. §§ 3347, 3349c. Moreover, the Dodd-Frank Act itself provides that all federal laws dealing with federal officers (which includes the FVRA) apply to the CFPB except where "otherwise provided expressly" by law. 12 U.S.C. § 5491(a). The provision invoked by English does not "expressly" displace the provisions of the FVRA; indeed, Section 5491(b)(5)'s text does not refer specifically to vacancies at all.

If these clear textual signposts left any doubt that the CFPB's Deputy-Director provision and the FVRA operate as alternative designation methods, the result is dictated by statutory construction canons favoring harmonization, disfavoring implied

repeals, and presuming that Congress is aware of existing law when it legislates. This is particularly true given that many statutes use language materially indistinguishable from the CFPB's Deputy-Director provision, yet none of them has ever been interpreted to displace the FVRA in whole or in part. Furthermore, if implemented in a logically consistent fashion across the U.S. Code, English's proposed statutory interpretation could create startling practical problems and prompt serious constitutional concerns. Simply put, every relevant interpretive principle compels the conclusion that the President's FVRA authority concerning the CFPB Director is not displaced by the Dodd-Frank Act.

Nor does the fact that Congress established the CFPB as an independent agency preclude the designation of Mulvaney simply because he is OMB's Director. Nothing in the text or structure of the FVRA or the Dodd-Frank Act supports English's assertion that there should be an unwritten exception precluding the President from choosing a particular Senate-confirmed official from serving in a vacancy in an office to which the FVRA applies.

Finally, even were English's statutory claims not meritless, the district court correctly determined that she has not met the equitable requirements for a preliminary injunction. English's inability to serve as Acting Director during the pendency of this litigation does not constitute irreparable harm, much less the kind of irreparable harm that could justify an injunction regarding government personnel matters. By contrast, in countermanding the President's exercise of his FVRA authority and placing control

of the CFPB in English's hands, the requested injunction would dramatically impinge on the separation of powers and would sow confusion and disruption within the CFPB. This Court should affirm the district court's denial of a preliminary injunction.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014). "When seeking a preliminary injunction, the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). This Court reviews "the district court's balancing of the preliminary injunction factors for abuse of discretion and review[s] questions of law underlying the district court's decision *de novo*." *Abdullah*, 753 F.3d at 197-98.

ARGUMENT

I. The Federal Vacancies Reform Act Authorizes The President To Designate Mulvaney The Acting Director Of The CFPB.

The President lawfully exercised his authority under the FVRA and Article II of the Constitution to designate Mulvaney as the CFPB's Acting Director upon the resignation of former Director Cordray. The conclusion that the Dodd-Frank Act's Deputy-Director provision does not displace the FVRA is compelled by the plain text

of the FVRA's applicability and exclusivity provisions, 5 U.S.C. §§ 3347, 3349c, as well as the Dodd-Frank Act's instruction that federal-officer laws like the FVRA apply to the CFPB unless "expressly" provided otherwise, 12 U.S.C. § 5491(a). The conclusion that the statutes can coexist is confirmed by every relevant canon of statutory construction, as well as the unbroken application of the FVRA to the many other statutes similarly providing that a certain deputy "shall" act in a vacant office. English's contrary position would create significant practical problems and constitutional concerns. Nor is the analysis any different either because the CFPB is an "independent" agency or because the President designated as Acting Director the current OMB Director.

A. The FVRA's Plain Text Applies To A Vacancy In The CFPB's Directorship.

As the district court explained, the FVRA "clearly" authorizes the President's designation of the CFPB's Acting Director "on its own terms." JA.258. The FVRA expressly authorizes the President to temporarily fill a vacancy arising by "resign[ation]" in a Senate-confirmed position by designating as an acting officer "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." 5 U.S.C. § 3345(a)(2). Congress made the FVRA's designation methods applicable to Senate-confirmed positions at all "Executive agenc[ies]." *Id.* § 3345(a); *see id.* § 105 (defining "Executive agency"). Where Congress intended to exclude an office from the FVRA's scope, it

said so, carefully delineating a short list of offices to which the FVRA "shall not apply." *Id.* § 3349c. Thus, the FVRA does not apply to Commissioners of the Federal Energy Regulatory Commission, Members of the Surface Transportation Board, and Article I court judges. *Id.* § 3349c(2), (3), (4). Notably, Congress also specified that the FVRA does not apply to any Senate-confirmed member of "any board, commission, or similar entity" that "governs an independent establishment or Government corporation," but only if that entity is "composed of multiple members." *Id.* § 3349c(1).

The CFPB thus falls within the express scope of the FVRA's coverage. Congress provided that "[t]he Bureau shall be considered an Executive agency." 12 U.S.C. § 5491(a). That alone would have brought the CFPB within the FVRA's scope, but Congress went further, specifying that "all Federal laws dealing with … officers" (like the FVRA) apply to the CFPB unless "otherwise provided expressly by law." *Id.* Nor does the CFPB come within any of the statutory exceptions to the FVRA's applicability. Although the CFPB is an "independent bureau," *id.*, it is not "composed of multiple members" and thus does not fall within the exclusion in 5 U.S.C. § 3349c(1).[1]

[1] On appeal, plaintiff has abandoned her argument that the CFPB Director is exempt because he is an *ex officio* member of the Board of the Federal Deposit Insurance Corporation. *See* Dkt. 26, at 16-17, 22. Regardless, as the district court explained, the Director's *ex officio* service on that Board does not mean that he was "appointed by the President, by and with the advice and consent of the Senate," *to* that Board, as required under 5 U.S.C. § 3349c(1). *See* JA.259-60.

Finally, Mulvaney is a permissible designee under the FVRA. As the OMB Director, he is a Senate-confirmed officer falling squarely within 5 U.S.C. § 3345(a)(2).

B. The Dodd-Frank Act's Deputy-Director Provision Does Not Displace The FVRA.

English contends that Congress made the FVRA inapplicable to the office of the CFPB Director by providing that the CFPB's "Deputy Director … shall … serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). This provision, she asserts, deprives the President of his FVRA authority to select someone other than the Deputy Director to serve as the acting CFPB Director. It is unclear whether English contends on appeal that the FVRA is inapplicable to the CFPB's Directorship in all circumstances or only when the CFPB has a Deputy Director in office.[2] Whether English is pursuing a theory of total or partial FVRA displacement, however, her arguments are ill-conceived.

1. The FVRA Specifies That It Is Nonexclusive, Rather Than Inapplicable, When Statutes Like Section 5491(b)(5) Apply.

In enacting the FVRA, Congress specifically recognized the existence of office-specific vacancy statutes, and it prescribed how these statutes intersect with the

[2] *Compare, e.g.,* Dkt. 44, at 6 (English's argument below that "if the Director had not named a Deputy Director before becoming unavailable," the CFPB would "be without an acting Director until a replacement is confirmed"), *and* Br. 16, 18, 20, 34, 36 (asserting, *e.g.*, that Section 5491(b)(5) forms the CFPB's mandatory, exclusive succession plan), *and* Members of Congress Amicus Br. 4 (arguing that Section 5491(b)(5) "displaces the FVRA entirely"), *with* Br. 26 (arguing that Section 5491(b)(5) "addresses our specific factual setting").

FVRA. By default, the FVRA is the "*exclusive* means for temporarily authorizing an acting official to perform the functions and duties of any office [requiring Senate confirmation] of an Executive agency." 5 U.S.C. § 3347(a) (emphasis added). But where "a statutory provision expressly … designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," Congress provided that the FVRA is not "exclusive." *Id.* § 3347(a)(1)(B). Section 3347's proviso that the FVRA is not the "exclusive" means of addressing vacancies in such offices stands in marked contrast with 5 U.S.C. § 3349c, which provides that the FVRA "shall not apply" to specified offices. Had Congress wanted to make the FVRA inapplicable to offices for which an office-specific statute designated an acting official, it would have listed such statutes in Section 3349c, not Section 3347. English ignores this critical flaw in her interpretation of the FVRA's exclusivity provision. Br. 29-31.

In light of the FVRA's text and structure, it is unsurprising that the only court of appeals to address the question has concluded that office-specific vacancy statutes do not displace the President's FVRA authority. In *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016), the court rejected the argument that the FVRA was inapplicable because an office-specific statute "provide[d] the exclusive means for the President to appoint an Acting General Counsel" of the National Labor Relations Board. *See id.* at 555-56 (discussing 29 U.S.C. § 153(d)). The Ninth Circuit concluded that "the text of the respective statutes" "belied" any such argument. *Id.* at

555. Examining 5 U.S.C. § 3347(a), the court concluded that the National Labor Relations Act qualified as "another statute [that] expressly provides a means for filling" a vacancy within the meaning of that provision. *Id.* at 556. Thus, the court concluded, "neither the FVRA nor the [National Labor Relations Act] is the *exclusive* means of appointing an Acting General Counsel of the [National Labor Relations Board]." *Id.*

English attempts to distinguish *Hooks* on the ground that the office-specific statute there merely authorized the presidential designation of a particular acting official, whereas Section 5491(b)(5) directly designates such an official. *See* Br. 29-30. The Ninth Circuit's reasoning, however, in no way turned on whether the office-specific statute there was an authorization or designation. *See Hooks*, 816 F.3d at 555-56. Moreover, this proposed distinction ignores that the exception to the FVRA's exclusivity provision expressly covers both types of office-specific vacancy provisions: authorization provisions in Section 3347(a)(1)(A), and designation provisions in Section 3347(a)(1)(B). Again, if Congress intended designation provisions to render the FVRA inapplicable, it would have included them in Section 3349c's exceptions to applicability rather than Section 3347(a)(1)(B)'s exception to exclusivity.

As the Ninth Circuit noted in *Hooks*, the FVRA's legislative history underscores that language such as Section 5491(b)(5)'s has long been understood to coexist with—not displace—the FVRA. In addressing a predecessor to the version of Section 3347 ultimately enacted, "[t]he Senate Report explains that the FVRA retains the vacancy-

filling mechanisms in forty different statutes, … and states that 'even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the [FVRA] would continue to provide an *alternative procedure* for temporarily occupying the office.'" *Hooks*, 816 F.3d at 556 (third alteration in original) (quoting S. Rep. 105-250, 1998 WL 404532, at 17 (1998)). A number of those statutes cited in the Senate Report provided that a particular official "shall" serve as the acting officer.[3] Congress in 2010 thus would have had no reason to presume that a provision like Section 5491(b)(5) would, for the first time, be read to displace the FVRA. *See also infra* § I.B.4 (further detailing the background statutory context).

The Senate Report's articulation of the background understanding that office-specific vacancy statutes and the FVRA's designation methods would coexist is all the more telling in light of later changes to the proposed statutory language. The draft bill discussed in the Senate Report provided that the FVRA was "*applicable* … unless" another statute "designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." S. Rep. 105-250, 1998 WL 404532, at 26 (emphasis added). Nonetheless, the Senate Report clearly indicated

[3] *See* S. Rep. 105-250, 1998 WL 404532, at 16-17 (listing statutes for the Departments of Defense, Education, Energy, Health and Human Services, Labor, and Treasury; the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the Small Business Administration, and the Export-Import Bank).

Congress's intent that such office-specific statutes would operate in tandem with—not supplant—the FVRA's provisions. Congress's subsequent revision and enactment of Section 3347, which makes the FVRA's provisions "*exclusive* … unless" such an office-specific statute exists, are even clearer evidence of the understanding that the FVRA and statutes like Section 5491(b)(5) would coexist.

Nor can English distinguish *Hooks* on the ground that the office-specific statute there pre-dated the FVRA, whereas the Dodd Frank Act post-dates the FVRA. Br. 30. The FVRA's exclusivity proviso instructs that the FVRA and office-specific vacancy statutes are to coexist, regardless of *when* such a statute was enacted. 5 U.S.C. § 3347(a)(1). Indeed, Congress considered, but did not ultimately enact, a version of Section 3347 that would have preserved only extant office-specific statutes. *See* S. 2176, 105th Cong. at 5-6 (July 15, 1998) (proposing language that would have preserved "statutory provision[s] *in effect on the date of enactment of the Federal Vacancies Reform Act of 1998* expressly … designat[ing] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity") (emphasis added); *cf.* Scholars Amicus Br. 19-20 (erroneously relying on the Senate Report's discussion of this eliminated text). Moreover, especially in light of this statutory language and context, it would make little sense for a post-FVRA Congress with the intent to displace the FVRA to borrow a statutory formulation long recognized not to displace the FVRA.

2. The Dodd-Frank Act Itself Makes The FVRA Applicable To Director Vacancies.

English's proposed reading of Section 5491(b)(5) is also refuted by the text of Section 5491 when read "as a whole." *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). In Section 5491(a), Congress provided that "[e]xcept as otherwise provided *expressly* by law, all Federal laws dealing with … officers" apply to the Bureau. 12 U.S.C. § 5491(a) (emphasis added). It is undisputed and indisputable that the FVRA is a federal law dealing with officers for purposes of Section 5491(a). Thus, as the district court reasoned, "by providing an express-statement requirement," Congress "explain[ed] how [the Dodd-Frank Act] interacts with [the FVRA]." JA.264.

Section 5491(b)(5) does not "expressly" provide that the FVRA is inapplicable to Director vacancies. To the contrary, Section 5491(b)(5) says nothing about the President's ability to designate an Acting Director, and "certainly does not expressly prohibit the President from doing so." JA.267. Indeed, in contrast with myriad other statutes, Section 5491(b)(5) says nothing about "vacancies" at all, explicitly addressing only the Director's "absence or unavailability." 12 U.S.C. § 5491(b)(5); *see* JA.266 (collecting statutes).

For these reasons, OLC and the CFPB's General Counsel both noted a basis to doubt whether Section 5491(b)(5) applies at all to vacancies. *See* JA.112-16, 123-24. Many office-specific statutes distinguish between absences and vacancies, *see, e.g.*, 31

U.S.C. § 301(c)(2); *cf.* JA.112-13, as do other provisions of the Dodd-Frank Act itself, *see, e.g.*, 12 U.S.C. § 5321(c)(3)). Similarly, Congress has distinguished between situations in which an office is vacant and those in which an officer is "unavailable." *See* 28 U.S.C. § 954. But OLC ultimately concluded that Section 5491(b)(5) is best read to apply to Director vacancies, JA.113-14, and the government does not here dispute that conclusion.

Yet even assuming that Section 5491(b)(5)'s ambiguous terms apply to Director vacancies, that does not *expressly* make the FVRA inapplicable. English erroneously conflates the question whether Section 5491(b)(5) is best read to apply to vacancies with the question whether Section 5491(b)(5) speaks clearly enough to displace an alternative vacancy-filling statute that Congress expressly made applicable to the CFPB elsewhere in Section 5491. *See, e.g.*, Br. 21. Because "there is a plausible interpretation" of Section 5491(b)(5) that would not cover Director vacancies at all, it certainly does not make the sort of express statement that could satisfy Section 5491(a). *See Southwestern Power Admin. v. Federal Energy Regulatory Comm'n*, 763 F.3d 27, 31 (D.C. Cir. 2014). English provides no support for her assertion that an ambiguous statute nevertheless constitutes an "express" limitation on an otherwise-applicable law. *See* Br. 34 n.3.

Moreover, even if Section 5491(b)(5) expressly referred to vacancies, that alone would be insufficient under Section 5491(a) to displace the FVRA. It still would not clearly override the FVRA's provisions unambiguously instructing that the FVRA is

nonexclusive but applicable in the face of office-specific vacancy provisions. Again, the question under Section 5491(a) is not whether Section 5491(b)(5) applies to vacancies, but whether it "expressly" replaces the FVRA rather than coexists with it.

This analysis does not, contrary to English's assertion, "impose[] a sweeping magic-words requirement." Br. 31-33. Consistent with cases that emphasize Congress's freedom to choose the means by which it makes its intent plain, *see* Br. 33, the district court did not require congressional intent to have taken any particular form. Rather, the court simply gave Section 5491(a) its unambiguous meaning, reading it to provide that all federal laws dealing with officers apply to the CFPB absent *some* form of express statutory directive to the contrary—which does not exist for the FVRA in any form. *See* JA.264-68.

English's attempt to find support in the Dodd-Frank Act's drafting history omits key details. She correctly notes that a House version expressly made the FVRA applicable in the event of a vacancy in the CFPB Directorship. H.R. 4173, 111th Cong. § 4102(b)(6)(B)(i) (engrossed version, Dec. 11, 2009); Br. 16, 37. Importantly, however, that bill lacked anything akin to the final version's explicit instructions that the CFPB "shall be considered an Executive agency," and that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with … *officers* … shall apply to the exercise of the powers of the Bureau." *Compare* 12 U.S.C. § 5491(a) (emphasis added), *with* H.R. 4173, 111th Cong. § 4101. By replacing the specific provision incorporating the FVRA with a more general provision making the CFPB subject to *all* laws

applicable to "Executive agencies" and "dealing with … officers," Congress did not somehow counter-textually render the FVRA *in*applicable.

Moreover, the earlier bill's express incorporation of the FVRA likely reflected the fact that it created an agency that was not continually headed either by a single officer or a multiple-member entity. H.R. 4173, 111th Cong. §§ 4002, 4102, 4103(b) (providing initially for a single Director, whose office would convert to a five-member Commission). It would have been unclear whether such an agency fell within the FVRA's exclusion of multiple-member independent entities (5 U.S.C. § 3349c), thus requiring clarification that became unnecessary once Congress settled on a continuous single-headed structure—a structure that unambiguously does not fall within the exceptions to the FVRA's applicability. More generally, this history demonstrates that Congress was well aware of the FVRA in crafting the CFPB, making English's contention that Section 5491(b)(5) was a backhanded means of displacing the FVRA particularly implausible.

3. Fundamental Principles Of Statutory Construction Preclude English's Proposed Interpretation Of Section 5491(b)(5).

Multiple canons of statutory construction confirm the foregoing textual analysis. First, the district court correctly observed that the harmonious-reading canon applies here. *See* JA.270. "[I]f by any fair course of reasoning the two [statutes] can be reconciled, both shall stand." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 622 (2011) (alterations in original). As this Court has explained, "[s]tatutes are to be considered

irreconcilably conflicting where 'there is a positive repugnancy between them' or 'they cannot mutually coexist.'" *Howard v. Pritzker*, 775 F.3d 430, 437 (D.C. Cir. 2015) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976)). Both the FVRA's exclusivity proviso and Section 5491(a)'s express-statement requirement demonstrate that Section 5491(b)(5) and the FVRA's designation options are far more than simply "capable of coexistence." *Id.* (quoting *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001)). As a result, courts must "regard each as effective." *Id.*

A related principle of statutory construction further undermines English's displacement argument. At base, English claims that by enacting Section 5491(b)(5), Congress implicitly repealed the FVRA as applied to the CFPB Director. But as the district court recognized, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original) (quotation marks omitted); JA.270; *see also Howard*, 775 F.3d at 437 (courts should interpret a later statute to repeal an earlier one only if "necessary to make the (later enacted law) work"). "An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." JA.271 (quoting *National Ass'n of Home Builders*, 551 U.S. at 663).

As the district court correctly held, English cannot escape "the presumption against implied repeals by relabeling a partial repeal" "as a discrete exception to the

FVRA's general rule." JA.271; *see* Br. 22-23. "Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and [the Supreme Court has] repeatedly recognized that implied amendments are no more favored than implied repeals." *National Ass'n of Home Builders*, 551 U.S. at 664 n.8. "A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Id.* (quotation marks omitted) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974)).

The conditions required to find an implicit repeal are not present here, because the FVRA and the Dodd-Frank Act's Deputy-Director provision do not conflict. English argues that Section 5491(b)(5)'s statement that the Deputy Director "shall … serve as acting Director in the absence or unavailability of the Director" cannot be reconciled with the FVRA, which provides that the "first assistant to [an] office … shall" serve as the acting officer, but that the President "may" designate various other officials. 5 U.S.C. § 3345(a). At the outset, as discussed above, the adoption of Section 5491(b)(5)'s general rule governing the "absence or unavailability" of the CFPB Director should not be read to conflict rather than coexist with the FVRA's earlier and specific rules governing a vacancy by resignation. *See Radzanower*, 426 U.S. at 155-56.

Moreover, even had Congress explicitly referred to vacancies in Section 5491(b)(5), English's myopic focus on the "shall" in Section 5491(b)(5) ignores the larger statutory context dictating harmonization of the provisions. As discussed above, both Section 5491(a)'s express-statement requirement and the FVRA's exclusivity proviso call for the mutual coexistence of the FVRA and Section 5491(b)(5) as separate, but equally available, tracks for designating an acting CFPB Director. And as the district court recognized, it must be presumed that when Congress enacted Section 5491(b)(5), it was "aware of how the FVRA typically interacts with other statutes" adopting office-specific vacancy rules—namely, that the FVRA becomes nonexclusive but remains applicable. JA.261-62. After all, "[i]t is a 'familiar principle that Congress legislates with a full understanding of existing law.'" JA.261 (quoting *American Fed'n of Gov't Emps., Local 3295 v. FLRA*, 46 F.3d 73, 78 (D.C. Cir. 1995)); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (applying this presumption even when the existing law was a well-established judicial "gloss" on statutory language).

English's contention that Congress intended Section 5491(b)(5) to conflict with—and therefore displace—the FVRA is particularly implausible in light of the history of analogous statutes coexisting with the FVRA. When Congress uses parallel language in different statutes on a related topic, it is presumed to have intended the same meaning. *See, e.g., Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *National Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 857 (D.C. Cir. 2006).

As discussed below, Congress has used materially identical "shall" language in at least fifteen statutes—including statutes enacted both before and after the FVRA—and very similar language in several others. *See infra* pp.28-30 & nn.4-6. Such statutes have never before been understood to displace the FVRA, and the FVRA has been repeatedly invoked in the face of them. In choosing the same statutory language for Section 5491(b)(5) that had so frequently been construed—consistent with Section 3347's plain instruction—to *permit* FVRA designations, it is highly improbable that Congress intended instead to *prohibit* FVRA designations and "create[] the exclusive method for filling a [Director] vacancy," as English suggests. Br. 16.

Moreover, English's insistence that Section 5491(b)(5) evidences such legislative intent ignores the context-specific meaning of "shall." In this context, "shall" means that the Deputy Director becomes the Acting Director automatically, without any need for presidential designation and independent of the FVRA and its time-limits, but it does not mean that the President's pre-existing FVRA authority to designate someone else is superseded. This interpretation of Section 5491(b)(5) is entirely consistent with courts' recognition that—although generally a mandatory term—"shall" can also be used in other ways. *See Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (treating as "significant, though not controlling," that "shall" is "the language of command"); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (acknowledging that with "legislation using 'shall,'" "matters are not always so

clear cut," and that "[t]here are instances when 'may' has been taken to mean 'must' and when 'shall' has been construed to mean 'may'").

For example, in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), the Supreme Court declined to give a statutory "shall" mandatory effect where a competing interpretation of the statute as a whole would "accord[] with traditional understandings and basic principles." *Id.* at 434; *see also id.* at 432 n.9 (citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 939 (2d ed. 1995), for the proposition that "[c]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice-versa," and David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 402-03 (2d ed. 1992), for the proposition that "'shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context"). Similarly, in *Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011), this Court refused to interpret a statute providing that the EPA's "Administrator shall" take certain actions to impose a mandatory, judicially reviewable duty. *Id.* at 855-56. It reached this conclusion despite observing that "'shall' is usually interpreted as 'the language of command,'" and noting the statute's "close juxtaposition of the mandatory 'the Administrator shall' with the permissive 'the State may.'" *Id.* These words, the Court instructed, could not be "consider[ed] … in isolation," and had to be interpreted in light of the statutory "language and structure." *Id.* at 856.

Nor does the principle that the specific governs the general support English's position. She argues that because Section 5491(b)(5) is specific to the CFPB, it must

displace the more general FVRA. Br. 15-16 (quoting *RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). As an initial matter, however, while Section 5491(b)(5) is more specific in that respect, the FVRA is more specific in the more relevant respect: it is directed specifically to *vacancies* by "resign[ation]" (or death or inability to perform), while Section 5491(b)(5) applies instead to "absence or unavailability"—even assuming those general terms may also encompass resignations. *See Maracich v. Spears*, 570 U.S. 48, 66 (2013) (declining to rely on the principle that "the specific … control[s] the general" because, "[a]s between the two [statutory] exceptions at issue here, it is not clear that one is always more specific than the other"). In any event, as the district court correctly observed, "[t]hese canons … are not appropriately invoked in this case" because "they apply only in the face of irreconcilably conflicting statutes." JA.272 (quoting *Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) (quotation marks omitted)). As shown above, there is no such conflict here.

Finally, English cannot establish that Section 5491(b)(5) would be superfluous unless it is read to implicitly repeal the FVRA's application to the CFPB Director. English is wrong that Section 5491(b)(5) would do no work if the FVRA applies to the CFPB Director. *See* Br. 8; *cf. Howard*, 775 F.3d at 437. The district court listed the "numerous functional differences between the CFPB's Deputy Director provision and the FVRA," JA.274, which illustrate the multiple reasons to create provisions like Section 5491(b)(5) that have nothing to do with displacing the FVRA. For example,

such provisions permit deputies to serve even if they have been nominated to the vacant office but do not satisfy the FVRA's tenure requirements for that scenario. *See* 5 U.S.C. § 3345(b)(1). They likewise allow deputies to serve past the 210-day time-limit (subject to various extensions) that the FVRA imposes. *See id.* § 3346. They also avoid any confusion as to who the "first assistant" is in the agency for purposes of the FVRA's default rule. *See Guidance on the Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 63 (1999) (noting that the FVRA "does not define the term 'first assistant'" and indicating some cause for doubt that an official "not designated by statute or regulation" could "qualify as first assistants").

4. Statutory Language Comparable To Section 5491(b)(5) Has Never Before Been Interpreted To Displace The FVRA.

The Dodd-Frank Act's provision that a particular officer "shall" serve as the acting head is by no means unique, and when Congress enacted the provision in 2010 it was well understood how such language would be interpreted in light of the FVRA. In many office-specific statutes passed both before and after the FVRA, Congress has provided that a deputy "shall" serve in the event of a vacancy, using terms comparable to Section 5491(b)(5).[4] Indeed, over a third of the heads of the executive departments

[4] *See, e.g.,* 5 U.S.C. app. 1, Reorganization Plan No. 4 of 1970 § 2(c) ("The Deputy Administrator [of the National Oceanic and Atmospheric Administration] … shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator."); 5 U.S.C. § 1102(b) ("The Deputy Director [of the Office of Personnel Management] … shall act as Director

forming the President's cabinet (along with the cabinet-rank officials heading the Environmental Protection Agency and the Small Business Administration) are subject to office-specific statutes providing that their deputies "shall" serve as the acting head in the event of a vacancy.[5] Yet more statutes provide that an officer *other* than the

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during the absence or disability of the Director or when the office of Director is vacant."); 12 U.S.C. § 635a(b) ("There shall be a First Vice President of the [Export Import] Bank, … who shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank."); 21 U.S.C. § 1703(a)(2) ("The Deputy Director of National Drug Control Policy shall … serve as the Director in the absence of the Director or during any period in which the office of the Director is vacant."); 44 U.S.C. § 2103(c) ("In the event of a vacancy in the office of the Archivist, the Deputy Archivist [of the National Archives] shall act as Archivist until an Archivist is appointed under subsection (a)."); 50 U.S.C. § 3026(a)(6) (enacted post-FVRA, in 2004) ("The Principal Deputy Director of National Intelligence shall act for, and exercise the powers of, the Director of National Intelligence during the absence or disability of the Director of National Intelligence or during a vacancy in the position of Director of National Intelligence."); 50 U.S.C. § 3037(b)(2) (enacted post-FVRA, in 2010) ("The Deputy Director of the Central Intelligence Agency shall … during the absence or disability of the Director of the Central Intelligence Agency, or during a vacancy in the position of Director of the Central Intelligence Agency, act for and exercise the powers of the Director of the Central Intelligence Agency.").

[5] *See* 5 U.S.C. app. 1, Reorganization Plan No. 1 of 1953 § 2 ("The Under Secretary [of the Department of Health and Human Services] (or, during the absence or disability of the Under Secretary or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary determined according to such order as the Secretary shall prescribe) shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary."); 5 U.S.C. app. 1, Reorganization Plan No. 3 of 1970 § 1(c) ("The Deputy Administrator [of the Environmental Protection Agency] shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator."); 10 U.S.C. § 132(b) ("The Deputy Secretary [of Defense] shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office."); 15 U.S.C.

President "shall" establish an order of succession designating acting officials, or simply direct that a deputy "acts" when a certain office is vacant.[6] None of these statutes has ever been thought to remove the offices they cover from the scope of the FVRA, even though they all *unambiguously* address vacancies.

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§ 633(b)(1) ("The Deputy Administrator [of the Small Business Administration] shall be Acting Administrator of the Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator."); 20 U.S.C. § 3412(a)(1) ("During the absence or disability of the Secretary [of Education], or in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary."); 29 U.S.C. § 552 ("The Deputy Secretary [of Labor] shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate."); 31 U.S.C. § 301(c)(2) ("The Deputy Secretary [of the Treasury] shall carry out … the duties and powers of the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant."); 42 U.S.C. § 7132(a) ("The Deputy Secretary [of Energy] shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant.").

[6] *See* 28 U.S.C. § 509 note, Reorganization Plan No. 2 of 1973, § 5(c) ("The Deputy Administrator [of the Drug Enforcement Administration] or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator."); 31 U.S.C. § 703(c) ("The Deputy Comptroller General … acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant."); 49 U.S.C. § 102(c), (d), (e) (providing that "[t]he Deputy Secretary [of Transportation] … acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant," and specifying other department officials to "act[] for the Secretary" in the event of more vacancies); 49 U.S.C. § 106(i) ("The Deputy Administrator [of the Federal Aviation Administration] acts for the Administrator when the Administrator is absent or unable to serve, or when the office of the Administrator is vacant.").

On the contrary, Presidents have consistently and explicitly invoked their FVRA authority to make acting-officer designations that would be barred if such office-specific statutes set out "exclusive, mandatory succession plan[s]." Br. 20. Using their FVRA authority, Presidents have long provided for orders of succession for offices covered by statutes materially indistinguishable from Section 5491(b)(5). *See, e.g.*, *Providing an Order of Succession Within the Department of Defense*, Exec. Order No. 13,394, 70 Fed. Reg. 76,665 (Dec. 22, 2005) (invoking FVRA authority); *Providing an Order of Succession Within the Department of Defense,* Exec. Order No. 13,533, 75 Fed. Reg. 10,163 (Mar. 1, 2010) (invoking FVRA authority to amend succession plan).[7] Such presidentially established succession plans help "ensure that each executive branch agency can perform its essential functions and remain an effectively functioning part of the Federal Government under all conditions." *Executive Branch Responsibilities With Respect to Orders of Succession*, Exec. Order No. 13,472, 73 Fed. Reg. 53,353 (Sept. 11, 2008).

Similarly, multiple presidents have used their FVRA authority to individually designate someone other than the deputy designated in an office-specific statute to

[7] *See also* 5 U.S.C. § 3345 note (listing succession plans established under the FVRA for the Departments of Labor, Treasury, Health and Human Services, the Environmental Protection Agency, the Office of Personnel Management, the Office of the Director of National Intelligence, and the National Archives and Records Administration).

serve as the acting agency head.[8] Notably, such FVRA appointments have even bypassed the extant deputy designated in the office-specific statute.[9] At no point has the commonplace formulation that a deputy head "shall" serve as an acting head been read to preclude such succession orders or designations.

This record of executive practice is consistent with OLC's longstanding and publicly expressed interpretation of the FVRA. Well before Congress enacted the Dodd-Frank Act, OLC had opined that office-specific statutes regarding an acting

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[8] *See* Presidential Designations of John Whitmore (Administrator, Small Business Administration, Feb. 2, 2001), Marianne Horinko (Administrator, Environmental Protection Agency, July 11, 2003, effective July 12, 2003), James Lambright (President of the Export-Import Bank, July 14, 2005, effective July 21, 2005), Beth Cobert (Director, Office of Personnel Management, July 10, 2015), Joseph Loddo (Administrator, Small Business Administration, Jan. 17, 2017, effective Jan. 20, 2017), Grace Bochenek (Secretary of Energy, Jan. 17, 2017, effective Jan. 20, 2017), Norris Cochran (Secretary of Health and Human Services, Jan. 17, 2017, effective Jan. 20, 2017), Edward Hugler (Secretary of Labor, effective Jan. 20, 2017), Adam Szubin (Secretary of Treasury, Jan. 17, 2017, effective Jan. 20, 2017) (Addendum A21-23, A25-30).

[9] *See* Designation of Michael Hager, Assistant Secretary of Veterans Affairs, to serve as Acting Director, Office of Personnel Management (OPM) (Aug. 11, 2008, effective Aug. 14, 2008) (Addendum A24); Designation of Santanu Baruah, Assistant Secretary of Commerce for Economic Development, as Acting Administrator, Small Business Administration (SBA) (Aug. 13, 2008, effective Aug. 18, 2008) (Addendum A20). OPM has confirmed that Howard Weizmann was Deputy Director at the time of Hager's designation, and SBA has confirmed that Jovita Carranza was the Deputy Administrator at the time of Baruah's designation, as is further evidenced by various public records from the relevant time periods. *See, e.g.,* 153 Cong. Rec. 17,912 (June 28, 2007) (confirming Howard Weizmann as OPM Deputy Director); 154 Cong. Rec. D1161 (daily ed. Sept. 24, 2008) (noting testimony from Deputy Director Weizmann); 152 Cong. Rec. 23,755 (Dec. 8, 2006) (confirming Jovita Carranza as Deputy Administrator of SBA); 154 Cong. Rec. D1167 (daily ed. Sept. 24, 2008) (noting testimony from Deputy Administrator Carranza).

officer provide a route to designate an acting officer without displacing the President's FVRA options.[10] OLC's conclusion that Section 5491(b)(5) did not preclude the President's authority to appoint Mulvaney under the FVRA was firmly rooted in that office's well-established precedent regarding the intersection of office-specific vacancy statutes with the FVRA.

English draws no support from contrasting Section 5491(b)(5) with other office-specific vacancy statutes. English notes several statutes that expressly provide a certain deputy "shall" act as the principal officer "unless the President designates another officer." Br. 28 (citing 38 U.S.C. § 304; 40 U.S.C. § 302; 42 U.S.C. § 902(b)(4)). Because the "unless" clause "demonstrate[s] that Congress knows how to make mandatory language yield" to a presidential designation, English argues that such clauses are necessary to make the FVRA applicable to a particular office covered by an office-specific statute using the word "shall." Br. 28. But the cited statutes include the "unless" clause not to incorporate the FVRA (or its predecessor), but to go *beyond* them. In particular, these statutes were all enacted before the FVRA became

[10] *See, e.g.*, *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 209-11 (2007) (concluding that the President could designate an Acting Attorney General under the FVRA, even though a separate statute specific to the position of Attorney General, 28 U.S.C. § 508, also provides a mechanism by which other designated officials in the Department of Justice may "act as Attorney General"); *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121, 121 n.l (2003) (concluding that the FVRA's appointment mechanisms remained available despite a separate statute that identified several officers who could be designated as OMB's Acting Director).

law.[11] Under the FVRA's predecessor, the Vacancies Act, the President had authority to designate an officer besides the "first assistant" to serve in an acting capacity only if that officer was Senate-confirmed. *See* 5 U.S.C. §§ 3345, 3346, 3347 (1996); *see also* Act of July 23, 1868, ch. 227, 15 Stat. 168, 168-69. And even after the FVRA, the President may designate an "officer or employee" who is not Senate-confirmed only if such individual satisfies certain tenure and salary requirements. 5 U.S.C. § 3345(a)(2)-(3). Accordingly, the inclusion of the "unless" clauses in the office-specific statutes English invokes permitted the President to make designations that were not otherwise authorized by the Vacancies Act and still are not authorized by the FVRA. Thus, English is mistaken that the omission of such language in Section 5491(b)(5) somehow bars designations that are authorized by the FVRA.

Besides, as the district court reasoned, even assuming the applicability of the principle that an express exception in one statute "tends to refute" the existence of such exceptions in other statutes, it would help English little here. JA.272-73 (quoting *Lukhard v. Reed*, 481 U.S. 368, 376 (1987) (plurality op.)). In order to find an implied repeal of the FVRA's plain language, especially in light of Section 5491(a)'s express-statement requirement, the district court properly required a "clear and manifest" indication of legislative intent, not a mere inference. JA.273. Moreover, if anything,

[11] 40 U.S.C. § 302 was recodified "without substantive change" in 2002, *see* Pub. L. No. 107-217 (Aug. 21, 2002), but it dates to the original 1949 creation of the General Services Administration, *see* Act of June 30, 1949, ch. 288, § 101, 63 Stat. 377, 379.

the *Lukhard* inference cuts the opposite way here. In the Dodd-Frank Act itself, Congress elsewhere expressly specified that other provisions of Title 5 do not apply to certain CFPB employment matters. 12 U.S.C. § 5493(a)(2) ("Notwithstanding any otherwise applicable provision of Title 5 concerning compensation, … the following provisions shall apply with respect to employees of the Bureau."). Under *Lukhard*, this express exception undermines English's claim that Section 5491(b)(5) creates an implicit exception to the FVRA.

5. Serious Practical Consequences And Constitutional Concerns Militate Against English's Interpretation of Section 5491(b)(5).

Applying English's proposed approach would lead to the untenable conclusion that numerous other statutes likewise provide a "mandatory, exclusive succession plan" for the offices to which they apply. *See supra* pp.28-32 nn.4-6. English is simply incorrect that Section 5491(b)(5)'s "succession language" is somehow an outlier and that "most other agencies work differently." Br. 28. The many statutes providing that a certain deputy "shall" serve as an acting principal were surely not intended to bar the President from using his FVRA authority to select an acting head of the Departments of Defense, Energy, Education, Health and Human Services, Labor, and Treasury, or the Environmental Protection Agency and the Small Business Administration.

English's proposed distinction between identically phrased statutes passed before and after the FVRA is unavailing. Br. 30. As discussed, that distinction has no basis in the text, structure, or context of the FVRA. *See supra* p.17. In any event,

English is incorrect that Section 5491(b)(5) is unique among mandatory office-specific statutes enacted post-FVRA. *See* Br. 30. Congress chose materially identical formulations when it addressed the subject of vacancies in the offices of Director of National Intelligence (in 2004) and Director of the Central Intelligence Agency (in 2010). *See* 50 U.S.C. §§ 3026(a)(6), 3037(b)(2). It is implausible that in so doing, Congress intended to displace the FVRA. *Cf.*, *e.g.*, Members of Congress Amicus Br. 4. After all, that would mean President Obama was precluded from using his FVRA authority to implement a succession plan for the Director of National Intelligence that went beyond the statutorily designated Principal Deputy Director. *See Designation of Officers of the Office of the Director of National Intelligence To Act as Director of National Intelligence*, 78 Fed. Reg. 59,159 (Sept. 20, 2013). Indeed, English's position would imply that, from January 20, 2017, to March 16, 2017—when there was neither a confirmed Director nor Principal Deputy Director—that crucial national-security position was required to be left empty, instead of permitting a different Deputy Director, Michael Dempsey, to serve as Acting Director per the FVRA succession plan. *See* Government Accountability Office, Federal Vacancy Reform Act Database, https://go.usa.gov/xnMhA (last visited Feb. 23, 2018).

These practical problems underscore the potential, as the district court recognized, for English's proposed interpretation of Section 5491 to interfere with the President's constitutional responsibility to "take care" that the laws are faithfully executed. *See* JA.275-78. At a minimum, her position runs the risk that, if she were

unable to serve, the CFPB Directorship would remain vacant, creating grave uncertainty about what actions the agency could take to execute the laws. And the problem would be exacerbated if, as she and various amici (incorrectly) presume, the Acting Director of the CFPB enjoys the Director's statutory protection from removal, such that the President could not direct the Deputy Director to cease serving as Acting Director. In such a scenario, an individual whom no President appointed and whom the President was constrained from removing would continue to serve as Director unless and until the Senate chose to confirm the President's permanent appointee. *Compare, e.g.*, Br. 44, *and* D.C. Amicus Br. 8, 18, *with Swan v. Clinton*, 100 F.3d 973, 983-88 (D.C. Cir. 1996) (holding that the President could remove at will a National Credit Union Administration Board member serving after his term's expiration pursuant to a holdover provision, notwithstanding any within-term statutory removal restrictions, in part because continued removal protection "might be pushing the constitutional envelope to the edge"). At bottom, it is the President—not the Senate or the prior agency head—who must ensure the agency continues to faithfully execute the laws, and thus must have the ability to ensure that a proper acting agency head exists.

In light of these concerns, English and amici's contention that statutes like Section 5491(b)(5) displace the FVRA *entirely* is untenable. In response, English may retreat to the narrower position that such statutes *only partially* displace the FVRA when the designated deputy (or other official) is available to serve as the acting

officer. But such a partial displacement theory is irreconcilable with English's own interpretation of Section 5491. After all, under this partial displacement theory, "shall" would no longer be mandatory, and an "independent" Acting Director would no longer be necessary. Instead, both of those alleged requirements would be subject to the implicit qualifier "unless the Deputy Director is unavailable." But English does not and cannot provide any explanation why that implicit qualifier would be consistent with Section 5491(b)(5)'s "shall," but "unless the President invokes the FVRA" is not. And that is especially so because the latter qualifier follows directly from the explicit terms of the FVRA's exclusivity proviso, Section 5491(a)'s express-statement requirement, and interpretive canons requiring harmonization of statutes. Moreover, English's partial displacement theory is self-defeating, because the President can direct at will the Deputy Director to cease serving as the Acting Director. *See Swan*, 100 F.3d at 983-88.

Finally, to the extent English suggests that constitutional avoidance principles cut in favor of insulating the Acting CFPB Director from presidential control, she is mistaken. *See* Br. 42. Whatever Congress's power to provide a measure of independence from presidential control for certain executive entities, there is indisputably no constitutional principle that *requires* any executive entity to have any such independence. English also hypothesizes that presidents could use the FVRA to end-run the need to obtain Senate confirmation for a new Director. Br. 39-40. But Congress enacted the provisions of the FVRA and Dodd-Frank Act upon which such

gambits would rely, and it retains the ability to amend them if they operate to undermine legislative prerogatives. By contrast, English's position threatens to undermine the President's ability to ensure the faithful execution of the law and would leave him meager remedies against that infringement. Although the FVRA plainly applies to the CFPB Director despite Section 5491(b)(5), this Court should resolve any residual doubt by adopting the interpretation that avoids the harm to the President while leaving options available to Congress.

C. Neither The FVRA Nor The Dodd-Frank Act Preclude The Designation Of The OMB Director As Acting CFPB Director.

English asserts that even if the FVRA permits the President to designate a CFPB Acting Director, the President was not permitted to designate the OMB Director. Br. 42-47. This purported limitation on the President's FVRA authority is entirely atextual, and the district court correctly rejected it. JA.282-85.

In the Dodd-Frank Act, Congress specified limitations on what type of outside office or employment the CFPB Director may hold, none of which encompass the OMB Director. *See* 12 U.S.C. § 5491(d) (precluding simultaneous service only "in any Federal reserve bank, Federal home loan bank, covered person, or service provider"). Similarly, Congress placed limits not exceeded here on which officials the President may designate as acting officers under the FVRA: if the President does not wish to follow the default selection of the "first assistant to the office," he may only choose a Senate-confirmed officer (which the OMB Director is) or an employee within the

relevant agency who satisfies certain tenure and salary requirements. 5 U.S.C. § 3345(a). Nothing in the text or structure of the Dodd-Frank Act or the FVRA supports English's assertion that there should be an unwritten exception precluding the President from choosing a particular Senate-confirmed official—the OMB Director—from serving in a vacancy to which the FVRA applies.

On the contrary, the FVRA's text makes clear that English's reliance on the CFPB's various forms of statutory independence is misplaced. Congress unambiguously described the type of "independent establishment[s]" to which the FVRA "shall not apply": those "composed of multiple members." 5 U.S.C. § 3349c(1). Because the CFPB does not satisfy this criterion, its independence does not render the usual FVRA options unavailable. As the district court correctly held, the CFPB may well be "independent in the many specific ways that Dodd-Frank dictates," but that does not mean that courts may "invent new atextual ways for it to be independent." JA.283; *see, e.g.*, *IRS Office of Chief Counsel v. Federal Labor Relations Auth.*, 739 F.3d 13, 20 (D.C. Cir. 2014) ("[W]hatever the validity of the Authority's policy rationale, it has failed to justify its atextual construction of section 7106(b)(3)."). The impropriety of creating an exception with no textual basis in the FVRA or Dodd-Frank Act is underscored by Congress's choice in other statutes to place limits on dual-office holding. *See, e.g.,* 50 U.S.C. § 3023(c) ("The individual serving in the position of Director of National Intelligence shall not, while so serving,

also serve as the Director of the Central Intelligence Agency or as the head of any other element of the intelligence community.").

Neither the CFPB's various measures of statutory independence nor its role in financial regulation provides any basis for inferring the atextual exception English proposes. Given that the Deputy-Director provision is insufficient to expressly displace or impliedly repeal the FVRA's application to the CFPB, the CFPB's mere "independent" status under 12 U.S.C. § 5491(a) certainly cannot expressly displace or impliedly repeal the President's options under the FVRA. Nor is there is anything unprecedented in the President exercising control over financial regulators. For instance, the President may remove the Secretary of the Treasury at will, and the Comptroller of the Currency with only a notification to the Senate of his reasons. *See* 31 U.S.C. § 301; 12 U.S.C. § 2. Similarly, there is nothing untoward in the President exercising control over individuals temporarily serving in an office that enjoys removal protections within an independent entity. *See* 42 U.S.C. § 902(a)(3), (b)(4) (expressly authorizing the President to designate at will an Acting Commissioner of the Social Security Administration even though the Commissioner has removal protections); *Swan*, 100 F.3d at 983-88 (holding that President may remove at will holdover members of a board even if the board members have removal protection during their terms).

English is also wrong that an OMB Director is a particularly improper choice for the President to make under the FVRA. *See* Br. 45-46. The Dodd-Frank Act does

not create a wall of separation between the CFPB and OMB. The statutory provision English cites makes clear that the CFPB is not required to obtain OMB's permission for various budgetary actions, but it certainly does not preclude consultation between the entities. *See* 12 U.S.C. § 5497(a)(4)(E). Quite the opposite, the statute specifically requires the CFPB to share information regarding its financial management and budget with OMB. *See id.* § 5497(a)(4)(A) ("The [CFPB] Director shall provide to the Director of [OMB] copies of the financial operating plans and forecasts of the Director, … and copies of the quarterly reports of the financial condition and results of operations of the [CFPB].").

In sum, English has no likelihood of success on the merits. The district court properly denied the preliminary injunction for that reason alone.

II. Equitable Factors Strongly Counsel Against A Preliminary Injunction.

Wholly apart from the merits, the district court also properly denied the preliminary injunction based on English's failure to satisfy the additional equitable requirements. JA.285-92.

A. English Cannot Establish She Will Suffer Irreparable Harm Absent Preliminary Relief.

English's claimed injury is the denial of a position to which she believes she is entitled by statute. Her claim does not meet the "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). That standard is particularly rigorous in cases involving government

employment, given that the "[g]overnment has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson v. Murray*, 415 U.S. 61, 83 (1974) (quotation marks omitted). English's showing thus must "override the[] factors cutting against the general availability of preliminary injunctions in Government personnel cases." *Id.* at 84. "[T]he injury must be both certain and great; it must be actual and not theoretical." *Chaplaincy*, 454 F.3d at 297 (quotation marks omitted). "The moving party must show the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm," and "the injury must be beyond remediation." *Id.* (brackets, emphasis, and quotation marks omitted).

As the district court correctly concluded, English has "utterly failed to describe any such harm" to herself. JA.288. The only harm English contends she will suffer absent an injunction is the violation of the statute itself; she does not assert the risk of any collateral financial or other harms from the alleged statutory violation, let alone irreparable ones. *See* Br. 48-49. But the Supreme Court has made clear that a plaintiff must identify a likelihood of irreparable harm separate and apart from establishing a strong likelihood of success on the merits. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Although irreparable harm may be presumed for certain constitutional violations, *see Chaplaincy*, 454 F.3d at 299-304, the Supreme Court has held that a plaintiff seeking a government position must show significant individualized harm beyond the fact of a statutory violation, emphasizing that

irreparable injury exists only in a "genuinely extraordinary situation" in which "the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation." *Sampson*, 415 U.S. at 92 n.68; *see also id.* at 91-92 (holding that even "a satisfactory showing of loss of income" and evidence "that [a plaintiff's] reputation would be damaged" "fall[] far short of the type of irreparable injury" that could support an injunction in a government personnel case). Here, although English "submitted a declaration in support of her motion" in district court, "she include[d] no factual allegations about any harm that she has suffered as a result of the events at issue here." JA.287. Instead, she tries to convert her statutory merits claim into a personalized irreparable injury by asserting the purported "loss of a 'statutory right to function'" as the Acting Director, a theory based on a single, unpublished district court case. *See* Br. 49-50 (quoting *Berry v. Reagan*, No. 83-3182, 1983 WL 538, at *5 (D.D.C. Nov. 14, 1983)).

It is dubious whether *Berry* is consistent with the Supreme Court's controlling *Sampson* precedent, but even assuming *Berry*'s validity, the district court explained the multiple reasons why English's allegations do not rise to the level of the harms the *Berry* plaintiffs alleged. *See* JA.288-89. There, the court concluded that an irreparable "injury is evident" because "the *denial* of preliminary relief" would have an "obviously disruptive effect" on the Civil Rights Commission's ability to fulfill several "statutory mandates." *Berry*, 1983 WL 538, at *5. Here, there is no question that the CFPB continues to function, and the issuance—not the denial—of a preliminary injunction

would produce disruption. Moreover, absent an injunction in *Berry*, the time-limited "commission would have expired," making it impossible to reinstate plaintiffs to it. JA.288. By contrast, as the district court noted, the Acting Director position will not evaporate absent an injunction. JA.288-89. When a new Director is nominated and confirmed, there will of course be no need for an Acting Director, but it is far from clear that a new Director will be confirmed before a final judgment is reached in this case. More fundamentally, the installation of a Senate-confirmed CFPB Director is hardly tantamount to any sort of injury, let alone similar to the potential loss of a report of a Senate-confirmed Commission that "provide[d] a quasilegislative service to Congress in the furtherance of civil rights in this country." *Berry*, 1983 WL 538, at *5.

Far from "superficial factual distinctions," Br. 50, the concerns that were held to support a finding of irreparable harm in *Berry* are not present here. Nor did the district court erroneously suggest that *Berry* set out the only type of "extraordinary" situation in which irreparable harm might be found in a government personnel case. Br. 50. The court merely examined the sole case English offered in support of her contention that a statutory violation equates to irreparable harm, and found that it would not apply here even on its own terms.

Finally, the conclusion that English lacks irreparable harm would not mean that a court would be "powerless to issue any meaningful equitable relief," even "if it concludes that [a] usurper plainly lacks legal authority." Br. 50. The difficulty of establishing that an individual personally suffers the type of irreparable harm that

could warrant a preliminary injunction in such a case would certainly not preclude the issuance of a declaratory judgment, 28 U.S.C. § 2201, "[f]urther necessary or proper relief based on or the issuance of" such a judgment, 28 U.S.C. § 2202, or a writ of quo warranto, D.C. Code § 16-3501. Indeed, as discussed below, the quo warranto statute is designed expressly to authorize relief in the case of a claim of office usurpation.

B. The Balance Of Harms And The Public Interest Weigh Heavily Against An Injunction.

The district court also properly "'balance[d] the competing claims of injury'" and "'consider[ed] the effect on each party of the granting or withholding of the requested relief.'" JA.290 (quoting *Winter*, 555 U.S. at 24). And it heeded the Supreme Court's edict that "[i]n exercising their sound discretion, courts . . . should [also] pay particular regard for the public consequences in employing the extraordinary remedy of injunction." JA.290-91 (quoting *Winter*, 555 U.S. at 24). The court did not abuse its discretion in concluding that the "balance of the equities and the public interest weigh against the injunction" here. JA.292.[12]

The court explained that even if it "fully accepted [plaintiff's] 'statutory right to function' theory of harm," the balance of equities would still not favor English. JA.291. English's assertion regarding the need for clarity, Br. 51, is unavailing "because Mulvaney could claim precisely the same harm: his own competing statutory

[12] These factors merge when the government is the non-movant. *See, e.g., Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); JA.291.

right to serve as acting Director of the CFPB." JA.291. And although "[t]here is little question that there is a public interest in clarity" regarding the CFPB's Acting Director, "it is hard to see how granting English an injunction would bring about more of it." *Id.* As the court observed, "[t]he President has designated Mulvaney the CFPB's acting Director, the CFPB has recognized him as the acting Director, and it is operating with him as the acting Director," and so issuing an injunction "would only serve to muddy the waters." JA.291-92.

Moreover, the injunction English requests disregards separation-of-powers principles. Even assuming that separation-of-powers concerns do not categorically bar jurisdiction over claims like English's, and even where plaintiffs allege clear constitutional harms, courts "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality op.) (explaining that "in general," courts have "'no jurisdiction of a bill to enjoin the President in the performance of his official duties'") (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)). A judicial order expelling the officer chosen by the President to fill the vacant CFPB Directorship, and installing someone else in that office based only on a preliminary legal determination, would be a profound judicial incursion into executive authority. Disputes regarding the legality of presidential appointments ordinarily are heard in the context of collateral challenges, where the plaintiff is seeking discrete relief from a

particular agency action. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929 (2017); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The injunctive relief sought by English in this case would entail a far deeper judicial intrusion into the province of the Executive Branch.

The need for judicial restraint in this area is underscored by Congress's decision to enact the federal quo warranto statute, which serves to mitigate the disruptive effects of just this sort of suit. When someone "usurps, intrudes into, or unlawfully holds or exercises … a public office of the United States" within the District of Columbia, the quo warranto statute authorizes a civil action to "oust[] and exclude[]" the person from the office. D.C. Code §§ 16-3501, 16-3545. As this Court recently explained, "direct attack[s]" on the occupant of an office "can be brought via writ of quo warranto only." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 939 (2017). But given the gravity of the remedy, the quo warranto statute places significant limitations on such suits.[13]

"To obtain quo warranto against a federal official, an interested party must petition the Attorney General of the United States to institute a proceeding in federal district court" under the statute's procedures. *SW Gen.*, 796 F.3d at 81; *see also Andrade v. Lauer*, 729 F.2d 1475, 1497-98 (D.C. Cir. 1984). The Attorney General has

[13] Because the district court concluded that plaintiff "is not likely to succeed on the merits," it did "not decide whether English has failed to state a claim" in light of the quo warranto statute. JA.285 n.6.

discretion to decline to bring such a proceeding. *SW Gen.*, 796 F.3d at 81. "If the Attorney General declines, the interested party can petition the court to issue the writ instead," proceeding as a relator. *Id.*; *see* D.C. Code § 16-3503. But like the Attorney General, "the court … ha[s] broad discretion to decline to make use of quo warranto." *SW Gen.*, 796 F.3d at 81 (quotation marks omitted).

The procedures Congress set out in the quo warranto statute exhibit—and require—an appropriate deference for the Executive's prerogatives. The statute gives the Executive Branch a central role in ensuring that properly authorized officials execute federal laws and ensures that courts have suitably "broad discretion to decline" to oust federal officials. *SW Gen.*, 796 F.3d at 81 (quotation marks omitted). Despite bringing precisely the type of claim Congress addressed in this statute, *see* D.C. Code § 16-3501, English has ignored the quo warranto procedures, making any claim for interim relief from this Court inappropriate, at the very least. And even if English had complied, an extraordinary showing should be required before a court sets aside its "broad discretion to decline" relief and unseats the acting head of a federal agency in contravention of the President's decision.[14]

[14] In *Andrade*, this Court indicated that only the Attorney General could bring a quo warranto action challenging *public* officeholders. *See Andrade*, 729 F.2d at 1497-98. Regardless of whether any other party could properly bring such an action, it is undisputed that English has not even attempted to comply with the statute's requirements.

In light of these considerations, the district court acted well within its discretion in concluding that the balance of the equities and the public interest did not support an injunction here.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,982 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Melissa N. Patterson
MELISSA N. PATTERSON

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Melissa N. Patterson
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* * * *

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In the event of a vacancy in the office of the head of a member agency or department, and pending the appointment of a successor, or during the absence or disability of the head of a member agency or department, the acting head of the member agency or department shall serve as a member of the Council in the place of that agency or department head.

* * * *

12 U.S.C. § 5491

(a) Bureau established

There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of Title 5. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of Title 5, shall apply to the exercise of the powers of the Bureau.

(b) Director and Deputy Director

(1) In general

There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment

Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) Qualification

The President shall nominate the Director from among individuals who are citizens of the United States.

(4) Compensation

The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of Title 5.

(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.

(c) Term

(1) In general

The Director shall serve for a term of 5 years.

(2) Expiration of term

An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause

The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

(d) Service restriction

No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.

* * * *

12 U.S.C. § 5493(a)(2)

Notwithstanding any otherwise applicable provision of Title 5 concerning compensation, including the provisions of chapter 51 and chapter 53, the following provisions shall apply with respect to employees of the Bureau:

> (A) The rates of basic pay for all employees of the Bureau may be set and adjusted by the Director.
>
> (B) The Director shall at all times provide compensation (including benefits) to each class of employees that, at a minimum, are comparable to the compensation and benefits then being provided by the Board of Governors for the corresponding class of employees.
>
> (C) All such employees shall be compensated (including benefits) on terms and conditions that are consistent with the terms and conditions set forth in section 248(l) of this title.

12 U.S.C. § 5497(a)(4)

(A) Financial operating plans and forecasts

The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau

* * * *

(E) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

* * * *

The Federal Vacancies Reform Act

5 U.S.C. § 3345. Acting Officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

> (1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;
>
> (2) notwithstanding paragraph (1), 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 subject to the time limitations of section 3346; or
>
> (3) notwithstanding paragraph (1), 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, subject to the time limitations of section 3346, if—
>
> > (A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
> >
> > (B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

> (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—
>
> > (i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

5 U.S.C. § 3346. Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

5 U.S.C. § 3347. Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) 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; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

5 U.S.C. § 3348. Vacant office

(a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d) (1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function

or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

5 U.S.C. § 3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to the Comptroller General of the United States and to each House of Congress—

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

5 U.S.C. § 3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

5 U.S.C. § 3349b. Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office—

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

5 U.S.C. § 3349c. Exclusion of certain officers

Sections 3345 through 3349b shall 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;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

5 U.S.C. § 3349d. Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

Other Provisions

5 U.S.C. App. 1, Reorganization Plan No. 1 of 1953, § 2

Sec. 2. There shall be in the Department an Under Secretary of Health, Education, and Welfare [now the Deputy Secretary of the Department of Health and Human Services] and two Assistant Secretaries of Health, Education, and Welfare, each of whom shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Secretary may prescribe, and shall receive compensation at the rate now or hereafter provided by law for under secretaries and assistant secretaries, respectively, of executive departments. The Under Secretary (or, during the absence or disability of the Under Secretary or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary determined according to such order as the Secretary shall prescribe) shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.

5 U.S.C. App. 1, Reorganization Plan No. 3 of 1970, § 1(c)

There shall be in the Agency a Deputy Administrator of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate. The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

5 U.S.C. App. 1, Reorganization Plan No. 4 of 1970, § 2(c)

There shall be in the Administration a Deputy Administrator of the National Oceanic and Atmospheric Administration who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315). The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

5 U.S.C. § 105

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

5 U.S.C. § 1102(b)

There is in the Office [of Personnel Management] a Deputy Director of the Office of Personnel Management appointed by the President, by and with the advice and consent of the Senate. The Deputy Director shall perform such functions as the Director may from time to time prescribe and shall act as Director during the absence or disability of the Director or when the office of Director is vacant.

10 U.S.C. § 132(b)

The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary dies, resigns, or is otherwise unable to perform the functions and duties of the office.

12 U.S.C. § 2

The Comptroller of the Currency shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate.

12 U.S.C. § 635a(b)

There shall be a President of the Export-Import Bank of the United States, who shall be appointed by the President of the United States by and with the advice and consent of the Senate, and who shall serve as chief executive officer of the Bank. There shall be a First Vice President of the Bank, who shall be appointed by the President of the United States by and with the advice and consent of the Senate, who shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank, and who shall at other times perform such functions as the President of the Bank may from time to time prescribe.

15 U.S.C. § 633(b)

(1) * * * The Deputy Administrator shall be Acting Administrator of the Administration during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.

* * * *

20 U.S.C. § 3412(a)(1)

There shall be in the Department a Deputy Secretary of Education who shall be appointed by the President, by and with the advice and consent of the Senate. During the absence or disability of the Secretary, or in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary. The Secretary shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.

21 U.S.C. § 1703(a)(2)

The Deputy Director of National Drug Control Policy shall—

(A) carry out the duties and powers prescribed by the Director; and

(B) serve as the Director in the absence of the Director or during any period in which the office of the Director is vacant.

28 U.S.C. § 509 note, Reorganization Plan No. 2 of 1973, § 5(c)

The Deputy Administrator [of the Drug Enforcement Administration] or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

28 U.S.C. § 954

When the office of clerk is vacant, the deputy clerks shall perform the duties of the clerk in the name of the last person who held that office. When the clerk is incapacitated, absent, or otherwise unavailable to perform official duties, the deputy clerks shall perform the duties of the clerk in the name of the clerk. The court may designate a deputy clerk to act temporarily as clerk of the court in his or her own name.

29 U.S.C. § 153(d)

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 552

There is established in the Department of Labor the office of Deputy Secretary of Labor, which shall be filled by appointment by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall perform such duties as may be prescribed by the Secretary of Labor or required by law. The Deputy Secretary shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate.

31 U.S.C. § 301(c)

The Department has a Deputy Secretary of the Treasury appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall carry out—

(1) duties and powers prescribed by the Secretary; and

(2) the duties and powers of the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant.

31 U.S.C. § 703(c)

The Deputy Comptroller General—

(1) carries out duties and powers prescribed by the Comptroller General; and

(2) acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant.

38 U.S.C. § 304

There is in the Department a Deputy Secretary of Veterans Affairs, who is appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary shall perform such functions as the Secretary shall prescribe. Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary

40 U.S.C. § 302(b)

The Administrator shall appoint a Deputy Administrator of General Services. The Deputy Administrator shall perform functions designated by the Administrator. The Deputy Administrator is Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President designates another officer of the Federal Government, when the office of Administrator is vacant.

42 U.S.C. § 902

(a) Commissioner of Social Security

* * * *

(3) The Commissioner shall be appointed for a term of 6 years, except that the initial term of office for Commissioner shall terminate January 19, 2001. In any case in which a successor does not take office at the end of a Commissioner's term of office,

such Commissioner may continue in office until the entry upon office of such a successor. A Commissioner appointed to a term of office after the commencement of such term may serve under such appointment only for the remainder of such term. An individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.

* * * *

(b) Deputy Commissioner of Social Security

* * * *

(4) The Deputy Commissioner shall perform such duties and exercise such powers as the Commissioner shall from time to time assign or delegate. The Deputy Commissioner shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner and, unless the President designates another officer of the Government as Acting Commissioner, in the event of a vacancy in the office of the Commissioner.

* * * *

42 U.S.C. § 7132(a)

There shall be in the Department [of Energy] a Deputy Secretary, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for level II of the Executive Schedule under section 5313 of Title 5. The Deputy Secretary shall act for and exercise the functions of the Secretary during the absence or disability of the Secretary or in the event the office of Secretary becomes vacant. The Secretary shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary during the absence or disability of both the Secretary and Deputy Secretary or in the event of vacancies in both of those offices.

44 U.S.C. § 2103(c)

There shall be in the Administration a Deputy Archivist of the United States, who shall be appointed by and who shall serve at the pleasure of the Archivist. The Deputy Archivist shall be established as a career reserved position in the Senior Executive Service within the meaning of section 3132(a)(8) of title 5. The Deputy Archivist shall perform such functions as the Archivist shall designate. During any absence or

disability of the Archivist, the Deputy Archivist shall act as Archivist. In the event of a vacancy in the office of the Archivist, the Deputy Archivist shall act as Archivist until an Archivist is appointed under subsection (a).

49 U.S.C. § 102

* * * *

(c) The Department has a Deputy Secretary of Transportation appointed by the President, by and with the advice and consent of the Senate. The Deputy Secretary—

> (1) shall carry out duties and powers prescribed by the Secretary; and
>
> (2) acts for the Secretary when the Secretary is absent or unable to serve or when the office of Secretary is vacant.

(d) The Department has an Under Secretary of Transportation for Policy appointed by the President, by and with the advice and consent of the Senate. The Under Secretary shall provide leadership in the development of policy for the Department, supervise the policy activities of Assistant Secretaries with primary responsibility for aviation, international, and other transportation policy development and carry out other powers and duties prescribed by the Secretary. The Under Secretary acts for the Secretary when the Secretary and the Deputy Secretary are absent or unable to serve, or when the offices of Secretary and Deputy Secretary are vacant.

(e) Assistant Secretaries; General Counsel.—

> (1) Appointment.—The Department has 6 Assistant Secretaries and a General Counsel, including—
>
> > (A) an Assistant Secretary for Aviation and International Affairs, an Assistant Secretary for Governmental Affairs, an Assistant Secretary for Research and Technology, and an Assistant Secretary for Transportation Policy, who shall each be appointed by the President, with the advice and consent of the Senate;
> >
> > (B) an Assistant Secretary for Budget and Programs who shall be appointed by the President;
> >
> > (C) an Assistant Secretary for Administration, who shall be appointed by the Secretary, with the approval of the President; and

(D) a General Counsel, who shall be appointed by the President, with the advice and consent of the Senate.

(2) Duties and powers.—The officers set forth in paragraph (1) shall carry out duties and powers prescribed by the Secretary. An Assistant Secretary or the General Counsel, in the order prescribed by the Secretary, acts for the Secretary when the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are absent or unable to serve, or when the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant.

* * * *

49 U.S.C. § 106(i)

The Deputy Administrator [of the Federal Aviation Administration] shall carry out duties and powers prescribed by the Administrator. The Deputy Administrator acts for the Administrator when the Administrator is absent or unable to serve, or when the office of the Administrator is vacant.

50 U.S.C. § 3023

* * * *

(c) Prohibition on dual service

The individual serving in the position of Director of National Intelligence shall not, while so serving, also serve as the Director of the Central Intelligence Agency or as the head of any other element of the intelligence community.

50 U.S.C. § 3026(a)(6)

The Principal Deputy Director of National Intelligence shall act for, and exercise the powers of, the Director of National Intelligence during the absence or disability of the Director of National Intelligence or during a vacancy in the position of Director of National Intelligence.

50 U.S.C. § 3037(b)

The Deputy Director of the Central Intelligence Agency shall—

> (1) assist the Director of the Central Intelligence Agency in carrying out the duties and responsibilities of the Director of the Central Intelligence Agency; and
>
> (2) during the absence or disability of the Director of the Central Intelligence Agency, or during a vacancy in the position of Director of the Central Intelligence Agency, act for and exercise the powers of the Director of the Central Intelligence Agency.

D.C. Code § 16-3501

A quo warranto may be issued from the United States District Court for the District of Columbia in the name of the United States against a person who within the District of Columbia usurps, intrudes into, or unlawfully holds or exercises, a franchise conferred by the United States or a public office of the United States, civil or military. The proceedings shall be deemed a civil action.

D.C. Code § 16-3503

If the Attorney General or United States attorney refuses to institute a quo warranto proceeding on the request of a person interested, the interested person may apply to the court by certified petition for leave to have the writ issued. When, in the opinion of the court, the reasons set forth in the petition are sufficient in law, the writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of the interested person on his compliance with the condition prescribed by section 16-3502 as to security for costs.

D.C. Code § 16-3545

Where a defendant in a quo warranto proceeding is found by the jury to have usurped, intruded into, or unlawfully held or exercised an office or franchise, the verdict shall be that he is guilty of the act or acts in question, and judgment shall be rendered that he be ousted and excluded therefrom and that the relator recover his costs.

THE WHITE HOUSE

WASHINGTON

August 13, 2008

MEMORANDUM FOR SANTANU K. BARUAH
Assistant Secretary of Commerce
for Economic Development

Pursuant to the Constitution and the laws of the United States including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of Administrator of the Small Business Administration, effective August 18, 2008.

Announced: 8/15/08
Dated: 8/13/08, eff. 8/18/08.
Original to COMMERCE, ATTN: Deborah Jefferson, Room 5001, via W.H. msgr: 8/19/08.

FG252 748998

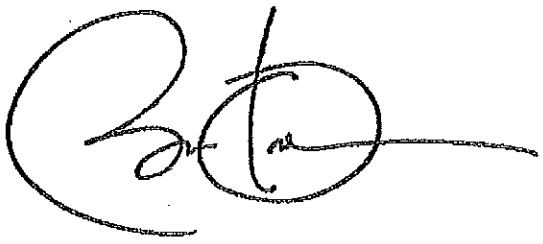
THE WHITE HOUSE

WASHINGTON

January 17, 2017

MEMORANDUM FOR GRACE M. BOCHENEK
Director of the National Energy Technology Laboratory

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Secretary of Energy, effective January 20, 2017.



THE WHITE HOUSE

WASHINGTON

July 10, 2015

MEMORANDUM FOR BETH F. COBERT
Deputy Director for Management,
Office of Management and Budget

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Director of the Office of Personnel Management.

THE WHITE HOUSE

WASHINGTON

January 17, 2017

MEMORANDUM FOR NORRIS COCHRAN
Deputy Assistant Secretary for Budget

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Secretary of Health and Human Services, effective January 20, 2017.

THE WHITE HOUSE

WASHINGTON

August 11, 2008

MEMORANDUM FOR MICHAEL W. HAGER
Assistant Secretary of Veterans Affairs (Human Resources and Management)

Pursuant to the Constitution and the laws of the United States including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of Director of the Office of Personnel Management, effective August 14, 2008.

FG319 768996

THE WHITE HOUSE

WASHINGTON

July 11, 2003

MEMORANDUM FOR MARIANNE LAMONT HORINKO
Assistant Administrator, Office of Solid Waste, Environmental Protection Agency

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of the Administrator of the Environmental Protection Agency.

This memorandum is effective July 12, 2003.

Noted: Wolfe.

Signed/dated: 7/11/03, eff., 7/12/03.
Announced: 7/10/03
Original to EPA, ATTN: Kelly Sinclair, Suite 3309, via W.H. msgr.: 7/11/03.

FG122 572781

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR EDWARD C. HUGLER
Deputy Assistant Secretary for Operations

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Secretary of Labor, effective January 20, 2017.

THE WHITE HOUSE

WASHINGTON

July 14, 2005

MEMORANDUM FOR JAMES LAMBRIGHT
Executive Vice President of the Export-Import Bank of the United States

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of President of the Export-Import Bank of the United States.

This memorandum is effective July 21, 2005.

Announced: 7/13/05
Signed/dated: 7/14/05
Effective: 7/21/05
Original to Ex-Im Bank, Room 1215, via receipted W.H. msgr: 7/15/05.

Noted: D. Wilhelm

FG126 668652

THE WHITE HOUSE

WASHINGTON

January 17, 2017

MEMORANDUM FOR JOSEPH P. LODDO
Deputy Chief Operation Officer

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Administrator of the Small Business Administration, effective January 20, 2017.

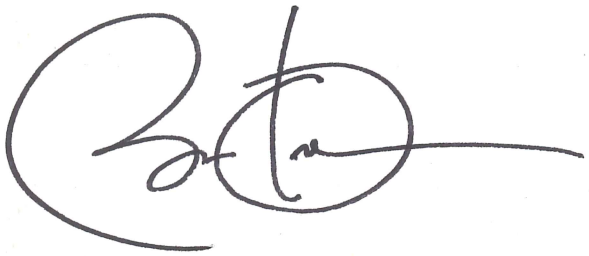
THE WHITE HOUSE

WASHINGTON

January 17, 2017

MEMORANDUM FOR ADAM J. SZUBIN
Director of the Office of Foreign Assets Control

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the duties of the office of Secretary of the Treasury, effective January 20, 2017.



THE WHITE HOUSE

WASHINGTON

February 2, 2001

MEMORANDUM FOR JOHN D. WHITMORE
Assistant Administrator, Office of Hearings and Appeals,
Small Business Administration

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of the Administrator of the Small Business Administration.

Signed/dated: 2/2/01
Original picked-up by JDWhitmore: 2/2/01

FG252 453018