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

BRIEF FOR CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae Harold Bruff, Richard Fallon, Jerry Mashaw, Gillian Metzger, Henry Monaghan, Richard Revesz, Richard Stewart, and David Strauss (see Appendix) are professors of constitutional law and administrative law with expertise in the area of separation of powers. Amici teach, research, and write on many of the issues presented in this case, including the scope of presidential appointment and removal powers, the structure of federal administrative government, and the scope of private regulatory schemes. Amici submit this brief to demonstrate that petitioners' broad view of presidential authority is not constitutionally mandated and risks upending longstanding precedent and established governmental practice.[1]

SUMMARY OF ARGUMENT

In this case, petitioners take aim at the removal and appointment provisions governing the Public Company Accounting Oversight Board ("Board"), created by the Sarbanes-Oxley Act of 2002 ("Act"), 15 U.S.C. §§ 7201 *et seq*. The precise scope of petitioners' constitutional challenge, however, is far from clear. At times, petitioners appear sympathetic to the view, raised expressly by their amici, that under the Constitution, "Presidents have the power to remove at will all persons exercising executive

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

authority on their behalf." Con. Law Acad. Br. at 2; *see also* Pet. Br. at 19-24 (arguing that removal restrictions undermine political accountability and enhance congressional power. At other points, however, petitioners appear to retreat to the position—espoused by the dissent below, *see* Pet. App. at 68a, 74a—that only the specific removal provisions challenged here are constitutionally flawed. These provisions, petitioners assert, must be set aside because they do not give the President or a presidential appointee who is herself removable at will (what they call a "presidential alter-ego") direct or immediate ability to remove executive officers such as the Board members. *See* Pet. Br. at 25.

Either version of petitioners' challenge, if accepted, would have far-reaching disruptive effects. A decision by this Court imposing a requirement of presidential at-will removal power over all executive officials would require overruling longstanding and deeply entrenched precedents, just as petitioners' amici expressly urge. *See* Con. Law Acad Br. at 1; Mountain States Leg. Found. Br. at 25-37. Similar disruption would result if this Court were to draw a categorical line mandating that the President or a presidential alter ego must have some direct ability to remove any executive official. These claims for unlimited presidential removal authority would cast into constitutional doubt broad swaths of our current governmental structure, including not just independent agencies, but in addition the civil service system and any other number of assorted removal protections embedded in different statutory schemes. Petitioners' challenges also threaten schemes of public-private cooperation that are basic to our system of financial regulation.

Petitioners and their amici offer no support for undertaking such a dramatic departure from established precedent and practice. Constitutional text and structure do not require either unfettered presidential at-will removal power or some immediate presidential role in all removals. Although the broad presidential authority petitioners seek might have represented a conceivable account of the scope of the removal power, it simply is not the constitutional understanding that has emerged over time. Instead, this Court has long settled on an understanding that accepts statutory limits on removal, provided Congress does not seek to insert itself directly into the removal process and does not undercut the President's ability to perform his constitutional duty to "take Care that the Laws be faithfully executed."

The appropriate analytical framework for resolving the question presented in this case is clearly outlined in this Court's established precedent, as Petitioners acknowledge. *See* Pet. Br. at 18. This Court must decide whether the challenged removal restrictions materially impede the President's ability to perform his constitutional duty. Under that standard, the Board's removal protections are plainly constitutional, given the extensive authority that the Securities and Exchange Commission (SEC)—whose members are themselves removable by the President for cause[2]—wields over the

2. Although no statutory provision expressly grants SEC Commissioners for-cause removal protection, that protection is commonly assumed to exist. *See MFS Sec. Corp. v. SEC*, 380 F.3d 611 (2d Cir. 2004). SEC Commissioners have the fixed, staggered terms and political balance requirements that are typical of many independent agencies. 15 U.S.C. § 78d(a).

Board. Such broad SEC oversight also confirms that Board members are inferior officers, and thus petitioners' Appointment Clause argument fails. Petitioners' suggestion that SEC Commissioners cannot exercise inferior officer appointment authority as heads of a department is equally without merit and is nothing more than an effort to bring in through the backdoor constitutional limits that this Court has already rejected.

ARGUMENT

I. Unlimited Presidential Removal Authority Is Not Required by the Constitution and Is at Odds with Deeply Entrenched Precedent and Practice

A. Neither Constitutional Text Nor Constitutional Structure Compels Unlimited Presidential Removal Power

The Constitution creates a unitary structure for the executive branch. That much is plain from Article II's text, which provides that "[t]he executive Power shall be vested in a President." U.S. Const., art. II, § 1, cl. 1. It is confirmed by the repeated rejection of proposals for a plural executive at the constitutional convention. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 599-602 (1984).

The real issue, however, concerns what this unitary executive structure entails for the scope of presidential

authority over administration of the laws.[3] Here the

3. Although this brief is focused on the merits of petitioners' claims, the source of the plaintiffs' right to maintain this action is a puzzle. This is not an enforcement proceeding, and no act of Congress confers a right of action directly or by implication. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). Petitioners cannot sue under the Administrative Procedure Act ("APA") because the Board is not an agency, *see* 15 U.S.C. § 7211(b), and thus its actions are not agency action for APA purposes. *See* 5 U.S.C. § 702. Petitioners invoked the Declaratory Judgment Act ("DJA") in their complaint, *see* J.A. at 49, but the DJA does not provide a cause of action. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). Nor does *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 & n.19 (1983)— whatever its reach—assist petitioners because the Board itself cannot directly bring an "arising under" coercive action in federal court.

This Court has in one context ignored the requirement that a right of action must exist: Claims by plaintiffs that federal statutes preempt state statutory law. R. Fallon, et. al., Hart & Wechsler's, The Federal Courts and the Federal System 806-807 (6th ed. 2009). Such holdings have been criticized from their outset. *See* Henry Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233, 239-240 (1991). In any event, to our knowledge, these cases have never been extended to the separation of powers context. This case is a particularly inauspicious occasion for such a notable extension, given that the Act *does* provide a remedial mechanism by which petitioners can obtain relief, but requires that they first appeal their claims against the Board to the SEC and then, if necessary, obtain judicial review of the SEC's decision in federal appellate court. *See* 15 U.S.C. §§ 78y, 7217(c); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09, 213-16 (1994) (holding that a similar process for obtaining administrative and subsequently judicial review precludes district court jurisdiction over a pre-enforcement challenge, including over petitioner's constitutional due process claim). Indeed, as the United States argues, *see* U.S. Br. at 15-19, a strong case can be made that this statutory review mechanism is exclusive.

constitutional text is far less certain and includes few details on the government's administrative structure. *See* Jerry L. Mashaw, *Governmental Practice and Presidential Discretion: Lessons from the Antebellum Republic?*, 45 Willamette L. Rev. 659, 659-61 (2009). Key terms are ambiguous, prime among these being "executive power," which could be read as encompassing all political and administrative functions or instead some subset of core executive responsibilities, such as the conduct of foreign affairs. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L. J. 1725, 1788-92 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 38-70 (1994). Similarly, assignment to the President of responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, surely supports some presidential supervisory or oversight role, but that Clause is compatible with a range of interpretations about the scope of such presidential oversight. *See* Strauss, *supra*, at 648-50.

Several provisions that the Constitution does contain are hard to square with claims of unlimited presidential power to remove executive officers. Of particular note is the Opinion Clause, authorizing the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective offices." U.S. Const., art. II., § 2. To be sure, the Clause supports the inference that the President enjoys some supervisory authority over the executive branch; he can at least demand reports from principal officers heading executive branch departments. As a result, Congress cannot fully insulate a department from

all presidential oversight. But the limited scope of the Opinion Clause—which allows the President to request opinions, as opposed to direct decisions or otherwise instruct principal officers—is more in keeping with an effort to ensure some minimum threshold of presidential supervision than one creating unlimited presidential control. *Cf. Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (ruling that a presidential directive is no defense to a claim that the Secretary of the Treasury violated his statutory duties). Indeed, the very fact that the Opinions Clause is included at all weighs strongly against efforts to read Article II's Vesting and Take Care Clauses as granting the President unlimited authority over executive branch officers. If these clauses granted the President such extensive power on their own, the Opinion Clause would be unnecessary. *See* Lessig & Sunstein, *supra*, at 32-38, 72.

Unlimited presidential authority to remove executive officers is also at odds with constitutional provisions granting Congress broad power over the structure of the executive branch. Most prominently, Article I provides that Congress "shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As this Court ruled early on, "necessary" and "proper" are properly read here as terms of empowerment. *McCulloch v. Maryland*, 17 U.S. 316, 411-21 (1819). One manner in which Congress can wield this broad authority is by imposing removal restrictions on executive officials.

Similarly, Congress is granted authority to "by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2. Even with respect to principal officers, the President cannot even appoint them on his own, but must obtain Senate advice and consent. *See id.*

Strikingly, no textual provision expressly grants the President power to remove executive officers. The only express reference to executive officers' removal is the requirement that "all civil Officers of the United States, shall be removed from Office" following impeachment and conviction, U.S. Const., art. II, § 4, which is a removal power controlled by Congress. Even under the longstanding presumption that the power to appoint carries with it power to remove, constitutional protection for direct presidential appointment extends only to principal officers. U.S. Const., art. II, § 2; *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839). Nothing in the text of the Constitution therefore precludes Congress from limiting the President's role in the removal of inferior officers.

These textual clues, though admittedly open to debate, appear on the whole to grant Congress broad authority to create independent agencies and impose conditions on the President's power to remove executive officials. At a minimum, this constitutional text cannot be read as mandating at-will or direct presidential removal power over all persons exercising executive authority. That reading simply ignores too much textual ambiguity and contradictory language to be plausible.

Nor does the separation of powers doctrine necessitate such a conclusion. Constitutional separation of powers principles require that the President be able to oversee those wielding executive authority, because lack of any oversight capacity might "prevent[] the Executive Branch from accomplishing its constitutionally assigned function[]" of ensuring that the laws be faithfully executed. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *see also* Strauss, *supra*, at 597, 602. But any number of methods exist by which such presidential oversight could be secured short of an unlimited power of removal—several of which, including presidential selection of principal officers and authority to obtain a statement of their opinions, are explicitly constitutionally provided, whereas removal is not. To be sure, some principal officers of the executive departments may be such "high political officer[s]" and so closely tied to the President that the President's ability to remove them at will "might conceivably be deemed indispensable to democratic government." *Myers v. United States*, 272 U.S. 52, 247, (1926) (Brandeis, J., dissenting); *cf. Marbury v. Madison*, 1 Cranch. (5 U.S.) 137, 166 (1803) (noting that some officers are "to conform precisely to the will of the President" and "their acts are his acts"). Yet that possibility falls well short of a constitutional mandate for unlimited presidential removal power for all executive officers. *See Myers*, 272 U.S. at 247.[4]

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4. This case, of course, does not raise any question concerning the removal of principal officers within an executive department.

Unlimited presidential removal power is also not necessary to guard against congressional aggrandizement. Petitioners repeatedly contend that restrictions on presidential removal, such as the for-cause protections that shield members of independent agencies, are unconstitutional because they grant Congress control over execution of the laws and executive officers. Pet. Br. at 19-23, 30-34. Whether removal restrictions in fact increase congressional influence is an empirical question, and recent scholarship suggests that the impact of such measures depends on the vagaries of party politics. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. Rev. 459, 477-79, 485-95 (2008).

Regardless, petitioners' argument presumes a level of insulation and separation among the branches that is simply not reflective of our constitutional structure. As this Court has frequently remarked, although the Constitution "divide[s] the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial," *INS v. Chadha*, 462 U.S. 919, 951 (1983), it "by no means contemplates total separation of each of these three essential branches of Government," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). "[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This is, of course, very old teaching. *See* The Federalist No. 47 at 269-76 (James Madison) (Clinton Rossiter, ed., 1999).

Recognizing that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence," *Mistretta v. United States*, 488 U.S. 361, 381 (1989), this Court has rejected efforts by Congress to keep for itself a direct role in the removal of executive officers as unwarranted aggrandizement. *See Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986); *Buckley*, 424 U.S. 135-37; *Myers*, 272 U.S. at 161; *see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991). But the Court has repeatedly upheld the constitutionality of measures that accrue power to Congress more indirectly and rejected claims that such measures represented "an attempt by Congress to increase its own powers at the expense of the Executive Branch." *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986); *Nixon*, 433 U.S. at 442-46, 452-55.

Perhaps the clearest lesson here is that it may be difficult to extract definitive guidance on the scope of the President's removal power from an exegesis of constitutional text and structure. Such guidance simply does not exist. Instead, the removal power represents a paradigmatic example of Hamilton and Madison's recognition that it would take time to "liquidate the meaning of all the [Constitution's] parts, and . . . adjust them to each other in a harmonious and consistent WHOLE." The Federalist No. 82 *(Alexander Hamilton)*, *supra*, at 459; *see also* The Federalist No. 37 (James Madison), *supra*, at 197. In Caleb Nelson's words, the "founders did not consider the Constitution's

meaning to be fully settled at the moment it was written. They recognized that it contained ambiguities and that subsequent interpreters would help 'fix' its meaning on disputed points." Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 521 (2003). As the following discussion demonstrates, such "liquidation" and "fixing" has occurred, and this Court's precedents have established that the Constitution does not grant the presidential unlimited removal authority over all executive officials.

B. Unlimited Presidential Removal Power Is Inconsistent with Longstanding Precedent

This Court's longstanding and deeply entrenched precedent establishes that the President does not enjoy a constitutionally-protected authority to remove at will all persons exercising executive power. Indeed, the claim that the Constitution grants the President such power finds no support whatsoever in the volumes of the Court's reports. Similarly unsupported is the assertion that the President or an alter ego must have some direct or immediate removal power over all executive officials, including inferior officers.

This Court has repeatedly and consistently upheld congressional limitations on the President's power to remove executive officers at will. Perhaps the earliest clear example is *United States v. Perkins*, 116 U.S. 483 (1886), in which this Court unanimously upheld a restriction on the President's power to remove an inferior officer whose appointment was vested in a department head: "We have no doubt that when congress, by law, vests the appointment of inferior

officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485; *see also Marbury*, 1 Cranch. (5 U.S.) at 157, 162 (concluding that an officer appointed by the President with Senate consent for a term appointment was not removable at will and had a right to his commission).

Perkins left open whether Congress could also limit the President's power to remove principal officers, but this Court subsequently answered that question affirmatively (at least for some such officers) in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). There, the Court stated: "We think it plain under the Constitution that illimitable power of removal is not possessed by the President" with respect to "members of quasi legislative and quasi judicial bodies," such as the Federal Trade Commission. *Id.* at 629. In *Wiener v. United States*, the Court again rejected a claim of inherent executive power to remove at will, in this case holding that "no such power is given to the President directly by the Constitution" with respect to the War Claims Commission, statutorily charged with adjudicating compensation claims connected to World War II. 357 U.S. 349, 356 (1958).

More recently, the Court strongly reaffirmed the constitutionality of limitations on the President's removal power in *Morrison v. Olson*, dismissing out-of-hand the suggestion that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable

by him at will." 487 U.S. at 690 n.29. Such a "rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers—depends upon an extrapolation from general constitutional language which we think is more than the text can bear," the Court cautioned. *Id.* *Morrison* left no doubt about its agreement with the holdings in *Perkins*, *Humphrey Executor*, and *Wiener*, questioning only *Humphrey's Executor's* assignment of determinative significance to the type of function an official performed. *Id.* at 689-91 & n.29. Adopting a more flexible inquiry, the Court in *Morrison* upheld the for-cause removal protections applicable to the Office of the Independent Counsel, emphasizing the Counsel's status as an inferior officer and other limitations on the Counsel's authority. *Id.* at 691-93, 695-96.

In other instances, this Court has accepted the constitutionality of removal restrictions without question. *See Mistretta*, 488 U.S. at 410-11 (emphasizing limitations on the President's power to remove members of the Sentencing Commission in upholding the latter's constitutionality); *cf. Buckley*, 424 U.S. at 141. Even strong supporters of broad presidential removal power have acknowledged the extent to which independent agencies are now interwoven into the fabric of the federal government. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 918-22 (1991) (Scalia, J., concurring in part and concurring in the judgment). On the few occasions when the Court has rejected challenges brought by individuals who have been removed by the President, it has carefully emphasized

that its rulings rest on constructions of the statutes at issue, and not on a constitutional basis. *See*, *e.g.*, *Shurtleff v. United States*, 189 U.S. 311, 316-18 (1903); *Parsons v. United States*, 167 U.S. 324, 334, 342-43 (1897).

Thus, far from being a constitutional outlier, *see* Con. Law Acad. Br. at 1, *Morrison* is simply the latest in a long line of decisions upholding the constitutionality of for-cause removal restrictions. Even *Myers*, the decision most commonly invoked by advocates of unlimited presidential removal power, *see*, *e.g.*, Con. Law Acad. Br. at 3-4, 6, 17-18, falls well shy of their mark. *Myers*, which invalidated a requirement of senatorial consent for removal of a presidentially-appointed inferior officer, expressly refused to call into question *Perkins'* holding that Congress could limit removal of *certain* inferior officers and recognized that Civil Service Act limitations on removal were valid. *Myers*, 272 U.S. at 160-62, 173-74. *Myers* simply insisted that "Congress is only given power to provide for appointment*s* and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent." *Id.* at 164; *see also id.* at 174 ("If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics.").

A decision by this Court holding that the President enjoys at-will removal power over any person exercising executive power would necessitate overruling this long line of precedent, as petitioners' amici acknowledge and urge. No justification exists for such a profound disruption of our settled constitutional understandings.

These decisions have not proved practically unworkable; they are fully consistent with current separation of powers analysis; and they are not called into question by changed factual understandings. Most importantly, as discussed below, this precedent underpins the shape of our modern governmental regulatory arrangements. This Court has repeatedly underscored the fundamental importance of the doctrine of stare decisis and refused to overrule precedent, even in constitutional cases, absent a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Such special justification is wholly lacking here.

No doubt it was concern about this disruptive potential that led the dissenting judge below to insist that the removal protections for Board members could be invalidated without calling this Court's established jurisprudence into question, on the ground that here neither the President nor a presidential alter-ego is directly involved in removing members of the Board. Pet App. 65a-69a. Such a situation, the dissenting judge maintained, was unique, a claim petitioners repeat here. *See id.* at 43a, 80a; Pet. Br. at 25. But the lack of such a direct presidential role is *not* unique to the Board. It exists as well with respect to those independent agencies that by statute have power to hire and remove their agencies' inferior officers and other subordinates. *See, e.g.*, 7 U.S.C. §§ 2(a)(4), 2(a)(5), 2(a)(7)(A) (Commodities Futures Trading Commission); 15 U.S.C. §§ 2053(g)(1)(A)-(B) (Consumer Product Safety Commission); 42 U.S.C. §§ 5843(a), 5844(a), 5845(a), 5849(a) (Nuclear Regulatory Commission). The heads of the independent agencies are by definition not presidential alter egos because they are not removable

by the president at will. As a result, no immediate involvement by the President or a presidential alter ego is present in these agencies' hiring and removal decisions; rather, the President exercises control through the regular chain of command. *See* Board Br. at 12, 14, 36-45.

Moreover, the dissent's argument proceeds on the unspoken—but erroneous—assumption that the Board members are principal officers. Under current precedent, however, the Board members must be deemed inferior officers in light of the SEC's extensive supervision of the Board. *See* Part II.B., *infra*. Regardless, if Board members are principal officers, then no reason exists to consider the removal limitations at all; the Act's mechanism for selecting Board members would plainly violate the text of the Appointments Clause. U.S. Const., art. II, § 2. Hence, there is no need in this case to address the question of whether the President must have some direct ability to remove principal officers for cause. The President already enjoys such removal power with respect to the only principal officers at issue, the Commissioners of the SEC.

Petitioners' insistence that the President directly wield removal authority is in considerable tension with longstanding precedent emphasizing that Congress may limit the removal of inferior officers whose appointment it has vested in the heads of departments. *See Perkins*, 116 U.S. at 485 (Congress may "limit and restrict" removal of such inferior officers "*as it deems best for the public interest*") (emphasis added); *Ex parte Hennen*, 38 U.S. at 260 ("[T]he President has certainly *no power* to remove . . . . that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department.") (emphasis added). Nor is there any reason for the Court to imply a constitutional requirement

of an immediate removal power when it has repeatedly upheld the constitutionality of for-cause removal restrictions. Such a rule would undermine the very independence that for-cause removal provisions seek to achieve. Thus, even the ostensibly more modest claim for a direct role in removal is wholly incompatible with this Court's precedent sustaining independent regulatory agencies. *Cf. Freytag*, 501 U.S. at 920-23 (Scalia, J.).

Petitioners and the dissenting judge below also fundamentally mistake this Court's jurisprudence insofar as they contend that some direct presidential role in the removal of inferior officers is categorically required for an administrative structure to be constitutional. This Court has clearly eschewed categorical rules and formal requirements in analyzing the constitutionality of removal limitations that do not give Congress a direct role. "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President." *Morrison*, 487 U.S. at 689; *see also United States v. Nixon*, 418 U.S. 683, 707 (1974) (rejecting an absolute rule of executive privilege against subpoenas).[5]

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5. Such rejection of categorical lines and insistence on contextual analysis is not limited to presidential power cases; rather, it is a prominent feature of this Court's separation of powers decisions more generally. *See*, *e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229, 2252-59 (2008) (rejecting a categorical rule that would determine the availability of the constitutional writ of habeas corpus based solely on whether the United States exercised de jure sovereignty over a territory, and adopting instead a multi-factored analysis).

Hence, as this Court has said repeatedly, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691; *see also id.* at 689-90; *accord*, *Mistretta*, 488 U.S. at 383 (describing the "inquiry as focusing 'on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions'" (quoting *Nixon*, 433 U.S. at 443 (insertion in original))); *see also Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."). The removal protection at issue here accordingly must be considered in the context of the other statutory measures that provide for substantial oversight and control of the Board. *See infra* Point II.A.

C. Unlimited Presidential Removal Power Is Inconsistent with Government Practice and Modern Administrative Government

Acceptance of restrictions on presidential removal power is not only deeply embedded in precedent. Such acceptance also represents a basic feature of the federal government's current structure and underlies the substantial growth in administrative government that occurred over the course of the last century.

Petitioners' academic amici devote a large portion of their brief to the claim that our nation's historical practices reveal a shared understanding that the

removal power is vested in the President. *See* Con. Law Acad. Br. at 12-19. In fact, the historical record is far more nuanced and complex than amici admit. Numerous examples exist of early administrative structures that appeared to limit presidential control over the executive branch, for instance by emphasizing congressional oversight and the independent discretion of executive officials or by incorporating private actors. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787-1801, 115 Yale L. J. 1256, 1284-96 (2006); *see also* Lessig & Sunstein, *supra*, at 15-21, 26-32. Even the fabled Decision of 1789, on which petitioners and their amici put great weight, *see* Pet. Br. at 27-28; Con. Law Acad. Br. at 13-14, is quite ambiguous, and to this day scholars debate its import. In particular, the Decision sheds little definitive light on the central question here, namely, the circumstances in which Congress can impose statutory constraints on the removal power. *See* David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 at 41 (1997); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1073 (2006). Moreover, measures imposing limitations on the President's removal power continued to be proposed and occasionally adopted throughout the nineteenth century. *See* Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 172, 192, 257-58, 263 (2008).[6]

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6. In their amici brief, several former attorneys general emphasize the extent to which Presidents have resisted congressional efforts to limit the removal power. *See* Br. of William P. Barr et al. at 18-25. Of course, "presidential defense of executive prerogative is no more determinative than

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Most importantly, the claim that our nation's practice supports at-will presidential removal power over all persons exercising executive power is incompatible with administrative and political developments in the modern era—developments that amici's brief essentially ignores. Starting in the late nineteenth century, Congress enacted numerous restrictions on presidential appointment and removal powers, from adoption of the civil service to creation of the so-called independent agencies headed by officials removable only for cause. *See* Civil Service Act of 1883 (Pendleton Act), ch. 27, 22 Stat. 403; Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383; Federal Reserve Act of 1913, ch. 6, § 10, 38 Stat. 251, 260; Federal Trade Commission Act of 1914, ch, 311, § 1, 38 Stat. 717, 718. Even if early measures of this sort were not thought to significantly constrain the President's removal discretion, *see* Calabresi & Yoo, *supra*, at 220-21, 258-59; *but see Perkins*, 116 U.S. at 485 (enforcing protections against dismissal), that effect became increasingly clear over time. *See*, *e.g.*, *Humphrey's Ex'r*, 295 U.S. at 631-32; *Wiener*, 357 U.S. at 356. Yet Congresses continued to enact and Presidents to sign statutes creating new independent entities and offices. *See*, *e.g.*, 15 U.S.C. § 2053(a) (Consumer Product Safety Commission, created in 1972); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory

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congressional challenges to presidential power." Mashaw, *Governmental Practice*, *supra*, at 669. In addition, most of the examples amici list involve either principal officers or presidentially-appointed inferior officers, which are not clearly analogous to members of the Board.

Commission, created in 1977); *see also* 5 U.S.C. §§ 1202(d), 1211(b) (Merit Systems Protection Board and the Office of Special Counsel, created in 1978).

Today, removal protections for executive branch officials and employees are a pervasive feature of the federal landscape. Examples include not just the numerous independent agencies, but in addition the civil service, administrative judges, and any number of other executive branch positions that Congress has determined necessitate the greater insulation and independence that removal protections afford. Currently, only a very small proportion of federal workforce serves on a truly at-will basis; the rest enjoy some form of removal protection.[7] These protections are

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7. Precise counts of the number of at-will federal government employees are not easily available. Almost all employees not in policy or supporting positions enjoy some form of protection against at-will employment termination, including probationary employees. *See*, *e.g.*, 5 C.F.R. § 315.806 (substantive and procedural protections for probationary employees); David E. Lewis, The Politics of Presidential Appointments: Political Control and Bureaucratic Performance 20-25 (2008) (describing the modern federal personnel system). As a result, one approach to estimating a count of at-will employees is to add together the number of policy and supporting positions in the federal government that are subject to noncompetitive appointment. Using data from the "Plum Book," S. Comm. On Homeland Security and Governmental Affairs, 108th Cong., 2d Sess., United States Government Policy and Supporting Positions at app. 1 (Comm. Print 2008), available at: *http:// www.gpoaccess.gov/plumbook/ 2008/* index.html (last visited Oct. 16, 2009), this yields a total of 7,996 at-will employees. This number is extremely generous, however,

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not limited to lower-level employees, but often encompass officials exercising significant policy discretion, such as administrative law judges or officials in the Senior Executive Service (SES).[8] Independence protections are particularly prevalent in the area of financial regulation, with many of the nation's central financial regulators—the Federal Reserve, the SEC, and the CFTC, for example—enjoying insulation from presidential removal. *See*, *e.g.*, 12 U.S.C. § 241 (members of the Federal Reserve are appointed to fourteen year terms).

The destabilizing potential of a decision upholding unlimited presidential removal power is therefore enormous. Basic features of the modern federal administrative state and our systems of financial regulation would suddenly be called into constitutional question. Moreover, the broad delegations of regulatory authority that characterize our contemporary

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as it includes 3,723 career SES employees who enjoy some removal protection as well as presidential appointees protected by for-cause provisions. Even this generous count represents only 0.4% of the current federal civilian workforce, listed at 1.92 million in March 2009. *See* http://www.fedscope.opm.gov/employment.asp (last visited Oct. 16, 2009).

8. Although members of the SES can be transferred from their positions after a certain period, they cannot be removed from federal employment and federal law significantly limits the number of SES slots that can be occupied by political appointees. *See* 5 U.S.C. § 3132(a)(2); 5 C.F.R. part 359 (removal grounds and protections for SES career appointees); *see also* Lewis, *supra*, at 23.

government were made against a background in which Congress' ability to provide executive branch officials with some insulation from total presidential control was not in doubt. To so dramatically change course now would undercut Congress's legitimate reliance on this Court's well-established precedent.

D. Petitioners' Challenge Threatens Congressional Efforts to Enhance the Accountability of Private Regulation

Petitioners' claims for at-will or direct presidential removal power also hold troubling implications for the public-private regulatory cooperation that pervades the financial sector. If embraced by this Court, petitioners' rigid understanding of separation of powers could significantly impede congressional efforts to make such regulatory arrangements more accountable. Indeed, it might even call into question the constitutionality of much current private regulation. The potential for disruption in this area of vital national regulation is vast.

Reliance on private regulation has been an essential feature of our securities laws, which have long incorporated self-regulation by private organizations such as the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD), the latter now known as the Financial Industry Regulatory Authority (FINRA).[9] *See* 15 U.S.C. § 78s; *see also id.* § 78o-4(b) (Municipal Securities Rulemaking Board,

9. NYSE merged its member regulation, enforcement and arbitration functions with NASD in 2007, and these functions are now performed by FINRA.

composed of public, broker-dealer, and bank representatives). To address constitutional concerns that private regulators could use their delegated authority to advance their own self-interested goals over the public interest, *see*, *e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), this Court has required that private delegates be formally subject to governmental oversight, *see Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940). But it has not inquired into whether such oversight is meaningful in practice, leaving a risk that private delegates who are not governmental actors will be able to wield their delegated powers subject only to nominal governmental supervision and outside of the constitutional constraints that ordinarily attach to exercises of governmental power. *See* Gillian E. Metzger, *Privatization As Delegation*, 103 Colum. L. Rev. 1367, 1439-45 (2003).

Prior to the creation of the Board, accountants were subject to a system of self-regulation under which the SEC deferred to private professional bodies to set the accounting and auditing standards governing securities issuers' financial statements and to undertake oversight of accounting firms. This self-regulatory approach came under heavy criticism for weak standards, unduly lax enforcement, and evident conflicts of interest, with the private regulators dependent on voluntary contributions from the accounting industry to support their activities. *See* Br. of Former SEC Chairmen at 6-10; S. Rep. No. 107-205 at 4-6, 13 (2002). Congress responded by creating the Board to oversee audits of publicly-traded companies in lieu of purely private regulators. It decided that the Board should be subject to extensive SEC oversight, while also seeking to integrate some

aspects of a private regulatory approach (for example, by denominating the Board a private not-for-profit corporation to ensure greater salary freedom). S. Rep. No. 107-205 at 2, 6-7; Board Br. at 3-4; Br. of Former SEC Chairmen at 10-14.

Congress' approach here secures far greater accountability than simply relying on pre-existing private self-regulatory organizations. Significantly, as a government-created and government-controlled corporation, the Board is a governmental actor for constitutional purposes and thus acts subject to constitutional requirements, a point the parties do not dispute here. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394-99 (1995); *see also* Pet. Br. at 9 n.1; U.S. Br. at 29 n.8; Board Br. at 18. In addition, the fact that it is a government-created entity, with its members chosen and removable by government officers and required to work for the Board full-time, serves to reinforce the Board's "inherently governmental mission." Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 Notre Dame L. Rev. 975, 1007-08, 1025 (2005). The Board's orientation toward the public interest is further reinforced by its extensive supervision by the SEC. 15 U.S.C. § 7217. Although petitioners' amici rightly note the dangers of lack of transparency and public accountability often associated with private regulation, *see* Securities Law Acad. Br. at 1-2, those dangers are mitigated here by the Board's status as a government-created and government-controlled entity.

Petitioners' challenge would erect substantial obstacles to congressional efforts to devise more

accountable forms of public-private regulatory cooperation. In essence, petitioners insist that the Constitution requires Congress to choose between delegating regulatory authority to a purely private entity or vesting it in a traditional public agency. The Constitution should not be interpreted to deny Congress reasonable middle ground for regulatory experimentation. It would be perverse indeed if separation of powers principles were read as punishing Congress for adopting an approach that improves public accountability and helps ensure that governmental power is not exercised outside of constitutional constraints.

Petitioners' claims could have even more dramatic implications for private regulation. Although officers of private securities self-regulatory organizations such as NYSE and FINRA are removable by the SEC on similar terms as members of the Board, the President's appointment authority over such private bodies is much more curtailed. Whereas principal officers appointed by the President in turn appoint Board members and can remove them for cause, no government official can directly appoint the officers of private self-regulatory organizations. *See* 15 U.S.C. § 78s(h)(4); Nagy, *supra*, at 1024-25. Moreover, by statute these entities are expressly entrusted with rulemaking, investigative and disciplinary responsibilities that closely resemble those of the Board, and they are subject to similar, albeit less extensive SEC oversight. *See* 15 U.S.C. §§ 78q(a)-(b),(d); *id.* § 78s; *see also id.* §§ 7217(a)-(c) (incorporating provisions authorizing SEC oversight of registered securities associations to apply to SEC oversight of the Board). If such functions necessitate presidential

appointment and removal in the context of the Board, the existing limitations on the President's appointment and removal powers in private regulatory contexts would seem hard to justify. Trying to ground this distinction in the Board's government-created status would allow "the political branches . . . to switch the Constitution on or off," *Boumediene*, 128 S. Ct. at 2259, based on a formality that is unrelated to the statutorily-delegated powers these private regulators enjoy.

II. The Statutory Provisions Governing Removal and Appointment of Board Members Are Plainly Constitutional under this Court's Governing Precedent

A. The Removal Provisions Are Clearly Constitutional In Light of the SEC's Comprehensive Supervision of the Board

As shown above, our constitutional understanding accepts congressional restrictions on the President's removal power provided they do not impede the President's ability to discharge his responsibilities under the Take Care Clause or directly involve members of Congress in the removal process. This constitutional understanding was not inevitable; the constitutional text could perhaps have supported petitioners' view that the President should have unlimited removal power. But that was not the understanding our nation came to adopt. Indeed, at no point in time was it the national understanding. Now, in the face of longstanding precedent and a government constructed on the assumption that Congress can shield many executive branch officials from at-will presidential removal, it is in

fact a radical argument to suggest that the Court (and the country) should abruptly change course.

Thus, the appropriate inquiry in assessing the constitutionality of the restrictions on removal of Board members is whether they hinder the President's execution of his constitutional functions. *See* Pet. Br. at 18; U.S. Br. at 46-47; Board Br. at 47. Petitioners' claims plainly fail under this analysis given the comprehensive oversight of the Board by the SEC, whose members are themselves removable by the President for cause.

As the majority below noted, the degree of SEC supervision of the Board is extraordinary. *See* Pet. App. 7a. The SEC must approve the Board's rules, which include not just the Board's "bylaws and rules," but also "those stated policies, practices, and interpretations of the Board" that the SEC deems to be Board rules. 15 U.S.C. §§ 7201(13), 7217(b). The Board must notify the SEC of any investigation of possible securities laws violations, and the SEC has power to "enhance, modify, cancel, reduce, or require the remission" of any Board sanction imposed on an accounting firm or its personnel. *Id.* §§ 7215(b)(4), 7215(d), 7217(c). The SEC can review such sanctions on its own motion as well as on request by those aggrieved by the Board's action. *Id.* § 78s(d)(2), *incorporated by id.* § 7217(c)(2). The Board's budget and the annual fees imposed on issuers to fund the Board's activities must be approved by the SEC. *Id.* § 7219. The SEC appoints Board members, can remove or censure them "for good cause shown," *id.* §§ 7211(e)(4), 7211(e)(6), can "relieve the Board of any [enforcement] responsibility," *id.* § 7217(d)(1), and can "impose limitations upon the activities, functions,

and operations of the Board, *id.* § 7217(d)(2). On top of this, the SEC has broad independent authority to issue rules itself that it deems "necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act," *id.* § 7202, and such SEC rules would then be substantive law that binds the Board.

In short, the SEC exercises comprehensive oversight of the Board. Petitioners attempt to portray the SEC's role as far more limited, arguing that the SEC does not oversee the Board's investigative and enforcement decisions prior to imposition of a sanction. Pet. Br. at 53-54. In fact, the SEC has greater powers over the Board's investigation and enforcement activities than petitioners acknowledge, because the Act requires the Board to "establish, by rule, . . . fair procedures for the investigation and disciplining of public accounting firms" or their personnel, and such Board rules cannot go into effect until approved by the SEC. 15 U.S.C. §§ 7215, 7217(b). The Board must apply to the SEC for a subpoena to compel document production or testimony. *Id.* § 7215(b)(2)(D). Moreover, the Act provides that the Board must submit its written inspection reports of public accounting firms to the SEC and that a firm which disagrees with the Board's report can obtain SEC review. *Id.* §§ 7214(g), (h).

In any event, some ground-level investigatory and enforcement discretion does not distinguish the Board from divisions of the SEC or indeed divisions in other executive branch agencies. The norm, as evidenced in the APA's provisions for formal adjudication, is for initial decisions to be made by agency employees presiding

over adjudicatory proceedings, subject to appeal to and de novo review by the agency head. *See* 5 U.S.C. §§ 556(a), 557(b); 15 U.S.C. § 78d-1 (authorizing SEC to delegate any of its functions to a single commissioner, division, employee, or ALJ, subject to subsequent opportunity for review by the full commission). Like the Board, agency employees and officers undertaking such initial decisionmaking often enjoy some form of removal protection. *See*, *e.g.*, 5 U.S.C. §§ 554(a), 7521 (removal protection for administrative law judges).

Petitioners additionally claim that Board members enjoy greater removal protection under the Act than that afforded other government officers who can only be removed for cause and that the SEC has only limited ability to reject Board rules. *See* Pet. Br. at 29-30, 39-40, 53, 55. Such statutory arguments are, however, clearly premature. Because of petitioners' decision to bypass administrative proceedings and file this constitutional challenge directly in court, the SEC has not had an opportunity to offer its interpretation of its oversight authority under the Act. Nor, moreover, do these provisions on their face mandate petitioners' narrow reading, particularly if such a reading might raise constitutional concerns. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S.Ct. 2504, 2513 (2009).

B. Board Members Are Inferior Officers and Their Appointment by SEC Commissioners Is Constitutional

Given the SEC's extensive oversight of the Board, *see supra* Point II.A, petitioners' Appointments Clause claims are likewise unavailing. Board members are

inferior officers under the test set forth in *Edmond v. United States*, 520 U.S. 651 (1997), because their "work is directed and supervised at some level by others who were appointed by *p*residential nomination with the advice and consent of the Senate." *Id.* at 663. *Edmond* is particularly instructive for its insistence that restrictions on review by principal officers do not preclude a finding of inferior officer status; instead, "[w]hat is significant is that [inferior officers] have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers." *Id.* at 665. This central condition of inferior officer status obtains here, given the SEC's review of Board determinations and other Board actions.

Finally, petitioners' contentions that the SEC does not qualify as a department for Appointments Clause purposes and that the head of the SEC is its Chair, not the full Commission, are unpersuasive, as even the dissenting judge below acknowledged. *See* Pet. App. at 97a n.24. Nothing in the Constitution's text mandates reading "department" so narrowly as to require cabinet status or otherwise excluding independent agencies. Instead, as Justice Scalia argued for four justices concurring in *Freytag v. Commissioner of Internal Revenue*, "the word must reasonably be thought to include all independent establishments [in the executive branch]," 501 U.S. at 918, and the SEC is such an independent establishment. Although it took a perhaps unduly narrow view of the meaning of "department," the majority in *Freytag* expressly left open the question of whether independent agencies are departments for purposes of the Appointments Clause, *see id.* at 887 n.4, so this Court need not overrule *Freytag* in order to hold that the SEC is a department.

Moreover, denying independent agencies department status—and thus denying them authority to appoint inferior officers—would have the same disruptive effects as denying the constitutionality of for-cause removal protections. Petitioners' claim is therefore simply a backdoor effort to eliminate independent agencies, notwithstanding that the Court upheld the constitutionality of such agencies in *Humphrey's Executor*. The Constitution should not be contorted in this fashion; we should not presume that the framers "hid[] elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Instead, as Justice Scalia wisely acknowledged in *Freytag*, "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor." 501 U.S. at 921. The Appointments Clause envisions that "[p]rincipal officers could be permitted by law to appoint their subordinates. That should subsist, however much the nature of federal business or of federal organizational structure may alter." *Id.* at 920. Here, this sensible principle means that the SEC should be able to appoint its inferior officers, a category which includes members of the Board.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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APPENDIX

APPENDIX

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