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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,
ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

In the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat, 745, Congress created the Public Company Accounting Oversight Board (Board) to standardize and regulate the auditing of public companies, subject to plenary oversight by the Securities and Exchange Commission (Commission). The issues presented are:

1. Whether the district court lacked jurisdiction because petitioners failed to exhaust the exclusive statutory review procedures for parties aggrieved by the Board's actions.

2. Whether Congress violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, by vesting the power to appoint members of the Board in the Commission.

3. Whether Congress violated the separation of powers by entrusting the regulation of public company auditors to the Board, subject to comprehensive oversight and control by the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-104a) is reported at 537 F.3d 667. The opinion of the district court (Pet. App. 106a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2008. A petition for rehearing was denied on November 17, 2008 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on January 5, 2009, and was granted on May 18, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). As explained at pp. 15-23, *infra*, however, the district court was barred from exercising jurisdiction in this case.

STATEMENT

1. In the wake of massive accounting failures that resulted in devastating harm to investors, Congress enacted the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act), Pub. L. No. 107-204, 116 Stat. 745. The Act regulates the activities of accounting firms that audit public companies subject to the securities laws. 15 U.S.C. 7211(a), 7212(a). To ensure adequate oversight of those firms, Congress established the Public Company Accounting Oversight Board (PCAOB or Board) in Title I of the Act. §§ 101-109, 116 Stat. 750-771 (15 U.S.C. 7211-7219). The Board carries out its functions subject to comprehensive control by the Securities and Exchange Commission (SEC or Commission).

a. The Act charges the Board with "oversee[ing] the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports." 15 U.S.C. 7211(a). The Board's principal responsibilities are set out in 15 U.S.C. 7212-7215. Accounting firms that audit publicly traded companies must register with the Board, 15 U.S.C. 7212(a). They must also comply with auditing, quality-control, and ethics standards issued by the Board. 15 U.S.C. 7213(a)(1). To ensure compliance, the Act directs the Board to "conduct a continuing program of inspections" of registered accounting firms. 15 U.S.C. 7214(a).[1] Those inspections are conducted annually for firms that audit more than 100 issuers of securities, and at least once

[1] As a condition of registration, a firm and its associated persons consent to cooperate with any request for testimony or documents by the Board in the furtherance of its responsibilities. 15 U.S.C. 7212(b)(3).

every three years for firms that audit fewer issuers, although the Board, by rule, may adjust those schedules. 15 U.S.C. 7214(b). The Board may also conduct special inspections at the request of the Commission or on its own motion. 15 U.S.C. 7214(b)(2).

The Act authorizes the Board to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate" the Act, the securities laws, the Board's rules, or the SEC's rules. 15 U.S.C. 7215(b)(1). The Board can also initiate disciplinary proceedings, which may result in sanctions up to and including suspension of the registration of a public accounting firm or associated person. 15 U.S.C. 7215(c).

b. In performing its functions, the Board is comprehensively subject to the "oversight and enforcement authority" of the SEC. 15 U.S.C. 7217(a); see 15 U.S.C. 7211(c) (in performing its duties under Sections 7212 to 7215, the Board is "subject to action by the Commission under [S]ection 7217 of this title").[2] In important respects, Congress patterned the Commission's relationship with the Board on its relationship with so-called self-regulatory organizations (SROs), like the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), whose role in regulating

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[2] See also 15 U.S.C. 7211(c)(5) (Board shall "perform such other duties or functions as the Board (or the Commission, by rule or order) determines are necessary or appropriate"); 15 U.S.C. 7211(f) (certain additional powers are "subject to [S]ection 7217 of this title"). To assist in the exercise of the Commission's supervision over the Board, the Board must create, retain, and make available for examination by the Commission such records and reports as the Commission may determine to be necessary or appropriate. See 15 U.S.C. 7217(a) (incorporating 15 U.S.C. 78q(a)(1) and (b)(1)).

the securities markets the SEC had closely supervised and controlled for several decades.[3] S. Rep. No. 205, 107th Cong., 2d Sess. 12 (2002); see generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). The authority exercised by SROs under the federal securities laws is "entirely derivative" and "ultimately belongs to the SEC," which has plenary authority to review and alter any regulatory or disciplinary decision the organizations may make. *NASD* v. *SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005). Once the SEC has taken action in a regulatory or disciplinary matter initiated by an SRO, an aggrieved party may obtain judicial review by filing a petition in an appropriate court of appeals. 15 U.S.C. 78y(a).

The provisions of Sarbanes-Oxley providing for SEC control over the Board specifically incorporate many of the provisions of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq*., that established SEC control over SROs. But the Act also confers additional authorities, thereby giving the SEC uniquely pervasive control over the Board's conduct. The following are the central features of that control:

i. *Rules and Auditing Standards*. When the Board promulgates auditing standards, ethics rules, or other rules, they cannot "become effective without prior approval of the Commission." 15 U.S.C. 7217(b)(2). After the Commission has approved a rule, it may modify or delete the rule in any manner it deems necessary at

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[3] In 2007, NASD and NYSE merged their regulatory functions, with the SEC's approval, and those functions are now exercised by the Financial Industry Regulatory Authority. See 72 Fed. Reg. 42,169 (2007).

any time. 15 U.S.C. 7217(b)(5) (incorporating 15 U.S.C. 78s(c) in modified form).[4]

ii. *Inspections, Investigations, and Sanctions.* When the Board conducts a periodic inspection of an accounting firm under 15 U.S.C. 7214, the firm may seek review by the Commission, under such rules as the Commission may promulgate, of the Board's final inspection report, so long as the firm previously presented to the Board its objections to the Board's draft report. 15 U.S.C. 7214(h). When the Board conducts investigations of registered accounting firms, it must act in accordance with its SEC-approved rules. 15 U.S.C. 7215(b)(1). The Board is required to notify the SEC of any investigations of potential violations of the securities laws, and to coordinate with the SEC to protect any SEC investigation. 15 U.S.C. 7215(b)(4). The Board lacks independent subpoena authority, and must request that the SEC issue a subpoena when the Board seeks to compel documents or testimony from any person. 15 U.S.C. 7215(b)(2)(D).

When the Board seeks to impose a disciplinary sanction, the sanction is subject to *de novo* review by the Commission. 15 U.S.C. 7217(c)(2) (making 15 U.S.C. 78s(d)(2) and (e)(1) applicable in modified form). Any disciplinary action of the Board is automatically stayed upon either application to the SEC for review or the SEC's *sua sponte* initiation of review. 15 U.S.C. 7215(e). The Commission may "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board" if the Commission concludes that the proposed sanction "is not necessary or appropriate" under the Act

[4] The Board's current rules, as approved by the Commission, are available at PCAOB, *Rules of the Board* (visited Oct. 12, 2009) <http://www.pcaobus.org/Rules/Rules_of_the_Board/index.aspx>.

or the securities laws or is "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed." 15 U.S.C. 7217(c)(3); see also 15 U.S.C. 7217(c)(2).

iii. *Rescission of the Board's Authority*. The Commission may rescind, in whole or in part, any aspect of the Board's enforcement authority at any time, based on the Commission's judgment of what is necessary to protect the public and advance the purposes of the Act and the securities laws. 15 U.S.C. 7217(d)(1) ("The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws, may relieve the Board of *any* responsibility to enforce compliance with *any* provision of this Act, the securities laws, the rules of the Board, or professional standards.") (emphases added); see 15 U.S.C. 7217(d)(2) (authorizing the Commission to censure or impose limitations on the Board).

iv. *Control Over the Board's Funding and Budget*. The Board is generally funded by annual accounting support fees paid by issuers of securities. 15 U.S.C. 7219(a) and (d). Those fees must be approved by the Commission. 15 U.S.C. 7219(d)(1). In addition, the Board's annual budget is subject to the Commission's approval. 15 U.S.C. 7219(b).

v. *Appointment, Censure, and Removal of Board Members*. Members of the Board are appointed for five-year terms by the Commission, 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) and (5)(A). The Commission may publicly censure any Board member or remove a Board member "for good cause shown." 15 U.S.C. 7211(e)(6), 7217(d)(3).

vi. *Additional Regulatory and Enforcement Authority of the Commission*. In addition to all of the foregoing specific powers, the Act grants the Commission the overarching authority to adopt "such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." 15 U.S.C. 7202(a). A violation of the Act, or a Commission or Board regulation issued under the Act, "shall be treated for all purposes in the same manner as a violation of the [Exchange Act]," 15 U.S.C. 7202(b)(1), which means that the Commission can take enforcement action itself if the Board does not, see, *e.g.*, 15 U.S.C. 78u. The Act further specifies that neither the Act nor the Board's rules shall be construed to impair or limit the Commission's own authority to regulate the accounting profession for purposes of enforcement of the securities laws, or to set accounting and auditing standards, or to take, on its own initiative, "legal, administrative, or disciplinary action" against accounting firms registered with the Board. 15 U.S.C. 7202(c); see 15 U.S.C. 7218.

2. Petitioners—a non-profit organization and an accounting firm that is registered with the Board—filed this facial constitutional challenge to the Board's status in the United States District Court for the District of Columbia. Pet. App. 106a-117a. When the complaint was filed, petitioner Beckstead and Watts was the subject of a disciplinary investigation by the Board, after an inspection by the Board had uncovered significant deficiencies in the firm's auditing procedures. J.A. 66.[5]

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[5] See PCAOB, *Release No. 104-2005-082, Inspection of Beckstead & Watts, LLP* 3 (Sept. 28, 2005) <http://www.pcaobus.org/Inspections/Public_Reports/2005/Beckstead_and_Watts.pdf> (identifying "deficiencies" in 8 of 16 audits reviewed that were "of such significance that

In their complaint, petitioners contended that the Act violates the Appointments Clause, separation-of-powers principles, and nondelegation principles. J.A. 67-71; Pet. App. 4a, 106a. The United States intervened to defend the constitutionality of the Act and to argue that the district court lacked jurisdiction because petitioners had failed to follow the exclusive mechanism established by Congress for administrative and judicial review of challenges to the Board's actions. *Id.* at 8a-9a, 106a; Statement of Interest (June 2, 2006); Motion to Intervene (Sept. 1, 2006).

3. The district court concluded that it could exercise jurisdiction over petitioners' suit, stating only that their constitutional challenges are "collateral to the Act's statutory scheme, and are therefore outside the universe of cases subject to the implicitly exclusive administrative review established by the Act." Pet. App. 111a. The court then rejected petitioners' arguments on the merits. *Id.* at 112a-117a. After describing the Commission's comprehensive powers over the Board, *id.* at 107a-109a, the court concluded that petitioners' facial challenge "present[s] nothing but a[] hypothetical scenario of an over-zealous or rogue PCAOB investigator," and that if the scenario were to occur, "the SEC could change the rules to prevent improper investigations or remove PCAOB members for 'good cause.'" *Id.* at 116a-117a.

4. a. The court of appeals affirmed. Pet. App. 3a-104a. The court first concluded that the district court possessed jurisdiction, outside the special statutory procedures for judicial review. The court reasoned that

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it appeared to the inspection team that the Firm did not obtain sufficient competent evidential matter to support its opinion on the issuers' financial statements"). The Board has taken no further action in its investigation of Beckstead and Watts.

those procedures are applicable only to challenges to an "order" or a "rule," *id.* at 9a, and that petitioners' facial challenge to the Act was a collateral claim, which did not attempt to "bootstrap other claims regarding a Board order or rule." *Id.* at 10a. Concluding that the challenge was "not properly viewed as a circumvention of the Act's review procedures," the court held that it could be brought directly in district court. *Id.* at 10a-11a.

On the merits, the court of appeals rejected petitioners' contention that the Act violates the Appointments Clause by vesting the power to appoint Board members in the SEC, rather than in the President with the Senate's advice and consent. Pet. App. 11a-20a. The court emphasized that Board members "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 13a (quoting *Edmond* v. *United States*, 520 U.S. 651, 665 (1997)). "Because the Board's exercise of its powers under the Act is subject to comprehensive control by the Commission and Board members are accountable to and removable by the Commission," the court concluded that Board members are inferior officers whose appointment Congress could properly vest in the Commission. *Id.* at 20a. The court found no merit in petitioners' claim that the Commission lacks authority to appoint inferior officers because the Commission is not a "Department" for purposes of the Appointments Clause. *Id.* at 20a-23a. It also rejected the contention that the Commission cannot appoint inferior officers because the Commission, as a multi-member body, is not the "Head[]" of the SEC for purposes of the Appointments Clause. *Id.* at 23a-25a.

Turning to petitioners' general separation-of-powers argument, Pet. App. 26a-37a, the court of appeals rejected petitioners' efforts to characterize the Board as

an agency independent of the Commission, *id.* at 29a-30a & n.9, and lacking adequate accountability to the President, *id.* at 26a. The court explained that petitioners' arguments are "undercut by the vast degree of Commission control at every significant step." *Id.* at 36a. Comparing the Commission's "extraordinary," "pervasive," and "exhaustive" (*id.* at 7a, 30a, 39a) control over the PCAOB with the Attorney General's circumscribed authority over the independent counsel in *Morrison* v. *Olson*, 487 U.S. 654 (1988), see Pet. App. 31a-32a, the court concluded that the President's powers over the Board, through the Commission, "extend comfortably beyond the minimum required to 'perform his constitutionally assigned duties.'" *Id.* at 31a (quoting *Morrison*, 487 U.S. at 696).

Especially in light of the Commission's extensive supervision of the Board in other respects, the court of appeals determined that the statutory provisions regarding the Commission's removal of Board members do not violate separation-of-powers principles. The court observed that under this Court's decisions, the President need not have direct removal authority over inferior officers whose appointment Congress has lawfully vested in the Heads of Departments. Pet. App. 17a, 36a. The court further explained that the "good cause" limitation on the Commission's removal of Board members must be read in conjunction with the other, pervasive means of control exercised by the Commission. *Id.* at 30a, 35a-36a. The court concluded: "Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, [petitioners] cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers." *Id.* at 39a.

b. Judge Kavanaugh dissented. Pet. App. 41a-104a. In his view, the Act violates separation-of-powers principles by "completely strip[ping] the President's ability to remove PCAOB members, either directly or through an alter ego." *Id.* at 66a. He also concluded that the Act violates the Appointments Clause. *Id.* at 80a-97a. According to his opinion, the Board's members are "principal" officers because the SEC cannot remove them at will and because the SEC lacks sufficient statutory authority to prevent, affirmatively command, or manage the ongoing conduct of specific Board inspections, investigations, and enforcement actions. *Id.* at 90a-97a.

Responding to petitioners' argument that the SEC cannot appoint inferior officers because it is not a "Department[]" and its five Commissioners are not the "Head[]" of a Department, Judge Kavanaugh "generally agree[d] with the majority opinion that [petitioners'] submission is inconsistent with current Supreme Court precedents" as well as constitutional "text and longstanding Executive Branch interpretation." Pet. App. 97a n.24.

SUMMARY OF ARGUMENT

I. Petitioners ask this Court to resolve claims that Congress has required to be presented in the first instance to the SEC, under special procedures, with subsequent judicial review in a court of appeals. Bypassing those procedures, petitioners filed this district court action, seeking to enjoin a pending Board investigation and to vacate prior Board actions in that investigation. Bedrock principles of administrative law preclude that course, which deprived the SEC of the opportunity to address statutory questions embedded in petitioners' constitutional claims.

That petitioners' primary ground for seeking declaratory and injunctive relief was their challenge to the constitutionality of the Board's authority does not excuse their noncompliance with statutory review procedures. A party must follow such procedures even when asserting a constitutional claim that cannot be resolved by an agency, provided (as here) that those procedures ensure a meaningful opportunity for judicial review once administrative review is complete. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994).

II. Petitioners contend that Sarbanes-Oxley violates the Appointments Clause by vesting the power to appoint Board members in the SEC rather than in the President with the Senate's advice and consent. That argument is incorrect.

A. The Commission comprehensively supervises and controls members of the Board. The Commission controls the Board in all the ways it does SROs, while also possessing yet additional authorities and the power to appoint Board members. Thus, the Commission can reject, modify, or supplant every procedural or substantive rule the Board adopts; it can refuse to issue a subpoena in aid of a Board investigation; it can reverse, veto, or set aside any of the Board's enforcement decisions; it can take enforcement action itself when the Board does not; it can disapprove or control any Board litigation; it can disapprove the Board's budget; it can remove Board members for cause; and it can entirely withdraw any aspect of the Board's enforcement authority.

B. Petitioners are therefore mistaken in contending that Board members are principal officers who must be appointed by the President and confirmed by the Senate. In fact, Board members are inferior officers, be-

cause their "work is directed and supervised at some level by others"—SEC Commissioners—"who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). The Board members' inferior status is demonstrated by comparison to the Coast Guard judges in *Edmond*, and the special tax judges in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), all of whom were subject to less comprehensive and effective supervision than Board members and yet were held to be inferior officers. The SEC's inability to remove Board members at will does not alter the superior–inferior nature of the relationship between them. Neither does the Board's statutory authority to fund its operations through user fees, which the Commission must approve.

C. Petitioners further contend that, if Board members are inferior officers, they cannot be appointed by the SEC because the Commission is not a "Head[] of Department[]" for Appointments Clause purposes. Although the *Freytag* majority expressly declined to resolve whether "Departments" are limited to Cabinet agencies, four concurring Justices persuasively explained that the SEC and other principal non-Cabinet agencies are indeed "Departments." See 501 U.S. at 918-920 (Scalia, J., concurring in part and concurring in the judgment). Moreover, petitioners err in arguing that the "Head[]" of the SEC is the Chairman alone rather than the full Commission. It is the Commissioners as a body who exercise the final rulemaking, investigative, and adjudicative authority that the securities laws vest in the SEC, and who also exercise control over the Board.

III. Petitioners contend that the President lacks adequate control over the Board's exercise of Executive

power, either because he cannot directly remove Board members under any standard or because the Commission cannot remove them at will. But no decision of this Court has ever suggested that the President must have direct removal authority over inferior officers. And in the circumstances of this statutory scheme, the limits on the Commission's removal authority pose no constitutional concern. Petitioners do not dispute the constitutionality of "independent" agencies generally, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), or of the SEC's ability to enforce the securities laws (including Sarbanes-Oxley). Nor do petitioners dispute that Congress may provide that inferior officers within Executive agencies may be removed only for cause. *E.g.*, *Myers* v. *United States*, 272 U.S. 52, 161 (1926). Here, Congress has included such a removal provision in the context of an overall regulatory structure that subjects the Board to the Commission's plenary control. In a world in which *Humphrey's Executor* remains good law, this set of statutory provisions gives the President constitutionally sufficient control over the Board's activities. Moreover, even when viewed in isolation, the Commission's power to remove Board members is broader than petitioners suggest—and should be so read in the course of resolving petitioners' constitutional challenge. Finally, this case does not involve any attempt by Congress to aggrandize its own power at the Executive's expense. To the contrary, this case at bottom involves authority Congress has possessed since *Humphrey's Executor*, and this Court should affirm the decision below on that basis.

ARGUMENT

I. SPECIAL STATUTORY REVIEW PROCEDURES BARRED THE DISTRICT COURT FROM EXERCISING JURISDICTION OVER PETITIONERS' CHALLENGE

A. Since the enactment of the Exchange Act in 1934, the federal securities laws have provided an exclusive mechanism for parties aggrieved by the actions of SROs to obtain judicial review. In creating the Board, Congress expressly made such review procedures applicable to the Board. See, *e.g.*, 15 U.S.C. 7217(b)(4) and (c) (applying provisions of 15 U.S.C. 78s in modified form).

The applicable procedures, set forth in the Exchange Act, 15 U.S.C. 78s(b) and 78y(a)-(b), guarantee the Commission an opportunity to address relevant legal issues in an authoritative order or ruling, which is then subject to direct review in a court of appeals. 15 U.S.C. 78y(a)(1) and (b)(1). To preserve the integrity of that exclusive review procedure, the Exchange Act further provides that "[n]o objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." 15 U.S.C. 78y(c)(1). As this Court has explained, "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see, *e.g.*, *NASD* v. *SEC*, 431 F.3d 803, 806-808 (D.C. Cir. 2005) (discussing administrative and judicial review of NASD disciplinary orders); *Swirsky* v. *NASD*, 124 F.3d 59, 62-64 (1st Cir. 1997) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *NASD*, 616 F.2d 1363,

1370 (5th Cir. 1980) (same); *First Jersey Sec., Inc.* v. *Bergen*, 605 F.2d 690, 696 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1074 (1980).

Petitioners, however, bypassed both the Commission and review in the court of appeals, instead filing their challenge to the Board's authority directly in district court. When the complaint was filed, petitioner Beckstead and Watts was the subject of a disciplinary investigation by the Board. J.A. 66. In their district court action, petitioners sought an injunction barring the Board from "taking any further action against" Beckstead and Watts and an order "nullifying and voiding any prior adverse action against" the firm. J.A. 71. Petitioners alleged that the Board's ongoing investigation was subjecting Beckstead and Watts to "burdensome discovery" and legal fees, J.A. 66; that the firm had been "injured by the Board's auditing standards, which ha[d] substantially increased the time and expense of its public company audits and reduced both its client capacity and its overall profits[;] and that the Board's inspection report ha[d] damaged its professional reputation," Pet. App. 110a; see J.A. 63, 65-66.

Under the Act, petitioners had multiple options for obtaining administrative—and then judicial—review of adverse Board actions or purported deficiencies in the Board's auditing standards. To the extent that they objected to the auditing standards, registration requirements, or other rules, see J.A. 65-66, petitioners could have sought review of those rules by the Commission, in which proceeding they could have raised relevant statutory and constitutional objections, and then they could have sought judicial review. See 15 U.S.C. 7217(b)(4); 15 U.S.C. 78s(b)(1), 78y(b). Likewise, to the extent petitioner Beckstead and Watts might object to any sanction

ultimately imposed by the Board for violations of applicable auditing standards, the firm could seek *de novo* review by the Commission, asserting constitutional as well as other objections, and then seek judicial review in the court of appeals. See 15 U.S.C. 7217(c)(2); 15 U.S.C. 78s(d)(2), 78y(a). And Beckstead and Watts (or any other firm) could challenge the Board's authority to conduct an inspection or investigation by refusing to comply and raising its constitutional challenges before the Commission and then a court in a disciplinary action brought by the Board for violating requirements that a registered firm cooperate with any inspection or investigation. See 15 U.S.C. 7212(b)(3), 7215(b)(3).[6] Instead, petitioners filed this facial challenge directly in district court, asking the court to enjoin the ongoing investigation of Beckstead and Watts and to "nullify[] and void[]" prior Board actions against the firm. J.A. 71.

That course is contrary to bedrock principles of judicial review of administrative action. A plaintiff's desire to present constitutional challenges to an agency's authority to take an action does not permit the plaintiff to disregard the statutory review procedures established

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[6] Petitioners are wrong to suggest that Beckstead and Watts could not have raised constitutional objections to the Board's authority on judicial review of the Commission's final action because "the Board is not the proper respondent" in a suit challenging such action. Cert. Reply Br. 3. A Commission rule or order approving an action of the Board would implicate the Board's constitutional authority to act in the first place, and a court therefore could address constitutional challenges to the Board in that context. See *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982) (rejecting argument on petition for review of SEC order that statute authorizing NASD violated nondelegation doctrine); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952); cf. 15 U.S.C. 7202(b)(1) (violations of Board's rules are deemed violations of Exchange Act).

by Congress for the review of such an action. As this Court explained in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), even when an agency cannot itself rule on the merits of a constitutional challenge, a regulated firm cannot bypass exclusive administrative review procedures established by Congress if the constitutional claims can be "meaningfully addressed in the Court of Appeals" after the administrative review. *Id.* at 215. Because judicial review of constitutional claims—including separation-of-powers claims—is available on a petition for review of a decision of the Commission, petitioners were not free to forgo that route in favor of a direct facial challenge in district court. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-106 (1946) (addressing a structural nondelegation claim on review from SEC); *Blinder, Robinson & Co.* v. *SEC*, 837 F.2d 1099, 1103-1109 (D.C. Cir.) (addressing separation of powers, structural due process, and Fourth Amendment arguments), cert. denied, 488 U.S. 869 (1988); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982) (addressing nondelegation challenge to NASD); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952); see also *First Jersey Sec.*, 605 F.2d at 696 (directing dismissal, for failure to exhaust administrative remedies, of nondelegation claim against NASD).

In *Thunder Basin*, adherence to the statutory requirements for administrative review in the first instance allowed subsequent judicial review to be informed by "'agency expertise * * * brought to bear on' the statutory questions presented." 510 U.S. at 215 (quoting *Whitney Nat'l Bank*, 379 U.S. at 420); *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946) (administrative review of legal challenges is required because,

"[e]ven when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the * * * industry"). The same is true in this case, rendering review by the Commission especially important.

Petitioners' facial constitutional challenge to the Board's authority depends upon the answers to several questions of statutory interpretation, relating to the extent of the Commission's supervision and control over the Board's regulations, sanctions, inspections, and investigations, and the scope of the Commission's authority to remove the Board's members. Petitioners' constitutional arguments are premised on the answers they have advanced to those questions—*e.g.*, their mistaken insistence (Br. 4) that "the SEC exercises no control over the conduct of the Board's regular inspections" and that the SEC is "*required*" to approve Board rules in certain circumstances. To the extent that the Board, and the Commission on review, interpreted and applied the Act in ways contrary to petitioners' claims—thereby evidencing the Commission's control over the Board's actions in the context of a concrete case—petitioners' constitutional challenge to the Act would appear in a very different and far less congenial light.

Moreover, in exercising its responsibilities to construe the Act when reviewing a concrete action of the Board, the Commission could, if necessary, do so in a manner that would avoid rather than create constitutional difficulties. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986) ("[I]t would seem an unusual doctrine * * * to say that [an agency] could not construe its own statutory mandate in the light of federal constitutional principles."). In so doing, the Commission would act in accordance

with this Court's repeated stricture that in "choosing between competing plausible interpretations of a statutory text," an interpretation should rely on the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (quoting *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005)). By contrast, as the court of appeals observed, the arguments petitioners advanced in this direct challenge in district court require "interpret[ing] the Commission's powers of oversight narrowly, and the limitations attendant to for-cause removal broadly, divorced from their statutory context in a manner to create constitutional problems where there are none." Pet. App. 39a (citations omitted); *id.* at 18a ("[T]he Commission could broadly interpret its removal authority in order to ensure that the Board conforms to its policies."). Petitioners' tactics in bypassing the Commission thus detach constitutional adjudication from its appropriate statutory grounding in precisely the way *Thunder Basin* intends to prevent.

B. Petitioners' suit is not, as the court of appeals believed, "collateral to the Act's administrative review scheme." Pet. App. 11a. The object of the suit is specifically to preempt the Board's investigation of Beckstead and Watts's compliance with the Act and the Board's standards. J.A. 63-66. And petitioners' alleged injuries derive entirely from the claim that the Board's auditing standards and inspections have imposed compliance costs on auditors that threaten "[s]maller accounting firms," extend further than "existing professional standards," and do not adequately "benefit[] * * * the investing public." J.A. 63, 65. The Commission could fully address all of these concerns during administrative re-

view, rendering it the appropriate initial decisionmaker. Moreover, petitioners' substantive objections to the Board's actions are intimately tied to their constitutional challenges, which are founded on the proposition (Br. 1, 7, 30, 43) that the Board is too free from political accountability to make policy decisions. For this reason too, petitioners should be required to use the review scheme that Congress established.

In cases in which this Court has permitted constitutional challenges to be brought directly in district court, without full exhaustion of an administrative review procedure, one of two circumstances was present: either no issues remained that fell within the agency's competence to address, see *Mathews* v. *Diaz*, 426 U.S. 67, 75-77 (1976), or meaningful judicial review of constitutional claims would otherwise have been entirely unavailable, see *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-498 (1991); *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976); *Johnson* v. *Robison*, 415 U.S. 361, 366-374 (1974). Neither is the case here. The Commission is competent to address the substance of the Board's actions as well as the scope of the Commission's own statutory authorities to control and supervise Board members and their actions. And petitioners' constitutional claims could "be meaningfully addressed in the Court of Appeals," after the Commission's consideration. *Thunder Basin*, 510 U.S. at 215.

C. Permitting petitioners to bypass the review procedures established by Congress would be particularly anomalous here because petitioners have identified no Act of Congress that permits their challenge to proceed in district court. Because the Board is deemed not to be, for statutory purposes, "an agency or establishment of the United States Government," 15 U.S.C. 7211(b), peti-

tioners cannot rely on the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or any other statutory mechanism providing for suits against the government. See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (Congress's characterization of an entity as non-governmental is "assuredly dispositive * * * for purposes of matters that are within Congress's control," including "whether [the entity] is subject to statutes * * * such as the Administrative Procedure Act").[7]

Petitioners have contended that the courts should imply a cause of action directly under the Constitution to permit suit outside the statutory review procedures. Pet. C.A. Reply Br. 22. But this Court is always reluctant to "imply a cause of action where Congress has not provided one," and it has refused to do so even when—unlike here—there is "no opportunity to fully remedy [a] constitutional violation" or no "other means for challenging a constitutional deprivation in federal court." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3, 68, 69 (2001); see *Seminole Tribe* v. *Florida*, 517 U.S. 44, 73-74 (1996). Still less should the Court take this path when petitioners have an available mechanism to raise their constitutional claims.

Indeed, petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles. This Court has considered such challenges only as and when they arose through established statutory mechanisms or as de-

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[7] Even were the APA somehow to apply, the Board's *initiation* of an inspection or investigation of Beckstead and Watts does not constitute "final agency action" that would be subject to immediate judicial review under the APA. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238 (1980).

fenses to enforcement actions. *E.g.*, *Edmond* v. *United States*, 520 U.S. 651, 655 (1997) (appeal from decisions affirming convictions by courts-martial); *Freytag* v. *Commissioner*, 501 U.S. 868, 871-873 (1991) (appeal from adverse decision of Tax Court); *Morrison* v. *Olson*, 487 U.S. 654, 668-669 (1988) (appeal from order denying motion to quash subpoena); *Bowsher* v. *Synar*, 478 U.S. 714, 719 (1986) (special statutory review procedure); *INS* v. *Chadha*, 462 U.S. 919, 928, 937-939 (1983) (petition for review of deportation order); *Myers* v. *United States*, 272 U.S. 52 (1926) (suit by dismissed officer for unpaid salary); *United States* v. *Germaine*, 99 U.S. 508 (1879) (appeal from criminal conviction involving defendant's status as "officer" as element of crime).

In sum, petitioners failed to pursue the express statutory mechanism that Congress established for challenges to the Board's actions, and the district court could not properly exercise jurisdiction over their suit.

II. CONGRESS VALIDLY VESTED THE APPOINTMENT OF MEMBERS OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD IN THE SECURITIES AND EXCHANGE COMMISSION

Congress may "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, Cl. 2. Petitioners argue (Br. 43-62) that Congress could not authorize the Commission to appoint the Board's members for three reasons: because Board members are principal rather than inferior officers; because the Commission is not a Department for purposes of the Appointments Clause; and because, even if the Commission is a Department, the Chairman, not the Commission as a whole, is its Head. Petitioners

rely primarily on the first of those contentions, arguing that Board members exercise authority comparable to that of the SEC Commissioners themselves—an argument that overlaps conceptually with their separation-of-powers claim (Br. 11-35) that the President lacks sufficient control, through the Commission, over the Board's actions. Because petitioners' misconceptions about the Board and its relationship to the Commission are crucial to their arguments under both the Appointments Clause and separation-of-powers principles, we begin by explaining the comprehensive nature of the Commission's supervision and control over the Board.

A. Congress Vested The SEC With Comprehensive Supervision And Control Over Board Activities

Congress created the PCAOB as part of its response to the Enron and Worldcom debacles. In doing so, Congress built upon the SEC's prior experience with SROs like the NASD and the NYSE. Incorporating and adapting pre-existing statutory provisions that govern the SEC's extensive involvement with SROs, Congress established a regime in which the SEC would comprehensively supervise and control the Board's activities.

1. SROs have regulated the securities markets with implicit or explicit government involvement since the so-called Buttonwood Tree Agreement of 1792. See generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). Federal law has recognized such organizations, and their unique role in federal securities regulation, since the Exchange Act first required registration of national securities exchanges and provided for SEC supervision of their activities. *E.g.*, 15 U.S.C. 78f. Shortly thereafter, Congress authorized the creation of "registered securities associations" to prescribe and enforce ethics

standards in the securities industry, subject to SEC oversight and control. Act of June 25, 1938, ch. 677, 52 Stat. 1070 (15 U.S.C. 78*o*–3).

Congress thus adopted a program of "cooperative regulation," in which regulation of the securities industry would "be largely performed by representative organizations of investment bankers, dealers, and brokers, with the Government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation." S. Rep. No. 1455, 75th Cong., 3d Sess. 4 (1938). Accordingly, "[a] statutory system authorizing self-regulatory organizations to act as quasi-governmental agencies in disciplining members for federal securities law violations has existed for [over] 70 years." *NASD* v. *SEC*, 431 F.3d at 804.

Under the Exchange Act, SROs have "no authority to regulate independently of the SEC's control." *NASD* v. *SEC*, 431 F.3d at 807 (quoting S. Rep. No. 75, 94th Cong., 1st Sess. 23 (1975)). As this Court noted in *Gordon*, the SEC exercised such "overriding supervision" over the fixed-commission practices of securities exchanges that those practices were immune from scrutiny under the antitrust laws. 422 U.S. at 661, 691; see *id.* at 685 (noting the SEC's "direct regulatory power over exchange rules and practices" and its "active role in review[ing]" them). This level of supervision applied not only to those particular practices, but to the exchanges' other regulatory activities.

2. Confronted with a widening crisis of confidence in the securities markets in 2002, Congress adapted familiar means of regulation to the problems presented by the accounting industry. In establishing the PCAOB as part of a new regulatory regime, Congress enacted extensive measures to ensure that the Board is in every

respect subordinate to the Commission. Under Sarbanes-Oxley, the Commission controls the Board in all the ways it does SROs, while also possessing additional authorities over the Board and the power to appoint Board members. See pp. 4-7, *supra*.

The Board's rules—which set out the basic framework for the Board's actions and govern, among other things, how it conducts its inspection and investigative functions—do not become effective without the Commission's approval, and the Commission may amend or abrogate those rules at any time. 15 U.S.C. 7201(13), 7211(g)(1), 7214(c), 7215(b)(1), 7217(b)(2) and (5); see, *e.g.*, 69 Fed. Reg. 29,150 (2004) (SEC order approving Board's proposed rules governing investigations and adjudications); *id.* at 31,850 (SEC order approving Board's proposed rules governing inspections). Similarly, when the Board imposes a sanction for violating a rule or the Act, an aggrieved person has a right to obtain *de novo* review by the Commission, and the Commission may also review such a sanctions order on its own motion. 15 U.S.C. 7217(c)(2). The Commission thus has the authority to review, reject, or modify all actions of the Board that have legal effect on the primary conduct of private parties—both rules and disciplinary orders—before those actions may become effective. See 15 U.S.C. 7217(b)(2), (4), and (c)(2).

The Board also has no subpoena power of its own. It must seek issuance of a subpoena by the Commission to require testimony or production of documents the Board considers relevant to an investigation, 15 U.S.C. 7215(b)(2)(D), thereby ensuring Commission control over investigative steps that impose obligations on private parties. And the Board's conduct of litigation in

any court must also be "with the approval of the Commission." 15 U.S.C. 7211(f)(1).

Petitioners complain that the Commission "exercises no control over Board members' daily exercise of their prosecutorial discretion" and cannot "proactively prescribe how Board members *should* act, particularly in case-specific enforcement." Br. 54, 55. But in fact the Commission has full authority to prescribe such details if and to the extent the Commission thinks appropriate. The Commission could, for example, amend the rules that govern how the Board carries out its functions by including requirements that it secure SEC approval for any actions that it now may take itself (such as the decision to initiate an investigation or not to impose a sanction). And quite aside from adopting additional pre-approval requirements, the Commission now may exercise the power either to negate a sanction decision of the Board, or to override a "no sanction" decision (Pet. Br. 56), by exercising its own enforcement powers, which extend to all violations of the Act, the Board's rules, and the SEC's rules and regulations. 15 U.S.C. 7202(b)(1). The Commission thus has multiple ways of controlling the Board's enforcement decisions in individual cases.

In addition to possessing such formal mechanisms of control, the Commission involves itself in the day-to-day activities of the Board in a multitude of informal ways. The Commission has charged its Office of the Chief Accountant with primary responsibility for overseeing the Board's work, and in practice that office works closely with the Board's staff during all of its rulemaking proceedings. Office of the Inspector Gen., SEC, *Audit No. 412, Audit of Oversight of PCAOB* 2, 3 (Sept. 22, 2006) <http://www.sec-oig.gov/Reports/AuditsInspections/2006/412final.pdf>. In a 2006 audit of the Commission's

oversight of the Board, the Chief Accountant explained that his office "not only analyzes and comments on the PCAOB's professional standards and rules," but also "work[s] with the Commission's other offices and divisions to oversee virtually every aspect of the PCAOB's operations." *Id.* App. 1. Similarly, the Board has explained that its "staff works closely with the SEC Division of Enforcement to coordinate many investigations." PCAOB, *2008 Annual Report* 13 (2009) <http://www.pcaobus.org/About_the_PCAOB/Annual_Reports/2008.pdf>.

Finally, the Commission's power to rescind, in whole or in part, any aspect of the Board's enforcement authority at any time, is sweeping and extraordinary. See 15 U.S.C. 7217(d)(1) ("The Commission, by rule, * * * may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards."). Indeed, the court of appeals aptly described that authority as "at-will removal power over Board functions." Pet. App. 35a.

3. The extent of the Commission's authority is underscored by its powers on budgetary matters. The Commission possesses the authority to approve the Board's budget, including the amount of the annual accounting support fee that the Board charges to fund its operations. 15 U.S.C. 7219(b) and (d). In exercising that authority, the Commission has, for example, required that the Board's budget adhere to guidance and economic assumptions provided in advance by Commission staff. See 71 Fed. Reg. 41,998, 41,999 (2006). It has curtailed the Board's ability to reprogram funds for purposes that the Commission has not approved in advance. *Id.* at 42,000. It has restricted Board members' ability

to increase their own salaries. 72 Fed. Reg. 73,052 (2007). And it has required the Board to provide the Commission annually with a written budget "justification" that describes exactly how the Board's budget priorities will advance the purposes of the Act. 71 Fed. Reg. at 41,999.

The Commission's control over the Board's budget occurs on an ongoing basis and is not confined to review of the Board's final proposals. As the Commission explained when it formalized its budget approval procedures, the SEC's Commissioners and staff had already established a practice of meeting regularly with Board members and staff to discuss matters related to the budget. 71 Fed. Reg. at 41,999. The Commission thus uses its power over the Board's purse to facilitate and enhance its control over the Board's regulatory and enforcement functions.

B. Unlike The SEC Commissioners Who Oversee Their Activities, Board Members Are Not Principal Officers

1. Petitioners' invocation of the Appointments Clause rests on the mistaken premise that the Board's members are principal officers who wield power comparable to that of the SEC Commissioners and therefore must be appointed by the President by and with the advice and consent of the Senate.[8] As the Court emphasized in *Edmond*, the constitutional term "inferior" provides important instruction in demarcating the line between principal and inferior officers. "Generally speak-

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[8] It is undisputed that "the Board is a government actor for constitutional purposes," and that its members are Officers of the United States for purposes of the Appointments Clause. Pet. Br. 9 n.1 (citing *Lebron*, 513 U.S. at 400; *Buckley* v. *Valeo*, 424 U.S. 1, 137-140 (1976) (per curiam)).

ing, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." 520 U.S. at 662. An officer is thus inferior for purposes of the Appointments Clause if his "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663. Under that principle, it is plain that Board members, unlike SEC Commissioners, are inferior officers. Board members are, in *Edmond*'s terms, "directed and supervised at some level" by the Commission; indeed, that phrasing substantially understates the extent of SEC control. As explained above, and as the court of appeals concluded, "[t]he Commission's authority over the Board is explicit and comprehensive. Indeed, it is extraordinary." Pet. App. 7a (citation omitted).

The "inferior" status of Board members for Appointments Clause purposes is demonstrated by comparison to *Edmond* and *Freytag*. In *Edmond*, civilian appointees to the Coast Guard Court of Criminal Appeals enjoyed substantial independence in the conduct of their offices. Supervisory authority over those judges was divided between the Judge Advocate General, who exercised administrative oversight, and the Court of Appeals for the Armed Forces (CAAF), which reviewed a subset of the judges' decisions. See 520 U.S. at 664-665. As this Court noted, the judges could not be directed to decide particular cases in particular ways in the first instance, enjoyed highly deferential review by the CAAF, and could not be removed based on their rulings in individual cases. See *ibid.* The Court nonetheless held that the judges were inferior officers. *Id.* at 666.

This Court also held that the special tax judges in *Freytag* were inferior officers, despite the "significant discretion" they enjoyed in conducting trials, ruling on evidentiary objections, and enforcing compliance with discovery orders—all without direct oversight. 501 U.S. at 881-882. In cases involving declaratory judgments or small sums, moreover, the special tax judges rendered final decisions, subject to further review only by Article III courts. *Id.* at 873, 881-882.

Unlike the oversight involved in *Edmond* and *Freytag*, the SEC's powers of supervision and control over the Board are neither limited nor deferential. The Commission can reject, modify, or supplant every procedural or substantive rule the Board proposes to adopt; it can refuse to issue a subpoena in aid of a Board investigation; it can reverse, veto, or set aside every enforcement decision the Board makes; it can take enforcement action itself if the Board declines to do so; it can disapprove or control any Board litigation; it can remove Board members for cause; and it can entirely withdraw any aspect of the Board's enforcement authority under Sarbanes-Oxley. Because the Commission must approve all Board rules and all appealed Board disciplinary sanctions and has complete authority to modify or reject the Board's rules and orders, the Board's members "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers." *Edmond*, 520 U.S. at 665.

Neither the Coast Guard judges in *Edmond* nor the special tax judges in *Freytag* labored under control nearly so pervasive, and yet they were deemed inferior officers. As noted, the CAAF reviewed only a subset of decisions of the Coast Guard judges, see *Edmond*, 520 U.S. at 664-665, and judges of the Tax Court similarly

had no authority to review many decisions of the special tax judges, see *Freytag*, 501 U.S. at 881-882. By contrast, no decisions of the Board are beyond the Commission's plenary review. And the standard of review the Commission wields is stricter. While the CAAF afforded deferential review to decisions of the Coast Guard judges, see *Edmond*, 520 U.S. at 665 ("So long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces [would] not reevaluate the facts."), the Commission's review of Board decisions entails *de novo* consideration of both legal and factual questions. See 15 U.S.C. 7217(c)(2); *NASD* v. *SEC*, 431 F.3d at 804; *Shultz* v. *SEC*, 614 F.2d 561, 568 (7th Cir. 1980).[9]

2. The statutory and regulatory provisions subordinating the Board to the Commission are flatly at odds with petitioners' assertion (Br. 48) that "every defining attribute of the Board demonstrates that it is an independent entity with an autonomy and authority" of such a degree that its members must be appointed by the President with the advice and consent of the Senate. Indeed, as the court of appeals observed, petitioners have been unable to identify any instance "in which the Board can make policy that the Commission cannot override," or in which the Board can take a final action or impose a sanction that is not subject to *de novo* review by the Commission. Pet. App. 38a-39a.[10]

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[9] As discussed below (at pp. 49-50, *infra*), the Commission also has greater control over the Board than the Attorney General had over the independent counsel who was found to be an inferior officer in *Morrison*, 487 U.S. at 671-673.

[10] Petitioners err in describing the Commission's oversight of the Board as purely "passive" review limited to "veto[ing] mistakes" after

Petitioners' contention that Board members cannot be inferior officers because they are not removable at will by the SEC (Br. 46) is irreconcilable with this Court's precedents. The independent counsel in *Morrison* enjoyed "for cause" removal protection but was nonetheless an inferior officer. 487 U.S. at 663. Indeed, as the Court there noted, the power of a principal officer (the Attorney General) to remove the independent counsel—even though for cause—counted as an important factor supporting inferior-officer status. *Id.* at 671; see also *Bowsher*, 478 U.S. at 729 (good-cause removal provision was broad enough to encompass "any number of actual or perceived transgressions"). At the least, a for-cause-removal provision does nothing to call into question the Commission's ability to exercise its other considerable authorities over the Board. See *Applicability of Exec. Order No. 12674 to Personnel of Reg'l Fishery Mgmt. Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993) ("[C]ase law clearly supports the view that 'for cause' limitations on removal power can be compatible with the continuing power and duty to supervise."). Such a provision therefore does not undermine the inferior status of Board members under *Edmond*.

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the fact. Br. 55 (emphasis omitted). The Commission, for example, can request a special inspection to be performed by the Board outside its regular schedule, 15 U.S.C. 7214(b)(2); amend regulations governing the Board's performance of its functions, or refuse to approve those regulations before they become effective, 15 U.S.C. 7217(b)(5); take enforcement action if the Board has not, 15 U.S.C. 7202(b)(1); and make use of regular consultative procedures to influence the Board's operations in real time. In any event, as *Edmond* makes clear, the Board's inability to render a *final* decision on behalf of the Executive Branch unless "permitted to do so by other Executive Officers" is itself indicative of inferior, not principal, officer status. 520 U.S. at 665.

The contention that inferior officers must be removable at will by a principal officer is also at odds with repeated statements of this Court that Congress may place at least some restrictions on the removal of inferior officers whose appointment Congress has lawfully vested in Courts of Law or Heads of Departments. See *Morrison*, 487 U.S. at 689 n.27; see also *id.* at 723-724 (Scalia, J., dissenting) (describing as "established" the proposition that the President's power "to remove inferior officers who exercise purely executive powers, and whose appointment Congress [has] removed from the usual procedure of Presidential appointment with Senate consent, could be restricted, at least where the appointment had been made by an officer of the Executive Branch"); *Myers*, 272 U.S. at 161-162 ("Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal."); *United States* v. *Perkins*, 116 U.S. 483, 485 (1886) (authority to vest appointment of inferior officers in the heads of departments implies the authority to impose restrictions on removal).

Petitioners' comparison of the power exercised by PCAOB members to that of the judges of lower federal courts (Br. 54), the Secretaries of the Army and Navy, and the heads of the CIA, IRS, FDA, and FAA (Br. 51), underscores the subordinate status of the Board. Assuming *arguendo* that the officers petitioners identify are not inferior officers, no person or entity enjoys express statutory control over them that is remotely analogous to the comprehensive control that the Commission exercises over the Board—including but not limited to review of every action having legal effect on primary

conduct. Final judgments of district court judges may be subject to appellate review, but no court of appeals is empowered permanently to withdraw any aspect of the district court's substantive authority at any time, and district court decisions are not automatically stayed pending review, as are the Board's proposed rules and sanctions orders. See 15 U.S.C. 7215(e)(1); 15 U.S.C. 7217(b)(2) and (d)(1). Nor, needless to say, may the courts of appeals on their own initiative overturn an unappealed ruling of a district court, impose their own sentence, make their own factual findings, restrict the district court's budget, or inspect the district court's internal records. Likewise, although the Secretary of the Army, the Director of the CIA, the Administrator of the FDA, and the other Executive officers cited by petitioners are subordinate in some respects to other Executive officers, they generally enjoy broad discretion and authority under law to make final decisions on behalf of the Executive Branch. See, *e.g.*, 10 U.S.C. 3013; 21 U.S.C. 393(d); 26 U.S.C. 7803(a); 50 U.S.C. 403–4a.

Petitioners improbably attribute (Br. 49) to the Board the power to levy a "direct[] *tax*" on the public "without any input by the people's representatives." In fact, the statutory provision at issue, which provides for the funding of the Board's operations through a "reasonable annual accounting support fee" paid by issuers of securities, requires the Commission to approve those fees annually, 15 U.S.C. 7219(d)(1), and the Act sets out the formula by which the fee for particular classes of issuers is to be calculated, 15 U.S.C. 7219(g). Contrary to petitioners' view, such user fees are neither particularly uncommon nor constitutionally troublesome. See generally *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-341 (1974) (distinguishing be-

tween Congress's power to levy taxes and federal agencies' ability to "exact a fee" that is "incident to a voluntary act," such as "a request that a public agency permit an applicant to practice law or medicine"); 3 Office of Gen. Counsel, U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 12-145 to 12-146 (3d ed. 2008) (describing how user fees "mushroomed" after 1980 and many agencies in the 1990s "became increasingly more reliant upon user fees, over general tax revenues, to fund their programs and operations"); see also, *e.g.*, 21 U.S.C. 379h (FDA user fees); 42 U.S.C. 2214 (NRC user fees).

Finally, petitioners misapprehend a crucial feature of a superior–inferior relationship when they suggest that the Commission's power to revoke the Board's authority (see 15 U.S.C. 7217(d)(1)) is immaterial because "wholly *unexercised*." Br. 56. Such power is, of course, no less real simply because the Commission so far has not needed to exercise it. As is true of the "presumed desire to avoid removal" from office, the prospect that significant power could be withdrawn from the Board at any time suffices to create a "here-and-now subservience." *Bowsher*, 478 U.S. at 727 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)); see also *ibid.* ("The Impeachment Clause of the Constitution can hardly be thought to be undermined because of nonuse."). Indeed, the nonuse of such a provision may be powerful evidence of its effectiveness in keeping a subordinate in line.[11]

[11] Equally immaterial is the amount of the Board members' salaries. See Pet. Br. 49-50. Congress created the Board as a private (nonprofit) corporation in the belief that higher salaries would attract qualified candidates from the private sector, but granted the Commission complete control over salaries through the power to approve the Board's budget.

C. The Commission Is A "Department" Within The Meaning Of The Appointments Clause, With The Commissioners As Its "Head"

Petitioners argue that Congress could not authorize the Commission to appoint inferior officers because the Commission is not a "Department" (Br. 57-59), and the Commissioners are not its "Head" (*id.* at 60-62). Both of those contentions fail for the reasons articulated by the majority and dissenting opinions in the court of appeals.

1. Near the time of the Founding, the term "department" referred to a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." *Freytag*, 501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment) (quoting 1 Noah Webster, *American Dictionary of the English Language* 58 (1828)). The Court has long recognized that, as used in the Appointments Clause, the term "has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power." *Germaine*, 99 U.S. at 510.

Like Cabinet officers, the SEC is subject only to the oversight of the President, without being subordinated to (or contained within) another component of the Executive Branch. Like Cabinet officers, SEC Commissioners are appointed by the President by and with the advice and consent of the Senate. See 15 U.S.C. 78d(a). Moreover, nobody from outside the Commission has

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Board members are thus ultimately paid only what the Commission allows. See 72 Fed. Reg. at 73,052 (limiting Board members' raises to 3.3%). While "emoluments" bear on whether someone is an officer, see *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868), this Court has never suggested they are relevant to distinguishing between principal and inferior officers.

any power to appoint its officers and employees. See 5 U.S.C. 4802(b); 15 U.S.C. 78d(b). Those factors strongly support the conclusion that the Commission is a Department for purposes of the Appointments Clause.

Petitioners contend (Br. 59) that "Departments" cannot include independent agencies because "the Appointments Clause's clear purpose was to lodge appointive power only in those 'directly answerable' to the President." But this Court has held that inferior officers can be appointed by entities that are not directly answerable to the President and do not share his political accountability. See *Freytag*, 501 U.S. at 888-892 (upholding appointments by the Tax Court); *Morrison*, 487 U.S. at 676-677 (discussing appointment of executive officers by courts). Moreover, petitioners' contention, if accepted, would rob the Commission of authority to appoint not only members of the PCAOB, but *any* inferior officers within the SEC. It would be "a most implausible disposition" to create a system in which any inferior officers within non-Cabinet (including independent) agencies could not be appointed by their immediate superiors, but must instead "be appointed by the President, the courts of law, or the 'Secretary of Something Else.'" *Freytag*, 501 U.S. at 919-920 (Scalia, J., concurring in part and concurring in the judgment). That implausible system would reverse decades of established practice at the SEC and many other non-Cabinet agencies—even though petitioners do not challenge the constitutionality of those agencies (Br. 22).

Nor does *Freytag*, on which petitioners rely (Br. 58-59), say anything to the contrary. The *Freytag* majority expressly reserved the question whether the heads of "principal agencies, such as * * * the Securities and Exchange Commission," may appoint inferior officers.

501 U.S. at 887 n.4. And Justice Scalia, in an opinion joined by three other Justices, concluded that the "evident meaning" of the term "Departments" encompassed "all agencies immediately below the President in the organizational structure of the Executive Branch," including "all independent executive establishments." *Id.* at 918-919 (concurring in part and concurring in the judgment); see also *id.* at 920 (the Founders "chose the word 'Departmen[t]' * * * not to connote size or function * * * but separate organization—a connotation that still endures even in colloquial usage today"); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 151-153 (1996).

2. Petitioners are on no firmer ground in arguing that, even assuming the SEC can be a Department, the Chairman, not the Commissioners, should be considered its "Head." Br. 60-62. That claim was appropriately rejected by both the majority and the dissent in the court of appeals. See Pet. App. 23a-25a; *id.* at 97a n.24 (Kavanaugh, J., dissenting).

The Commission comprises five individuals appointed by the President by and with the advice and consent of the Senate. 15 U.S.C. 78d(a). As a body, the Commissioners exercise the same kind of final authority that is vested in the single "Head" of a traditional Cabinet department, and the statutory provisions granting rulemaking, investigative, and adjudicative authority uniformly vest that authority in "the Commission," rather than its Chairman.[12] So too it is "the Commission" that

[12] See, *e.g.*, 15 U.S.C. 77s(a) (vesting rulemaking powers under the Securities Act of 1933 in "[t]he Commission"); 15 U.S.C. 77t(a) (same for investigative powers); 15 U.S.C. 78u(a)(1) (vesting authority to investigate violations of the Exchange Act in "[t]he Commission"); 15

is vested with control over the Board. 15 U.S.C. 7217. Treating the Commissioners as the SEC's "Head" therefore is much more natural than saying that the SEC has no "Head," or that its "Head" is a person in whom Congress has *not* vested the agency's final decisionmaking authority. See *Silver* v. *Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) (holding that the Postal Service is a "Department" under the Appointments Clause, and its nine Governors collectively constitute the "Head" for appointment purposes); *Authority of Civil Serv. Comm'n to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933) (opining that the three commissioners of the Civil Service Commission collectively served as "the 'head of a Department' in the constitutional sense"); cf. Classification Act of 1923, ch. 265, § 2, 42 Stat. 1488 ("'the head of the department' means the officer *or group of officers* in the department who are not subordinate or responsible to any other officer of the department") (emphasis added).[13]

U.S.C. 78w(a)(1) (vesting "power to make such rules and regulations as may be necessary or appropriate to implement the provisions of" the Exchange Act in "[t]he Commission" and other agencies).

[13] The Appointments Clause itself refers to "Heads of Departments," without requiring them to be single individuals. It also expressly contemplates that collective bodies may appoint inferior officers, by allowing appointments to be made by "Courts of Law." The Judiciary Act of 1789 provided for the appointment of the Clerk of the Supreme Court by "the Supreme Court," which had six Members. See ch. 40, §§ 1, 7, 1 Stat. 73, 76; see also 28 U.S.C. 671-672 ("Supreme Court" appoints the Clerk and Marshal); 28 U.S.C. 631(a) ("judges of each United States district court" appoint magistrate judges); 28 U.S.C. 152(a)(1) (court of appeals appoints bankruptcy judges); 28 U.S.C. 751(a) ("[e]ach district court" appoints a clerk); 28 U.S.C. 49 (independent counsels appointed by three-judge division of D.C. Circuit).

Petitioners support their contrary view by noting appointments made by the Chairman pursuant to Reorganization Plan No. 10 of 1950 § 1(a), 5 U.S.C. App. at 568. Petitioners assert (Br. 62) that such appointments would be invalid if the Commissioners collectively constituted the "Head" of the SEC.

But well-settled caselaw regarding the Appointments Clause demonstrates the flaw in petitioners' claim. Even assuming that the persons identified by petitioners as appointed by the Chairman are "officers" rather than employees, this Court has long construed the Appointments Clause to permit a person other than the agency head to appoint an inferior officer so long as the appointment is made with the approval or approbation of the agency head. Thus, in *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868), the Court concluded that the Assistant Treasurer (who was not the head of the department) could appoint an inferior officer when the appointment was made "with the approbation" of the Secretary of the Treasury. *Id.* at 392, 393-394; see *United States* v. *Smith*, 124 U.S. 525, 532-533 (1888) (emphasizing that the Secretary's approval in *Hartwell* "rendered [the] appointment one by the head of the department within the constitutional provision upon the subject of the appointing power"); *Germaine*, 99 U.S. at 511.

Consistent with that practice, Reorganization Plan No. 10 of 1950, while giving the Chairman power to appoint SEC personnel, also provided that "[t]he appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission." § 1(b)(2), 5 U.S.C. App. at 568. The provisions pertaining to other agencies cited by petitioners (Br. 62) generally contain similar require-

ments. See 7 U.S.C. 2(a)(6)(A) and (C) (CFTC); Reorganization Plan No. 8 of 1950, § 1(b)(2), 5 U.S.C. App. at 567 (FTC); Reorganization Plan No. 1 of 1980, § 1(b)(1) and (2), 5 U.S.C. App. at 682 (NRC); but cf. 46 U.S.C. 301(c) (requiring Federal Maritime Commission Chairman to "consult[] with the other Commissioners").[14]

III. CONGRESS DID NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES BY CREATING THE BOARD

Petitioners contend that—even if the Board's members are inferior officers whose appointment by the Commission is proper—the Board still violates the Constitution's separation of powers. In petitioners' view, the President lacks adequate control over the Board's exercise of Executive power, either because he cannot directly remove Board members even for cause or because the Commission cannot remove them at will. But petitioners' arguments are misplaced, because the President has constitutionally adequate control over the SEC, and Sarbanes-Oxley provides the SEC, as demonstrated above, with plenary control over the Board's actions.

A. The constitutional sufficiency of the President's control over "independent" agencies has been settled for more than seventy years. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); see also *Wiener* v. *United States*, 357 U.S. 349 (1958). Petitioners do not dispute the constitutionality of independent agencies or

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[14] If this Court were to accept petitioners' argument that the Chairman should be deemed the "Head" of the SEC, that designation would not render the statute unconstitutional. Canons of constitutional avoidance would then dictate that the statutory grant of appointment authority to "the Commission" be deemed a grant to its "Head," the Chairman. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

of the SEC. See Br. 22. Notwithstanding the common understanding that "the President may remove [an SEC] commissioner only for 'inefficiency, neglect of duty or malfeasance in office,'" *SEC* v. *Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)); see also *Freytag*, 501 U.S. at 916 (Scalia, J., concurring in part and concurring in the judgment) (referring to SEC as an "independent regulatory agenc[y]"),[15] petitioners treat the constitutionality of the Commission's ability to enforce the securities laws (and Sarbanes-Oxley) as uncontroverted.[16]

Petitioners thus appear to concede (Br. 43) that the constitutional defects they perceive in the Board's structure "could be solved by * * * vesting the Board's power in the SEC." They do not, however, explain why Congress's decision to create the Board as a separate entity empowered to take steps in the first instance, but all the while subject to comprehensive SEC control, raises distinctions of constitutional significance.

B. 1. Petitioners first argue (Br. 25-28) that the Act violates the Constitution by depriving the President of the authority to remove Board members. It is, of

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[15] This understanding exists even though the provision of the Exchange Act establishing the Commission (15 U.S.C. 78d(a)) does not expressly limit the President's power of removal.

[16] Some of petitioners' amici argue that *Humphrey's Executor* should be overruled (Mountain States Legal Found. Br. 28-33), or that it has been superseded by *Morrison*, which itself should be overruled (Law Profs. Christopher Yoo et al. Br, 18, 22-24). Petitioners do not contend that the Court should overrule *Humphrey's Executor*, and neither does the United States. In the seven decades since that decision, "independent" agencies have become an accepted part of American government. Cf. *Freytag*, 501 U.S. at 921 (Scalia, J., concurring in part and concurring in the judgment) (declining to "adjust[] the remainder of the Constitution to compensate for *Humphrey's Executor*").

course, settled that the President must have the power to remove the heads of departments in the Executive Branch. *E.g.*, *Myers*, 272 U.S. at 134. But this Court has never held that the President must have direct removal authority over *inferior* officers. Pet. App. 17a-18a; see U.S. Const. Art. II, § 2, cl. 2. To the contrary, in discussing the removal of district court clerks in *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), the Court reasoned that the power to remove an inferior officer who was not appointed by the President resided solely with the appointing authority: "the President has certainly no power to remove." *Id.* at 260. And the Court has repeatedly recognized that the power to remove an inferior officer need not be held by the President when Congress has lawfully vested the appointment of that officer in another official. See, *e.g.*, *Morrison*, 487 U.S. at 689 n.27; *Myers*, 272 U.S. at 161-164; *Perkins*, 116 U.S. at 485. Thus the Judge Advocate General, not the President, had the power of removal in *Edmond*, and the Attorney General, not the President, had the power of removal in *Morrison*.

Petitioners rely (Br. 27) on the so-called "Decision of 1789," in which Congress recognized the President's inherent authority to remove the Secretary of Foreign Affairs. The Decision of 1789, however, concerned a principal officer, not an inferior officer. This Court declined to extend the apparent rationale of the Decision of 1789 to the removal of inferior officers in *Ex parte Hennen*, explaining that the congressional debate "related * * * to the power of the President to remove officers *appointed with the concurrence of the Senate:* and the great question was, whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power." 38

U.S. (13 Pet.) at 259 (emphasis added). Nothing in the Decision of 1789 suggests that the President must have authority to remove *inferior* officers whom he has not appointed. See *id.* at 259-260.

Petitioners' removal-power claim thus turns largely on their premise that Board members exercise power akin to that of SEC Commissioners, who are principal officers. But for all the reasons previously given, that premise is mistaken. The SEC, not the Board, is the "Department" of the Executive Branch charged with enforcing the securities laws, and Congress did not violate the Constitution by vesting the SEC, rather than the President, with the power to appoint its inferior officers, including the Board's members. It follows that Congress did not violate the Constitution by vesting the SEC, rather than the President, with the power to remove those inferior officers.

2. Petitioners also find it problematic (Br. 30) that the Commission lacks at-will removal authority and may remove a Board member only for good cause, 15 U.S.C. 7211(e)(6), 7217(d)(3). That objection fails on several grounds.

a. This Court has repeatedly held that the Constitution permits reasonable restrictions on the removal of inferior officers whose appointment Congress has vested in the Courts of Law or the Heads of Departments. As the Court observed in *Morrison*, 487 U.S. at 691, with respect to an inferior officer, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." See also *id.* at 696 (noting that "the power to remove the counsel for 'good cause' * * * provides the Executive with substantial ability to ensure that the laws are 'faithfully executed'"). In *Myers*, the Court distinguished restrictions

placed on the removal of principal officers from those limiting the power to remove inferior officers not appointed by the President, and explicitly approved the latter. See 272 U.S. at 161 ("Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal."); see also *Perkins*, 116 U.S. at 485 (when Congress "vests the appointment of inferior officers in the heads of Departments," it may "limit and restrict the power of removal").

Petitioners do not directly challenge the holdings of those cases that Congress has the power to provide that inferior officers within an Executive agency may be removed only for cause. What petitioners appear to find objectionable (Br. 25 & n.3) is the application of these principles in the context of the SEC. According to petitioners, limitations on the Commission's power to remove Board members are rendered constitutionally problematic because coupled with limitations on the President's power to remove the Commissioners themselves. Presumably, the idea here is that the presence of two layers of "good cause" protection too far removes the actions of the Board from the possibility of presidential control. But this objection, even if potentially persuasive in some contexts, has no force with respect to the specific arrangement that Congress established in Sarbanes-Oxley, which combines constitutionally sufficient presidential control over the SEC with extraordinary control by the SEC over the Board.

Petitioners' arguments cannot succeed if the President has fully effective control, through the SEC, over the Board's activities. As the Court emphasized in *Morrison*, the animating concern of the Court's removal-

power cases is the President's ability to perform his constitutional duties: "The analysis contained in [the Court's] removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." 487 U.S. at 689-690 (footnote omitted). The "real question" in a removal challenge, the Court explained, is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Id.* at 691.

The question, therefore, is not whether two for-cause-removal provisions in the chain of Executive authority are always permissible (surely, they might not be), but only whether they are permissible in the particular context of Sarbanes-Oxley. For while removal is a "powerful tool for control," *Edmond*, 520 U.S. at 664, it is not the only one—and for purposes of assessing the constitutionality of this statute, the critical question is whether the Act, *in toto*, provides the SEC with the ability to control the Board's activities. If the SEC indeed has such control, then the constitutional validity of the President's relationship with the SEC carries over to the Board as well.

In assessing this matter, the numerous mechanisms the SEC possesses to supervise and control the Board must carry great weight. Those mechanisms include the power to review and reject all actions of the Board affecting private parties that have the force of law (rules, requests for subpoenas, and disciplinary orders) before

those actions become effective; to override the Board's non-enforcement decisions by exercising enforcement authority itself; to amend the rules governing the Board's inspections, investigations, and sanctions by imposing more detailed requirements, including prior SEC approval; and to relieve the Board of any of its responsibilities if the Commission concludes that doing so is consistent with the public interest, protection of investors, and other purposes of the Act. The Commission can exercise all those statutory powers to supplant Board decisionmaking on any basis consistent with its own statutory mission, without any need to show "good cause." Cf. Pet. App. 35a (Commission in effect has "at-will removal power over Board functions"). And the Commission also controls the Board's budget, including its members' salaries. As previously argued, the full panoply of these statutory provisions, with or without an at-will-removal provision, gives the SEC comprehensive and fully effective control over all the Board's activities.

Under *Humphrey's Executor*, *supra*, for-cause limitations on the President's power to remove Commissioners adequately preserve his ability to take care that the laws within the Commission's purview be faithfully executed. Under one of those laws, Sarbanes-Oxley, the Commission in turn can control the Board's actions by withdrawing, preempting, or supplanting any aspect of the Board's substantive authority at any time to effectuate the Commission's own understanding of the public interest and the needs of the investing public. A good-cause restriction on the Commission's authority to remove individual Board members therefore does not unconstitutionally impede the President's ability, through the Commission, to take care that Sarbanes-Oxley is

faithfully executed.[17] See Pet. App. 39a ("Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, [petitioners] cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers.").

Contrary to petitioners' contentions (Br. 38-43), the Court's reasoning in *Morrison* underscores the constitutionality of the Board under this analysis. First, just as the Attorney General had the power to remove an independent counsel for good cause (487 U.S. at 663), the SEC has the power to remove the members of the PCAOB for "good cause shown" (15 U.S.C. 7211(e)(6)). Second, while the Attorney General could only *request* that the Special Division appoint an independent counsel, and lacked the authority to choose the particular person for the office (487 U.S. at 661), the SEC itself selects and appoints the Board's members (15 U.S.C. 7211(e)(4)), thereby giving the Commission an important form of *ex ante* control over the Board. Third, while the independent counsel was *generally* required to abide by Justice Department policy (487 U.S. at 662, 696), the PCAOB must abide by the rules, regulations, and orders of the SEC without exception, and the Commission can directly amend or repudiate the Board's rules as it pleases. Fourth, while an investigation by the independent counsel required "the Attorney General and the Justice Department * * * to suspend all investigations and proceedings regarding the [same] matter" (*id.* at

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[17] Petitioners suggest that the affront they perceive to Executive control is made still greater by "[p]rocedural safeguards" associated with the removal of a Board member (Br. 53), but in *Morrison* this Court saw "no constitutional problem" in providing for judicial review of a decision to remove an independent counsel, 487 U.S. at 693 n.33.

662-663), the PCAOB is required to coordinate its investigations "as necessary to protect an ongoing Commission investigation" (15 U.S.C. 7215(b)(4)(A)). Finally, unlike the Attorney General, who had no authority to rescind the jurisdiction of the independent counsel once appointed, the Commission has broad authority to rescind any aspect of the Board's authority at any time, as well as to reject its rules, disciplinary orders, and requests for subpoenas, and to control its litigation.

b. Even looking only at the Commission's power to remove Board members as a means of control, that power is broader than petitioners suggest. Petitioners point out (Br. 30) that two of the three express specifications of grounds for removal of Board members in 15 U.S.C. 7217(d)(3) refer to actions that are taken "willfully." But significantly, one of those two provisions authorizes the Commission to remove a Board member who "has willfully violated any provision of this Act, *the rules of the Board*, or the securities laws." 15 U.S.C. 7217(d)(3)(A) (emphasis added).[18] Because no rule of the Board can go into effect until the Commission approves it and the Commission may thereafter amend any such rule, the Commission has broad authority to prescribe standards for the Board, the willful violation of which would furnish a ground for removal. And "willful" is itself "a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). In the securities context, the term has been interpreted broadly to mean, in effect, *volitional* behavior: even ordinary negligence, in this context, has been deemed "willful" conduct. See, *e.g.*,

[18] The second provision authorizes removal of a Board member who "has willfully abused [his or her] authority." 15 U.S.C. 7217(d)(3)(B).

Wonsover v. *SEC*, 205 F.3d 408, 413-415 (D.C. Cir. 2000) (discussing "willfulness" in the securities context, and upholding the Commission's imposition of sanctions for "willful" conduct based on a broker's negligent failure to conduct a reasonable factual inquiry); see also Pet. App. 37a.

Furthermore, one express ground for removal in Section 7217(d)(3) contains no willfulness requirement at all: it authorizes removal of a member who, "without reasonable justification or excuse," has failed to enforce compliance with any Board rule or professional standard by any registered accounting firm or associated person. 15 U.S.C. 7217(d)(3)(C). That provision affords the Commission broad authority over individual Board members for conduct at the heart of their statutory responsibilities.[19]

Because petitioners failed to present their challenges to the Board's action through the special statutory procedure prescribed by Congress to review actions of the Board that would have the force of law, the SEC had no opportunity to address petitioners' cramped construction of its removal authority. In these circumstances, petitioners' facial constitutional challenge should be evaluated by giving the statute the broadest reading that the Commission could have adopted, rather than by

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[19] Section 7217(d)(3) also does not expressly make its three specified grounds of removal exclusive, and the Act could be construed to permit other grounds, if necessary to avoid constitutional difficulties. See *Edmond*, 520 U.S. at 658 (rejecting interpretation that would render appointment provision unconstitutional); *Bowsher*, 478 U.S. at 729 (questioning the dissent's premise that "the enumeration of certain specified causes of removal excludes the possibility of removal for other causes").

accepting petitioners' unnaturally restrictive construction.[20]

c. In sum, the Commission has ample authority to control every aspect of the Board's operations, through the combined force of its substantive control and removal authority. That authority, which is subject to the President's own constitutionally sufficient control over the SEC, as determined in *Humphrey's Executor*, preserves the President's ability to take care that the laws under which the Board plays a role will be faithfully executed.

3. Petitioners seek (Br. 19-20, 30-34) to buttress their separation-of-powers claim with the unwarranted suggestion that the Board is unusually susceptible to congressional influence. Nothing in Title I of Sarbanes-Oxley evinces an attempt by Congress to aggrandize its own power at the expense of the Executive. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989); *Morrison*, 487 U.S. at 694. Congress has not, for example, sought to appoint its own officers to execute the laws (cf. *Metropolitan Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)),

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[20] If the Court were to conclude that a broad construction of "good cause" in Section 7211(e)(6) is impossible or insufficient to avoid a constitutional problem, then it could sever the grounds for removal in Section 7217(d)(3) or the "good cause" provision in Section 7211(e)(6). That would cleanly eliminate the "double for-cause removal statute." Pet. App. 80a (Kavanaugh, J., dissenting). The resulting augmentation of the Commission's already-considerable powers over the Board would be far more consistent with Congress's intentions than any broader invalidation of the Act. See *United States* v. *Booker*, 543 U.S. 220, 246 (2005); cf. *Bowsher*, 478 U.S. at 734-735 (using statutory fallback provision to invalidate more than removal power in light of evidence that "striking the removal provisions would lead to a statute that Congress would probably have refused to adopt").

to retain removal power for itself (cf. *Bowsher*, 478 U.S. at 726), or to assert control over the execution of the laws without acting through bicameralism and presentment (cf. *Chadha*, *supra*).

Indeed, the Board enjoys certain protections from congressional influence that many federal agencies do not. Most notably, the Board does not depend on Congress for regular approval of its budget, because that function is discharged by the Commission itself, 15 U.S.C. 7219(b). Thus, the significant influence that Congress would typically exercise through the appropriations process is instead exercised by the Commission.

Petitioners suggest that Congress has effectively given itself—or at least the Senate—a "veto power" (Br. 31) over the President's ability to remove Board members, hypothesizing a sequence (*id.* at 31-34) in which the President directs the Commission to remove a Board member; the Commission refuses to do so; the President removes the objecting Commissioners; the President's nominees to replace the Commissioners languish in the Senate; and, in the meantime, no action is taken with regard to the Board member or the Board's conduct. But petitioners' Rube Goldberg construct is no more a "veto" of the President's authority than a host of scenarios in which Congress could frustrate the President's appointments or proposals. If the Senate's power to advise and consent to replacement SEC Commissioners is a potential "veto" of the President's supervision (through the Commission) of the Board, that power is just as much a potential "veto" of the President's supervision of the Commission's own enforcement of the securities laws. Thus, that power of the Senate is simply an example of the permissible checks and balances that prevent the three Branches of government from being

"'hermetically' sealed from one another." *Chadha*, 462 U.S. at 951.

As the court of appeals concluded, "[t]he bulk of [petitioners'] challenge to the Act was fought—and lost—over seventy years ago" when *Humphrey's Executor* validated for-cause-removal restrictions for certain officers appointed by the President by and with the Senate's advice and consent. Pet. App. 39a-40a. Once the validity of the SEC is accepted, there is no basis for overturning Congress's decision to lodge certain matters relating to its expertise in an entity entirely subject to its supervision and control.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with directions to dismiss the complaint. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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