NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-5007

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

LEANDRA ENGLISH,
APPELLANT,

v.

DONALD J. TRUMP; JOHN M. MULVANEY,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE 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 AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—All parties, intervenors, or amici who have appeared before the district court and so far in this Court are listed in the Brief for the Appellant.

B. *Ruling under review*.—References to the ruling at issue appear in the Brief for the Appellant.

C. *Related cases*.— This case has not previously been before this Court or any other court, and undersigned counsel is unaware of any related cases pending in this Court or any other court.

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CFPB	Consumer Financial Protection Bureau

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are the 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, who seek to maintain the legislatively crafted independence of the Consumer Financial Protection Bureau ("CFPB") that is so essential to its mission. Through the Consumer Financial Protection Act ("Act"), Congress has authorized State Attorneys General to enforce the Act's consumer protection provisions and CFPB regulations. 12 U.S.C. § 5552(a). In bringing such enforcement actions, the States consult with the CFPB, which has the right to intervene in those suits. 12 U.S.C. § 5552(b). As enforcement partners with the CFPB, the *Amici* States have an interest in preserving the independence of the CFPB from short-term political pressures so that it can use its resources and expertise to pursue the long-term public interest, as Congress intended. The CFPB's independence is crucial to the effectiveness of the *Amici* States' enforcement efforts, as the CFPB and the *Amici* States make decisions about cooperating in parallel investigations, sharing information and documents collected, coordinating enforcement actions, and negotiating joint settlements. Attempts to dismantle Congress's careful and concerted efforts in structuring the CFPB as a truly independent agency would, if successful, harm the

Amici States' ability to enforce the many consumer financial laws that protect their residents.[1]

Current events reinforce the interest and concern of the *Amici* States. *See, e.g.*, Patrick Rucker, *Exclusive: U.S. Consumer Protection Official Puts Equifax Probe on Ice – Sources*, Reuters, Feb. 5, 2018, https://tinyurl.com/yaomzlea (reporting that the CFPB "has pulled back from a full-scale probe of how Equifax Inc. failed to protect the personal data of millions of consumers"); Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, Wash. Post, Feb. 1, 2018, https://tinyurl.com/ycnn836c (disclosing that Mr. Mulvaney "has stripped enforcement powers from a [CFPB] unit responsible for pursuing discrimination cases"); Press Release, CFPB, *CFPB Statement on Payday Rule* (Jan. 16, 2018), https://tinyurl.com/ybdwlpls (stating that the CFPB intends "to reconsider the Payday Rule," which aims to stop payday debt traps by requiring lenders to determine upfront consumers' ability to repay).

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[1] As just one concrete example, the CFPB coordinated with the States to investigate allegations that Chase Bank USA N.A. and Chase Bankcard Services, Inc. had committed a variety of deceptive and unlawful debt-collection practices for credit cards. This resulted in a joint settlement with the District of Columbia, 47 States, and the CFPB under which Chase agreed to reform those practices, pay $136 million, and cease collection actions against more than 528,000 consumers. *See* Press Release, D.C. Office of the Attorney General, *Chase Bank to Change Unlawful Debt-Collection Practices Thanks to Agreements with State Attorneys General* (July 18, 2015), *available at* https://tinyurl.com/ybfcukr4.

STATEMENT OF THE CASE

Congress established an independent CFPB to help prevent a repeat of the 2008 financial crisis, which devastated the nation's economy and was the worst such crisis since the Great Depression. S. Rep. No. 111-176, at 15, 39 (2010). More than 8 million American jobs were lost, 7 million homes entered foreclosure, and household wealth fell by $13 trillion. *Id.* at 39. As the Senate Committee on Banking, Housing, and Urban Affairs found, "it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166. The existing regulatory system had been a "spectacular failure," as regulators had "routinely sacrificed consumer protection for short-term profitability of banks" and other financial institutions. *Id.* at 15.

After extensive testimony and deliberations, Congress enacted the Consumer Financial Protection Act, which created the CFPB as an "independent bureau" within the Federal Reserve System, itself an independent entity, to regulate consumer financial products and services under federal consumer financial laws. 12 U.S.C. § 5491 (a); *see* S. Rep. No. 111-176, at 9-11. Congress determined that the new agency needed to be independent "to prevent problems that had handicapped past regulators." *PHH Corp. v. CFPB*, 2018 U.S. App. LEXIS 2336, No. 15-1177, Slip Op. 6 (Jan. 31, 2018) (en banc) (hereinafter, "*PHH Corp. II*"). That independence, which Congress has given to other financial regulators, "shields the nation's economy from manipulation or self-dealing by political incumbents." *Id*. at 7. It also "enables such agencies to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term." *Id.* at 7-8.

In the Act, Congress carefully calibrated the CFPB's structure to ensure a particularly high degree of independence. First, the Act establishes independent leadership of the agency. It provides for a Director, who "shall be appointed by the President, by and with the advice and consent of the Senate," and a Deputy Director "who shall be appointed by the Director . . . and serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b). The Director "shall serve for a term of 5 years," and may be removed by the President only "for cause," that is, "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c).

Second, the Act provides the CFPB a source of funding independent of the usual budget process. Specifically, "the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau," subject to an annually adjusted funding cap (but with a mechanism for additional appropriations). 12 U.S.C. § 5497(a)(1)-(2), (e). Such funds "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C).

Third, the Act gives the CFPB independent rulemaking authority. It provides: "The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws." 12 U.S.C. § 5512(b)(1). This rulemaking authority is "exclusive," and the judicial deference afforded the Bureau's interpretation "shall be applied as if the Bureau were the only agency" interpreting and administering those laws. 12 U.S.C. § 5512(b)(4).

Fourth, the Act gives the CFPB "primary enforcement authority" among federal agencies authorized to enforce the consumer financial laws with respect to certain covered entities. 12 U.S.C. § 5515(c)(1). Another federal agency may not bring its own enforcement action until 120 days after it recommends that the CFPB bring such action and the CFPB declines to do so. 12 U.S.C. § 5515(c)(2)-(3). Supporting its strong enforcement powers, the Act provides the CFPB with independent litigation authority, such that it may "commence a civil action" and "act in its own name and through its own attorneys" in any suit. 12 U.S.C. § 5564(a)-(b). In lieu of filing suit, the CFPB may also conduct "adjudication proceedings" to enforce compliance. 12 U.S.C. § 5563(a). "The court (or the Bureau, as the case may be) in an action or adjudication proceeding . . . shall have jurisdiction to grant any appropriate legal or equitable relief . . . ." 12 U.S.C. § 5565(a)(1).

Congress, of course, did not give the CFPB unbridled discretion, but struck a precise and intentional balance. For example, as mentioned, the President may remove the Director for cause before the end of his or her five-year term. 12 U.S.C. § 5491(c)(3). In addition, the Act directs the Government Accountability Office to conduct annual audits of the CFPB's financial transactions. 12 U.S.C. § 5497(a)(5). The Act also permits the Financial Stability Oversight Council to set aside a CFPB regulation when it decides, by a two-thirds vote, that the regulation risks certain adverse impacts. 12 U.S.C. § 5513. As designed by Congress, the independence of the CFPB is not only robust but also carefully delineated.

SUMMARY OF ARGUMENT

The *Amici* States agree with Ms. English, in support of her request for a preliminary injunction, that she is likely to succeed on the merits of her claim that the Consumer Financial Protection Act provides an exclusive, mandatory method for designating an acting CFPB Director. (*See* English Br. 18-47.) The *Amici* States file this brief to develop two additional points.

1. The Consumer Financial Protection Act's designation of the CFPB Deputy Director as acting Director, in the event of a vacancy, is essential to the purpose of the statutory scheme, which gives the CFPB a considerable amount of independence necessary, in Congress's view, to accomplish the agency's mission of consumer financial protection. The defendants' contrary position, which would allow the

Federal Vacancies Reform Act to control who succeeds as acting Director, would fatally undermine the independence that Congress so carefully and deliberately chose for the agency. Under the defendants' position, the President alone would select the individuals who could serve indefinitely as acting director, thereby destroying the CFPB's independence. Without independent leadership of the agency, the other statutory provisions designed to uphold an effective and independent agency—independent funding and rule-making authority and primary enforcement authority—would be all for naught.

The Consumer Financial Protection Act and the Federal Vacancies Reform Act can be reconciled through the canon of *lex specialis derogat legi generali*—that is, a specific law overrides a more general one. Aided by this canon, this Court should give effect to the Consumer Financial Protection Act's successor provision, as Ms. English requests, rather than the general, default provisions of the Federal Vacancies Reform Act. This interpretation would uphold Congress's comprehensive solution to the failures of consumer financial protection that, as Congress determined, helped lead to the 2008 financial crisis. Yet the district court ignored the canon by attempting to find some other method of reconciling the two statutes, no matter how much damage caused to the objectives of the Consumer Financial Protection Act. It failed to recognize that the canon is readily available to harmonize both statutes, so that the Consumer Financial Protection Act's successor provision is a narrow exception to the

Federal Vacancies Reform Act, which remains in effect and virtually untouched by Ms. English's interpretation.

2. The district court's reliance on the canon of constitutional avoidance was erroneous. Ms. English's interpretation of the Consumer Financial Protection Act does not raise any serious constitutional problem, especially given that this Court has upheld Congress's constitutional authority to bestow the CFPB's enforcement powers upon a single director, removable for cause. The district court's concern that the accession of the Deputy Director to acting Director would render the President "virtually powerless" over the agency is entirely misplaced. The President retains the ability both to appoint a new successor, subject to Senate confirmation, and to remove the acting Director for cause.

It is the defendants' position, in fact, that raises serious constitutional concerns. By arguing that the President has unfettered power to appoint an acting director, the defendants have removed the legislative branch from its constitutional role in the selection of executive branch officers. Congress's determination about the succession process for the acting CFPB Director should be respected, not ignored. At the least, the canon of constitutional avoidance does not provide courts guidance in this area. The intent of Congress in enacting the Consumer Financial Protection Act, as evidenced by its plain language, should be upheld, and Ms. English should be recognized as the lawful acting Director of the agency.

ARGUMENT

I. This Court Can, And Should, Give Effect To The Successor Provision In The Consumer Financial Protection Act, Because It Is Essential To The CFPB's Independence And Fully Capable Of Being Harmonized With The Federal Vacancies Reform Act.

A. By providing that the Deputy Director succeeds to the acting Director, the Consumer Financial Protection Act ensures the CFPB's independence.

The defendants' position—that the President may select an acting CFPB Director outside of the Consumer Financial Protection Act's provisions—violates the "independent" agency structure that Congress expressly created. 12 U.S.C. § 5491(a). Under the Act, once a Director has been appointed by the President with approval of the Senate, the Director serves a five-year term, which notably transcends the President's own four-year term. 12 U.S.C. § 5491(c)(1). To further ensure the Director's independence, the President's role during the Director's term is limited: the President can remove the Director only for cause. 12 U.S.C. § 5491(c)(3). And if the Director is removed, or resigns, then the Act provides that the Deputy Director "shall" serve as the acting Director until the President appoints (again with Senate approval) a new Director. 12 U.S.C. § 5491(b)(2), (5)(B). Thus, the text of the Act, on its face, forecloses the defendants' position.

In contravention of this statutory scheme, the defendants erroneously contend that the President can unilaterally designate another individual—not the Deputy Director—to serve as acting Director for an extended period. They posit that the

Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq*., enacted more than a decade before the CFPB's creation, allows the President to make such a designation. Under this view, the President could select an acting director who could serve for as long as the Vacancies Reform Act permits—seven months or much longer—but all the while presumably at the President's will. *See* 5 U.S.C. § 3346. Indeed, because defendants have contended that the Vacancies Reform Act is just "one means" of filling the Director's vacancy,[2] the President could choose an acting director under that act and then select, as another successor, the deputy director that the acting director has appointed. Taken to its logical conclusion, the defendants' interpretation would allow the CFPB to be headed indefinitely by individuals who are effectively just of the President's own choosing. This would not only circumvent the required process for Senate confirmation and thus the separation-of-powers doctrine, but also violate the Congressionally mandated independence of the agency director.[3]

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[2] Office of Legal Counsel, U.S. Dep't of Justice, Opinion on Designating an Acting Director of the Bureau of Consumer Financial Protection, Slip Op. 4 (Nov. 25, 2017), *available at* https://www.justice.gov/olc/file/1014441/download.

[3] Raising further concerns about the President's ability to undermine the CFPB's independence, President Trump tweeted several weeks ago in response to news reports about an ongoing CFPB enforcement action: "Fines and penalties against Wells Fargo Bank for their bad acts against their customers and others will not be dropped, as has incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating!" @realDonaldTrump, Twitter (Dec. 8, 2017, 7:18 AM), https://twitter.com/realDonaldTrump/status/939152197090148352.

The defendants' approach demolishes a critical part of Congress's carefully constructed statutory scheme for the CFPB's independence. The independence of an agency means little without independent leadership. *See Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threat[en] the independence of [the] commission.'" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935))); *PHH Corp. II*, Slip Op. 25-26. Congress thus found it necessary to ensure independent leadership through the for-cause removal and succession provisions. 12 U.S.C. § 5491(b)-(c). These leadership provisions undergird other provisions of the Consumer Financial Protection Act that are also essential to a strong and independent CFPB, such as those that insulate it from the usual budget process and grant it exclusive rulemaking authority and primary enforcement powers. *See* 12 U.S.C. §§ 5497(a), 5512(b), 5515(c), 5564. This independence should be maintained, as Congress intended, even when the Director leaves office.

The Vacancies Reform Act can and should be harmonized with the Consumer Financial Protection Act to effectuate its provision requiring that the Deputy Director serve as the acting Director. This harmonization can readily be accomplished by recognizing that the Consumer Financial Protection Act's successor provision is not only the more recent enactment, but also the more specific one. It is "a commonplace of statutory construction that the specific governs the general." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015). Notably, this principle is "particularly true" where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Id.*; *accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

That precisely describes the situation here. Congress enacted a comprehensive scheme to ensure the CFPB's independence. It did not simply declare the CFPB independent and leave unresolved the bounds of that independence. Instead, the Consumer Financial Protection Act has numerous, detailed provisions that create a high degree of agency independence, while still striking a balance that carefully delineates its scope. As a direct response to the 2008 financial crisis, the establishment of the CFPB as an independent agency was a "specific solution" to "specific problems" of utmost national importance. Indeed, this Court recognized as much when describing Congress's creation of the CFPB, explaining that the 2008 financial crisis was "surely such a situation" of "new problems calling for tailored solutions." *PHH Corp. II*, Slip Op. 54. The CFPB's establishment was a carefully crafted response to that crisis, "which Congress partially attributed to a colossal failure of consumer protection." *Id.*

By contrast, the Vacancies Reform Act was a statute enacted well before this devastating financial crisis, at a time when the CFPB was not even in existence. It would be unreasonable to conclude that, on the present question concerning the agency's structure and independence, such a statute would prevail over the act that created the CFPB to target the regulatory failures underlying that crisis. Such a conclusion would impermissibly allow an earlier, general statute to fundamentally undermine Congress's specific and comprehensive legislative solution to a critically important issue.

B. The district court's suggestion that the *lex specialis* canon is inapplicable, or even supportive of defendants, misapplies the canon and overrides Congress's intent.

The district court's analysis erroneously found inapplicable the canon that the specific governs the general. The court erred by concluding that there is no apparent contradiction between the two statutes, as it interpreted them, for the canon to help resolve. JA 322. In fact, though, there is such a contradiction given the court's interpretation of the Vacancies Reform Act as providing a non-exclusive means to temporarily fill a vacancy in the CFPB Director position. JA 312. As Ms. English correctly argues, the Consumer Financial Protection Act, on its face and by design, establishes the *exclusive* means of temporarily filling that particular vacancy: it provides that the Deputy Director "shall" serve as the acting Director. 12 U.S.C. § 5491(b)(5)(B). But it cannot be the exclusive means if the Vacancies Reform Act provides an alternative means. Thus, the conflict arises.

The court further erred by reconciling the two statutes before even considering the *lex specialis* canon. JA 322. The court correctly recognized its duty to try to harmonize the two statutes so as to give effect to each. JA 320. But the need "to harmonize and give meaningful effect to these seemingly contradictory provisions . . . can readily be accomplished by employing the well established canon of statutory interpretation that the specific governs the general." *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 306 (D.C. Cir. 2014) (internal quotation marks and ellipsis omitted). "When one statute speaks in general terms while the other is specific, conflicting provisions may be reconciled by carving out an exception from the more general enactment for the more specific statute." *Stewart v. Smith*, 673 F.2d 485, 492 (D.C. 1982); *accord RadLAX*, 566 U.S. at 645 ("To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

This canon best reconciles the statutes here. It recognizes that the acting-director provision in the Consumer Financial Protection Act is a narrow, agency-specific exception to the more general provisions of the Vacancies Reform Act. Despite that exception, the Vacancies Reform Act is still the default statute for filling vacancies across federal government agencies. Even under Ms. English's interpretation, the act remains in effect, with its basic purpose fulfilled and its application in the vast majority of instances unaffected. *See Mittleman*, 757 F.3d at

306 (harmonizing provisions by recognizing one as a specific exception to a general provision that still applies in "the broad run" of situations).

The *lex specialis* canon is thus not, as the district court conceived, a canon of last resort, applied when every other attempt at reconciliation has failed. The court thought that the canon is "not appropriately invoked" here because the two statutes "*can* be reconciled." JA 322. But there is no dispute about the possibility of reconciliation. As just shown, the Consumer Financial Protection Act and the Vacancies Reform Act can be reconciled, but through aid of the canon, which better effectuates congressional intent. The sound guidance that the canon provides cannot be ignored simply because some alternative form of reconciliation is possible regardless of how much that alternative would frustrate the accomplishment of Congress's objectives. "[E]ven when the literal terms of statutory provisions would allow the specific language to be controlled by the more general, we cannot ignore evidence that Congress intended to address a specific situation through special legislation." *Stewart*, 673 F.2d at 492.

The district court was also mistaken that the Vacancies Reform Act is "arguably more 'specific'" than the Consumer Financial Protection Act. JA 322. The court reasoned that the Vacancies Reform Act addresses a particular scenario: the occurrence of a vacancy in a position, like that of CFPB Director, requiring Presidential appointment and Senate confirmation. JA 322. There is no dispute, however, that the Consumer Financial Protection Act applies when a vacancy occurs in the specific position of CFPB Director (and no other such position). This clearly makes the act more specific. *See Edmond v. United States*, 520 U.S. 651, 656-57 (1997) (indicating that statutory provision for appointment of Coast Guard appellate judges would be more specific, for purposes of the canon, than a provision for appointment that included other Coast Guard officers). Another reason that the Consumer Financial Protection Act is more specific is that it was designed to address the specific problem of consumer financial protection, with the independent structure of the director position being essential to Congress's comprehensive solution. *See Howard*, 775 F.3d at 440-41 (relying on the canon to hold that the six-year statute of limitations for suits against the United States does not apply to federal employee claims under Title VII's comprehensive scheme).

II. The Canon Of Constitutional Avoidance Is Inapplicable And In Any Event Cannot Defeat Congress's Intent—As Evidenced Through The Plain Language Of The Consumer Financial Protection Act—That The Deputy Director Become The Acting Director.

The district court erroneously relied on the canon of constitutional avoidance. This canon "is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television*, 556 U.S. 502, 516 (2009). Its premise is a "presumption that Congress did not intend the alternative which raises [such] doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

This canon must be used with caution, though, since it should be "a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

The district court first erred by concluding that Ms. English's interpretation of the Act "poses a serious constitutional problem." JA 328. It explained that such interpretation "potentially impairs the President's ability to fulfill his obligations under the Take Care Clause" to ensure that the laws be faithfully executed. JA 325; *see* U.S. Const. art II, § 3. To the contrary, Ms. English's interpretation is fully consistent with the Constitution (and congressional intent).

The district court initially misstepped by doubting the constitutionality of placing CFPB's broad enforcement powers in the hands of single officer, removable only for cause, rather than a board of such officers. JA 327. While the court's doubts rested on the panel decision in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), this Court, reconsidering *en banc*, recently reversed that decision, *PHH Corp. II*, Slip Op. 67-68. In doing so, this Court affirmed that the CFPB's leadership structure "fully comports with the President's Article II executive authority and duty to take care that the consumer financial protection laws within the CFPB's purview be faithfully executed." *Id*. at. 18. This Court's decision in *PHH Corp. II* has negated the district court's constitutional doubts.

The district court further went astray by suggesting that the President would be "virtually powerless" to replace the Deputy Director upon her ascension to acting

Director. JA 327. This is incorrect. First, the President may appoint, subject to Senate confirmation, a new Director immediately or at any time thereafter. *See* U.S. Const. art. II, § 2, cl. 2; 12 U.S.C. § 5491(b). Second, there is no dispute that the acting Director remains subject to dismissal for cause: "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c); *see* JA 325. Indeed, by virtue of his power to immediately nominate a new Director, the President has a *greater* say in the leadership of the CFPB under an acting Director than under a Director who was appointed by a prior President but whose 5-year term has not yet expired. Because there is no suggestion that the latter situation is constitutionally problematic, Ms. English's interpretation is similarly free from constitutional concern.

Moreover, the defendants' position raises its own serious constitutional doubts. As the district court's analysis reflects, the defendants' interpretation relies almost entirely on a theory of unfettered executive power, to the exclusion of Congress's constitutional role in the selection of executive officers. *See* U.S. Const. art. II, § 2, cl. 2 (requiring that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States"). This is a serious oversight. "The Senate's advice and consent power is a critical structural safeguard of the constitutional scheme." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (internal quotation marks and brackets omitted). "The Framers envisioned it as 'an excellent check upon a spirit of favoritism in the President' and a guard against 'the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity.'" *Id.* (quoting The Federalist No. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton)). Any notion that the President can unilaterally install an agency head who requires Senate confirmation would contravene the constitutional structure.

Consistent with its constitutional role, Congress has long determined when, and under what circumstances, an officer will serve in an acting capacity. "Since President Washington's first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of [an office requiring Presidential appointment and Senate confirmation] without first obtaining Senate approval." *SW Gen., Inc.*, 137 S. Ct. at 935. Indeed, the very authority upon which defendants rely for the selection of Mr. Mulvaney as acting Director is the Vacancies Reform Act, an exercise of Congressional power that contains extensive restrictions on the President's ability to temporarily fill such vacancies. *See id.* at 936-37; 5 U.S.C. §§ 3345, 3346, 3348.

Thus, while there is nothing constitutionally suspect in Congress providing who may serve as an acting agency head, it *would be* constitutionally suspect to decline to give full recognition to Congress's choice in the matter. Here, Congress has spoken clearly by providing that, in the event of a vacancy in the CFPB Director position, the

Deputy Director "shall" serve as acting Director until a successor is appointed by the President and approved by the Senate. 12 U.S.C. § 5491(b).

At the least, the canon of constitutional avoidance provides no assistance to defendants. Especially in light of *PHH Corp. II*, Ms. English's interpretation of the Consumer Financial Protection Act has not been shown to raise "grave and doubtful" constitutional questions, and so the canon has no application. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Moreover, assuming that the Act's provisions for a highly independent CFPB might conceivably implicate executive power, that is the statutory scheme that Congress deliberately established, and so there is also no relevant ambiguity for the canon to address. Of course, courts can determine if what Congress intended through legislation is unconstitutional. *See PHH Corp. II,* Slip Op. 67-68. But it is entirely inappropriate to refuse to give effect to Congress's intent, as expressed in the plain language of the statute, simply because the legislation operates in an area of constitutional complexity or uncertainty. In this particular area, such concerns may well be unavoidable and, as explained, the defendants' position raises its own serious separation-of-powers questions.

Accordingly, the touchstone for discerning Congress's intent remains the language of the Consumer Financial Protection Act, which plainly establishes that Ms. English, as the Deputy Director, lawfully serves as acting Director of the CFPB.

CONCLUSION

This Court should reverse the district court's decision and direct the district court to grant Ms. English's request for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 4,805 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

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