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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**

BRIEF OF THE COUNCIL OF INSTITUTIONAL INVESTORS; THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; THE CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM; THE CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM; CFA INSTITUTE; THE CONSUMER FEDERATION OF AMERICA; THE LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION; THE NATHAN CUMMINGS FOUNDATION; THOMAS P. DINAPOLI, COMPTROLLER OF THE STATE OF NEW YORK, AS TRUSTEE OF THE NEW YORK STATE COMMON RETIREMENT FUND AND AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL RETIREMENT SYSTEMS; THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF COLORADO; THE SACRAMENTO COUNTY EMPLOYEES' RETIREMENT SYSTEM; AND THE TEACHERS INSURANCE AND ANNUITY ASSOCIATION-COLLEGE RETIREMENT EQUITIES FUND AS AMICI CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amici Curiae	1
Summary of Argument	5
Argument	7
I. The History of Self Regulation Demonstrates That the Investing Public Needs the PCAOB to Protect Its Interests	7
II. To Restore and Maintain Justified Investor Confidence in the Securities Markets, the PCAOB Must Be a Strong, Industry-Independent, and Accountable Oversight Authority	14
A. The PCAOB Is Carefully Designed to Have the Necessary Independence from the Regulated Industry	14
B. The PCAOB Remains Accountable to the SEC and the Investing Public	16
C. The PCAOB's Rulemaking Authority Is Providing the Framework for Meaningful Reform	22
D. The PCAOB's Inspection and Enforcement Powers Are Making Reform a Reality for Investors	27
III. The Court Should Preserve the PCAOB Even If the Removal Restrictions Are Deemed Impermissible	32
Conclusion	36

TABLE OF AUTHORITIES

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546 U.S. 320 (2006) 32, 33

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488 U.S. 361 (1989) 19

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STATUTES

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TABLE OF AUTHORITIES—Continued

	Page
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15 U.S.C. §7214(a)	28
15 U.S.C. §7214(b)	28
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TABLE OF AUTHORITIES—Continued

Page

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Page

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Page

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Page

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INTEREST OF AMICI CURIAE[1]

The Council of Institutional Investors is an organization of public, labor, and corporate pension funds. The Council's membership includes more than 120 pension funds, with assets exceeding $3 trillion, and more than 130 nonvoting members from a broad range of industries. The Council's member funds have fiduciary obligations to millions of Americans whose retirement savings are invested through them. Accordingly, the Council seeks to address investment issues that affect the size or security of plan assets.

As major shareowners, the Council's members have a keen interest in the health and integrity of the American securities market.[2] The Council has explained in a policy statement that "[t]he efficiency of global markets—and the well-being of the investors who entrust their financial present and future to those markets—depends, in significant part, on the quality, comparability and reliability of the information provided by audited financial statements and disclosures." CII Policy on Independence of Accounting and Auditing Standard Setters (updated October 7, 2008), http://www.cii.org/UserFiles/file/council%20policies/Policies%20on%20Accounting%20and%20Auditing%205-7-09.pdf.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the amici or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

[2] See, *e.g.*, P&I Daily, August 31, 2006 ("Earnings from investment income accounted for 63% of state and local pension system revenue for the 22 years ended Dec. 31, 2004.").

The other amici include members of the Council and other entities interested in investor protection.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a labor federation comprised of 53 member unions representing approximately 9 million workers. Union-sponsored pension funds have approximately $400 billion in assets, and union members participate in benefit plans with over $5 trillion in assets. The vast majority of these assets are invested in securities traded in the public markets. Through its Capital Stewardship Program, the AFL-CIO advocates for workers' interests as investors and was actively involved in the legislative process that led to the adoption of the Sarbanes-Oxley Act.

The California Public Employees' Retirement System (CalPERS) is the largest state public pension system in the United States with approximately $190 billion under management. CalPERS provides retirement benefits to over 1.5 million public workers, retirees, and their families and beneficiaries.

The California State Teachers' Retirement System (CalSTRS) is the second largest public pension fund in the United States. It administers retirement, disability, and survivor benefits for California's 833,000 public school educators and their families from the state's 1,400 school districts, county offices of education, and community college districts.

CFA Institute is a global membership and educational organization for the investment profession. Its mission is to lead the investment profession globally by setting the highest standards of ethics, education, and professional excellence. CFA Institute administers the Chartered Financial

Analyst and Certificate in Investment Performance Measurement curriculum and exam programs worldwide, publishes research, conducts professional development programs, and sets voluntary ethics-based professional and performance-reporting standards for the investment industry. CFA Institute has nearly 100,000 members, who include the world's 86,000 CFA charterholders, in 131 countries and territories, as well as 136 affiliated professional societies in 57 countries and territories.

The Consumer Federation of America is a nonprofit association of approximately 280 national, state, and local pro-consumer organizations. It was established in 1968 to advance the consumer interest through research, education, and advocacy.

The Public Employees' Retirement Association of Colorado (CoPERA) provides retirement and other benefits to the employees of more than 400 government agencies and public entities in the state of Colorado. Established by state law in 1931, CoPERA operates by authority of the Colorado General Assembly and is administered under Title 24, Article 51 of the Colorado Revised Statutes by a fifteen-member board of trustees.

The Los Angeles County Employees Retirement Association (LACERA) administers and manages the retirement fund for the County of Los Angeles. With over $30 billion in plan assets and 156,000 members, LACERA is the largest county pension fund in the United States. During the last fiscal year, LACERA distributed nearly $2 billion in benefit payments to members and their beneficiaries.

The Nathan Cummings Foundation is rooted in the Jewish tradition and committed to democratic

values and social justice, including fairness, diversity, and community. It seeks to build a socially and economically just society that values and protects the ecological balance for future generations, promotes humane health care, and fosters arts and culture that enriches communities.

The New York State Common Retirement Fund (NYSCRF) is one of the largest public pension funds in the United States. NYSCRF provides pension, disability, and death benefits for New York state and local government employees and employees of certain other participating employers. As of March 31, 2009, NYSCRF had more than one million members, beneficiaries, and retirees and total net assets of approximately $110.94 billion.

The Sacramento County Employees' Retirement System (SCERS) is a public defined benefit retirement system established and administered under the provisions of California's County Employees' Retirement Law of 1937.

Teachers Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF) is a national financial services organization and the country's leading provider of retirement services in the academic, research, medical, and cultural fields with $363 billion in combined assets under management as of December 31, 2008. CREF, one of the world's largest institutional investors, holds shares in approximately 5,500 publicly traded companies.

Amici file this brief in support of the Public Company Accounting Oversight Board (PCAOB or the Board), established by the Sarbanes-Oxley Act of 2002, because of that organization's vital role in

restoring and maintaining the investing public's confidence in financial reporting.

Petitioners ask the Court to invalidate as unconstitutional the legislative provisions by which Congress created and empowered the PCAOB. Petitioners and their amici make assertions and arguments regarding the Board's creation and powers. As explained in the Board's brief, the PCAOB sits firmly and comfortably within the long-established constitutional framework of the modern administrative state. Amici seek to provide further information to the Court—in particular, from the perspective of the investing public—regarding the history that led to the creation of the PCAOB, the reality of the Board's operation under the oversight of the Securities and Exchange Commission, and the importance of the PCAOB as structured by Congress to reinstating and preserving investor confidence in the American securities market.

SUMMARY OF THE ARGUMENT

Investors—who now include a majority of American families—rely heavily on honest and accurate financial statements in determining whether to invest in public corporations and how to allocate their capital. By late 2001, the investing public's confidence had been badly shaken by massive corporate scandals involving prominent companies with household names. With the disclosure of wrongs by senior corporate executives and widespread auditing failures involving some members of the accounting profession, investors no longer trusted the information coming from issuers.

The widespread failure by auditors to detect serious management fraud, which shocked American

financial markets, occurred in large part because no one was watching the watchers. The scandals demonstrated the inadequacy of accounting industry self-regulation.

The crisis focused attention on the need for fundamental reform. The intense effort of investors, shareowners, other stakeholders, regulators, and legislators culminated in the passage of the Sarbanes-Oxley Act. The centerpiece of that legislation is the PCAOB—the serious, industry-independent, SEC-accountable regulator that the accounting industry had long needed and always lacked.

The PCAOB's independence from the industry it is charged with regulating is key to its effectiveness. So is its accountability to the SEC and the investing public. The PCAOB's essential powers to promulgate auditing and other rules, inspect accounting firms to assure quality audits, and sanction improper auditor conduct are dependent on both its independence from the industry and its accountability to the SEC.

The history of the PCAOB's current auditing standard for internal control audits—which addresses concerns that arose under its previous standard—illustrates the Board's responsiveness and effectiveness. In developing that standard, the PCAOB and the SEC heeded the concerns of numerous stakeholders to balance the goal of investor protection with that of minimizing unnecessary burdens on business, contrary to suggestions by petitioners' amici that the PCAOB is an unaccountable regulator.

Finally, if the Court finds the provisions for removal of PCAOB members constitutionally flawed,

it should sever those provisions and preserve the Board as Congress intended. The Court should permit the PCAOB to continue its vital role in protecting the investing public.

ARGUMENT

I. THE HISTORY OF SELF REGULATION DEMONSTRATES THAT THE INVESTING PUBLIC NEEDS THE PCAOB TO PROTECT ITS INTERESTS.

Sarbanes-Oxley and the PCAOB incorporate the lessons learned through decades of experience with a deficient system of self-regulation in the accounting profession. The system Sarbanes-Oxley replaced has been described as a "positively Byzantine structure of accounting disciplinary bodies which generally lack[ed] adequate and assured financial support, clear and undivided responsibility for discipline, and an effective system of SEC oversight." Accounting Reform and Investor Protection: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 532 (2002) [hereinafter Accounting Reform Hearings] (testimony of Joel Seligman, Dean and Ethan A. H. Shepley Univ. Professor, Washington Univ. Sch. of Law).

Widespread improper accounting practices first came to the attention of the investing public after the 1929 stock market crash. Final Annual Report of the Public Oversight Board (2001), at 40 [hereinafter POB Final Annual Report 2001]. "Until 1933, the contents of financial statements included in public companies' prospectuses and annual reports were regulated only by some state laws and stock exchanges' listing agreements." Pritchard, The Irrational Auditor and Irrational Liability, 10 Lewis & Clark L. Rev. 19, 28 (2006). Action by the New

York Stock Exchange in 1932 and congressional action beginning with the Securities Act of 1933 required public companies to have annual financial statements certified or audited by independent accountants. POB Final Annual Report 2001, *supra*, at 39-40. "With the adoption of the federal securities laws in 1933 and 1934, auditing of public companies in the United States was placed under the supervision of the Securities and Exchange Commission." Pritchard, *supra*, at 28-29. Oversight of the accounting industry, however, remained the province of the industry's own trade association, the American Institute of Certified Public Accountants (AICPA). POB Final Annual Report 2001, *supra,* at 40. In 1939, the AICPA's Committee on Auditing Procedure issued its first statement setting forth auditing procedure. POB Final Annual Report (2001), *supra*, at 40.

The self-regulatory system instituted in the 1930s continued virtually unchanged for more than four decades, until a new wave of audit failure scandals spurred reexamination in the 1970s. *Ibid.* In 1970, the market was shocked by the collapse, amid financial scandals, of Penn Central Transportation, the largest bankruptcy since the Great Depression. See, *e.g.*, Zeff, How the U.S. Accounting Profession Got Where It Is Today: Part I, No. 3, Vol. 17 Acct. Horizons, Sept. 1, 2003, at 189. Similar financial frauds also brought down companies like Equity Funding and Continental Vending. *Ibid.* In 1974, congressional investigations uncovered further widespread abuses: "unrecorded slush funds, secret bank accounts, and other devices to hide bribes and kickbacks by over 200 major companies. And the cry went out, 'Where were the auditors'?" Lynn Turner, SEC Chief Accountant,

Shifting Paradigms in Self-Regulation: Address at the 27th Anniversary Securities Regulation Institute (Jan. 27, 2000), http://www.sec.gov/news/speech/spch340.htm.

Those events led to a revamping of the regulatory structure in 1977. Despite warnings of the dangers of continued self-regulation and serious consideration given to establishing an industry-independent regulator, the system remained a fragmented scheme in which the regulators and structure were under the control of the accounting industry itself. See Charles Niemeier, PCAOB Board Member, Speech (Nov. 8, 2007), http://www.pcaobus.org/News_and_Events/Events/2007/Speech/11-08_Niemeier.aspx. The AICPA established the SEC Practice Section (SECPS) and the Quality Control Inquiry Committee (QCIC). Framework for Enhancing the Quality of Financial Information Through Improvement of Oversight of the Auditing Process, Securities Act Release No. 8109, Exchange Act Release No. 46120, 67 Fed. Reg. 44964, 44967, 45010 app. A (2002) [hereinafter Framework]; see also U.S. Gen. Accounting Office, GAO-02-411, The Accounting Profession: Status of Panel on Audit Effectiveness Recommendations to Enhance the Self-Regulatory System 7 (2002). The SECPS was charged with overseeing the peer review of auditing firms, and the QCIC investigated allegations of audit failure. Framework, *supra*, at 45010 app. A. An AICPA member firm that performed audits for public companies was required to join the SECPS, meet its standards, and submit to periodic peer reviews. *Ibid.* Also in 1977, the AICPA established the Public Oversight Board (POB). *Ibid.* On paper, the POB was charged with overseeing the activities of the SECPS and the system of peer review. *Ibid.* The

POB, however, depended for its funding entirely on voluntary dues paid by AICPA-member firms that audited public companies and belonged to the SECPS. *Id.*, at 44970. "In addition, the POB lacked the ability to organize and implement its own quality control reviews. And, the POB was not given any authority to sanction auditors for deficiencies or incompetence noted during quality control reviews." *Ibid.*; see also, *e.g.*, Rodrigues, From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level, 61 Fla. L. Rev. 1, 39-40 (2009).

After more than two decades, the industry-funded POB and the rest of the self-regulatory regime creaked toward the new century as nominal overseers of an accounting profession radically transformed since 1977. Between 1977 and 2000, the Big Eight accounting firms merged into the Big Five and fees from auditing and accounting, as a percentage of those firms' revenue, decreased from 70 percent to 30 percent. Thomas, Schwab, & Hansen, Megafirms, 80 N.C. L. Rev. 115, 153-155 (2001). That shift reflected the trend by the big auditing firms toward a one-stop-shopping model of providing diverse financial services. See *id.*, at 154-156. The lucrative mix of services audit firms now offered for sale—and pressure on audit partners to cross-sell technology and financial products—was perceived to pose a large, new threat to auditor objectivity.

Moreover, auditing standards were still being set by the industry itself, through the AICPA's Auditing Standards Board, successor to the Committee on Auditing Procedure. That group, composed predominantly of practicing accountants, was criticized for crafting standards that observers perceived as geared more toward protecting its

members' own interests than the investing public. For example, Lynn Turner, former SEC Chief Accountant, testified:

> "One of the problems with that part of the system today is, when they go through that drafting process, since it is all being done by the firms themselves, in fact, their legal counsels get involved in editing those very standards themselves, those standards tend to be written to protect the accounting firms in case they get in trouble on an audit, sometimes probably which is deserved and, quite frankly, sometimes which is not deserved.
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>
> It is not drafted with the public interest in mind. . . . 'As long as you leave that standard setting process in the hands of the firms and the firm's legal counsel, you are going to get standards written to protect them in court, as opposed to standards written to ensure that they do audits that will protect the public.'" Accounting Reform Hearings, *supra*, at 217 (testimony of Lynn Turner, SEC Chief Accountant, 1998-2001) (quoting Sandy Burton, former Chief Accountant).

Especially in this changed and charged environment, it became clear to most observers that past standard setting and peer review (under POB oversight) were not meeting the stated objective of zealously protecting investors' interests in reliable, transparent financial statements.[3] In 1999 the SEC

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[3] See, *e.g.*, Accounting Reform Hearings, *supra*, at 76 (prepared statement of Harold M. Williams, Former SEC Chairman) ("To

felt compelled to end its endorsement of the peer review process in its Annual Reports to Congress.

Events beginning in 2000 confirmed beyond any doubt the inability of the 1977-vintage self-regulatory structure to effectively supervise the twenty-first century accounting industry, highlighting the need for a truly industry-independent regulator with real power to inspect auditors and enforce compliance. Thousands of violations uncovered at PricewaterhouseCoopers LLP prompted suspicion that similarly widespread noncompliance likely remained to be discovered in other large firms. POB Final Annual Report 2001, *supra*, at 48. Reacting to this crisis of confidence, the POB prepared to undertake intensive special reviews of the Big Five firms. *Ibid.* But the SECPS, under pressure from member firms, stopped the special-review plan in its tracks by cutting off funding to the POB. *Ibid.* When the POB then tried to undertake more limited special reviews, that effort was also thwarted by a lack of cooperation. *Ibid.* "The lesson of this episode is

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my knowledge, there has never been a negative review of a major firm. . . . [P]eer review in its present form becomes too incestuous."); *id.*, at 1116 (prepared statement of Harvey L. Pitt, SEC Chairman) ("[I]t appears that the current system of firm-on-firm peer reviews, overseen by [the POB] . . . has not produced a credible result."); *id.*, at 1035 (prepared statement of Howard M. Metzenbaum, Chairman, Consumer Fed'n of Am. and former U.S. Senator) ("The POB . . . is notable for having never sanctioned a major accounting firm in its 25 years of existence, even when peer reviews have uncovered serious shortcomings in a firm's audit procedures."); *id.*, at 533 (testimony of Joel Seligman, Dean and Ethan A. H. Shepley Univ. Professor, Washington Univ. Sch. of Law) ("[E]ven at its best, [peer review] involves competitors reviewing competitors. The temptation to go easy on the firm you review lest it be too critical of you is an unavoidable one.").

crystal clear: self-regulation by the accounting profession is a bad joke . . . . The firms would never subject themselves to scrutiny unless forced to do so." A. Levitt, Take on the Street 127 (2002).

Then came a spate of major business frauds, scandals, and collapses that involved several prominent companies and that reflected massive audit failures and—in some cases—undetected accounting misconduct. Those events justifiably shook the confidence of the investing public. See, *e.g.*, Editorial, Executives on Trial: Scandal Scorecard, Wall St. J., Oct. 3, 2003, at B1. "The markets were in turmoil, corporations were in disrepute. There was a real fear that the lack of trust in the markets could create long-term problems." Former SEC Commissioner Harvey Goldschmid, quoted in Farrell, Sarbanes-Oxley Has Been a Pretty Clean Sweep, USA Today, July 30, 2007, at 6B. From those ashes rose the legislative will to enact Sarbanes-Oxley—"the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt." President George W. Bush, Remarks on Signing the Sarbanes-Oxley Act of 2002, 2002 Pub. Papers 1319, 1319 (July 30, 2002)—with the industry-independent yet publicly accountable PCAOB as the centerpiece of a reconstructed regulatory regime. The new structure draws on the many lessons deduced from decades of attempts to allow the accounting industry to regulate itself and that system's demonstrated failings.

II. TO RESTORE AND MAINTAIN JUSTIFIED INVESTOR CONFIDENCE IN THE SECURITIES MARKETS, THE PCAOB MUST BE A STRONG, INDUSTRY-INDEPENDENT, AND ACCOUNTABLE OVERSIGHT AUTHORITY.

An estimated "fifty-five percent of American families now own stock in public companies," Biggs, Shareholder Democracy, 39 Loy. U. Chi. L.J. 493, 498 (2008), and those families deserve protection. Congress concluded that the key lesson learned from the failure of self-regulation is that independence from the accounting industry is the most vital aspect for any regulatory authority if it is to be effective at protecting the investing public from accounting fraud, or rule violations falling short of fraud. In contrast to the self-regulatory system it replaces, many features of the PCAOB ensure the needed independence from the regulated industry. Through SEC oversight and other controls, however, the Board remains accountable to the investing public.

A. The PCAOB Is Carefully Designed to Have the Necessary Independence from the Regulated Industry.

A foundation of the PCAOB's industry independence is its status as an entity created by act of Congress. The Board's statutorily authorized role gives it legitimacy. The legislative origin of the PCAOB follows the reform recommendations of the POB, one of its predecessor bodies. In one of its final statements before terminating its existence, the POB called for legislative action to replace the system of which it had been a part, explaining that it was "essential that all critical elements of regulation—including all standard setting, inspections and reviews of accounting firms, enforcement and

discipline, and other functions—be placed under the aegis of a single regulator operating under statutory authority." POB Final Annual Report 2001, *supra*, at 51. Without that statutory authority, the PCAOB would be hampered by the same reliance on voluntary cooperation that undermined the accounting industry's self-regulatory scheme.

Another crucial element of the PCAOB's industry independence is the requirement that two—and only two—of its members be accountants. That structure ensures that the Board has the benefit of accounting professionals' expertise, see Framework, *supra*, at 44976, yet is not dominated by members of the profession. Aside from avoiding *de facto* control by the accounting industry, the non-accountant majority members bring to the Board creative perspectives less likely to come from the members steeped in the culture of the regulated industry. Cf. Weiss, Some Thoughts on an Agenda for the Public Company Accounting Oversight Board, 53 Duke L.J. 491, 497 (2003) ("[T]he PCAOB will need to think outside the box and promulgate auditing and ethical standards that address the very issues the accounting profession traditionally has chosen not to address.").

Finally, and perhaps most important to long-term independence from the industry it helps supervise, is a funding mechanism for the PCAOB that does not depend on the largesse of the regulated industry. Subject to SEC approval, which for accountability reasons is a matter of great consequence, the PCAOB is empowered to establish its own annual budget. 15 U.S.C. §7219(b). And it is empowered to fund that budget by collecting—again subject to all-important SEC approval—accounting support fees from issuers. 15 U.S.C. §§7219(c), (d). Removing the regulator's

purse strings from the hands of the regulated was vital to the Board's continued autonomy. See, *e.g.*, Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work), 35 Conn. L. Rev. 915, 919 (2003) (in article generally critical of other aspects of Sarbanes-Oxley, acknowledging that replacement of the AICPA as regulator with the PCAOB "which is to be funded by public companies and led mostly by non-CPAs" is the Act's "principal silver bullet"). The dangers inherent in relying on a regulatory mechanism funded by the very industry being regulated—obvious enough in theory—were dramatically illustrated in practice by the industry's cut-off of funding to the POB in May 2000. The POB viewed that defunding as the industry's direct response to the POB's attempt to undertake a special review of the largest accounting firms after concerns about widespread auditor independence violations arose. POB Final Annual Report 2001, *supra*, at 48. The planned special reviews were stopped, and SEC Chairman Arthur Levitt noted that the funding cut-off was "a significant setback to self-regulation and independent oversight" that raised "serious questions as to the profession's commitment to self-regulation." *Ibid.* Experiences like the May 2000 defunding made clear that the PCAOB needed more financial insulation from industry caprice and self-interest if it was to be a more effective governing body than those it replaced.

B. The PCAOB Remains Accountable to the SEC and the Investing Public.

Just as vital as the PCAOB's independence from the industry it regulates is the PCAOB's accountability to the SEC and the investing public.

That counterbalance—a regulator not beholden to the regulated but accountable to the investors it is charged with protecting—was essential for real reform of the accounting profession. Indeed, the PCAOB, and Sarbanes-Oxley, of which it is a prominent part, were the outcome of a political process in which public shareowners and other stakeholders provided extensive input. Numerous witnesses testified in several days of public hearings before the Senate adopted Sarbanes-Oxley as its preferred solution. Additional hearings were held in the House on related reform legislation proceeding in that body. And, as the legislative history reveals, Congress had the benefit of voluminous reports detailing the troubled history of self-regulation and prescriptions for meaningful reform.

Ignoring the vast bulk of the Act's legislative history and extensive political input into the design of the Board, plaintiffs and their amici seize on an isolated soundbite from a single Senator, who, as a member of the Senate Committee on Banking, Housing, and Urban Development, was an outspoken critic of the bill. See Oppel, Corporate Conduct, N.Y. Times, July 25, 2002, at A1. Petitioners' and their amici's constant repetition of the phrase "massive . . . unchecked power by design," *e.g.*, Petitioners' Br. 2; Br. of *Amici Curiae* Law Professors in Support of Petitioners 18, does not make it so. The PCAOB's power is indeed carefully checked—by design—through its accountability to the SEC and, through that entity, to the Executive Branch and the investing public. See, *e.g.*, 15 U.S.C. §7217(a) ("The Commission shall have oversight and enforcement authority over the Board, as provided in this Act."). The PCAOB—although carefully designed to avoid encroachments on its authority through capture by

the regulated industry—is accountable to the SEC and the public it is charged with protecting. No amount of hyperbole by petitioners and their amici or repeated quotation of an isolated snippet by a PCAOB opponent can change this fact.

By design and in practice, the PCAOB exercises its regulatory authority over the accounting profession while itself under SEC supervision. The SEC, whose members are "appointed by the President by and with the advice and consent of the Senate," 15 U.S.C. §78d(a), appoints the members of the PCAOB "after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury." 15 U.S.C. §7211(e)(4)(A). The Board's budget and rules are subject to SEC approval. 15 U.S.C. §§ 7211(g), 7219(b). "In addition to appointing the PCAOB's members, the SEC has extensive oversight authority over the Board analogous to that exercised by the Commission over the [self-regulatory organizations]." Pritchard, *supra*, at 34. For example, the Commission may review any disciplinary action taken by the Board on its own motion or upon request, and it "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board upon a registered public accounting firm or associated person thereof." 15 U.S.C. §7217(c)(3). Through this structure the PCAOB, although an industry-independent body with sufficient flexibility and authority to address fundamental problems in the accounting industry, remains directly responsible to the SEC and ultimately subject to control by the Executive Branch, and, generally, accountable to the investing public. See, *e.g.*, Heminway, Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate

Governance Initiatives, 10 Fordham J. Corp. & Fin. L. 225, 319 (2005).

Congress's authority to vest regulatory power in independent agencies like the SEC is well established. See *Mistretta* v. *United States*, 488 U.S. 361, 412 (1989) (separation of powers not violated by Congress's establishment of the Federal Sentencing Commission as an independent agency in the judicial branch); *Wiener* v. *United States*, 357 U.S. 349, 355-356 (1958) (upholding implied congressional limitations on presidential power to remove members of the War Claims Commission); *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 631-632 (1935) (upholding provision limiting the President's power to remove members of the Federal Trade Commission to a showing of cause); cf. *Morrison* v. *Olson*, 487 U.S. 654, 670-697 (1988) (upholding constitutionality of the office of independent prosecutor). And, by longstanding practice, Congress has frequently endowed those agencies, including the SEC, with the power to appoint inferior officers who are necessary to an agency's fulfillment of its congressional mandate. See, *e.g.*, 47 U.S.C. §155(e) (Federal Communications Commission—managing director); 5 U.S.C. §4802(b) (SEC—"such officers . . . as may be necessary") (formerly codified at 15 U.S.C. §78d(b)); 15 U.S.C. §42 (Federal Trade Commission—secretary); 7 U.S.C. §2(a)(4) (Commodity Futures Trading Commission—general counsel). Petitioners do not question Congress's authority to locate regulation of the accounting industry in the SEC or, in broad fashion, the subordination of related duties to independent entities under the SEC's oversight. Cf. 15 U.S.C. §§77s(b)(1), 7219 (formalizing the SEC's reliance on an independent entity like the Financial Accounting Standards Board (FASB) to promulgate Generally

Accepted Accounting Principles). To the extent the PCAOB can be said to exercise governmental authority, it does so—by congressional design—only subject to the approval of the SEC. And the SEC's power to appoint the PCAOB members is entirely consistent with that independent agency's longstanding authority to appoint officers under its control. To the extent that Congress's declaration that "[t]he Board shall not be an agency or establishment of the United States Government," 15 U.S.C. §7211(b), must be respected, the SEC's reliance on the PCAOB to carry out particular oversight functions is no different than the SEC's long-established coordination with and supervision of entities like the FINRA (and one of its predecessor bodies, the NASD), NYSE, and other SROs and the FASB in the SEC's supervision of the securities markets. Indeed, the SEC exercises much greater control over the PCAOB than it has over any of those entities. For example, the FASB's members are appointed by the Financial Accounting Foundation, which also sets that board's budget, not the SEC or any other federal government entity. See Financial Accounting Foundation: Overview, http://www.fasb.org/faf/faf_info.shtml. In short, the PCAOB is no less accountable to the President and the public than the independent agency under whose auspices it operates.

The practical effect of the PCAOB's public accountability was illustrated early in the Board's existence when a public response compelled the resignation of its first chairman and the SEC chairman who sponsored him. See*, e.g.*, Spotlight on Sarbox, Corporate Financing Week, July 28, 2003, at 6. That event demonstrates the ability of the body politic to exert meaningful influence over the SEC

and PCAOB to curb even an appearance of impropriety that could shake investor confidence in the new regulating authority.

Additional controls provide further assurance that the PCAOB will remain an effective yet accountable body. The Board has been carefully designed with sufficient authority to fulfill its mission effectively while subject to sufficient checks to preserve the public's confidence that it is pursuing that mission with their interests at heart. The PCAOB is independent from the accounting industry it regulates and firmly under the control of the SEC.

The PCAOB's carefully crafted combination of industry independence and political accountability promises to benefit the investing public in a number of ways. The concentration of oversight functions that were previously fragmented across various divisions of the accounting industry itself should promote coherence and transparency in rulemaking, with an emphasis on rules that are more likely to protect the investing public.

Further, the Board's independence from the industry it is overseeing has resulted in more intensive inspections and more stringent enforcement. Such a shift provides an important boost for investor confidence in contrast to the old peer-review system that, as noted by observers like former Delaware Chancellor William Allen, many perceived as an "I scratched your back, you scratch my back organization." Framework, *supra*, at 44971, n. 63; Editorial, Watching the Watchers, Wash. Post, May 21, 2002, at A16. More rigorous and effective inspections along with more vigorous enforcement gives investors justified confidence not only that large-scale abuses will be caught and punished, but

also that many will be averted through earlier correction or prevention and deterrence.

C. The PCAOB's Rulemaking Authority Is Providing the Framework for Meaningful Reform.

The PCAOB's clearly delineated authority to establish auditing, attestation, quality control, and independence standards, subject to SEC approval, is providing the necessary structure around which a reformed American investment market is being built. In contrast to the patchwork, voluntary system it replaces, concentrating those governing functions in a single, authoritative body promises greater clarity for auditors and issuers regarding the rules under which they must operate and enhances the investing public's understanding of the rules that are followed in generating the statements on which those investors must rely. "As even critics concede, SOX helped restored [*sic*] investor confidence in the stock market, facilitating a rapid and dramatic recovery. This should be no surprise, for studies show that investors value increased transparency about a company's corporate governance, including the internal audit functions, when making investment decisions." Prentice, Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404, 29 Cardozo L. Rev. 703, 712-713 (2007). Empirical studies have demonstrated that, already by early 2007, the PCAOB's implementation of Sarbanes-Oxley's Section 404 had improved public companies' internal controls, with corresponding benefits to the capital markets' integrity and competitiveness. See, *e.g.*, Christopher Cox, SEC Chairman, Remarks to the U.S. Chamber of Commerce's First Annual Capital Markets Summit: Securing America's Competitiveness (Mar.

14, 2007), http://www.sec.gov/news/speech/2007/spch031407cc.htm; Rittenberg & Miller, Sarbanes-Oxley Section 404 Work: Looking at the Benefits 1-4, 19-21 (2005), http://www.theiia.org/research/research-reports/chronological-listing-research-reports/downloadable-research-reports/?i=248. Further, the PCAOB's open notice-and-comment rulemaking process, which is followed by notice-and-comment review by the SEC, gives investors a full and fair opportunity for input into the rules that are supposed to protect their interests—input they were denied when the accounting industry dominated the organizations that were supposed to be overseeing them.[4]

Fundamental to the PCAOB's mission is its power to set auditing standards (previously known as Generally Accepted Auditing Standards (GAAS)). "For generations, establishing GAAS had been the province of the AICPA. It has used various arms and structures to exercise this authority . . . . The total mix produced a situation that threatened the independence and objectivity of the entire process of promulgating GAAS and supervising the public auditing industry." Cunningham, *supra*, at 943. Shifting the authority to promulgate auditing standards from the accountants' own trade association to the PCAOB, an industry-independent body that is accountable directly to the SEC (and indirectly to the investing public) restores the fact and perception of

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[4] In contrast to the PCAOB, the board of the international auditing standard setter—a component of the International Federation of Accountants—has only one full-time member and no representatives from the investor community and is generally dominated by representatives of the accounting industry. See International Auditing and Assurance Standards Board, http://www.ifac.org/IAASB/About.php.

needed objectivity to the process. Both because the PCAOB starts its rulemaking process from a position of independence from the regulated industry and because that process invites participation by affected shareowners and other stakeholders, the outcome is likely to be standards that better protect investors' interest in the accuracy of financial statements.

Moreover, the confluence of rulemaking, inspection, and enforcement authority in the new body means that standards are more likely to evolve quickly and effectively to meet real-world needs. As former PCAOB Chairman William McDonough has explained, "for the first time, those developing auditing standards—[the PCAOB] Members and staff—will have access to robust empirical and anecdotal evidence from inspections and enforcement activities to set priorities and to identify needs to develop or amend standards." Oversight of the Public Company Accounting Oversight Board: Hearing Before the H. Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the Comm. on Financial Services, 108th Cong. 45 (2004) [hereinafter Oversight Hearing] (testimony of William J. McDonough, PCAOB chairman).

Some of petitioners' amici assert that the PCAOB's auditing standards are too burdensome and hurt American industry. See Br. of William P. Barr *et al.* 5; Br. of The Claremont Institute 31; Br. for the CATO Institute *et al.* 24-25. The Board's rules, however, are subject to notice-and-comment review before the SEC. 15 U.S.C. §§78s(b), 7217(b)-(c). The SEC receives the comments of public companies regarding burdens of compliance that reflect the same concerns amici raise, and it approves a rule

only if it independently determines that the rule is in the public interest.

The history of the PCAOB's Auditing Standard No. 5 illustrates the Board's responsiveness and effectiveness, and its coordination with the SEC. Auditing Standard No. 5 establishes a standard for the internal control audits required by SOX 404. Auditing Standard No. 5, PCAOB Release No. 2007-005A 1, 4 (June 12, 2007), http://www.pcaobus.org/Rules/Docket_021/2007-06-12_Release_No_2007-005A.pdf. Adopted by the PCAOB in June 2007 and approved by the SEC in July 2007, Auditing Standard No. 5 supersedes Auditing Standard No. 2, which had been adopted in 2004. *Id.*, at 1-2, 4. Standard 5 reflects the PCAOB's determinations—made following extensive information gathering; discussions with "representatives of issuers, auditors, investor groups, and others"; feedback from forum participants; review of reports and studies; and consultation with the SEC—that, although "the audit of internal control over financial reporting ha[d] produced significant benefits, . . . these benefits ha[d] come at a significant cost," especially for smaller companies. *Id.*, at 2.

The new auditing standard, promulgated after extensive public comment, *id.*, at 2-4, was intended to "make Section 404 audits and management evaluations more risk-based and scalable to company size and complexity," and thus "strengthened investor protection by refocusing resources on what truly matters to the integrity of financial statements." SEC Press Release, July 25, 2007, http://www.iasplus.com/usa/sec/0707as5secpr.pdf (quoting SEC Chairman Christopher Cox). "As one might imagine, one response to these SOX provisions

has been a greater emphasis by business leaders to the effectiveness of internal controls." Bucy & Joseph, Conducting Business in the Twenty-First Century, 70 Ala. Law. 184, 186 (2009); see also Wade, Sarbanes-Oxley Five Years Later, 39 Loy. U. Chi. L.J. 595, 607-611 (2008) (discussing Standard 5's role in shifting implementation of §404 from a "check-the-box" to a principles-based approach and concluding that "[e]mphasis on the admittedly broad principles of ethical compliance and monitoring, and the clearly articulated demand and expectation that managers behave ethically, will reduce risks and protect investors"). A recent PCAOB report indicates generally good compliance with Standard 5. Report on the First-Year Implementation of Auditing Standard No. 5, PCAOB Release No. 2009-006, http://www.pcaobus.org/Inspections/Other/2009/09-24_AS5_4010_Report.pdf; McCann, Most Auditors Ace Internal Control Tests, http://www.cfo.com/article.cfm/14442918/c_14443063?f=home_todayinfinance.

A recent survey demonstrates a high level of satisfaction with Sarbanes-Oxley and its implementation by the PCAOB and the SEC among investors. The Center for Audit Quality (CAQ), an autonomous group affiliated with the AICPA, conducted a nationwide survey of 1,000 investors in July 2007, in which 76% of investors said they felt that the PCAOB's oversight of auditing had had a positive effect. CAQ Research Summary 2, http://www.thecaq.org/events/sox/researchsummary.pdf. Nearly a third of the investors thought the PCAOB had had a "very positive" effect, while only 8% thought it had had a negative effect, with only 2% rating the PCAOB's effect "very negative." CAQ Survey Questionnaire 5, http://www.thecaq.org/

events/sox/surveyquestions.pdf. Additionally, investors answering the 2007 survey had positive views about Sarbanes-Oxley provisions generally.[5]

D. The PCAOB's Inspection and Enforcement Powers Are Making Reform a Reality for Investors.

The best rules in the world do investors no good unless put into practice. Again drawing on the lessons from the history of the voluntary self-regulatory regime, Congress endowed the PCAOB with the necessary and appropriate enforcement tools to fulfill its mission to the investing public. See 15 U.S.C. §§7214, 7215; cf. Manns, Rating Risk After the Subprime Mortgage Crisis, 87 N.C. L. Rev. 1011, 1057 & n.196 (2009) (contrasting the SEC's "nominal oversight" of rating agencies under the Credit Rating Agency Reform Act of 2006 with the PCAOB's oversight of auditing). Those tools include the registration requirement, inspection authority, investigatory powers, and recourse to significant sanctions. All of these tools are subject generally to SEC oversight.

"Registration of public accounting firms that audit public companies is the foundation of the Board's authority. Since October 22, 2003, it has been illegal for any U.S. public accounting firm to prepare, issue, or play a substantial role in the

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[5] A 2008 CAQ survey indicated declining confidence in U.S. capital markets, but economic factors were the top reasons given for that decline. Report on the Center for Audit Quality's Second Annual Survey of Investors, July 2008, at 7, http://www.thecaq.org/newsroom/pdfs/july2008investorsurvey.p df. The 2008 survey did not include questions about the PCAOB or Sarbanes-Oxley.

preparation or issuance of, an audit report on the financial statements of a U.S. public company unless it is registered with the Board." Oversight Hearing, *supra*, at 38 (testimony of William J. McDonough, Chairman, Public Company Accounting Oversight Board). The SEC now also requires registration by auditors of non-public broker-dealers, Board Statement on the PCAOB Registration Process For Auditors of Non-Public Broker-Dealers, http://www.pcaobus.org/News_and_Events/News/2009/01-07.aspx, and proposed legislation could give the PCAOB additional authority over such registered firms, all of which may better protect investors from Ponzi schemes like the Madoff fraud involving non-registered auditors. See Stevelman, Globalization and Corporate Social Responsibility, 53 N.Y.L. Sch. L. Rev. 817, 832-833, 845 (2008/2009).

Registered firms are subject to inspection by the PCAOB, under rules that must be approved, and can be modified, by the SEC. 15 U.S.C. §7214(a). Large firms—those that audit more than 100 public companies—are inspected at least annually; smaller firms at least once every three years. 15 U.S.C. §7214(b). The Board may conduct special inspections as needed, either at the request of the SEC or on its own motion. *Ibid.* In addition to being more frequent than inspections under the former peer review system, the PCAOB inspections dig deeper and produce more meaningful results. Oversight Hearing, *supra*, at 41-42 (testimony of William J. McDonough, Chairman, Public Company Accounting Oversight Board). The PCAOB's inspections go beyond reviewing auditors for technical compliance, delving into the broader business context of audit practices and influences on those practices. *Ibid.*; see 15 U.S.C. §7214(d)(2); cf. Weiss, *supra*, at 501-502

(advising the PCAOB to consider "principal-agent tensions that exist within" each accounting firm and "abandon[] the notion—now implicit in the accounting profession's ethical standards and rules on independence—that it is appropriate to view each accounting firm as a 'black box' that can and should be regulated as an entity"). The increased regularity and rigor of inspections will greatly improve the odds of detecting violations of auditing standards or auditor-independence rules and of excising minor problems before they metastasize into major ones.

Further adding to the PCAOB's ability to detect and correct violations in a timely manner is the lifting of any restraint on inspection of audit engagements that are the subject of litigation or other ongoing controversy. See 15 U.S.C. §7214(d). Under the peer review regime, reviews of such engagements were delayed—if they took place at all—until after a litigation or other dispute was resolved. See Daniel L. Goelzer, PCAOB Board Member, Remarks: Lessons from Enron, The Importance of Proper Accounting Oversight (July 27, 2006). Under that system, years could pass from the time a violation was committed to when it was caught and punished, if at all. Clearly the PCAOB's new flexibility to review engagements even while a lawsuit or controversy is pending provides for more swift and certain correction of violations, furthering the interest of investors in removing the financial reporting process from the hands of incompetent or unethical auditors.

In addition to its inspection duties, the PCAOB has tools to investigate and discipline violations, again subject to control and review by the SEC. The Board may, subject to SEC oversight, promulgate

rules requiring cooperation with requests for document or testimony production and may request the SEC to subpoena witnesses and documents. 15 U.S.C. §7215(b)(1)-(2). The Board must coordinate investigations involving potential violations of securities laws with the SEC, and may—subject to SEC review—discipline individuals or firms who refuse to cooperate with its investigations. 15 U.S.C. §7215(b)(3)-(4).

As described above, the POB's frustrated attempt to conduct effective independence reviews in 2000 illustrates why an effective oversight body needs the inspection authority like that granted in 15 U.S.C. §7214, investigatory and enforcement tools like those in 15 U.S.C. §7215, and financial independence from the accounting industry. Because of the Board's funding independence, duty to conduct regular inspections, and ability to undertake necessary investigations, investors can be assured that the PCAOB will not be hampered in its enforcement efforts by the structural obstacles that prevented the POB from pursuing effective independence reviews.

Critically also, the Act imposes an enforcement regime with teeth. Unlike the AICPA self-regulatory structure it replaced, the PCAOB is empowered to impose meaningful, proportionate sanctions on violators. Cf., *e.g.*, Editorial, Watching the Watchers, Wash. Post, May 21, 2002, at A16 ("[T]he [POB] was a peerless paper tiger, and no major auditor was ever sanctioned as a result of its reviews."). "The PCAOB has signaled an intention to be tough-minded in enforcing its mandate [to] scrutinize auditors." Brodsky, Updates on the Corporate Attorney-Client Privilege, 8 Sedona Conf. J. 89, 99 (2007). The PCAOB has already undertaken several enforcement

actions, including, for example, in December 2007, fining firm Deloitte & Touche $1 million for knowingly permitting an incompetent auditor to handle the engagement for Ligand Pharmaceuticals. *In re Deloitte & Touche LLP*, Order, PCAOB Release No. 105-2007-005 (Dec. 10, 2007), http://www.pcaobus.org/enforcement/disciplinary_proceedings/2007/12-10_deloitte.pdf; see also Disciplinary Proceedings, http://www.pcaobus.org/enforcement/disciplinary_proceedings/index.aspx.

But those enforcement powers are all exercised subject to SEC review. 15 U.S.C. §7217. In its 2002 Framework report, the SEC identified ineffective discipline as "[a] primary criticism" of the old, voluntary self-regulatory system, noting that "[t]he strongest sanction issued by the AICPA is expulsion from that organization, which does not remove the individual or firm from practice before the Commission." Framework, *supra*, at 44964. The PCAOB, by contrast, has the discretion, subject to SEC review, to choose from a broad array of sanctions for a rule violation, ranging from censure or requiring professional education through permanent disbarment or civil monetary penalties of up to $750,000 for an individual or $15 million for a firm for intentional, knowing, or reckless misconduct. 15 U.S.C. §7215(c)(4). The Board must notify the SEC of any final sanction imposed, and "[t]he Commission may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board." 15 U.S.C. §7217(c)(3). Thus, once again, Congress has provided the PCAOB with the tools to do its regulatory job and the agency oversight to ensure the Board's public accountability.

III. THE COURT SHOULD PRESERVE THE PCAOB EVEN IF THE REMOVAL RESTRICTIONS ARE DEEMED IMPERMISSIBLE.

Amici disagree with petitioners' assertion that Sarbanes-Oxley's provisions regarding the SEC's power to remove PCAOB members from office, see SOX §107(d)(3), 15 U.S.C. §7271(d)(3); SOX §101(e)(6), 15 U.S.C. §7211(e)(6), violate the Constitution. But if the Court finds the removal provisions invalid, it should limit its holding to excising the invalid portions and, in accordance with congressional intent, preserve the PCAOB as a vital protector of the investing public.

"Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem," preferring "to sever its problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-329 (2006). If the limitations on the SEC's removal power are constitutionally flawed, any problem is easily solved by either (1) leaving the SEC with generic for-cause removal authority by striking "remove from office or" from §107(d)(3) and "in accordance with section 107(d)(3)" from §101(e)(6) or (2) leaving the SEC with at-will removal authority by, for example, striking "remove from office or" from §107(d)(3) and "in accordance with section 107(d)(3), for good cause shown before the expiration date of the term of that member" from §101(e)(6) or by striking §§107(d)(3) and 101(e)(6) in their entirety.[6] Such

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[6] A statute that is silent as to removal is presumed to invest the appointing authority with at-will removal power. *Shurtleff* v. *United States*, 189 U.S. 311, 316-318 (1903); *Ex parte Hennen*, 13 Pet. 225, 258-260 (1839).

a solution would serve the "[t]hree interrelated principles" explained in *Ayotte*: (1) it would nullify only as much of Congress's work as necessary, respecting the intent of the people's elected representatives; (2) it would strike the constitutionally problematic portions without rewriting the entire statute; and (3) it would recognize that Congress would "have preferred what is left of its statute to no statute at all." 546 U.S., at 330.

Even when a statute contains no severability clause, "the presumption is in favor of severability." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984); accord *New York* v. *United States*, 505 U.S. 144, 186 (1992). In *Myers* v. *United States*, the Court retained the bulk of a statute dividing postmasters into classes and granting certain powers to the Postmaster General while severing an invalid provision constraining the President's power of removal of certain postmasters. 272 U.S. 52, 176 (1926).

Severability "is largely a question of legislative intent." *Regan*, 468 U.S., at 653. In contrast to the Gramm-Rudman-Hollings Act considered in *Bowsher* v. *Synar*, 478 U.S. 714, 735 (1986), the legislative history of Sarbanes-Oxley demonstrates that Congress would have created the PCAOB even without the provisions that restrict the SEC's removal of Board members. Congress's primary purpose in creating the PCAOB was to establish a regulatory framework that was independent of *the accounting profession*, and thus protect investors. See, *e.g.*, S. Rep. No. 107-205, at 2 (2002); Pub. L. No. 107-204, 116 Stat. 745, 745; 148 Cong. Rec. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes); 148 Cong. Rec. S6330

(daily ed. July 8, 2002) (statement of Sen. Sarbanes).[7] Indeed, Congress considered vesting the functions of the PCAOB in the SEC and rejected that idea primarily because of concern that the SEC lacked adequate resources, not because Congress preferred to insulate the PCAOB's functions from the Executive Branch. See, *e.g.*, Senate Hearings, at 36-38, 219, 704-709, 1087-1088, 1091; House Hearings, at 157-158, 223; 148 Cong. Reg. H1548 (daily ed. April 24, 2002); 148 Cong. Reg. H4479 (daily ed. July 10, 2002); 148 Cong. Rec. S6761 (daily ed. July 15, 2002).

In creating the Board, Congress sought not to make the PCAOB independent of the SEC but, rather, by *enhancing* SEC oversight of the PCAOB, ensuring the Board's independence from the accounting profession. See, *e.g.*, S. Rep. No. 107-205, at 12. Nothing in the legislative history suggests

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[7] See also, *e.g.*, Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, The Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies, 107th Cong. 897-898 (2002) (statement of Charles Bowsher, POB chairman) [hereinafter Senate Hearings]; *id.*, at 15-16 (statement of Arthur Levitt, former SEC chairman); *id.*, at 24 (statement of Lynn Turner, former SEC chief accountant); *id.*, at 106 (testimony of Paul Volcker, former SEC chairman); *id.*, at 661 (letter from Comptroller General David Walker to Sen. Sarbanes); 148 Cong. Rec. S6330 (daily ed. July 8, 2002) (statement of Sen. Sarbanes); 148 Cong. Rec. S6758 (daily ed. July 15, 2002) (statement of Sen. Kohl); H.R. 3763, The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002, Hearings Before the H. Comm. on Financial Services, 107th Cong. 22 (2002) (statement of Rep. Sanders) [hereinafter House Hearings]; *id.*, at 200 (statement of Barry Melancon, AICPA president and CEO); *id.*, at 50 (statement of Barbara Roper, Consumer Federation of America); S. Rep. 107-205, at 6; H.R. Rep. No. 107-414, at 18.

that Congress intended to limit the Executive Branch's authority over the PCAOB. The removal power was never a focus of debate. In thousands of pages of the Act's legislative history, it is mentioned only briefly by two witnesses—one emphasizing the SEC's for-cause removal power as a means of SEC *control*, the other addressing a very different proposal from that Congress enacted. Senate Hearings, at 584, 899, 942.

Because the statutory structure and legislative record confirm that Congress would have preferred the creation of the PCAOB without the removal restrictions to no PCAOB at all, if the Court finds the removal provisions unconstitutional, it should sever those provisions and leave the remainder intact. Preserving the PCAOB fulfills the intent of the people's elected representatives to enhance investor protection.

CONCLUSION

For the reasons detailed above, amici urge the Court to recognize the enormous importance that the success of the PCAOB has for the investing public. Acting within the constitutional framework, Congress has carefully designed a body with the necessary industry independence, accountability, and authority to restore the public's trust in auditing and its confidence in the financial reports of public companies. In the interest of protecting investors, the PCAOB should be permitted to continue doing the job Congress has charged it with doing.

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