

[ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2018]  
Case No. 18-5007

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

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LEANDRA ENGLISH,  
*Plaintiff-Appellant,*

v.

DONALD J. TRUMP and  
JOHN MICHAEL MULVANEY,  
*Defendants-Appellees.*

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On Appeal from the United States District Court for the District of Columbia  
Case No. 1:17-cv-02534-TJK

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**BRIEF OF AMICI CURIAE 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., AND UNITED STATES PUBLIC  
INTEREST RESEARCH GROUP EDUCATION FUND, INC.  
IN SUPPORT OF APPELLANT AND REVERSAL**

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February 6, 2018

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), amici state as follows:

### **(A) Parties and Amici**

All parties, intervenors, and amici appearing before the district court and that have appeared in this Court to date are listed in Plaintiff-Appellant's Brief and Defendants' Response to Plaintiff's Motion to Expedite Appeal (Jan. 19, 2018).

The amici curiae joining this brief are:

1. Public Citizen, Inc.
2. Americans for Financial Reform
3. Center for Responsible Lending
4. Consumer Action
5. National Association of Consumer Advocates
6. National Consumer Law Center
7. National Consumers League
8. National Fair Housing Alliance
9. Tzedek DC, Inc.
10. United States Public Interest Research Group Education Fund, Inc.

The required corporate disclosure statement for each amicus curiae joining this brief is set forth below.

**(B) Rulings Under Review**

Reference to the ruling under review is in Plaintiff-Appellant's Brief.

**(C) Related Cases**

Counsel for amici are not aware of any pending related cases.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Circuit Rule 26.1, amici curiae Public Citizen, Inc., Consumer Action, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, National Fair Housing Alliance, Tzedek DC, Inc., and United States Public Interest Research Group Education Fund, Inc. state that they are nonprofit, non-stock corporations. They have no parent companies, and no publicly traded companies have an ownership interest in them.

Amicus curiae Americans for Financial Reform states that it is a project of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, two nonprofit, non-stock corporations. These two nonprofit corporations have no parent companies, and no publicly traded companies have an ownership interest in them.

Amicus curiae Center for Responsible Lending states that it is a nonprofit, non-stock corporation. Its parent company is Center for Community Self-Help, a nonprofit, non-stock corporation. No publicly traded companies have an ownership interest in Center for Responsible Lending or the Center for Community Self-Help.

All ten amici curiae are organizations devoted to the protection of consumer interests.

## CERTIFICATE REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel for amici curiae Public Citizen, Inc., et al. certify that a separate brief is necessary to provide a perspective informed by amici curiae's long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Amici have extensive knowledge of the consumer needs that the Consumer Financial Protection Bureau (CFPB) addresses, the statutes that the CFPB enforces, and the work that the agency has accomplished. Further, amici have a rich understanding of the CFPB's place in history and the broader regulatory landscape affecting consumers. Most of the amici were advancing the interests of consumers—the people the CFPB was created to protect—for decades before the CFPB existed and were heavily involved in the policy debates that led to the agency's creation. Amici also address a wide variety of consumer issues, including those under other regulators' purview. Amici's experience and perspective are thus different from those of the other amici who have provided notice of their intent to participate in this appeal (consumer finance scholars), and the other district court amici in support of plaintiff (scholars, current and former members of Congress, and states and the District of Columbia).

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## **GLOSSARY**

**CFPB** Consumer Financial Protection Bureau

**OMB** Office of Management and Budget

## INTEREST OF AMICI<sup>1</sup>

Amici are ten nonprofit consumer organizations that protect and defend the rights of consumers through education, advocacy, policy, research, and litigation. Their consumer advocacy work spans decades. Before Congress created the Consumer Financial Protection Bureau (CFPB), many of these organizations were leading voices advocating for its formation. Since the CFPB launched, amici curiae have frequently engaged with the agency and vigorously supported both its mission and its independence. Amici curiae are now deeply concerned about the CFPB's ability to continue pursuing its work as an independent agency. Additional information about each amici was included in the separately filed representation of consent and is repeated in the addendum to this brief. All parties have consented to the filing of this brief.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to address the fourth prong of the preliminary injunction standard, to which the district court gave short shrift: the public interest.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

A preliminary injunction will serve the public interest by enabling the CFPB to pursue its statutory mission and maintain its independence during the course of this litigation.

The CFPB is a response to the 2008 financial crisis. Inattention by other regulatory agencies, along with limitations on their authority, contributed significantly to the crisis that destabilized the American economy and caused grave hardship to American families. Reacting to market and regulatory failures that fueled this “Great Recession,” Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). As part of this reform, “Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So it established the Consumer Financial Protection Bureau.” *PHH Corp. v. CFPB*, -- F.3d --, 2018 WL 627055, \*1 (D.C. Cir. Jan. 31, 2018). Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency “the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced.” H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally* *PHH*, 2018 WL 627055, at \*3-4.

From the day of the agency's creation until the start of this dispute, the CFPB used its authority and accountability to serve the public interest. The CFPB's supervision and enforcement actions alone resulted in nearly \$12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers* (July 2017);<sup>2</sup> Zixta Q. Martinez, *Six Years Serving You*, CFPB (July 21, 2017).<sup>3</sup>

Now, with the dispute over its acting director, the CFPB is at a turning point. Although Plaintiff's claims regard *who* can serve as acting director until the next Senate-confirmed director is seated, the district court, in considering the motion for a preliminary injunction, should also have examined *how* Plaintiff English or Defendant Mulvaney would lead the CFPB. The answer to this question has great significance to the fourth prong of the preliminary injunction standard: where the public interest lies. The public has an overriding interest in the CFPB's continued pursuit of its statutory role, including both its consumer protection mission and the independence that Congress deemed "necessary for the effectiveness," *PHH*, 2018

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<sup>2</sup> [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707\\_cfpb\\_by-the-numbers.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf).

<sup>3</sup> <https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/>.

WL 627055, at \*11, of the new agency. Plaintiff English, a long-time and full-time CFPB official, has a track record of preserving this mission and independence. By contrast, Defendant Mulvaney has an inherent conflict of interest with the agency's statutory mission and independence as long as he serves in his White House leadership position, as Director of the Office of Management and Budget (OMB). Further, he has been using his purported appointment at the CFPB to slow or halt execution of the CFPB's core functions and to tie the independent agency to the current Administration's priorities. For this reason, the public interest weighs strongly in favor of Plaintiff's motion for a preliminary injunction.

## **ARGUMENT**

### **I. Prior to this dispute, the CFPB vigorously served the public interest.**

#### **A. Congress intended the CFPB to be an independent consumer agency.**

Congress created the CFPB in 2010 after more than 100 hearings and extensive debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis from occurring in the future. *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010). When it did so, Congress “gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products.” *PHH*, 2018 WL 627055, at \*3; *see also* 12 U.S.C. § 5511(a).

To direct its work, Congress assigned the CFPB five key functions, in addition to support activities: (1) “collecting, investigating, and responding to consumer complaints”; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) “issuing rules, orders, and guidance” to implement consumer protection law; (4) “conducting financial education programs”; and (5) researching and monitoring the markets for consumer financial products and services. 12 U.S.C. § 5511(c)(1)-(6).

Congress concluded that with this singular focus on consumers, the CFPB could serve American households more effectively than other regulators. In the past, “[f]ederal bank regulators had given short shrift to consumer protection.” *PHH*, 2018 WL 627055, at \*3. The Federal Reserve, for example, “waited more than 14 years to implement rules Congress gave it to address unfair and deceptive trade practices in the mortgage lending market ... .” Ctr. for Responsible Lending, *Neglect and Inaction: An Analysis of Federal Banking Regulators’ Failure to Enforce Consumer Protections* 1 (July 13, 2009).<sup>4</sup> The Office of the Comptroller of the Currency exempted national banks from following state anti-predatory lending

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<sup>4</sup> <http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/neglect-and-inaction-7-10-09-final.pdf>.

laws, helping “create[] an environment where abusive mortgage lending could flourish.” S. Rep. No. 111-176, at 16-17. “Congress concluded that [the] ‘failure by the prudential regulators to give sufficient consideration to consumer protection ... helped bring the financial system down.’” *PHH*, 2018 WL 627055, at \*3 (ellipsis in original) (quoting S. Rep. No. 111-176, at 166). “All told, nearly \$11 trillion in household wealth ... vanished” in the 2008 financial crisis. *Id.* (internal brackets and quotation marks omitted). “In Congress’s view, the 2008 crash represented a failure of consumer protection.” *Id.*

Congress responded to these failures by consolidating in the CFPB “authorities to protect household finance that had previously been scattered among separate agencies in order to ... ensure accountability.” *Id.* (internal quotation marks and brackets omitted); 12 U.S.C. § 5581(b). It also gave the CFPB important new authority. The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers’ most important financial transactions. *See CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012);<sup>5</sup> *see generally* 12 U.S.C. § 5481(15)(A)(ix). More generally, Congress

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<sup>5</sup> <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-supervise-credit-reporting/>.

made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders. *See* 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017).<sup>6</sup> With this “level playing field” approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market. S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4).

Congress also paid careful attention to the CFPB’s structure. Vital to the new agency’s success, Congress concluded, was its independence. *See* S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874.<sup>7</sup> “By providing the Director with a fixed term and for-cause protection, Congress sought to promote stability and confidence in the country’s financial system.” *PHH*, 2018 WL

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<sup>6</sup> <https://www.consumerfinance.gov/data-research/research-reports/semi-annual-report-spring-2017/>.

<sup>7</sup> Congress also provided exacting direction about other aspects of the new agency’s organization. The Dodd-Frank Act required specific offices and units and an advisory board, 12 U.S.C. §§ 5493(a)(5), (b)-(g), 5494, 5535, specified personnel rules, *id.* § 5493(a)(1)-(4), and described how employees could be transferred from other agencies, *id.* § 5584.



627055, at \*4. “Congress also determined ‘that the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator.’” *Id.* (quoting S. Rep. No. 111-176, at 163). Other financial regulators had been “overly responsive to the industry they purported to police.” *Id.* at \*1. With the Dodd-Frank Act, as Senator Cardin put it, Congress aimed to “create a consumer bureau ... that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure.” 156 Cong. Rec. S5871 (daily ed. July 15, 2010).

To that end, the Dodd-Frank Act expressly designated the agency as independent. 12 U.S.C. § 5491(a). To further its independence, the Act gave the CFPB funding from the Federal Reserve, rather than annual appropriations from Congress, *id.* § 5497(a), allowed the CFPB to make financial operating plans without OMB approval, *id.* § 5497(a)(4)(E), and placed the agency under a single director appointed by the President and confirmed by the Senate for a five-year term, removable by the President only for “inefficiency, neglect of duty, or malfeasance in office,” *id.* § 5491(b)(1)-(2), (c)(1), (c)(3). The Dodd-Frank Act also allowed the CFPB to make independent recommendations to Congress, *id.* § 5492(c)(4), and represent itself in court, *id.* § 5564(b). Consistent with this independence, the CFPB’s only political appointee prior to the start of this dispute

was its director, who had been nominated by then-President Obama and confirmed by the Senate to a five-year term. *See* Zach Piaker, *Help Wanted: 4,000 Presidential Appointees*, Center for Presidential Transition (Mar. 16, 2016),<sup>8</sup> *see also* S. Comm. on Homeland Sec’y and Gov’t Affairs, 114th Cong., 2d Sess., *United States Government Policy and Supporting Positions* 151 (Comm. Print 2016).<sup>9</sup>

**B. The CFPB has meaningfully improved consumer financial markets and concretely benefited consumers.**

Between its 2011 launch and the start of this dispute, the CFPB advanced the public interest that Congress identified in the Dodd-Frank Act. By operating independently of the government’s political branches, it delivered on its mission to protect consumers and make the markets for consumer financial products fair, transparent, and competitive. On its opening day, for example, the agency started a consumer complaints program that responded to a detailed set of Dodd-Frank Act directives. *See* 12 U.S.C. §§ 5493(b)(3), 5511(c)(2), 5534(a); CFPB, *Monthly*

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<sup>8</sup> [http://presidentialtransition.org/blog/posts/160316\\_help-wanted-4000-appointees.php](http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php).

<sup>9</sup> <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf>.

*Complaint Report, Vol. 25*, at 2 (2017).<sup>10</sup> A legal aid attorney identified this program as the source of the “biggest change” in the consumer financial industry since the 2008 financial crisis; now, when he “complains about a large company, the company actually responds.” Shahien Nasiripour, *Banks Can’t Wait to Wipe this Complaints Database*, Bloomberg (Feb. 8, 2017).<sup>11</sup> By July 2017, the CFPB had collected more than 1.2 million consumer complaints and helped hundreds of thousands of consumers receive relief. Companies responded to nearly every complaint forwarded to them by the CFPB and provided relief to consumers in about 20 percent of cases. *See CFPB, Monthly Complaint Report, supra* p. 9, at 5, 8-9.

Congress anticipated that the CFPB could also use consumer complaints like canaries in coal mines, to help federal agencies identify more widespread problems. *See* 12 U.S.C. §§ 5512(c)(4)(B)(i) (regarding the CFPB’s use of complaints to monitor markets for risks to consumers), 5514(a)(1)(C) (giving the CFPB authority to supervise a nonbank financial company when the CFPB

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<sup>10</sup> [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707\\_cfpb\\_monthly-complaint-report-vol-25.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_monthly-complaint-report-vol-25.pdf).

<sup>11</sup> <https://www.bloomberg.com/news/articles/2017-02-08/the-cfpb-keeps-a-database-that-banks-can-t-wait-to-wipe>.

determines, based on consumer complaints, that a company's conduct poses risk to consumers); *see also id.* § 5493(b)(3)(D) (requiring the CFPB to share complaint data with other agencies). The agency did just that. One set of complaints to the CFPB sparked a Department of Justice investigation of student loan companies for ignoring servicemembers' rights under consumer law. The matter ended with the companies agreeing to pay about \$60 million in compensation to about 60,000 servicemembers. *Justice Department Reaches \$60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans*, U.S. Dep't of Justice (May 13, 2014).<sup>12</sup>

Through its other key functions, the CFPB likewise forcefully pursued the consumer protection mission that Congress required of it. The CFPB's enforcement and supervision actions led to nearly \$12 billion in ordered relief for more than 29 million consumers. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra* p. 3; Martinez, *Six Years Serving You*, *supra* p. 3. In one heavily publicized matter, the CFPB forced Wells Fargo to pay a \$100 million fine in addition to refunds for opening millions of accounts without

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<sup>12</sup> <https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging>.

consumers' authorization. *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB (Sep. 8, 2016).<sup>13</sup> In dozens of other enforcement actions, the CFPB halted myriad other abuses, such as “illegal debt collection tactics,” “reselling sensitive personal information to lenders and debt collectors,” “illegal redlining and discriminatory mortgage underwriting and pricing practices,” and deception of students by a for-profit education provider. *Testimony of Richard Cordray* 4-5 (Apr. 5, 2017);<sup>14</sup> see also CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* p. 7, at 77-100; see generally Am. for Fin. Reform, *CFPB Enforcement Actions (through April 2017)*.<sup>15</sup> In supervisory actions, the CFPB rooted out illegal practices in auto loan servicing, credit card accounts, debt collection, deposit accounts, mortgage origination and

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<sup>13</sup> <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>.

<sup>14</sup> <https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-rcordray-20170405.pdf>.

<sup>15</sup> <https://docs.google.com/spreadsheets/d/1q5nD0Zku1YAoiu2GUOwLNo dPdoqCu2j0sFPE3pW7Jy0/>.

servicing, remittances, and short-term small-dollar lending. CFPB, *Supervisory Highlights, Issue 16, Summer 2017* (Sept. 2017).<sup>16</sup>

The CFPB's regulations brought important protections to the mortgage market, where abuses by lenders and federal agencies' weak oversight were widely viewed as key contributors to the 2008 financial crisis. *See* S. Rep. 111-176, at 11-14, 167. For instance, the agency's rules require lenders to determine that borrowers can afford their loans. *See Ability-to-Repay and Qualified Mortgage Standards, Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408 (Jan. 30, 2013). The CFPB also overhauled mortgage disclosures so that consumers receive two easy-to-use disclosures rather than four forms. *See* 12 U.S.C. § 5532(f); CFPB, *TILA-RESPA Integrated Disclosure Rule: Small Entity Compliance Guide* 15-16 (Oct. 2017).<sup>17</sup> More than 10 million consumers have received the new disclosures. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers*, *supra* p. 3; *see generally* CFPB, *Semi-Annual Report of*

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<sup>16</sup> [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709\\_cfpb\\_Supervisory-Highlights\\_Issue-16.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf).

<sup>17</sup> [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710\\_cfpb\\_KBYO-Small-Entity-Compliance-Guide\\_v5.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_KBYO-Small-Entity-Compliance-Guide_v5.pdf).

*the Consumer Financial Protection Bureau, supra* p. 7, at 59-69 (describing other rulemaking activities and initiatives to support companies in implementation).

The CFPB's financial education programs have also reached millions. By July 2017, the agency's "Ask CFPB" website had received over 13 million unique visitors. CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers, supra* p. 3. Students at more than 3,200 colleges are now benefiting from a "financial aid shopping sheet" that the CFPB developed with the Department of Education, and that colleges are voluntarily adopting to help students understand college financing options. *Id.* (with link to materials). Additional CFPB programs have helped consumers navigate other critical financial decisions. The agency's online resources include materials for practitioners to use with economically vulnerable consumers, and consumer tools for: Buying a House, Planning for Retirement, Managing Someone Else's Money, and Navigating the Military Financial Lifecycle. *See We're the CFPB, CFPB.*<sup>18</sup>

The CFPB's research and monitoring of consumer financial markets has undergirded its work. The Dodd-Frank Act required the research and monitoring

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<sup>18</sup> <https://www.consumerfinance.gov/> (navigate to "Consumer Tools" and "Practitioner Resources" menus) (last visited Feb. 2, 2018).

function so that the new agency could identify key risks to consumers and prioritize its activities accordingly. *See* 12 U.S.C. §§ 5512(c)(1), 5514(b)(2). To implement the Dodd-Frank Act's commands, the CFPB built multiple teams to research and monitor the markets that it regulates. *See Research, Markets, and Regulations*, CFPB.<sup>19</sup> Years of CFPB research and market monitoring anchored the CFPB's recent rulemaking activities. *See, e.g.*, 82 Fed. Reg. 54472, 54507-09 (Nov. 17, 2017) (describing CFPB research and market monitoring prior to a rulemaking on payday loans); Kelly Cochran, *Spring 2017 Rulemaking Agenda*, CFPB (July 20, 2017) (recognizing CFPB research that has preceded rulemaking activities regarding overdraft products).<sup>20</sup>

In short, by dedicating itself to its statutory mission, the agency—before this dispute began—consistently worked to advance the public interest as identified in the Dodd-Frank Act. To use its own words, the CFPB has

aim[ed] to make consumer financial markets work for consumers, responsible providers, and the economy as a whole. [It has] protect[ed] consumers from unfair, deceptive, or abusive practices and

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<sup>19</sup> <https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/research-markets-regulation/> (last visited Feb. 2, 2018).

<sup>20</sup> <https://www.consumerfinance.gov/about-us/blog/spring-2017-rulemaking-agenda/>.



take[n] action against companies that break the law. [It has] arm[ed] people with the information, steps, and tools that they need to make smart financial decisions.

*The Bureau*, CFPB.<sup>21</sup> In accordance with statutory requirements, the CFPB has done so with special attention to the needs of underserved consumers, servicemembers, older Americans, and students. *See* 12 U.S.C. §§ 5493(b)(2), 5493(e), 5493(g), 5535; *Consumer Education and Engagement Division*, CFPB.<sup>22</sup>

### **C. The CFPB's independence has been central to its success.**

Until this dispute, the CFPB maintained its commitment to the Dodd-Frank Act's mandates through turbulence in federal politics and under repeated pressure from elected officials and regulated entities to reduce, reverse, or stop its operations. As Congress foresaw, the agency's independence has been central to its ability to perform its statutory function.

Although the CFPB enjoys strong support from many members of Congress, other politicians and financial companies have regularly criticized the congressionally-mandated structure of the CFPB and the agency's implementation

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<sup>21</sup> <https://www.consumerfinance.gov/about-us/the-bureau/> (last visited Feb. 2, 2018).

<sup>22</sup> <https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/consumer-education-engagement/> (last visited Feb. 2, 2018).

of Dodd-Frank Act directives. *See generally* Steve Eder, et al., *Republicans Want to Sideline this Regulator. But It May Be Too Popular*, N.Y. Times (Aug. 31, 2017).<sup>23</sup> Political criticisms of the CFPB have intensified under the current Administration. Although the Dodd-Frank Act protects the CFPB's budgeting process and funding from control by the President and Congress, *see* 12 U.S.C. § 5497(a)(1), (a)(4)(E), the President used his initial budget documents to call for the agency to be funded through appropriations rather than the Federal Reserve, and to advocate for a dramatic reduction in the CFPB's budget. OMB, *Major Savings and Reforms: Budget of the U.S. Government, Fiscal Year 2018*, at 158-69 (2017);<sup>24</sup> *see also* Megan Leonhardt, *Buried in Trump's Budget: A New Attempt to Kill a Powerful Consumer Watchdog*, Money (May 23, 2017).<sup>25</sup> The President's Secretary of the Treasury evaluated the CFPB against Administration priorities, and branded the CFPB's congressionally-created structure "unaccountable," labeled as "unduly broad" its statutorily-granted authority over financial

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<sup>23</sup> <https://nyti.ms/2wVYGr5>.

<sup>24</sup> <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf>.

<sup>25</sup> <http://time.com/money/4790486/trump-budget-2018-cuts-cfpb-consumers/>.

companies' unfair, deceptive, and abusive practices, and deemed "unnecessary" the supervisory authority that Congress expressly granted to the agency. U.S. Dep't of the Treasury, *A Financial System That Creates Economic Opportunities Banks and Credit Unions* 79, 81, 88 (2017).<sup>26</sup> The President himself labeled the CFPB a "total disaster." Donald J. Trump (@realDonaldTrump), Twitter (Nov. 25, 2017, 1:48 PM).<sup>27</sup>

Nevertheless, until Defendant Mulvaney arrived at the CFPB, the agency maintained both its financial stability and its focus on its statutorily defined mission. See CFPB, *Financial Report of the Consumer Financial Protection Bureau, Fiscal Year 2017*, at 13, 15-28 (Nov. 15, 2017) (showing the CFPB's continued funding and accomplishment of its performance goals).<sup>28</sup> In 2017 alone, for example, the CFPB issued rules regarding payday loans and arbitration

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<sup>26</sup> <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>. The Treasury report responded to Executive Order 13772, which stated the current Administration's "Core Principles" for financial regulation and required the Secretary to report to the President on whether existing laws and policies promote those principles. Exec. Order No. 13772, §§ 1-2, 82 Fed. Reg. 9965, 9965 (Feb. 3, 2017).

<sup>27</sup> <https://twitter.com/realDonaldTrump/status/934539256940417024>.

<sup>28</sup> [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_financial-report\\_fy17.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf).

agreements. In accordance with Dodd-Frank Act instructions about how the CFPB should do its work, the CFPB issued both rules after years of study and multiple rounds of input from industry and consumer stakeholders. *See Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. at 54503-19 (describing the CFPB's multi-year process of seeking and receiving public input before issuing rule on payday loans); *Arbitration Agreements*, 82 Fed. Reg. 33210, 33245-46 (July 19, 2017) (similar, regarding rule on arbitration agreements); *see also* 5 U.S.C. § 609 (requiring the CFPB to seek input from small entities prior to certain rulemakings); 12 U.S.C. § 5512(b)(2)(A) (requiring CFPB rulemaking to consider potential costs and benefits). Reflecting the significance of the independence conferred on it by statute, the CFPB issued both rules in the face of strong political opposition. *See* Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243 (2017); H.J. Res. 122, 115th Cong. (2017) (introduced).<sup>29</sup>

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<sup>29</sup> Congress, of course, maintains the authority to change the CFPB's focus and structure. With regard to the CFPB's arbitration rule, it exercised this authority. In 2010, Congress expressly gave the CFPB the ability to restrict companies' use of mandatory pre-dispute arbitration agreements. 12 U.S.C. § 5518. In 2017, after the Vice President broke a tie vote in the Senate, a different Congress voted to vacate the CFPB's rule regarding such arbitration agreements. *See* Pub. L. No. 115-74, *with vote information*, <https://www.congress.gov/bill/115th-congress/house-joint-resolution/111/actions> (last visited Feb. 2, 2018).

That said, independence does not mean that the CFPB acts alone. The Dodd-Frank Act requires regular engagement with Congress, industry, and other stakeholders. *See, e.g.*, 5 U.S.C. § 609; 12 U.S.C. §§ 5493(b)(3)(C), 5496, 5512(b)(2), 5535(d), 5587(b); *see also Bureau Structure*, CFPB (Dec. 5, 2017) (with links to descriptions of outreach offices in the divisions of External Affairs and Research, Markets, and Regulations).<sup>30</sup> The overriding thrust of the Dodd-Frank Act, however, is that the agency should view external input through the lens of the law, not politics. Like other financial regulators, the CFPB is “designed to protect the public interest in the integrity and stability of markets from short-term political or special interests.” *PHH*, 2018 WL 627055, at \*20; *cf. Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (describing the Federal Trade Commission as “charged with the enforcement of no policy except the policy of the law”). Appropriately, in 2017, former CFPB Director Richard Cordray instructed his staff to “tune out the political noise.” Eder, *supra* p. 17.

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<sup>30</sup> <https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/>. By March 2017, senior CFPB officials had testified before Congress 63 times. CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau*, *supra* p. 7, at 166.

## II. The public interest lies in the CFPB's faithful adherence to its mission and independence.

Significant weight should be accorded to the “overriding public interest” in both the specific Dodd-Frank Act provisions that this case implicates and “the general importance of [the] agency’s faithful adherence to its statutory mandate.” *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977); *see also Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 42 (D.D.C. 2006). Because the public interest “is best assessed through the statutory provisions passed by the public’s elected representatives,” the public’s interest in the CFPB implementing the Dodd-Frank Act’s commands “outweighs” any general arguments about the agency’s value. *See Wash. Post v. Dep’t of Homeland Sec.*, 459 F. Supp. 2d 61, 76 (D.D.C. 2006) (in the context of a Freedom of Information Act request, concluding that the public’s interest in statutorily-authorized expedited processing “outweighs any general interest that it has in first-in-first-out processing of FOIA requests”).

In this case, the public interest in the CFPB’s ability to carry out its statutory mandate is particularly strong because the agency’s focus is protecting consumers from harm. *See, e.g.*, 12 U.S.C. § 5511(b)(2), (4) (describing CFPB objectives including “ensuring that ... consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination,” and that “Federal consumer

financial law is enforced consistently”). The laws that the CFPB implements and enforces, such as the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act, 12 U.S.C. § 5481(12), (14), “seek to curb fraud and deceit and to promote transparency and best practices.” *PHH*, 2018 WL 627055, at \*3; *see also id.* (regarding the CFPB’s authority to prohibit unfair, deceptive, or abusive acts or practices). They are thus fundamentally about the safety and fairness of consumer financial markets. Relaxation of the CFPB’s efforts to implement and enforce these laws will irreparably harm consumers by increasing their risk of exposure to discrimination, unfair, deceptive, or abusive practices, and other illegal actions. *Cf. Nat’l Ass’n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 613 n.39, 616 (D.C. Cir. 1980) (regarding safety laws and the public interest).

The overriding public interest in the CFPB’s statutory mission encompasses the public interest in the agency’s independence. A basic management principle holds that an organization’s strategy and structure should be “inextricably linked.” *See* Steven Aronowitz, et al., *Getting Organizational Redesign Right*, McKinsey Q. (June 2015).<sup>31</sup> Congress has repeatedly recognized and applied this principle. It has

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<sup>31</sup> <https://www.mckinsey.com/business-functions/organization/our-insights/getting-organizational-redesign-right>.

concluded that “for-cause removal restrictions” are “necessary for the effectiveness of certain types of agencies.” *PHH*, 2018 WL 627055, at \*11; *see also id.* at \*9. Relatedly, “Congress has consistently deemed insulation from political concerns to be advantageous in cases where it is desirable for agencies to make decisions that are unpopular in the short run but beneficial in the long run.” *Id.* at \*13 (internal quotation marks and brackets omitted).

This management principle could not be truer here. The CFPB is “designed to protect the public interest in the integrity and stability of markets from short-term political or special interests.” *Id.* at 20. “Congress validly decided that the CFPB needed a measure of independence.” *Id.* at \*13.

Reduction in that independence creates a very real risk to the CFPB’s ability to pursue its mission. The current Administration has already expressed interest in neutering the CFPB. OMB, *supra* p. 17, at 158-69; U.S. Dep’t of the Treasury, *supra* p. 18, at 79-92. If the boundaries that Congress drew between the CFPB and the Administration fall, the President will gain coercive authority to implement his vision and direct the agency away from the Dodd-Frank Act’s commands. *See generally PHH*, 2018 WL 627055, at \*9; *Humphrey’s Ex’r*, 295 U.S. at 630 (concluding that the President’s authority to remove FTC Commissioners at will



would have “coercive influence” that “threatens the independence of [the] commission”).

### **III. The public interest weighs in favor of a preliminary injunction.**

#### **A. Without an injunction, the CFPB will be stymied from pursuing its mission, to the detriment of the public.**

The public interest lies strongly with Plaintiff’s requested injunction because, absent the injunction, Defendants’ actions risk slowing the agency to a halt. The CFPB’s “faithful adherence to its statutory mandate,” *Jacksonville Port Auth.*, 556 F.2d at 59, will suffer dramatically. Plaintiff English is a full-time CFPB employee, prepared by her tenure at the agency to continue the CFPB’s implementation of the Dodd-Frank Act. She has directed the CFPB to press forward with pending enforcement actions, for example. Patrick Rucker & Pete Schroeder, *U.S. Consumer Financial Watchdog Official Defies Trump from Within Agency*, Reuters (Dec. 1, 2017).<sup>32</sup> By contrast, Defendant Mulvaney aims to drastically pare back the CFPB’s mission work. As a member of Congress,

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<sup>32</sup> <https://www.reuters.com/article/us-usa-trump-cfpb/u-s-consumer-financial-watchdog-official-defies-trump-from-within-agency-idUSKBN1DV5IC>.

Defendant Mulvaney co-sponsored legislation to eliminate the CFPB,<sup>33</sup> and his early actions at the CFPB have shown his continued antipathy to the agency's operation.

Defendant Mulvaney himself gives the CFPB only part-time leadership, working at the agency just three days per week. *Acting CFPB Director Mulvaney News Conference*, C-Span (Nov. 27, 2017) (video at approximately 4:36).<sup>34</sup> This half-way commitment slows any action requiring the acting director's review, input, or approval. *See, e.g.*, 12 C.F.R. § 1080.6(e)(4) (giving the Director authority to rule upon a petition for an order modifying or setting aside a civil investigative demand, an investigative tool of the CFPB).

Defendant Mulvaney has attempted an even more drastic cut-back in the work of the CFPB staff. In his first week at the agency, he froze hiring and contracting, and halted statutorily-mandated mission work: rulemaking and guidance, enforcement actions, and payments from the CFPB's Civil Penalty Fund,

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<sup>33</sup> H.R. 3118, 114th Cong. (2015) (Bill “[t]o eliminate the Bureau of Consumer Financial Protection by repealing title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Consumer Financial Protection Act of 2010”).

<sup>34</sup> <https://www.c-span.org/video/?437841-1/acting-cfpb-director-mick-mulvaney-speaks-reporters>.

a fund that Congress required to provide relief to the victims of financial companies' abuses, 12 U.S.C. § 5497(d). *See Acting CFPB Director Mulvaney News Conference, supra* p. 25 (video at approximately 2:35); Dave Boyer, *Mulvaney Scrutinizing 125 CFPB Cases Opened by Liberal Predecessor*, Wash. Times (Nov. 30, 2017).<sup>35</sup> Shortly thereafter, Defendant Mulvaney halted the agency's collection of certain consumer information, a move that could reduce the CFPB's ability to enforce the law, address consumer complaints, and develop and implement rules. *See Yuka Hayashi, New CFPB Chief Curbs Data Collection, Citing Cybersecurity Worries*, Wall St. J. (Dec. 4, 2017).<sup>36</sup> In sum, Defendant Mulvaney explained: "We stopped a good many things.... We stopped all new regs going out the door. We stopped all the new contracting. We're stopping the filing of new lawsuits." Boyer, *supra*.

With these actions, Defendant Mulvaney was not leading the CFPB to pursue its statutory mission of implementing and enforcing consumer protection law. Nor was he simply taking time to get up to speed at the agency or making a

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<sup>35</sup> <https://www.washingtontimes.com/news/2017/nov/30/mick-mulvaney-seeks-more-trump-appointees-help-him/>.

<sup>36</sup> <https://www.wsj.com/articles/new-cfpb-chief-curbs-data-collection-citing-cybersecurity-worries-1512429736>.

routine policy shift. Defendant Mulvaney's statements make clear his intention to change the agency fundamentally, to "limit as much as we can what the CFPB does to sort of interfere with capitalism and with the financial services market." John Bowden, *Mulvaney: Authority I Have at Consumer Bureau 'Should Frighten People'*, Hill (Nov. 30, 2017) (quoting Mulvaney);<sup>37</sup> see also *id.* (quoting Mulvaney as stating, "Authority that I have now as the acting director really should frighten people"). This goal is directly at odds with the consumer protection mission that Congress created for the CFPB. The agency's very purpose, as set forth by statute, focuses on changing markets, to make them more "fair, transparent, and competitive." 12 U.S.C. § 5511(a).

Defendant Mulvaney continues to emphasize that he is working to shift the CFPB away from its statutorily mandated focus on protecting consumers, to protecting businesses. He recently opined that the agency should serve regulated entities, not just consumers. Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, Wall St. J. (Jan. 23, 2018).<sup>38</sup> He launched an exploration of how the

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<sup>37</sup> <http://thehill.com/homenews/administration/362709-mulvaney-authority-i-have-at-consumer-bureau-should-frighten-people>.

<sup>38</sup> <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561/>.

CFPB can improve “outcomes” for companies. *Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions*, CFPB (Jan. 17, 2018).<sup>39</sup> And he reorganized the agency to weaken the agency’s ability to pursue discriminatory lending practices. See Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, Wash. Post. (Feb. 1, 2018).<sup>40</sup> With these actions, Defendant Mulvaney is pushing the CFPB toward the trap that Congress designed it to avoid: being “overly responsive to the industry [it] purport[s] to police.” See *PHH*, 2018 WL 627055, at \*1.

Defendant Mulvaney’s actions also directly harm consumers during this litigation. When this lawsuit began, for example, the CFPB had open about 100 investigations regarding companies such as Wells Fargo and Zillow. Boyer, *supra* p. 26; Matt Egan, *After Political Drama at Consumer Agency, What Happens to Its*

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<sup>39</sup> <https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/>.

<sup>40</sup> <https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/>.

*Open Investigations?*, CNN (Nov. 27, 2017).<sup>41</sup> A freeze on the agency's ability to take any of these companies to court, even if temporary, means that companies violating the law have more time to harm more consumers.

Defendant Mulvaney's hiring freeze exacerbates the harm to the public interest that his directives cause. Unfilled positions mean vital mission work goes undone. The agency has fewer resources to enforce the law, monitor markets for risk, or educate consumers on financial decision-making. The stress and uncertainty experienced by current employees and potential new hires can have lasting organizational effects. *Cf.* Beth Reinhard & Rebecca Ballhaus, *Impact of Federal Hiring Freeze Seen at Veterans Affairs, Prisons, Social Security*, Wall St. J. (Apr. 9, 2017);<sup>42</sup> Alissa Greenberg, *The Real-Life Consequences of the Federal Hiring Freeze*, Atlantic (Feb. 9, 2017).<sup>43</sup>

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<sup>41</sup> <http://money.cnn.com/2017/11/27/investing/cfpb-mick-mulvaney-consumer-agency/index.html>.

<sup>42</sup> <https://www.wsj.com/articles/impact-of-federal-hiring-freeze-seen-at-veterans-affairs-prisons-social-security-1491735612>.

<sup>43</sup> <https://www.theatlantic.com/business/archive/2017/02/real-life-consequences-hiring-freeze/516150/>.

As this litigation has progressed, Defendant Mulvaney's slow-down of the CFPB has persisted. Though he changed some of his initial directives,<sup>44</sup> his data freeze remains and is hampering the ability of CFPB examiners to review financial companies' operations. James Kim & Bowen Ranney, *CFPB Data Collection Freeze Impacting CFPB Examinations*, *Consumer Finance Monitor* (Dec. 15, 2017).<sup>45</sup> Defendant Mulvaney has also indefinitely extended his hiring freeze. Gillian B. White, *Mick Mulvaney Is Quickly Deregulating the Financial Industry*, *Atlantic* (Jan. 5, 2018).<sup>46</sup> Additionally, now more than two months since this dispute began, the agency has not filed any new lawsuits, but has dismissed one and ended at least one other investigation. *Enforcement Actions*, CFPB;<sup>47</sup> Kate

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<sup>44</sup> Defendant Mulvaney has restarted Civil Penalty Fund payments, for example. Stacy Cowley, *Consumer Bureau Lifts Freeze on Payments to Crime Victims*, *N.Y. Times* (Dec. 7, 2017), <https://nyti.ms/2klKiTQ>.

<sup>45</sup> <https://www.consumerfinancemonitor.com/2017/12/15/cfpb-data-collection-freeze-impacting-cfpb-examinations/>.

<sup>46</sup> <https://www.theatlantic.com/business/archive/2018/01/cfpb-gop-trump/549755/>.

<sup>47</sup> <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited Feb. 2, 2018).

Berry, *CFPB Drops Probe into Lender That Gave to Mulvaney's Campaigns*, Am. Banker (Jan. 23, 2018).<sup>48</sup>

Defendant Mulvaney also continues to find new ways to reduce the agency's work. Under his purported leadership, the CFPB shelved key aspects of its own authority to enforce a new rule, for at least a year. *CFPB Issues Public Statement on Home Mortgage Disclosure Act Compliance*, CFPB (Dec. 21, 2017).<sup>49</sup> This year, Defendant Mulvaney significantly weakened the agency's financial status. The CFPB was facing its first opportunity, since Director Cordray's departure, to request funds to continue its operations. Defendant Mulvaney took that opportunity to request no funds; he sought to spend down the agency's reserves instead of maintaining funding flows. Letter from Mick Mulvaney, Acting Director, CFPB, to Janet Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys. (Jan. 17, 2018).<sup>50</sup>

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<sup>48</sup> <https://www.americanbanker.com/news/cfpb-drops-probe-into-lender-that-gave-to-mulvaney-campaigns>.

<sup>49</sup> <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/>.

<sup>50</sup> [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_fy2018\\_q2\\_funding-request-letter-to-frb.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf).



**B. Without an injunction, the public loses the CFPB's independence.**

The public interest in the CFPB's independence also weighs strongly in favor of a preliminary injunction, which will preserve Plaintiff in her role as acting director. Plaintiff English has a proven commitment to the CFPB's independence. Defendant Mulvaney, by contrast, is inherently conflicted from supporting this congressionally-mandated aspect of the CFPB's structure; he has also taken active steps to eviscerate it.

By the very nature of his OMB Director position, Defendant Mulvaney's presence at the CFPB guts the agency's independence. OMB drives the President's budget agenda and is in charge, more generally, of "overseeing the implementation of [the President's] vision across the Executive Branch." *Office of Management and Budget*, White House.<sup>51</sup> Defendant Mulvaney's OMB responsibilities and role thus inherently conflict with those of the CFPB director. Congress intentionally divorced the CFPB and its director from the budget and policy processes that OMB drives. *See* 12 U.S.C. §§ 5492(c)(4), 5497(a)(4)(E).

The conflict between Defendant Mulvaney's OMB role and his purported CFPB role is readily apparent here. The President's "vision" includes restructuring

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<sup>51</sup> <https://www.whitehouse.gov/omb> (last visited Feb. 2, 2018).

the CFPB and making it funded through appropriations—a priority that *OMB itself* explained in the President’s budget, with estimates of CFPB budget reductions so severe that they could amount to the agency’s elimination. OMB, *supra* p. 17, at 158-69; Leonhardt, *supra* p. 17. With this Presidential priority at issue, Defendant Mulvaney cannot dutifully serve both the President as OMB Director and the CFPB. *See generally* OMB, *supra* p. 17, at 1 (directing that the “Administration will build on [the listed] proposals in order to implement the President’s charge.”). As the Supreme Court has recognized, “one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.” *Humphrey’s Ex’r*, 295 U.S. at 629.

Defendants have also left no doubt that they intend to work together to run the CFPB in accordance with the Administration’s priorities, thus eliminating the CFPB’s independence in practice. The President pronounced that he will “cut Regs” at the agency, a pronouncement made as he reacted to a news article about a CFPB investigation and also explained how he would impose penalties at the CFPB. Donald J. Trump (@realDonaldTrump), Twitter (Dec. 8, 2017, 7:18 AM);<sup>52</sup> *see also* Patrick Rucker & Pete Schroeder, *Exclusive: Wells Fargo Sanctions Are*

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<sup>52</sup> <https://twitter.com/realDonaldTrump/status/939152197090148352>.

*on Ice Under Trump Official-Sources*, Reuters (Dec. 7, 2017) (news article regarding CFPB investigation, published prior to the President’s tweet).<sup>53</sup> Defendant Mulvaney, for his part, promised a “new attitude” “in light of the fact that the Trump Administration is now in charge,” while expressing “fundamental principled misgivings” about the agency’s structure. *Acting CFPB Director Mulvaney News Conference*, *supra* p. 25 (video at approximately 2:25, 7:49).

Defendant Mulvaney has quickly sought to put these views into practice. While freezing the hiring of career officials, he sought immediately to infuse the CFPB with political appointees—an approach that would mirror OMB’s but be dramatically out of step with those of independent financial regulators, which typically have few political appointees. See Ian McKendry, *Mulvaney’s First Days at CFPB: Payday, Personnel and a Prank*, Am. Banker (Dec. 4, 2017);<sup>54</sup> Kevin Wack, *Mulvaney’s Plan to Embed Political Staffers in CFPB Sparks Backlash*,

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<sup>53</sup> <https://www.reuters.com/article/us-usa-trump-wells-fargo-exclusive/exclusive-wells-fargo-sanctions-are-on-ice-under-trump-official-sources-idUSKBN1E12Y5>.

<sup>54</sup> <https://www.americanbanker.com/news/cfpbs-mulvaney-backs-congressional-repeal-of-payday-lending-rule>.

Am. Banker (Dec. 5, 2017).<sup>55</sup> While directing agency staff to stop their work for consumers, he dialed up the agency's collaboration with CFPB detractors in Congress. *See Boyer, supra* p. 26; *see also* Ian McKendry, *supra* p. 34.<sup>56</sup>

OMB Director Mulvaney's commitment to White House priorities and his efforts to link the CFPB to politics stand to destroy the agency's independence and thus its ability to focus on its statutory mission. This type of risk is one that the Supreme Court foresaw decades ago when it considered the Federal Trade Commission's independence in *Humphrey's Executor*. Central to the agency's independent character, the Supreme Court recognized, was that the agency was "free from political domination and control," *Humphrey's Ex'r*, 295 U.S. at 625 (internal quotation marks omitted), and charged with "the enforcement of no policy except the policy of the law," *id.* at 624. The same is true here, as this Court's recent *PHH* opinion confirmed. *See PHH*, 2018 WL 627055, at \*4, \*14, \*20. Accordingly, an acting director beholden to the White House and politics would be anathema to the Congress that purposely crafted an independent CFPB.

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<sup>55</sup> <https://www.americanbanker.com/news/mulvaney-plan-to-embed-political-staffers-in-cfpb-sparks-backlash>.

<sup>56</sup> <https://www.americanbanker.com/news/cfpbs-mulvaney-backs-congressional-repeal-of-payday-lending-rule>.

## CONCLUSION

For the foregoing reasons, the public interest weighs strongly in favor of Plaintiff's motion for a preliminary injunction and the decision below should be reversed.

Dated: February 6, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because excluding the material referenced in Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e), it contains 6,393 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

**ADDENDA**

**ADDENDUM: STATUTES**



**STATUTES**

Except for the following, all pertinent statutes are contained in the addendum to Plaintiff-Appellant’s Brief.

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**12 U.S.C. § 5497(a)**

**(a) Transfer of funds from Board of Governors**

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, 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 under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to--

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) Transition period

Beginning on July 21, 2010 and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the Secretary needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from July 21, 2010 until the designated transfer date.

(4) Budget and financial management

...

(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.

...

(5) Audit of the Bureau

...

[remainder omitted]

## 12 U.S.C. § 5511

### **(a) Purpose**

The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

### **(b) Objectives**

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services--

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

### **(c) Functions**

The primary functions of the Bureau are--

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 5514 through 5516 of this title, supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

**ADDENDUM: ORGANIZATIONAL DESCRIPTIONS OF AMICI CURIAE**

## ORGANIZATIONAL DESCRIPTIONS OF AMICI CURIAE

**Public Citizen, Inc.**, a consumer-advocacy organization founded in 1971, with members in all 50 states, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the general public. Of particular relevance here, Public Citizen advocates for strong consumer-protection laws to bring fairness to consumer finance and accountability to the financial sector. Public Citizen actively supported establishment of the CFPB to serve as the first federal agency devoted to protecting the financial interests of consumers. Public Citizen believes that the political independence of the CFPB is a crucial feature of the agency's ability to effectively ensure that banks, lenders, and other financial companies treat consumers fairly and in accordance with law.

**Americans for Financial Reform (AFR)** is a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups that works through policy analysis, education, advocacy, and outreach to lay the foundation for a strong, stable, and ethical financial system. AFR was formed to advocate for the passage of the legislation that became the Dodd-Frank Wall Street Reform and Consumer Protection Act and continues to protect and advance the reforms in that legislation, including a strong and independent CFPB.

**Center for Responsible Lending (CRL)** is a nonprofit, nonpartisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Since 1980, Self-Help has provided over \$7 billion in financing to 131,000 families, individuals, and businesses underserved by traditional financial institutions. Through its credit union network, Self-Help's two credit unions serve over 130,000 people in North Carolina, California, Chicago, Florida, and Wisconsin and offer a full range of financial products and services. Additionally, CRL's research and policy reports and recommendations have addressed numerous issues within the mission and activities of the CFPB, including auto loans, debt collection, mortgage lending, payday lending, and student loans. CRL also has advocated rules to be issued by the CFPB and commented on the agency's rulemaking. As a result, CRL has a direct and immediate interest in the independence and agility of the CFPB and its Director.

**Consumer Action**, a nonprofit 501(c)(3) organization, has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on consumer education that empowers low-to-moderate-income and limited-English-speaking consumers to financially prosper. Consumer Action has a keen

interest in the independence and effectiveness of the CFPB. Consumer Action advocated for the creation of the CFPB and has worked to support its role as a thoughtful, independent regulator with a commitment to fair and transparent consumer financial transactions—and consumer protection—since its inception. Consumer Action has engaged with the CFPB, regularly sharing consumer perspectives and advocating for reasonable rules and actions related to credit cards, credit reporting, mortgages, student loans, debt collection, and, especially, its complaint process and public complaint database. Nearly 7,500 community and grassroots organizations benefit annually from Consumer Action’s extensive outreach programs, free multilingual training materials, advocacy and support, and materials on Consumer Action’s comprehensive consumer financial website ([www.consumer-action.org](http://www.consumer-action.org)).

**National Association of Consumer Advocates (NACA)** is a nonprofit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA’s mission is to promote justice for consumers by maintaining a forum for information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.



**National Consumer Law Center (NCLC)** is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding in 1969, NCLC has been a resource center addressing consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee, as the Federal Trade Commission's designated consumer representative, and on committees of the National Conference of Commissioners on Uniform State Laws. NCLC staff engage with the CFPB on a broad range of issues, and an NCLC staff member serves on the CFPB's Consumer Advisory Board.

**National Consumers League (NCL)**, founded in 1899, is the nation's oldest consumer advocacy organization. NCL's mission is to protect and promote the interests of consumers in the United States. Since 1992, NCL's Fraud.org campaign has helped millions of consumers avoid financial scams. NCL also works with a network of more than 90 federal, state, local, and international law enforcement and consumer education partners to share consumer fraud complaint information. Through efforts such as its 30-member Alliance Against Fraud and the #DataInsecurity Project, NCL coordinates state and federal anti-fraud advocacy

and public education efforts on fraud generally. NCL has worked closely with the CFPB to protect consumers against fraud.

**National Fair Housing Alliance** (NFHA) is a national organization dedicated to ending discrimination in housing. NFHA is a consortium of private, nonprofit, fair-housing organizations, state and local civil rights groups, and individuals. NFHA engages in efforts to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. NFHA and its members have undertaken important fair housing enforcement initiatives in cities and states across the country; NFHA's work to enforce fair lending laws and advance fair and equal access to credit has contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

**Tzedek DC, Inc.** is a nonprofit public-interest organization dedicated to safeguarding legal rights and interests of low-income District of Columbia residents facing predatory debt collectors, including in litigation, as well as other consumer financial crises. Headquartered as an independent center at the University of the District of Columbia David A. Clarke School of Law, its work is aided by students and legal volunteers. Tzedek DC and its client communities have a substantial interest in the continued, robust work of the CFPB, the only federal

agency dedicated solely to consumer financial protection. Through March 2017, according to a CFPB report, debt collection was the topic on which the CFPB received the most complaints from D.C. households.

**U.S. Public Interest Research Group Education Fund, Inc.** (U.S. PIRG Education Fund) is an independent, nonpartisan 501(c)(3) organization that works for consumers and the public interest. Founded in 1984, U.S. PIRG Education Fund advocated and worked for the creation of the CFPB, urging Congress to create “a robust, independent federal Consumer Financial Protection Agency to protect consumers from unfair credit, payment, and debt management products.”<sup>1</sup> U.S. PIRG Education Fund now continues to collaborate with the CFPB to ensure that its mission is fulfilled. For example, U.S. PIRG Education Fund has used the CFPB’s Consumer Complaint Database to write in-depth reports (10, thus far) that uncover patterns in the problems that consumers are experiencing with financial

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<sup>1</sup> *Consumer Group Testimony on Enhancing Consumer Financial Products Regulation*, Consumers Union (June 24, 2009), [https://consumersunion.org/research/consumer\\_group\\_testimony\\_on\\_enhancing\\_consumer\\_financial\\_products\\_regulation/](https://consumersunion.org/research/consumer_group_testimony_on_enhancing_consumer_financial_products_regulation/) (Testimony of Travis Plunkett, Consumer Federation of America and Edmund Mierzwinski, U.S. PIRG, before the Committee on Financial Services, U.S. House of Representatives, Hearing on Regulatory Restructuring: Enhancing Consumer Financial Products Regulation).

products.<sup>2</sup> The most recent report, published in June 2017, examines complaints from servicemembers and documents financial companies' widespread mistreatment of servicemembers.<sup>3</sup> In addition, U.S. PIRG Education Fund has worked with the CFPB to protect students from unfair financial practices that have occurred when colleges and universities have partnered with financial institutions. Thus, in May 2012, U.S. PIRG Education Fund released a report that analyzed the campus card marketplace and surveyed practices at 120 colleges and universities.<sup>4</sup> Prompted in part by U.S. PIRG Education Fund's work, the CFPB released in December 2015 the Safe Student Account Scorecard, which is a resource to assist colleges and universities that are seeking to select college-sponsored financial

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<sup>2</sup> See *Reports: The CFPB Gets Results for Consumers*, U.S. PIRG Education Fund, <https://uspirgedfund.org/page/usp/reports-cfpb-gets-results-consumers>.

<sup>3</sup> See U.S. PIRG Education Fund, *Protecting Those Who Serve: How the CFPB Safeguards Military Members and Veterans from Abuse in the Financial Marketplace* (2017), <https://uspirg.org/reports/usp/protecting-those-who-serve>.

<sup>4</sup> See U.S. PIRG Education Fund, *The Campus Debit Card Trap* (2012), [http://www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap\\_may2012\\_uspef.pdf](http://www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf).

accounts. U.S. PIRG Education Fund strongly supported the release of the Safe Student Account Scorecard.<sup>5</sup>

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<sup>5</sup> See *News Release, U.S. PIRG Lauds Consumer Guide for Safe Bank Accounts on Campus*, U.S. PIRG (Dec. 16, 2015), <http://uspirg.org/news/usp/us-pirg-lauds-consumer-guide-safe-bank-accounts-campus>.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 6, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I certify that counsel for all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rebecca Smullin  
Rebecca Smullin