

No. 08-861

IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit**

REPLY BRIEF

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ARGUMENT

Petitioners' opening brief established that the Constitution "allocated powers among three independent branches" in order to "make Government accountable ... [and] secure individual liberty." *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008). To preserve these values, the Court has made clear that Congress may not "impede the President's ability to perform his constitutional dut[ies]" by denying him the authority to "control or supervise ... an executive official," *Morrison v. Olson*, 487 U.S. 654, 685, 691-92 (1988), especially where such encroachments are not "justified by an overriding need," *Nixon v. Adm'r*, 433 U.S. 425, 443 (1977). *See* Pet. Br. 17-24.

The Board clearly runs afoul of these foundational purposes and this precedent because the democratically accountable President concededly has no direct influence over the Board, and his ability to influence it through the SEC is just as nonexistent as his ability to "supervise" the New York Stock Exchange—the private entity regulated by the SEC on which the Board was expressly modeled.

In response, Respondents do not even attempt to argue that the Board squares with the Constitution's language and purposes or the test established in *Morrison*. Instead, they advance an analysis that necessarily authorizes a system in which Congress can deprive the President of virtually all meaningful control over the exercise of his executive power.

I. RESPONDENTS EVISCERATE THE EXECUTIVE AND APPOINTMENT POWER

Respondents' briefs myopically focus on specific legal points in a vacuum, but utterly fail to address the broader, dispositive point that their analysis necessarily provides Congress with virtual *carte blanche* to largely eliminate the President's ability to appoint or influence important executive officials.

First, the Solicitor General does not dispute that, if the Board is upheld, then *every* executive function could be transferred to entities identical to the Board that are overseen by independent agencies, thereby "reduc[ing] the President to the largely symbolic and hortatory role of appointing bipartisan independent commissioners who, in turn, would appoint independent board members who do the actual governing but could not be removed or supervised by the President." Pet. Br. 38.

The Board does briefly imply that the arrangement here might not be constitutionally acceptable for some undefined "purely executive" functions, Board Br. 52 (quoting *Morrison*, 487 U.S. at 690), but this purported "limitation" is meaningless (and incapable of principled judicial application). The Board's citation of *Morrison* for this limitation itself demonstrates that such an exception would be completely toothless, since *Morrison* upheld restrictions in the area of *criminal prosecution*—a core executive function. Even apart from *Morrison*, this exception is largely chimerical, because even the conduct of foreign policy and military operations are not *purely* executive, since Congress plays a

significant role in both. *See* U.S. Const. art. II, § 2; *id.* art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952); *id.* at 635-38 (Jackson, J., concurring). Any “limitation” that does not prevent independent bipartisan commissions from replacing the Secretaries of State and Defense is meaningless. And even if those two Departments were “purely executive,” the rest of the Cabinet—from Treasury to Labor—surely is not. In all events, *Morrison* itself expressly rejected any separation-of-powers analysis that “turn[s] on” whether the function at issue is “classified” as within the core or periphery of executive power. 487 U.S. at 689.

Second, with respect to the Appointments Clause, Respondents do not dispute either that the fully debated, central purpose of the Clause was to “limit[] the appointment power” in a single President (with Senate consent) and thereby “ensure that those who wield[] it [a]re accountable to political force and the will of the people,” *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991), or that the Excepting Clause was a mere “administrative convenience” that should not, properly interpreted, undermine that central purpose, *Edmond v. United States*, 520 U.S. 651, 660 (1997). *See* Pet. Br. 43-45. But Respondents would eviscerate both the unified Presidential appointment power and political accountability.

Their central argument is that “direction and supervision” of one officer’s work product by another officer—even if not accompanied by the latter’s authority to remove the former for policy-related reasons—is sufficient, standing alone, to render the

first officer “inferior.” Board Br. 15-18, 21-23; U.S. Br. 24-29. This means that *only* Cabinet members (and independent commissioners) are principal officers who must be appointed by the President. Under this view, all deputy secretaries, and even the Solicitor General herself, would be inferior officers because they cannot take final binding action that is not subject to override by a Cabinet head. Indeed, the Board does not dispute that those important officers specifically identified in Petitioners’ opening brief (at 51)—from the CIA Director to the FDA Commissioner—are inferior officers under Respondents’ analysis, and the Solicitor General only “[a]ssume[s] *arguendo*” that they are principals. U.S. Br. 34.¹

By so dramatically limiting the group of principal officers who must be appointed through the confirmation process, Respondents’ analysis eviscerates the Framers’ purpose of ensuring “political accountability relative to important Government assignments.” *Edmond*, 520 U.S. at 663.

¹ The Government’s conclusory suggestion that these officials “generally enjoy broad discretion” (U.S. Br. 35) to make final decisions unreviewable by their superiors is plainly incorrect. *See* 10 U.S.C. §§ 153(a), 3013(b) & 5013(b) (Chairman of the Joint Chiefs and Army and Navy Secretaries all act “[s]ubject to the authority, direction, and control” of the Defense Secretary); 21 U.S.C. § 393(d)(2) (HHS Secretary exercises power “through” FDA Commissioner); 26 U.S.C. § 7801(a)(1) (Internal Revenue Commissioner exercises powers “under the supervision of the Secretary of the Treasury”); 49 U.S.C. § 106(f)(3)(B)(i) (requiring Transportation Secretary approval for significant regulations promulgated by FAA Administrator); 50 U.S.C. § 403-4a(b) (CIA Director “report[s] to” Director of National Intelligence).

Indeed, Respondents' position represents an exponentially greater intrusion on Presidential appointment power than simply requiring that those who counsel him on appointments adhere to the Federal Advisory Committee Act, yet every Justice to reach that issue agreed that such a mild, indirect intrusion "plain[ly]" violated the Appointments Clause. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring in the judgment).

Worse still, under Respondents' interpretation of the Excepting Clause, since Congress could deny the President the power to *appoint* all such sub-Cabinet "inferior" officers, it has the correlative ability to deny the President the power to *remove* those important officers. This is because, according to Respondents, "the power of removal [i]s incident to the power of appointment," so that when Congress properly vests the appointment of inferior officers in a department head, the President literally has "*no power to remove*" and therefore Congress "*may limit and restrict the power of removal as it deems best for the public interest.*" Board Br. 36-38 (internal quotation marks omitted); *see also* U.S. Br. 44.

Accordingly, with respect to every officer whose work product may be reviewed or supplanted by another executive official, Congress could grant all such officers fifteen-year terms (analogous to Federal Reserve Governors, 12 U.S.C. § 241) immune from Presidential removal, if it thought that best served the "public interest." Thus, if a new President is elected on a platform of "change," the only personnel

he could change would be the relatively few department heads, but the actual business of those departments would still be done by the deputies on down—the very officers whose wrong-headed policies led the people to clamor for “change.”

Even worse, Congress could transfer the President’s appointment power to *independent agencies* like the SEC—which concededly make appointments free from all Presidential influence—because these agencies are purportedly “Departments” under the Clause. Board Br. 30-33; U.S. Br. 37-39. Thus, the President (and his alter egos) could not even fill the rare *vacancies* occurring below the department-head level.

Thus, in Respondents’ hands, the Excepting Clause—a last-minute “administrative convenience,” *Edmond*, 520 U.S. at 660—becomes an all-powerful vehicle for Congress to destroy the central purpose of both the Appointments Clause and separated powers, by authorizing congressional creation of a group of quasi-permanent, high-level policy officers below Cabinet-rank who are appointed by a diffuse group of individuals over whom the President exercises no political oversight. Moreover, since the continued employment of such officers would depend entirely on whether Congress shortens their offices’ tenure and be unaffected by the President’s wishes, those officers would have every incentive to comply with congressional desires.

In sum, simply stating the inexorable result of Respondents’ “analysis” demonstrates that it is irreconcilable with any reasonable conception of the

executive and appointment power, or with *Morrison's* prohibition against unduly hampering the President's performance of his constitutional duties.

II. RESPONDENTS' SEPARATION-OF-POWERS ARGUMENTS LACK MERIT

1. Even apart from its absurd consequences, Respondents' position is based on a flawed syllogism. Respondents insist that, although the President has no direct control over Board personnel or policies, the SEC's purportedly comprehensive control over the Board necessarily cures any deprivation of executive power because the President has constitutionally adequate control over the SEC and, *ipso facto*, has adequate control over those entities directly regulated by the SEC. This is obviously untrue. The *SEC's* control over the Board is constitutionally irrelevant because it does not possess the "executive power"; the President is "[t]he magistrate in whom the whole executive power resides." *Medellin v. Texas*, 128 S. Ct. 1346, 1370 (2008) (quoting *The Federalist No. 47*, at 326 (Madison) (Jacob E. Cooke ed., 1961) (alteration in *Medellin*)). And it is clear that the President cannot sufficiently control how the Board performs its executive functions by virtue of his influence over the SEC.

Respondents do not dispute that the President's indirect control over the SEC cannot be translated into any influence over whom the SEC appoints to the Board, and the United States does not dispute that the President has no influence over the SEC's discretionary decisions to usurp the Board's functions, overturn Board sanctions or rules, or

remove Board members.² Thus, the President's constitutionally adequate control over the SEC cannot be translated into constitutionally adequate influence over the Board.

In contrast, vesting appointment and removal power in alter-ego *cabinet officers* does not burden the President because "their acts are his acts." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *see also* Pet. Br. 25 n.3. Thus, the President can easily perform his constitutionally assigned

² The Board now contends that the President has the power to remove Commissioners if they "neglect" their "duty" to overturn Board actions or rescind the Board's powers. Board Br. 51. Understandably, the Board fails to explain how, short of some malfeasance like embezzlement, Board rules or sanctions could so completely violate the Board's extraordinarily open-ended requirement to act "in the public interest" that the SEC would have not only the authority, but the "duty," to reverse or rescind the Board's activities upon pain of removal by the President. *See* Pet. Br. 39-40. Indeed, Respondents point to no independent commissioner who has ever been removed on remotely comparable grounds. *See* Marshall Breger & Gary Edles, *Established by Practice*, 52 Admin. L. Rev. 1111, 1144-51 & nn.197-98 (2000), *cited in* Board Br. 31. Critically, the Board does *not* contend that the President can remove SEC Commissioners because he profoundly disagrees with what he views as fundamentally misguided policies, so long as the Board's policies are not *irrational* under the *SEC's* conception of the "public interest." Any such contention would be contrary to *Humphrey's Executor's* ruling that independent agencies are "independent of executive authority ... and free to exercise [their] judgment without the leave or hindrance of any other official." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935); *see also* Pet. Br. 22-23, 36.

functions by directing the inferior officers through a chain of command, just as a general's ability to control a major is not affected because his orders are conveyed through a colonel. But since, unlike with his alter egos, the President has no power to command the SEC to follow his personnel or policy preferences, he obviously cannot engage in such chain-of-command supervision of the Board through the SEC.

Respondents' effort to equate the Board with the SEC's staff is plainly wrong for similar reasons. SEC staff serve at the pleasure of the Chairman. Pet. Br. 61. And the SEC Chairman serves (as Chairman) at the pleasure of the President. Pet. Br. 60-62. Since the staff are the Chairman's "alter egos," the President has the same considerable influence over them that he has over the Chairman. Not so for Board members, who are appointed and reviewed by the Commission as a whole, and who are not removable for policy-related reasons. It is indisputable that the President cannot "control or supervise" the officers or policies of the New York Stock Exchange, notwithstanding the SEC's pervasive regulatory control over that entity. The same is true of the Board that is directly modeled after the Exchange.

In short, the fact that the SEC and its staff are constitutional hardly suggests (let alone proves) that those whom the SEC regulates are also constitutional.

Indeed, while Respondents tout SEC supervision of the Board as reflecting a laudable congressional

desire to preserve the President's executive power, this SEC supervision is, in fact, a transparent device to strip the President of that basic power while maintaining the fig leaf of Presidential influence. If Congress had *not* provided for SEC review of the Board's rules and sanctions, then there would be no basis for the argument that Board members are inferior officers. Consequently, the President would have had to appoint the Board members and therefore indisputably would have had the power to remove them, because removal would follow appointment. Board Br. 36. In contrast, interjecting the SEC as a buffer between the President and the Board provides Congress with the best of both worlds. It deprives the President of any ability to influence the Board because any such effort will be thwarted by the SEC's independence or by a Senate veto if the President seeks to override that independence. At the same time, it allows Congress to directly control the Board because the Board's existence and exorbitant salaries are dependent on legislative largesse and, if need be, to control it through the SEC, over which Congress exercises considerable influence.³

³ Respondents do not dispute the Solicitor General's prior admission that "successful insulation of administration from the President ... will tend to enhance Congress's own authority over the insulated activities." Pet. Br. 20 (quoting Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2271 n.93 (2001)); see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (plurality) ("freedom from presidential oversight (and protection)" results in "increased subservience to congressional direction"). For example,

Even if the Court and the Framers had not repeatedly warned that Congress will continually seek to “mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments,” *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) (“MWWA”) (quoting *The Federalist No. 48*, at 334 (Madison)), only the most willfully obtuse could fail to perceive Congress’ direct usurpation of executive power here, or fail to understand that the Court’s endorsement of this unprecedented scheme would lead Congress to draw even more executive “power into its impetuous vortex,” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995) (quoting *The Federalist No. 48*, at 333).⁴

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congressional pressure led to the resignation of the Board’s first Chairman and the SEC Chairman who selected him. See Stephen Labaton, *3 Inquiries Begun Into S.E.C.’s Choice of Audit Overseer*, N.Y. Times, Nov. 1, 2002, at A1.

⁴ The Board erroneously contends that there are other free-standing entities run by officers not appointed by the President and that double “for cause” removal provisions are common. Board Br. 20, 43. But the cited agencies are either private entities (Federal Reserve Banks, Municipal Securities Rulemaking Board) whose members are appointed by private citizens (and thus would violate the Appointments Clause if they were public entities), entities whose chairmen are appointed by the President (National Indian Gaming Commission and Board of Veteran Appeals), or simply corporations administering “private gifts” (National Fish and Wildlife Foundation). The only offices with double “for cause” removal provisions are the Inspector General regulating the

2. Respondents also cannot reconcile their position with the Court’s precedent on removal.

First, neither Respondent attempts to explain how the Act’s elimination of Presidential removal power can be reconciled with *Morrison*’s central prohibition against “completely stripp[ing]” the President of that power. 487 U.S. at 692. Giving limited removal power to the SEC cannot cure the constitutional problem because the United States in no way disputes that the President is without authority to direct the independent Commission on how to exercise this purely discretionary function. The Board contends that, in some undefined extreme cases, the President may order the Commissioners to exercise a “duty” to remove Board members.⁵ Even if true—and it is not, *see supra* note 2—the President would be able to accomplish removal of *Board members* over SEC opposition only through what the Solicitor General aptly describes as a “Rube

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Postal Service’s mail delivery, a few ALJs performing quasi-judicial functions, and the Social Security Administration’s Chief Actuary, none of whom performs an executive or investigative function directed at the citizenry.

⁵ The Board cites *Bowsher v. Synar* to argue that the President’s power to remove SEC Commissioners is broad (Board Br. 50-51), but *Bowsher* simply recognized that the removal statute might be broad “*as interpreted by Congress*,” particularly because there was no judicial review. 478 U.S. 714, 729 (1986) (emphasis added). The President has no similar freedom here, where Congress has imposed removal restrictions on him, and where there is judicial review, *see Shurtleff v. United States*, 189 U.S. 311, 313-14 (1903).

Goldberg” scenario (U.S. Br. 53) in which the Senate must confirm replacement Commissioners willing to execute removal—thus providing Congress with an impermissible veto over the removal of executive officers. Pet. Br. 31-33; *Morrison*, 487 U.S. at 686.

Second, the Board suggests that the President could somehow influence the Board because “the President’s mere *threat* of removal [of Commissioners] would suffice” to compel the SEC to remove a Board member. Board Br. 53. But, of course, the President needs the power “to *remove*,” not to bluster about it. Moreover, no “threat” here could actually accomplish a Board member’s removal. If an SEC Commissioner voted to remove a Board member *because of* a Presidential “threat,” this self-motivated acquiescence would be invalidated as improper in the mandated hearing on the member’s removal. SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3). (And if the Commissioner would have removed *absent* the threat, it is not *Presidential* removal.) In any event, no Board member would take the alleged “threat” seriously, since neither the hypothetical threatener—the President—nor those threatened—the Commissioners—have suggested in their brief (or anywhere else) that the President has any such removal authority. (Even under the Board’s view, the President could plausibly threaten to remove only when there is a clear “duty” to remove the Board member—*i.e.*, when the member has engaged in misconduct equivalent to an impeachable offense. *See* Pet. Br. 39-40.) And removal of a Commissioner would be utterly pointless unless the Senate agreed to confirm a replacement Commissioner willing to

remove the Board member. The President's exercise of his "executive *power*" is not satisfied by his alleged potential to bluff with a very bad hand.

Third, recognizing that the President has no realistic power to remove here, the Board seeks to overturn *Morrison* by arguing that, under *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), and *United States v. Perkins*, 116 U.S. 483 (1886), Congress may place any limit on Presidential removal "it deems best for the public interest" if it has first stripped him of the appointment power (by vesting it in an independent agency allegedly constituting a "Department"), because the power to remove purportedly stems from the power to appoint. Board Br. 36-38 (emphasis and internal quotation marks omitted). But, as even the United States concedes, *Morrison* makes clear that the "real question" on the constitutional validity of congressional removal restrictions is *not* whether the President has appointed the officer in question, but "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." U.S. Br. 47 (quoting *Morrison*, 487 U.S. at 691). That is why *Morrison* studiously analyzed whether the "good cause" standard for removing the independent counsel "unduly trammel[ed] on executive authority." 487 U.S. at 691.

If the *Morrison* Court shared the Board's understanding of *Hennen* and its progeny, it would have simply rubber-stamped the removal restriction because the independent counsel was an inferior

officer properly appointed under the Excepting Clause by an entity outside the President’s control. Therefore, having properly been deprived of the appointment power, the President could be stripped of the derivative removal power. But *no* judge or Justice thought the absence of appointment power relevant to the removal question in *Morrison*, even though the independent counsel made precisely the argument the Board seeks to resurrect here. *See Morrison* Appellant’s Br. 54-56, 1988 WL 1031595; *Morrison* Appellant’s Reply Br. 14-15, 1988 WL 1031603; *Morrison*, 487 U.S. at 693-96; *id.* at 723-24 & n.4 (Scalia, J., dissenting); *In re Sealed Case*, 838 F.2d 476, 498 (D.C. Cir. 1988); *id.* at 530 (R.B. Ginsburg, J., dissenting).

The Board’s proposed rule was universally rejected in *Morrison* because it makes no sense. Denying the President the power to appoint like-minded officers—an “important ... *ex ante* control” mechanism (U.S. Br. 49)—*decreases* his ability to influence execution of the law, so such a deprivation cannot rationally justify the *additional restriction* of denying him the removal power. *See* Laurence H. Tribe, *American Constitutional Law* § 4-8, at 684 (3d ed. 2000).⁶

⁶ Justice Story’s idiosyncratic views on removal—including that Congress could “requir[e] the consent of the Senate to [such] removals” (*Myers v. United States*, 272 U.S. 52, 150 (1926) (quoting Story))—have been rejected by the Court. *Id.* at 161; *Morrison*, 487 U.S. at 686. Similarly, amici’s reading of *Marbury* (Constitutional and Administrative Law Scholars Br. 13) was rejected by *Myers*, 272 U.S. at 140-44, and by Chief Justice Marshall himself, *id.* at 144 (quoting Marshall), and the officer in *Marbury* was a justice of the peace (exercising judicial,

As this reflects, *Hennen* and *Perkins* said nothing about whether Congress unconstitutionally interfered with the President's executive power, but involved only the procedural question whether, "[i]n the absence of all constitutional ... provision" (*Hennen*, 38 U.S. at 259), it is the President or his appointing alter ego that is the proper entity to remove. Resolution of that procedural question had no relevance to separation of powers because the alter egos in *Hennen* and *Perkins* had to do the President's bidding. And, while *Perkins'* dicta suggests that such *subordinate alter egos* may be subject to congressional control since they have no Article II standing, such control is impermissible if it interferes with the executive power the *President* possesses under that Article. The removal restriction in *Perkins* had no cognizable effect on the President's ability to control subordinates because it obviously authorized removal of the naval cadet for failure to follow any lawful order by his superiors. See *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Fourth, there is nothing to Respondents' notion that stripping the President of removal authority can somehow be cured by vesting the *SEC* with allegedly expansive power to review the Board's *work product*. Reviewing work product is not equivalent to (or meaningful without) the power to remove, and, in any event, it is conceded that the *President* has no

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not executive, power) in the District of Columbia (over which Congress has special exclusive jurisdiction).

power to direct the SEC how to exercise its oversight function. *See supra* pp. 7-8. Moreover, even assuming that Presidential removal may be denied if “compensated” for by other means of Presidential control, Respondents cannot dispute that *every* other “compensating” factor analyzed in *Morrison*—from appointment to the office’s importance and permanence—*further demonstrates* that the Act, “taken as a whole,” is an impermissible intrusion on executive power. 487 U.S. at 677, 679, 685, 691; Pet. Br. 41-43.

3. As predicted (Pet. Br. 34-35), neither Respondent even attempts to offer any legitimate purpose, much less “overriding need,” *Nixon*, 433 U.S. at 443, underlying Congress’ decision to not place the Board’s functions in the SEC or another body whose members are appointed and removable by the President. The Government simply ignores this critical factor in the Court’s analysis, and the Board provides only, in a footnote, the wholly unexplained *ipse dixit* that Congress had “legitimate and important reasons for structuring the Board the way it did.” Board Br. 55 n.20. The reason that Respondents cannot *articulate* such “legitimate” purposes is because any explanation of why it was “important” to *not* make the Board a “component” of the SEC would necessarily be at war with Respondents’ central thesis—that Congress actually intended for the SEC to control the Board. If, as Respondents contend, Congress thought that public policy would be fully served if SEC Commissioners exercised plenary supervisory authority over those who regulated auditors, then its decision to preclude

such SEC control over Board members, by creating extraordinarily narrow grounds for removal, would be, by definition, wholly gratuitous and unnecessary. In reality, of course, Congress affirmatively rejected placing the power to regulate auditors in the SEC because it did not want SEC Commissioners to have plenary control over those regulating auditors. Amicus Br. of Law Professors Donna Nagy et al. (“Nagy Br.”) 10-13. And, as the decision below and the legislative history make clear, the reason Congress rejected such plenary control is because it wanted the Board, in the words of Senator Sarbanes himself, to “actually have more independence from political influence than the SEC would have.” *Accounting Reform and Investor Protection Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 1027 (2002); *see also id.* at 15, 44, 186, 195, 793-94 (statements, comments and testimony about the Board’s “insulat[ion]” from “political pressure” and “constituent pressures” “brought to bear on the Commission”); Pet. App. 34a; Nagy Br. 10-13, 17-19.

Moreover, neither Respondent even attempts to provide a legitimate justification for the Act’s unprecedented decision to strip the Chairman of her traditional authority (Pet. Br. 60-62) to appoint and remove at will all chief subordinates within the SEC.

4. Apparently recognizing that the Act’s language, fairly read, does not authorize anything approaching plenary SEC control over the Board, Respondents urge the Court, under the doctrine of constitutional avoidance, to give that language any

“reasonable” interpretation that enhances SEC control. Board Br. 29. But this Court gives a statute a narrow interpretation only to *avoid* a separation-of-powers question. *See Pub. Citizen*, 491 U.S. at 466; *Edmond*, 520 U.S. at 658. Where, as here, the Court must *resolve* the separation-of-powers question, it does not interpret the statute in a manner that favors the Executive over Congress by artificially interpreting the language of the congressional enactment to enhance Presidential power. Thus, in *Morrison* and *Bowsher*, the Court interpreted the removal provisions straight up, without any shading to “avoid” constitutional difficulties. 487 U.S. at 692-93; 478 U.S. at 727-30. This simply reflects the basic principle that this Court does not take sides in contests between the two co-equal branches, either by reading the statute with an eye towards enhancing Presidential control or by invoking the normal presumption of constitutionality afforded congressional enactments. *See Morrison*, 487 U.S. at 704-05 (Scalia, J., dissenting) (“where the issue pertains to separation of powers,” “[t]he playing field for the ... case ... [must be] a level one”).⁷

⁷ It does not matter that two administrations have defended the Act. Board Br. 51. Separated powers protect the citizenry, not the office’s current occupant, *Freytag*, 501 U.S. at 880, and “[t]he Constitution’s division of power ... is violated [by an improper encroachment] ... whether or not the encroached-upon branch approves the encroachment,” *New York v. United States*, 505 U.S. 144, 182 (1992). *See also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983); *MWAA*, 501 U.S. at 276-77 (invalidating congressional interference notwithstanding Solicitor General’s defense); *Chadha v. INS*, 634 F.2d 408, 422 (9th Cir. 1980) (Kennedy, J.), *aff’d*, 462 U.S. 919; Amicus Br. of William Barr et

In any event, the only meaningful statutory dispute here is whether the SEC has authority to *take over* the Board's functions, and that disagreement is irrelevant to resolving this case because the SEC has *not* exercised this alleged power and the President obviously cannot *force* it to do so. Thus, "no set of circumstances exists" in which the constitutionally compliant SEC regulates Petitioners or where the possessor of the Article II power can compel it to do so. *United States v. Salerno*, 481 U.S. 739, 745 (1987). No coherent principle would permit the exercise of government power by an unconstitutional actor because an entity outside the Branch assigned that power might transfer it to the proper constitutional actor. A statute empowering an agency's ALJs to adjudicate Article III controversies would be unconstitutional even if the statute authorized the agency to transfer cases to the proper Article III courts.⁸

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al. 32 n.16. This is particularly true here because the Solicitor General's position reverses the Executive's consistently articulated view of executive power. *See Morrison* U.S. Amicus Br., 1988 WL 1031600; *Bowsher* U.S. Br., 1986 WL 728082; Steven Calabresi & Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008); Amicus Br. of Law Professors Christopher Yoo et al. 15-19.

⁸ Similarly, severing the restrictions on the *SEC's* removal power (Board Br. 48-49) would not cure the constitutional problem here, which is the Board's lack of accountability to the *President*. Moreover, Respondents cannot show that a severed statute would "function in a *manner* consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685

III. RESPONDENTS' APPOINTMENTS CLAUSE ARGUMENTS LACK MERIT

A. Board Members Are Principal Officers

Respondents' notion that any officer subject to "direction and supervision" is, *ipso facto*, an "inferior officer" is contrary to the observations by Madison and members of this Court, as well as the Appointments Clause's language. Pet. Br. 47-48. As noted, it would also authorize a revolutionary regime where extraordinarily powerful federal officers are appointed without any accountability by the President or Senate. *See supra* pp. 3-6.

In any event, Board members are not directed or supervised by the SEC. First, the Board was concededly modeled after private self-regulatory organizations ("SROs") like the New York Stock Exchange. Far from being directly supervised or controlled by the SEC, "the [E]xchange[] take[s] the leadership with Government playing a *residual* role." *Silver v. NYSE*, 373 U.S. 341, 352 (1963) (quoting Justice Douglas) (emphasis added). More specifically, the Act's sponsors and Committee Reports repeatedly described the Board as a "*strong, independent*" entity with "*broad* authority to

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(1987), given Congress' unequivocal desire to vest the Board's power in an SRO-like entity, rather than one controlled by the SEC. Instead, striking the offensive provision from the statute would "significantly alter" the "balance that Congress had in mind," "lead[ing] to a statute that Congress would probably have refused to adopt." *Bowsher*, 478 U.S. at 734-35.

investigate,” S. Rep. No. 107-205, at 2, 10 (2002) (emphasis added), and “*plenary* authority to deal with this important situation,” 148 Cong. Rec. 12,116 (2002) (statement of Senator Sarbanes) (emphasis added). *See also* Nagy Br. 18. Indeed, the Board’s former Chairman himself said the relationship between the Board and the SEC is “that of cousins,” not “that of ... parent and child.” Paul S. Atkins, *Speech by SEC Commissioner* (Sept. 21, 2006), <http://www.sec.gov/news/speech/2006/spch092106psa.htm> (quoting Board Chairman).

More significantly, the statute’s language demonstrates that Congress made the Board independent from the SEC in numerous ways. First, it deprived the SEC of the “[m]ost important[]” means of supervision, by precluding it from removing Board members absent egregious misconduct. *Morrison*, 487 U.S. at 696; *see also* Pet. Br. 46, 53. Even if the word “willful” is interpreted to mean “volitional[ly],” as the Board argues (Board Br. 22), then a Board member must “volitionally”—*i.e.*, with knowledge that he is engaging in the prohibited conduct—violate the securities laws or abuse authority (or unreasonably fail to enforce compliance) to be removed. This is gross misconduct, and plainly does not include the failure to follow SEC policies. In contrast, the independent counsel could be removed for failing to follow Justice Department policies if it was “possible” to do so. *Morrison*, 487 U.S. at 671-72.

Moreover, notwithstanding Respondents’ obfuscation, it remains undisputed that the SEC exercises *no* control over the thousands of

investigations and inspections conducted by the Board. First, the *post hoc* power to review rules and sanctions (through cumbersome notice-and-comment procedures) obviously cannot be used and has never been used to shape or direct *investigative* practices. A U.S. Attorney cannot “supervise” a prosecutor’s investigative actions by reviewing rules or vetoing proposed indictments. This is why the lower courts have uniformly ruled that the SEC’s control over SROs’ investigative activities is not sufficiently pervasive to render those activities “state action” subject to the Constitution. Nagy Br. 28-31.

Further, the SEC’s hypothetical ability to issue rules requiring Commission preclearance of all Board investigations or to otherwise take over the Board’s investigative responsibilities does not constitute direction and supervision. First, the SEC has not exercised this purported power and thus there is no such “direction and supervision” taking place. Second, if the SEC ever does exercise this alleged power to usurp Board’s functions, that would simply *supplant* the Board, not direct or supervise its members. The ability to narrow or withdraw an office’s jurisdiction does not enable one to supervise the officer for the tasks remaining within his jurisdiction. *Cf. Morrison*, 487 U.S. at 680-83. Otherwise, *Congress* would “supervise” the Board (and the SEC and all other agencies). Moreover, the “threat” of losing some of the office’s responsibilities is not remotely equivalent to the threat of losing one’s *job*. If anything, the ability to have the same job with *less* responsibility might well be viewed as desirable.

In any event, the SEC lacks power to usurp the Board's functions. Respondents would have this Court believe that Congress, while consciously separating the Board from the SEC and vesting it with its own statutory responsibilities, simultaneously authorized the SEC, at its discretion, to render the Board a Potemkin village full of idle, well-paid officials, by usurping all of the Board's functions. In fact, however, the Act expressly states that the SEC may impose "limitations" on the Board's authority *only* if the SEC finds, after a hearing, that the Board has "violated" the securities laws, is "unable to comply" with those laws or, "without reasonable justification or excuse," has failed to enforce them. SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2). Neither the SEC's general power to issue regulations "in furtherance of th[e] Act," *id.* § 3(a), 15 U.S.C. § 7202(a), nor its power to "relieve" the Board of duties when that is "consistent with ... the other purposes of th[e] Act," *id.* § 107(d)(1), 15 U.S.C. § 7217(d)(1), permit it to limit or take over the Board's functions absent the requisite Section 107(d)(2) findings. Any such action could not be "consistent with" or "in furtherance of" the Act because (1) it would render the specific provision governing Board "limitations" a nullity and (2) the Act "nowhere gives the SEC authority to direct and supervise Board inspections, investigations, and enforcement actions." Pet. App. 95a. Thus, just as the SEC cannot assume the Board's *taxing* power, it cannot assume its investigative power.⁹ And the

⁹ Contrary to the Board's representation that its power to tax is

Act’s savings clause (SOX § 3(c), 15 U.S.C. § 7202(c)) simply “preserves the SEC’s pre-existing authority” (Board Br. 7); it does not give the SEC the power to exercise the Board’s new authority.

B. SEC Appointment Violates the Clause Even if Board Members Are Inferior Officers

1. *Freytag* squarely held that an Appointments Clause “Department” consists only of those agencies that resemble a Cabinet department, including those whose “heads are subject to the exercise of political oversight and share the President’s accountability to the people,” a definition that unequivocally excludes independent agencies like the SEC. 501 U.S. at 886; *see also id.* at 907, 920-21 (Scalia, J., concurring in part and concurring in the judgment); Pet. Br. 57-58.

Respondents essentially urge the Court to overrule this precedent simply because *Freytag* states the truism that the Court was not resolving issues not before it—*i.e.*, whether its holding would extend to independent agencies not at issue there. U.S. Br. 38-39; Board Br. 30. But a proper respect for precedent requires the Court “to adhere not only to the holdings of [its] prior cases, but also to their explications of the governing rules of law.” *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part

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not unique (Board Br. 19 n.3), none of the cited agencies imposes a fee on entities that it does not regulate directly and/or to which the government does not provide a reciprocal financial benefit such as insurance or marketing efforts.

and dissenting in part). This principle particularly applies here because Justice Scalia's separate *Freytag* opinion recognized that the Court's reasoning obviously extended to the "independent regulatory agencies such as ... the Securities and Exchange Commission." 501 U.S. at 916.¹⁰

Finally, Respondents contend that adherence to precedent would create an "implausible system" where inferior officers at independent agencies could not be appointed by their supervisors. U.S. Br. 38. But that is true only if those inferiors are "officers," which the Board denies. Board D.C. Cir. Br. 37-38. (Moreover, *Respondents'* view of "Head" would render unconstitutional any inferior officers *currently* appointed by the Chairmen of independent agencies.) In any event, appointment of all executive officers by the President (or an alter ego), far from being implausible, would further the Appointments Clause's core purpose of political accountability and simply replicate the practice in the Executive Branch departments, where the President appoints officers well below the department-head level.

2. Respondents contend that the Chairman is not the head of the SEC because the Commission collectively exercises the SEC's *regulatory* authority. U.S. Br. 40; Board Br. 33-34. But surely the relevant

¹⁰ The United States also frontally assaults *Freytag* by arguing that a "Department" is any agency not "subordinated to (or contained within) another component of the Executive Branch." U.S. Br. 37. But *Freytag* *rejected* this test, for the Tax Court was "a free-standing, self-contained entity in the Executive Branch." 501 U.S. at 915 (Scalia, J.).

question for *Appointments* Clause purposes is who makes *appointments*, and the Chairman is delegated that authority for the very purpose of providing the accountability demanded by the Clause. Pet. Br. 60-62.

Recognizing that their position would render unconstitutional any inferior officers now appointed by agency Chairmen, Respondents contend that the agencies collectively *appoint* these officers because the Commissioners collectively can *veto* the Chairman's appointments. U.S. Br. 41-42; Board Br. 35. But as Senate confirmation hearings demonstrate, approval is fundamentally different than appointment, and results in different officers being selected. Indeed, the SEC's actual experience in selecting Board members—marred by disputes between the Chairman and the other Commissioners, *see* U.S. Gen. Accounting Office, No. GAO-03-339, *Securities and Exchange Commission: Actions Needed to Improve Public Company Accounting Oversight Board Selection Process* 9-10 (2002)—belies amici's claim (Former Chairmen Br. 34 n.19) that "[n]o meaningful distinction exists, in practice" between SEC appointment and Chairman appointment.

IV. RESPONDENTS' EXHAUSTION ARGUMENT IS UNAUTHORIZED AND FRIVOLOUS

1. The Government's exhaustion argument (U.S. Br. 15-23) is not properly before the Court because Respondents failed to cross-petition the circuit court's rejection (Pet. App. 9a-11a) of that argument. "A cross-petition is required ... when the respondent

seeks to alter the judgment below,” including where it seeks to replace a merits judgment with a non-merits dismissal, *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); accord *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528, 531, 535-36 (1924), which is exactly what the Government seeks to do here, see U.S. Br. 54.

The Government cannot evade the cross-petition requirement by contending that its exhaustion argument is “jurisdictional.” U.S. Br. 15, 23. In *Air Courier Conference of America v. American Postal Workers Union*, the Court rejected the Government’s argument that “congressional preclusion of judicial review is in effect jurisdictional” and thus “cannot be waived by the parties[.]” failure to petition or cross-petition, and squarely held that “whether Congress intended to allow a certain cause of action” “is not a question of jurisdiction” and thus would not be decided due to the failure to raise the issue in a petition or cross-petition. 498 U.S. 517, 522-23 & n.3 (1991); see also *Nw. Airlines*, 510 U.S. at 364-65 (same).

2. There is also no merit to the argument (U.S. Br. 16-17) that a judicial challenge to the Board’s unconstitutional structure can only be made by petitioning the appellate court for review of an SEC order approving a Board rule or sanction. *First*, the cited judicial review provision of the Exchange Act is not even *available* here because it extends jurisdiction only to “person[s] aggrieved by a final

order of *the Commission* entered pursuant to *this* chapter [2B].” 15 U.S.C. § 78y(a)(1) (emphasis added). But any SEC order approving Board action would be entered pursuant to *Chapter 98* of Title 15, *see* SOX § 107(b)(2), 15 U.S.C. § 7217(b)(2), not “this chapter [2B],” and separation-of-powers challengers to the Board would be “aggrieved” by *Board* actions unrelated to the rule approved by the “Commission.” *See also* Amicus Br. of Center for Individual Rights (“CIR Br.”) 4-6. Moreover, the Board would not be the proper respondent, 15 U.S.C. § 78y(a), as the Government implicitly concedes, U.S. Br. 17 n.6.

Second, even if available, it is simply absurd to argue that the *exclusive* means for challenging the Board’s unconstitutional structure is to manufacture a “controversy” by selecting an unobjectionable Board rule at random and petitioning the appellate court to review the SEC’s approval of that rule.¹¹ No case anywhere has ever hinted that such a standard provision for appellate review of agency orders is the exclusive vehicle for challenging the agency’s (much less another agency’s) constitutionality, thus

¹¹ Petitioners could not have appealed a Board sanction because the Board’s investigation of Petitioner Beckstead did not result in sanctions. U.S. Br. 8 n.5. Nor were Petitioners required to *manufacture* a reviewable sanction by purposefully “refusing to comply” with the Board (U.S. Br. 17)—thereby risking serious civil *and criminal* penalties (Pet. Br. 2-3)—because it is “not require[d], as a prerequisite” to enjoining a law, “that the plaintiff bet the farm” and “expose himself to liability” “by taking the violative action.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007); *accord Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967).

displacing a district-court suit for injunctive relief—which, contrary to the Government’s contention (U.S. Br. 21-23), “has long been recognized as the proper means for preventing entities from acting unconstitutionally,” even absent a statutory cause of action, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); accord *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 241-44 (1979); *Ex parte Young*, 209 U.S. 123, 143-45 (1908).

Finally, a statutory administrative-review mechanism is exclusive only for claims “of the type Congress intended to be reviewed within this statutory structure,” but not for “collateral” claims, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994), where the agency “lacks institutional competence to resolve the particular type of issue presented, *such as the constitutionality of a statute*,” or “lack[s] authority to grant the type of relief requested,” *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (emphasis added). See also *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Johnson v. Robison*, 415 U.S. 361, 373 (1974); CIR Br. 8-11.

Here, (1) the SEC lacks “institutional competence” and “authority” to opine on separation of powers or invalidate the Board; (2) the SEC’s views on the constitutional issues are entitled to no deference, *McCarthy*, 503 U.S. at 147-48; and (3) both the SEC and the appellate court in a statutory-review procedure “lack authority to grant the type of relief

requested,” *id.* at 148, because the court can only *invalidate* the challenged SEC *order*, 15 U.S.C § 78y(a)(3), but cannot enjoin the Board’s regulatory authority. Moreover, the Commission has provided (in the briefs it joined) its construction of the Act, the *same* “opportunity” it would have had in a statutory-review case.

CONCLUSION

The Court should reverse the judgment of the court of appeals, declare the Board unconstitutional, and remand the case for further proceedings.

Respectfully submitted,

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