IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION, on behalf of itself and its members, Plaintiff, -against- DONALD JOHN TRUMP, in his official Capacity as President of the United States of America; JOHN MICHAEL MULVANEY, in his capacity as the person claiming to be acting director of the Consumer Financial Protection Bureau, Defendants.	)	No. 17-cv-9536 (PGG)

AMENDED 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, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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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, Pennsylvania, 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. 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]

BACKGROUND

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

[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, Office of the Attorney General for the District of Columbia (July 18, 2015), *available at* https://oag.dc.gov/release/chase-bank-change-unlawful-debt-collection-practices-thanks-agreements-state-attorneys.

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.

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). In support of 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).

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.

ARGUMENT

I. Congress's Specific Direction In The Consumer Financial Protection Act That The Deputy Director Succeed To The Acting Director Is An Essential Component Of The Act's Comprehensive Scheme Creating An Independent Agency Structure.

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). 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 1998 Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq*., 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 the separation-of-powers doctrine, but also violate the Congressionally mandated independence of the agency director.[3]

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[2] U.S. Dep't of Justice Office of Legal Counsel, Opinion on Designating an Acting Director of the Bureau of Consumer Financial Protection, at 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 last week 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

The defendants' approach demolishes a critical part of Congress' 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))). 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. *See* Mot. for Prelim. Inj. 7-11. But if the two acts cannot be harmonized, the Consumer Financial Protection Act's successor provision must

incorrectly been reported, but will be pursued and, if anything, substantially increased. I will cut Regs but make penalties severe when caught cheating!" https://twitter.com/realDonaldTrump/status/939152197090148352.

prevail. Not only is it the more recent enactment, but it is 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. By contrast, the Vacancies Reform Act was a statute enacted well before the devastating financial crisis in 2008, 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 a general statute to fundamentally undermine Congress' comprehensive legislative solution to a critically important issue.

CONCLUSION

This Court should grant the motion for a preliminary injunction.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Acting Solicitor General

CARL J. SCHIFFERLE
Assistant Attorney General

/s/ Christina Okereke
CHRISTINA OKEREKE
Assistant Attorney General

Office of the Attorney General
441 4th Street, NW, Suite 630S
Washington, D.C. 20001
(202) 727-5173
christina.okereke@dc.gov

XAVIER BECERRA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General
State of Delaware
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

DOUGLAS S. CHIN
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

TOM MILLER
Attorney General
State of Iowa
1305 East Walnut Street
Des Moines, IA 50319

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

ERIC SCHNEIDERMAN
Attorney General
State of New York
120 Broadway, 25th Floor
New York, NY 10271

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100