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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In the Sarbanes-Oxley Act of 2002, 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 (SEC). The questions 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.

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

3. Whether Congress violated the separation of powers by entrusting the regulation of the accounting industry to the Board, subject to oversight and control by the SEC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Constitution, statutes and regulations: Page

Statutes and regulations—Continued: Page

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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 order and opinion of the district court (Pet. App. 105a-117a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued 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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) but, as explained below, because the district

court lacked jurisdiction, this Court lacks jurisdiction to decide the merits of petitioners' constitutional claims.

STATEMENT

1. a. In the wake of the accounting debacles at Enron, Worldcom, and other prominent public companies, Congress created the Public Company Accounting Oversight Board (Board or PCAOB) as part of the Sarbanes-Oxley Act of 2002 (Act). See Pub. L. No. 107-204, 116 Stat. 745. 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). Accounting firms that serve publicly traded companies must register with the Board and comply with auditing, quality control, and ethics standards issued by the Board. 15 U.S.C. 7212(a), 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). The Board is also authorized to investigate conduct by registered firms and their associated persons that may violate the Act, other securities laws, or its own rules or those of the Securities and Exchange Commission (SEC or Commission). 15 U.S.C. 7215(b). Based on the results of such investigations, the Board may initiate proceedings to impose disciplinary sanctions. 15 U.S.C. 7215(c).

b. Congress patterned the Board on the so-called self-regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), see S. Rep. No. 205,

107th Cong., 2d Sess. 12 (2002),[1] that have regulated the securities markets under close government supervision for more than half a century. See generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). The regulatory authority exercised by SROs under the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, 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).

In drawing on that existing model of financial regulation, Congress specifically incorporated many of the provisions of the Exchange Act that govern the SROs. Congress also granted the Commission additional powers over the Board that the Commission does not possess with respect to the SROs.

c. The Commission enjoys comprehensive control over every aspect of the Board and its activities. Every rule and ethical standard issued by the Board, including rules governing the initiation and conduct of Board investigations, must be approved in advance by the Commission. 15 U.S.C. 7217(b). The SEC is empowered at any time to abrogate, add to, or delete from the Board's rules in any respect the Commission may deem necessary or appropriate to ensure the fair administration of the Board, to conform the Board's rules to the requirements of the Sarbanes-Oxley Act, or otherwise to further the purposes of that Act or the securities laws. 15 U.S.C. 78s(c), incorporated and modified by 15 U.S.C. 7217(b)(5).

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[1] In July 2007, those organizations merged their regulatory functions to create the Financial Industry Regulatory Authority (FINRA). See http://www.finra.org (visited Apr. 6, 2009).

The Board's powers of investigation and enforcement are likewise controlled by the Commission. The Board's rules governing the timing, initiation, scope, and conduct of investigations, like other Board rules, must be approved by the Commission in advance and may be modified by the Commission at any time. 15 U.S.C. 7215(b); 15 U.S.C. 78s(c), incorporated and modified by 15 U.S.C. 7217(b)(5). In addition, the Board is required to notify the SEC of investigations of potential violations of the securities laws, and to coordinate with the SEC to the extent there is a simultaneous SEC investigation. 15 U.S.C. 7215(b)(4). The Board lacks independent subpoena authority, and must apply to the SEC for a subpoena when it seeks to compel documents or testimony from any person. 15 U.S.C. 7215(b)(2)(D); compare 15 U.S.C. 78u(d) (SEC power of subpoena). Final inspection reports are subject to review before the SEC at the request of the investigated party. 15 U.S.C. 7214(h)(1).

Disciplinary sanctions imposed by the Board are subject to de novo review by the Commission, including an opportunity for a hearing before the Commission. 15 U.S.C. 78s(e)(1), as incorporated by 15 U.S.C. 7217(c)(2). The Commission may institute review of a disciplinary sanction on its own motion. 15 U.S.C. 78s(d)(2), as incorporated by 15 U.S.C. 7217(c)(2). An application to the SEC for review of a sanction, or the institution of review by the SEC on its own motion, operates as an automatic stay of the disciplinary sanction. 15 U.S.C. 7215(e). If the Commission affirms the Board's findings, it may affirm or modify the sanctions imposed by the Board, or remand for further consideration. See 15 U.S.C. 78s(e)(1)(A), as incorporated by 15 U.S.C. 7217(c)(2). If the SEC does not affirm the finding of wrongdoing, the sanction must be set aside. 15

U.S.C. 78s(e)(1)(B), as incorporated by 15 U.S.C. 7217(c)(2). In addition, the SEC may "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board" if the Commission concludes that the Board's proposed sanction "is not necessary or appropriate" under the Act 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)(A) and (B).

The Commission also has the authority to remove or publicly censure any member of the PCAOB "for good cause shown before the expiration of the term of that member." 15 U.S.C. 7211(e)(6); see 15 U.S.C. 7217(d)(3). In addition to its power to remove individual PCAOB members, the Commission is empowered to rescind, in whole or in part, any aspect of the PCAOB'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 securities laws. 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.").

The Commission also possesses control over the Board's annual budget. 15 U.S.C. 7219(b). The Commission may inspect the Board's records at any time. 15 U.S.C. 78q(b)(1), as incorporated by 15 U.S.C. 7217(a). The Board's exercise of its "sue and be sued" authority is also subject to SEC control: the Board cannot appear

in court without the approval of the Commission. 15 U.S.C. 7211(f)(1).[2]

Finally, the Act grants the Commission affirmative authority in its own right 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). Pursuant to those powers, "the Commission is empowered to modify the Board's investigative authority as it sees fit and may mandate that all decisions regarding investigation or enforcement actions against a firm be approved by the Commission." Pet. App. 19a.

2. Petitioners, a non-profit organization and an accounting firm, filed in federal district court this facial challenge to the Act's provisions concerning the Board. Pet. App. 106a-117a. At the time of the filing of the complaint, petitioner Beckstead & Watts was the subject of an ongoing formal investigation by the Board. C.A. App. A27 (para. 79). Petitioners contended that the Act violates the Appointments Clause, the constitutional separation of powers, and non-delegation principles, because the Act allegedly does not permit adequate Presidential control over the Board. Pet. App. 106a; *id.* at 4a. The United States intervened to defend the constitutionality of the Act. *Id.* at 8a, 106a.

The district court, after concluding that it possessed jurisdiction despite the exclusive review procedures in the Act and petitioners' failure to exhaust administrative remedies, Pet. App. 110a-111a, granted respondents' motion for summary judgment. *Id.* at 110a-117a. The

[2] Indeed, the Commission approved the Board's defense of this case, and the General Counsel of the Commission has reviewed and approved the briefs filed by the Board, including the Board's response to the petition in this Court.

court observed that petitioners' facial challenge "present[s] nothing but a[] hypothetical scenario of an overzealous or rogue PCAOB investigator," noting that petitioners had no answer to respondents' position that, "if such a scenario became real, the SEC could change the rules to prevent improper investigations or remove PCAOB members for 'good cause.'" *Id.* at 116a-117a. In addition, with respect to petitioners' claim that the Board members should have been appointed by the SEC Chairman rather than by the entire Commission, the district court held that petitioners lacked standing. *Id.* at 114a.

3. a. The court of appeals affirmed. Pet. App. 3a-104a. The court first concluded that the district court possessed jurisdiction, despite petitioners' failure to exhaust the Act's statutory review procedures. The court reasoned that the judicial review procedures available under the Act are limited to challenges to an "order" or a "rule," *id.* at 9a, and that petitioners' facial challenge was a "collateral" one that was "not properly viewed as a circumvention of the Act's review procedures." *Id.* at 10a (internal quotation marks omitted).

The court 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 advice and consent of the Senate. Pet. App. 11a-20a. The court emphasized that Board members, like the Coast Guard judges in *Edmond* v. *United States*, 520 U.S. 651 (1997), "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." Pet. App. 13a (quoting *Edmond*, 520 U.S. at 665). "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 who may be appointed by the "Head[]" of a "Department[]" under the Appointments Clause. *Id.* at 20a. The court likewise found no merit in petitioners' claims that the Commission is not a "Department" for purposes of the Appointments Clause, *id.* at 21a-23a, or that the five members of the Commission are not the "Head[]" of the SEC, *id.* at 23a-25a.

Turning to petitioners' general separation-of-powers argument, Pet. App. 26a-37a, the court rejected efforts to characterize the Board as an agency independent of the Commission, *id.* at 29a-30a & n.9, resulting in an "excessive attenuation of Presidential control." *Id.* at 26a. The court reasoned that petitioners' arguments are "undercut by the vast degree of Commission control at every significant step." *Id.* at 36a. Comparing the Commission's "extraordinary" (*id.* at 7a), "pervasive" (*id.* at 30a), and "exhaustive" (*id.* at 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).

Nor did the court find any merit in petitioners' arguments regarding the removal power. The court explained that petitioners' insistence that the President must have direct removal authority over all executive officers, including "inferior" officers such as PCAOB members, has no basis in law. Pet. App. 17a (citing, *e.g.*,

United States v. *Perkins*, 116 U.S. 483 (1886)), 36a. And in light of the Commission's pervasive control over the Board—including its power to rescind any aspect of the Board's enforcement authority at any time—the court reasoned that the "good cause" limitation on the Commission's authority to remove PCAOB members raises no concerns of constitutional dimension. *Id.* at 30a. The court concluded: "Given the constitutionality of independent agencies and the Commission's comprehensive control over the Board, the Fund cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers." *Id.* at 39a.[3]

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 would have held that the Act violates the Appointments Clause. *Id.* at 80a-97a. He concluded that the Board members are "principal" officers because, in his view, the SEC lacks sufficient authority to remove them or affirmatively to manage their activities. *Id.* at 90a-97a. With respect to petitioners' argument that the SEC cannot appoint inferior officers because it is not a "Department[]" and its five Commissioners collectively are not the "Head[]" of a "Department[]," Judge Kavanaugh noted that, while he did not reach the issue, he "generally agree[d] with the majority opinion that [petitioners'] submission is inconsistent with current Supreme Court precedents." *Id.* at 97a n.24.

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[3] Petitioners did not pursue their non-delegation claim on appeal. Pet. App. 9a.

ARGUMENT

Petitioners renew their claims (Pet. i, 7-35) that the Sarbanes-Oxley Act of 2002 violates the Appointments Clause and the separation of powers. The decision below is correct, however, and, as petitioners acknowledge (Pet. 13), it does not conflict with the decision of any other court of appeals. Under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the President's control over the SEC is constitutionally sufficient, and the Act in turn grants the SEC complete and pervasive control over every aspect of the Board's authority and operations. The court of appeals thus rightly observed that "[t]he bulk of [petitioners'] challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor*." Pet. App. 39a-40a. In any event, this case would be a poor vehicle for reviewing petitioners' facial constitutional challenges, given that petitioners did not exhaust their administrative remedies. That failure deprived the district court of jurisdiction and, at the least, prevented the SEC from issuing an authoritative ruling on important statutory questions that underlie petitioners' challenge. Further review is not warranted.

I. REVIEW IS NOT WARRANTED BECAUSE THE DISTRICT COURT LACKED JURISDICTION AND, IN ANY EVENT, THIS CASE IS A POOR VEHICLE FOR REVIEW OF THE CONSTITUTIONAL QUESTIONS PETITIONERS SEEK TO PRESENT

A. As an initial matter, this Court's review is not warranted because petitioners failed to exhaust administrative remedies before the Commission. The courts below consequently lacked jurisdiction over the action.

Since the enactment of the Exchange Act in 1934, the federal securities laws have provided the exclusive mechanism for parties aggrieved by self-regulatory organizations to obtain judicial review. That procedure, set forth in Sections 19 and 25 of the Exchange Act, 15 U.S.C. 78s(b) and 78y(a)-(b), guarantees the Commission an opportunity to address the questions presented in an authoritative order or ruling, subject to direct review in the court of appeals. *Ibid.* 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); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *NASD*, 616 F.2d 1363, 1370 (5th Cir. 1980); *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690, 696 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

Modeling the Board on the SROs, Congress made the same judicial-review procedures applicable to the Board. See, *e.g.*, 15 U.S.C. 7217(b)(4) and (c). It is undisputed that petitioner Beckstead & Watts, the only identified member of the organizational petitioner Free Enterprise Fund before the Court, *could* have availed itself of that avenue of review. For example, Beckstead & Watts or another regulated firm could have sought Commission review of the claim that "burdensome" auditing standards adopted by the Board "have imposed substantial compliance costs" and caused the loss of clients, see C.A. App. A24 (paras. 62-64), A26 (paras. 72-73), and raised any constitutional objections before the Commission and on judicial review, see 15 U.S.C. 7217(b)(4) & (5); 15 U.S.C. 78s(b)(1) & (c), 78y(a) & (b). Likewise, Beckstead & Watts or another firm may seek de novo review by the Commission of any adverse action imposed by the Board, followed by judicial review in the court of

appeals. See 15 U.S.C. 7217(c)(2); 15 U.S.C. 78s(d)(2), 78y(a). Instead, petitioners brought this collateral challenge to the Board's ongoing investigation of petitioner Beckstead & Watts, seeking a court order enjoining that investigation and "nullifying and voiding any prior adverse action against [it]." C.A. App. 31 (prayer for relief).

In the courts below, petitioners justified their decision to proceed directly to district court on the ground that their lawsuit does not challenge any specific action or rule of the PCAOB. See Pet. App. 11a. But petitioners are not free to disregard the statutory review process established by Congress and, instead, assert facial challenges in district court untethered to particular claims of injury. As this Court explained in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), even if an agency cannot rule on the merits of a constitutional challenge to the statute it administers, a regulated firm cannot bypass exclusive administrative review procedures established by Congress as long as its constitutional claims can be "meaningfully addressed in the Court of Appeals" after administrative review. *Id.* at 215. Here, it is undisputed that judicial review of constitutional claims—including structural constitutional claims—*is* available on petition for review from decisions of the SEC. See, *e.g.*, *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-106 (1946) (addressing structural non-delegation claim on review from Commission); *Blinder, Robinson & Co.* v. *SEC*, 837 F.2d 1099, 1103-1109 (D.C. Cir.) (separation of powers, structural due process, and Fourth Amendment), cert. denied, 488 U.S. 869 (1988); *Sorrell* v. *SEC*, 679 F.2d 1323, 1325-1326 (9th Cir. 1982) (non-delegation challenge to NASD); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. de-

nied, 344 U.S. 855 (1952). And, in a directly relevant context, at least one court has directed dismissal, for failure to exhaust administrative remedies under the Exchange Act, of a lawsuit asserting a non-delegation claim against the NASD. See *First Jersey Securities*, 605 F.2d at 696.

In addition, although the issue was not addressed by the courts below, the jurisdictional defects in petitioners' complaint are underscored by their implicit invitation to the lower courts to create a new cause of action on their behalf. See Gov't C.A. Br. 22-23. The PCAOB is not "an agency or establishment of the United States Government," 15 U.S.C. 7211(b), and petitioners accordingly do not invoke the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*; in any event, steps taken in an agency investigation are not final agency action reviewable under the APA, see *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). Rather, petitioners assert that their cause of action is one implied directly under the Constitution. Pet. C.A. Reply 22. The federal courts should not entertain requests to create implied remedies against quasi-governmental agencies when Congress has expressly provided a mechanism for judicial review. See *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 67-68 (2001) (availability of remedial scheme provided by Congress obviates need to fashion new, judicially created remedy). None of this Court's previous cases involving Appointments Clause and removal-power claims featured a free-floating facial challenge of the kind petitioners press here. Instead, each arose through established statutory mechanisms or as defenses to enforcement actions. *E.g.*, *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); *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).

Because the district court lacked jurisdiction over petitioners' claims, this Court could not reach the merits of the questions presented in the petition, even if review of those questions were otherwise warranted. See, *e.g.*, *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). That jurisdictional bar warrants denial of the certiorari petition. At the least, the presence of this threshold question—which does not itself warrant this Court's review—makes this case a poor vehicle for reviewing petitioners' constitutional claims.

B. In any event, even assuming that the district court possessed jurisdiction, this is an unsuitable vehicle to review petitioners' claims.

Important statutory-interpretation questions with respect to the scope of the SEC's authority over the Board underlie petitioners' freestanding constitutional challenge. Petitioners base their facial constitutional challenge on their own answers to those statutory questions, premising their claims on the contention that the Act "strip[s] the President of all power to appoint, remove or otherwise supervise the members" of the Board. Pet. 1. If petitioners had presented their separation-of-powers challenges to the Commission, the federal courts would then have the benefit of the Commission's authoritative construction of the Act, which could well be material to petitioners' myriad contentions regarding the relative authority of the Commission and the Board—including, for example, the circumstances in which the

Commission may properly exercise its power to remove Board members. See Pet. App. 18a (observing that "the Commission could broadly interpret its removal authority in order to ensure that the Board conforms to its policies"); see *id.* at 28a & n.8 (noting that this Court has broadly interpreted for-cause removal powers).

By bringing their claims directly in federal district court, petitioners deprived the Commission of the opportunity to consider those arguments and, if necessary, to construe its own powers under the Act in light of the asserted constitutional defects. 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."). Indeed, as the majority below observed, the dissent reached its conclusion by "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 (internal citations omitted). That is precisely the opposite of what this Court has counseled. See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, No. 07-1372 (Mar. 31, 2009), slip op. 11-12. ("[T]he canon of constitutional avoidance 'is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.'") (quoting *Clark* v. *Martinez*, 543 U.S. 371, 381-382 (2005)). Had the questions at issue here been brought before the Commission in the first instance, it could have made clear that it does not read the statute in this unnatural and constitutionally problematic way.

Moreover, the antecedent statutory questions are not independently worthy of certiorari. Indeed, although petitioners advert to statutory-interpretation claims at the end of their petition (Pet. 35-37), they do not seek independent review of those questions. See Pet. i (presenting only constitutional questions). Because resolution of those antecedent questions of statutory authority is necessary to intelligent resolution of the constitutional questions in this case—and because petitioners could prevail on their facial challenge only if the statute is incapable of being construed in a manner to make it constitutional—this Court should not consider the issues petitioners present at least until the Commission has opined on its construction of the Act.

Accordingly, this Court's review of the questions that petitioners seek to pose is premature. If, in an appropriate future case in which a regulated person invokes the Act's review procedures, the SEC interprets its statutory authority over the Board in such a way as to call the constitutionality of the Act into question, there would be time enough for this Court to review the relevant constitutional questions.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' APPOINTMENTS CLAUSE CLAIM

Petitioners contend (*e.g.*, Pet. 27) that members of the PCAOB are principal officers under the Constitution who can only be appointed by the President with the advice and consent of the Senate. The court of appeals correctly rejected that claim, holding that Board members are "inferior" officers. That conclusion represents an unremarkable application of the principles established by this Court in *Edmond* v. *United States*, 520 U.S. 651 (1997). No further review is warranted.

A. The Appointments Clause provides that 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.[4] "Generally speaking, 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." *Edmond*, 520 U.S. at 662. Accordingly, this Court has explained that an inferior officer is one "whose 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 analysis, the Board members are "inferior" officers, as they are in every respect subordinate to the SEC. As the court below observed, "[t]he Commission's authority over the Board is explicit and comprehensive. Indeed, it is extraordinary." Pet. App. 7a (internal citations omitted). Every auditing standard, ethics rule, or other rule or modification of a rule promulgated by the Board must be approved by the Commission, 15 U.S.C. 7217(b), and "[n]o rule of the Board shall become effective without prior approval of the Commission," 15 U.S.C. 7217(b)(2). If the Commission becomes dissatisfied with the operation of a Board rule in practice, it is empowered at any time to abrogate, add to, or delete from the rules of the Board as the Commission deems necessary or appropriate to insure the fair administration of the Board (in the Commission's judg-

[4] All parties agree that the Board is a governmental entity for purposes of the Constitution, see *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), and that Board members are "Officers of the United States," see *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976). See Pet. App. 112a; Pet. 7 n.1.

ment), to conform the Board's rules to the requirements of the Act (as interpreted by the Commission), or otherwise to advance the purposes of the Act, the securities laws, or the rules and regulations thereunder (again, as interpreted by the Commission). 15 U.S.C. 78s(c), incorporated and modified by 15 U.S.C. 7217(b)(5). The Commission also retains concurrent authority to adopt and enforce its own rules relating to accounting and audits. 15 U.S.C. 7202(c), 7218(c). Similarly, every disciplinary action taken by the Board is subject to automatic stay and de novo review by the Commission, which the Commission may institute on its own motion. See 15 U.S.C. 78s(d)(2) and (e)(1), incorporated by 15 U.S.C. 7217(c)(2); 15 U.S.C. 7215(e).

Nor is the Commission's power over the Board limited to substantive review of the Board's decisions. The Commission may remove or publicly censure Board members for good cause. 15 U.S.C. 7211(e)(6); 15 U.S.C. 7217(d)(3). It controls the Board's annual budget, 15 U.S.C. 7219(b), including the annual fee that funds its operations, 15 U.S.C. 7219(d)(1). The Commission must approve any request by the Board to issue a subpoena to any person. 15 U.S.C. 7215(b)(2)(D). Even the Board's sue-and-be-sued authority is subject to SEC control: the Board cannot appear in court to defend its rules or decisions without the express approval of the Commission. See 15 U.S.C. 7211(f)(1).

And on top of those and other supervisory powers, the Act grants the Commission the authority to rescind, in whole or in part, *any* aspect of the Board's enforcement authority at any time, based on the Commission's own judgment of what is necessary to protect the public and advance the purposes of the securities laws. 15 U.S.C. 7217(d)(1).

In light of those provisions, the court of appeals properly concluded that Board members are "directed and supervised" by other Executive officers, and consequently are "inferior officers" under *Edmond*. See 520 U.S. at 663.

B. Petitioners nevertheless contend that Board members are principal officers who "exercise extraordinary autonomy and power." Pet. 28. That contention disregards the statutory scheme. Like the Coast Guard judges in *Edmond*, 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." Pet. App. 13a (quoting *Edmond*, 520 U.S. at 665). As the court of appeals observed, neither petitioners nor the dissenting judge could identify a single 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 not subject to de novo review by the Commission—review that the Commission can initiate on its own motion. *Id.* at 39a.

Nonetheless, petitioners contend that Board members exercise independent authority equivalent to that of United States district court judges or the Director of the Central Intelligence Agency (CIA), Pet. 29, urging that "a definition of inferior officer which ensnares such autonomous and powerful officials must be wrong." Pet. 31. Such comparisons only highlight the extent to which petitioners' arguments are divorced from the actual provisions of the Act and the reasoning of the court below. No superior officer enjoys authority over the CIA Director or federal district judges that is remotely analogous to the "extraordinary" (Pet. App. 7a), "pervasive" (*id.* at 30a), and "exhaustive" (*id.* at 39a) control that the Commission exercises over the PCAOB. Final judgments of

district courts may be subject to appellate review, for example, but no court of appeals is empowered permanently to withdraw any aspect of the district court's enforcement authority at any time. Compare 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.").

C. Petitioners also briefly renew their claim (Pet. 38-39) that the Commission is not a "Department" under the Appointments Clause. See Pet. App. 21a-23a. Even the dissent below expressed skepticism of that claim, *id.* at 97a n.24, and for good reason. The SEC is the principal federal agency charged with execution of the securities laws. Like the Cabinet Departments, the Commission is subject only to the oversight of the President, without being subordinated to (or contained within) another component of the Executive Branch. Although this Court in *Freytag* left open the question whether principal non-Cabinet agencies such as the Commission are "Departments," see 501 U.S. at 887 n.4, Justice Scalia, in a concurring opinion joined by three other Justices, persuasively explained that the term should be understood to encompass "all agencies immediately below the President in the organizational structure of the Executive Branch," including "all independent executive establishments." *Id.* at 918-919 (Scalia, J., concurring in part and concurring in the judgment). As Justice Scalia observed, it would be "a most implausible disposition" to create a system in which all inferior officers within non-Cabinet agencies could not be appointed by their immediate superiors, but instead "must be appointed by the President, the courts of law, or the 'Secretary of Something Else.'" *Id.* at 919-920. Accord *Silver* v. *USPS*,

951 F.2d 1033, 1038 (9th Cir. 1991) (per curiam) (Postal Service is a "Department" under the Appointments Clause).[5]

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' SEPARATION-OF-POWERS CLAIM

Petitioners also contend (Pet. 14-27) that the Act violates more general separation-of-powers principles. But, as the court of appeals explained, "[g]iven the constitutionality of independent agencies and the Commission's comprehensive control over the Board, the Fund cannot show that the statutory scheme so restricts the President's control over the Board as to violate separation of powers." Pet. App. 39a. That conclusion is correct, and further review is not warranted.

A. In essence, petitioners contend that the Board is unconstitutional because the President lacks adequate control over the Board's exercise of Executive power. See, *e.g.*, Pet. 9. But under the Court's decision in *Humphrey's Executor*, 295 U.S. at 632, the President's control over the Commission's administration of the securities laws satisfies the Constitution. Because the Act in turn gives the Commission complete and pervasive control over the Board's authority and operations, the

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[5] Likewise, the court of appeals correctly rejected petitioners' claim (Pet. 38-39) that the chairman of the SEC, not the Commission as a whole, is the relevant "Head" under the Appointments Clause. See Pet. App. 23a-26a. As the dissent noted, "both text and longstanding Executive Branch interpretation confirm that the head of a department can consist of multiple persons." *Id.* at 97a n.24 (citing *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 151-153 (1996), and *Authority of Civil Service Commission to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933)); see also *Silver*, 951 F.2d at 1038-1039.

President's control over the Board satisfies the requirements of the Constitution.

As the court of appeals concluded, petitioners' arguments that the Board has too much independence are "undercut by the vast degree of Commission control at every significant step." Pet. App. 36a. As discussed above, see pp. 3-6, 17-19, *supra*, every auditing standard, ethics rule, or other rule or modification of a rule promulgated by the Board must be approved by the Commission before it can take effect. Every disciplinary action taken by the Board is subject to automatic stay and de novo review by the Commission. The Commission can abrogate, add to, or delete from the Board's rules at any time, for any reason sufficient in the Commission's judgment. It can remove Board members for good cause. Cf. *Morrison*, 487 U.S. at 692 (upholding "good cause" removal provision that retains for the Executive "ample authority to assure that [the inferior officer] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of [governing law]"). It controls the Board's budget. It decides when the Board may issue subpoenas. It decides when the Board may file suit in court, and what arguments the Board may make when it is sued. And the Commission is authorized to rescind, in whole or in part, any aspect of the Board's enforcement authority at any time, based on the Commission's own judgment of what is necessary to protect the public and advance the purposes of the securities laws. 15 U.S.C. 7217(d)(1). The court below appropriately described this last power

as effectively "at-will removal power over Board functions." Pet. App. 35a.[6]

Even apart from those provisions, moreover, Congress granted to the SEC general "oversight and enforcement authority over the Board," 15 U.S.C. 7217(a) (incorporating 15 U.S.C. 78q(a)(1) and (b)(1)), as well as sweeping rulemaking powers of its own under the Act. See 15 U.S.C. 7202(a) ("The Commission shall promulgate 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."). As the court below recognized, those provisions grant the SEC authority, for example, "to modify the Board's investigative authority as it sees fit and [to] mandate that all decisions regarding investigation or enforcement actions against a firm be approved by the Commission." Pet. App. 19a. Indeed, the Commission has already exercised its authority under those provisions to impose additional transparency requirements on the Board, restrict the Board's budgetary discretion, and enhance the Commission's powers of oversight.[7]

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[6] Petitioners argue that the SEC's power to withdraw the Board's enforcement authority is irrelevant because it is "wholly unexercised" and thus "theoretical." Pet. 26-27. But it is the "*power* to remove," not its exercise, that "is a powerful tool for control." *Edmond*, 520 U.S. at 664 (emphasis added); see *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986) (noting that the removal power need not be exercised to exert control). The Board operates on a daily basis in the knowledge that if it strays from the Commission's guidance and instructions, it risks the loss of its regulatory authority. That is a potent tool for control, particularly in conjunction with the Commission's authority to remove Board members for good cause.

[7] For example, in July 2006 the Commission issued a detailed regulation establishing rules and timetables for its review of the Board's annual budget, see 17 C.F.R. 202.11, including explicit restrictions on

Against this background, the court of appeals correctly held that the statutory scheme does not, "taken as a whole, violate[] the principle of separation of powers by unduly interfering with the role of the Executive Branch." *Morrison*, 487 U.S. at 693. As the majority below concluded, "[t]he bulk of the Fund's challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey's Executor*." Pet. App. 39a-40a.

B. As the court of appeals recognized, the hyperbole that pervades petitioners' arguments is thus misplaced. See Pet. App. 32a n.11 ("The 'sky is falling' approach to the Board's separation of powers implications is an exaggerated response to a relatively insignificant innovation."). Petitioners assert, for example, that the PCAOB represents a "wholly unprecedented" regulatory structure that presages a "sea change in the structure of the federal government." Pet. 7. In fact, as already explained, see pp. 2-3, 11, *supra*, Congress patterned the Board on the so-called self-regulatory organizations, such as the National Association of Securities Dealers and the New York Stock Exchange, that have long regulated the securities markets under government supervision. See generally *Gordon* v. *NYSE*, 422 U.S. 659, 663-667 (1975). Those organizations, and their critical roles in federal securities regulation, have been recognized in

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the Board's ability to depart from limits approved by the Commission or to reprogram funds for different purposes, 17 C.F.R. 202.11(e). Further, in connection with approving individual budgets, the Commission has directed additional actions for the Board, including directing the Board to produce a revised budgetary plan with additional information and prohibiting the Board from increasing the salaries of the Board members by more than a specified percentage. See 72 Fed. Reg. 73,051, 73,052 (2007).

federal law since the enactment of the Exchange Act in the 1930s, which required registration and provided for close SEC oversight. *E.g.*, 15 U.S.C. 78f.

In the Sarbanes-Oxley Act of 2002, Congress drew on that familiar model to provide regulation for the accounting industry, including the SEC's comprehensive oversight authority. See S. Rep. No. 205, *supra*, at 12. Indeed, in many instances, Congress simply incorporated by reference the provisions of the Exchange Act that govern the SROs. See, *e.g.*, 15 U.S.C. 78q(b)(1) (SEC's power to examine organization's records at any time), incorporated by 15 U.S.C. 7217(a); 15 U.S.C. 78s(c) (SEC's power to abrogate, add to, or delete from the rules of an SRO at any time), incorporated and modified by 15 U.S.C. 7217(b)(5). In addition, Congress gave the Commission new, broader powers over the Board that it does not possess with respect to the SROs, such as the ability to withdraw any aspect of the Board's enforcement authority at any time. 15 U.S.C. 7217(d)(1). Even more so than the SROs, therefore, the Board exercises power that is "entirely derivative" and "ultimately belongs to the SEC." *NASD* v. *SEC*, 431 F.3d 803, 806 (D.C. Cir. 2005).

There is thus no basis for petitioners' insistence that Congress established the PCAOB as a "wholly unprecedented" entity (Pet. 7) in order "to test the outer boundaries of its ability to reduce Presidential power" (Pet. 8).[8] Rather, Congress borrowed an existing regulatory

[8] Petitioners selectively quote a statement by former Senator Gramm during congressional floor debates in suggesting that the Act grants the Board "massive power, unchecked power, by design." Pet. 2 (quoting 148 Cong. Rec. 12,119 (2002)). In fact, Senator Gramm specifically noted during the same floor speech that the bill provided for oversight by the Commission. See 148 Cong. Rec. at 12,120 (explaining

model in the financial industry and ramped it up to guarantee complete and pervasive SEC control over the Board's policies and activities. Congress had no reason to believe that approach was improper, given the constitutional validity of the Commission itself under *Humphrey's Executor*.

C. Petitioners also argue (*e.g.*, Pet. 20) that the Act violates the Constitution by "completely strip[ping]" the President's power of removal. But, as the court of appeals explained (Pet. App. 17a-18a), this Court has never held that the Constitution requires that the President have direct removal authority over *inferior* officers, such as the PCAOB members. See, *e.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-260 (1839). Indeed, were the rule otherwise, *Morrison* would have had to come out the opposite way.

Nor, as the court of appeals correctly concluded (Pet. App. 17a), does the Constitution preclude Congress from imposing at least some restrictions on the removal of inferior officers. See *Morrison*, 487 U.S. at 690 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 ha[s] removed from the usual procedure of Presidential appoint-

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that "to meet the constitutional test, the SEC has to have authority over it"). As the Senate committee report ultimately explained: "The Board is subject to SEC oversight and review to assure that the Board's policies are consistent with the administration of the federal securities laws, and to protect the rights of accounting firms and individuals subject to the Board's jurisdiction." S. Rep. No. 205, *supra*, at 12; *ibid.* ("The SEC can relieve the Board of any responsibility to enforce any provision of the bill, or censure or limit operations of the Board, or remove a Board member, for cause.").

ment with Senate consent, could be restricted, at least where the appointment had been made by an officer of the Executive Branch"). Even in *Myers*, the seminal case affirming the President's authority to remove principal officers performing "purely executive" functions, the Court distinguished restrictions placed on the removal of inferior officers. See *Myers*, 272 U.S. at 161-162; see also *United States* v. *Perkins*, 116 U.S. 483, 485 (1886) (Congress's authority to vest appointment of inferior officers in the heads of departments implies authority to impose restrictions on removal.).

Despite this authority, petitioners contend that the decision below is contrary to this Court's precedent, urging that it "holds that the Constitution allows Congress to impose *any* restriction on the President's ability to appoint *or* remove inferior officers, no matter how important their function." Pet. 23. But, as its decision makes clear, the court of appeals announced no such rule. Nor did it countenance a removal limitation that "sufficiently deprives the President of control over the [inferior officer] to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." See *Morrison*, 487 U.S. at 693. The court merely held that the for-cause restriction at issue here is within Congress's power under *Perkins*, at least when coupled with the unfettered power to rescind, reject, direct, or alter any substantive decision made by the inferior officer at any time, and the authority to rescind the enforcement powers of the entity of which the inferior officer is a member. Pet. App. 35a-37a. That conclusion is both modest and fully consistent with this Court's precedents.

At bottom, petitioners' argument is that the double for-cause removal scheme established by the Act—the

President over the Commission, and the Commission over the Board—interposes too much insulation between the President and the execution of the laws. *E.g.*, Pet. 20-21. If the removal authority were the Commission's only means of control over the Board, that might present a harder question. But Congress simultaneously provided elaborate mechanisms to ensure the Commission's control over the Board and its activities—provisions that are difficult to explain if, as petitioners insist, Congress's purpose was "to test the outer boundaries of its ability to reduce Presidential power." Pet. 8. As the court of appeals reasoned, "for-cause removal is not the end of the constitutional inquiry": if Congress intended to make the Board wholly independent, "why has Congress granted such pervasive Commission authority over the Board if not to preserve the means of Executive control? Indeed, why would Congress deny the Commission at-will removal authority on the one hand and then provide the Commission with the authority to abolish Board powers on the other, essentially granting at-will removal power over Board functions if not Board members?" Pet. App. 35a. The court correctly concluded that "[c]ertainly the latter power blunts the constitutional impact of for-cause removal," and that "the Act as a whole provides ample Executive control over the Board." *Id.* at 35a-36a. That conclusion does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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