

No. 08-861

IN THE
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

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

BRIEF FOR PETITIONERS

KENNETH W. STARR
24569 Via De Casa
Malibu, CA 90265

VIET D. DINH
BANCROFT ASSOCIATES
PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036

July 27, 2009

MICHAEL A. CARVIN
Counsel of Record

NOEL J. FRANCISCO
CHRISTIAN G. VERGONIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners

[Additional counsel listed on inside front cover]

SAM KAZMAN
HANS BADER
COMPETITIVE
ENTERPRISE INSTITUTE
1899 L Street, N.W.
12th Floor
Washington, DC 20036

QUESTIONS PRESENTED

1. Whether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest."

2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC"), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product.

3. If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

The parties to the proceeding below are those identified in the caption of the case, along with defendant-appellee Board members Bill Gradison, Daniel L. Goelzer and Charles D. Niemeier in their official capacities. Former Board member Kayla J. Gillan was a defendant-appellee in her official capacity until being dismissed from the case by stipulation of the parties upon the conclusion of her service to the Board.

Petitioner Free Enterprise Fund has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Free Enterprise Fund.

Petitioner Beckstead and Watts, LLP, has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Beckstead and Watts, LLP.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE ACT VIOLATES SEPARATION OF POWERS BY INSULATING THE BOARD FROM PRESIDENTIAL SUPERVISION AND CONTROL	11
A. Separation of Powers Secures Liberty.....	11
B. Impeding the President’s Ability to Execute the Law Violates Separation of Powers.....	17
C. The Act Impermissibly Impedes Presidential Supervision of Executive Functionaries in Order to Enhance Congressional Influence.....	24

TABLE OF CONTENTS
(Continued)

	Page
II. RESPONDENTS' DEFENSES OF THE ACT LACK MERIT.....	35
A. The SEC's Purported Control Over the Board Cannot Cure the President's Deprivation	35
B. The Act Violates <i>Morrison v. Olson</i>	38
III. THE ACT VIOLATES THE APPOINTMENTS CLAUSE	43
A. Board Members Are Principal Officers Who Must Be Appointed by the President and Confirmed by the Senate	45
B. SEC Appointment Violates the Clause Even if Board Members Are Inferior Officers.....	56
1. The SEC Is Not a "Department"	57
2. The Five Commissioners Are Not the SEC's "Head"	60
CONCLUSION	62

TABLE OF AUTHORITIES

	Page
Cases	
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	<i>passim</i>
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	<i>passim</i>
<i>Burnap v. United States</i> , 252 U.S. 512 (1920)	57
<i>Caperton v. A.T. Massey Coal Co.</i> , 129 S. Ct. 2252 (2009).....	33
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	21
<i>Clinton v. Jones</i> , 520 U.S. 681 (1997)	14
<i>Cunningham v. Neagle</i> , 135 U.S. 1 (1890).....	57
<i>Edmond v. United States</i> , 520 U.S. 651 (1997).....	<i>passim</i>
<i>FCC v. Fox Television Stations, Inc.</i> , 129 S. Ct. 1800 (2009).....	20, 22, 23, 34, 36
<i>Freytag v. Commissioner</i> , 501 U.S. 868 (1991).....	<i>passim</i>
<i>Humphrey's Executor v. United States</i> , 295 U.S. 602 (1935).....	20, 23
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	11, 15, 17, 23
<i>Lebron v. National Railroad Passenger Corp.</i> , 513 U.S. 374 (1995).....	9
<i>Loving v. United States</i> , 517 U.S. 748 (1996).....	12, 13, 18, 23, 24
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	13

TABLE OF AUTHORITIES
(Continued)

	Page
<i>Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.</i> , 501 U.S. 252 (1991)	12, 17
<i>MFS Securities Corp. v. SEC</i> , 380 F.3d 611 (2d Cir. 2004)	31
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	<i>passim</i>
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	<i>passim</i>
<i>Myers v. United States</i> , 272 U.S. 52 (1926).....	13, 25, 28, 58
<i>National Treasury Employees Union v. Reagan</i> , 663 F.2d 239 (D.C. Cir. 1981)	26
<i>Nixon v. Administrator</i> , 433 U.S. 425 (1977).....	18, 19, 25, 34, 43
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982).....	12, 15, 18, 19
<i>Northwest Austin Municipal Utility District No. One v. Holder</i> , 129 S. Ct. 2504 (2009)	16
<i>Parsons v. United States</i> , 167 U.S. 324 (1897).....	28
<i>Pittston Coal Group v. Sebben</i> , 488 U.S. 105 (1988).....	40
<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	11, 15, 16, 35
<i>Ponzi v. Fessenden</i> , 258 U.S. 254 (1922)	26

TABLE OF AUTHORITIES
(Continued)

	Page
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	14, 22
<i>Public Citizen v. U.S. Department of Justice</i> , 491 U.S. 440 (1989)	12, 19, 27
<i>Ryder v. United States</i> , 515 U.S. 177 (1995)	44
<i>In re Sealed Case</i> , 838 F.2d 476 (D.C. Cir.), <i>rev'd sub nom. Morrison v. Olson</i> , 487 U.S. 654 (1988)	25, 26, 50, 54
<i>SEC v. Blinder, Robinson & Co.</i> , 855 F.2d 677 (10th Cir. 1988)	31, 61
<i>Springer v. Philippine Islands</i> , 277 U.S. 189 (1928)	17
<i>Synar v. United States</i> , 626 F. Supp. 1374 (D.D.C.), <i>aff'd sub nom. Bowsher v. Synar</i> , 478 U.S. 714 (1986)	28
<i>United States v. Eaton</i> , 169 U.S. 331 (1898)	48
<i>United States v. Germaine</i> , 99 U.S. 508 (1878)	49, 57
<i>United States v. Mouat</i> , 124 U.S. 303 (1888)	57
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	18, 19
<i>United States v. Perkins</i> , 116 U.S. 483 (1886)	6
<i>Weiss v. United States</i> , 510 U.S. 163 (1994)	44, 45, 50, 51, 52, 54
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975)	33

TABLE OF AUTHORITIES
(Continued)

	Page
Constitution and Statutes	
U.S. Constitution, Appointments Clause	<i>passim</i>
U.S. Constitution art. III, § 1	54
Foreign Affairs Act of 1789, 1 Stat. 28.....	48
Reorganization Act of 1949, 5 U.S.C. § 904	61
Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 745	
§ 3, 15 U.S.C. § 7202	3, 49
§ 101, 15 U.S.C. § 7211	2, 4, 9, 30, 49, 50
§ 103, 15 U.S.C. § 7213	2
§ 104, 15 U.S.C. § 7214	3
§ 105, 15 U.S.C. § 7215	3, 4
§ 107, 15 U.S.C. § 7217	<i>passim</i>
§ 109, 15 U.S.C. § 7219	3, 29, 49
Securities Exchange Act of 1934	
§ 4, 15 U.S.C. § 78d	50
§ 19, 15 U.S.C. § 78s.....	5
§ 25, 15 U.S.C. § 78y	53
§ 32, 15 U.S.C. § 78ff.....	3, 49
5 U.S.C. § 3349c	32
5 U.S.C. § 5314.....	50
5 U.S.C. § 5315.....	50
7 U.S.C. § 2.....	62

TABLE OF AUTHORITIES
(Continued)

	Page
10 U.S.C. § 153.....	51
10 U.S.C. § 3013.....	51
10 U.S.C. § 5013.....	51
12 U.S.C. § 2.....	50
12 U.S.C. § 241.....	50
12 U.S.C. § 1462a.....	50
12 U.S.C. § 1812.....	50
15 U.S.C. § 41.....	50
15 U.S.C. § 2053.....	50
21 U.S.C. § 393.....	51
26 U.S.C. § 7801.....	51
28 U.S.C. § 991.....	36
28 U.S.C. § 1254.....	1
42 U.S.C. § 2996c.....	50
46 U.S.C. § 301.....	62
47 U.S.C. § 154.....	50
49 U.S.C. § 106.....	51
49 U.S.C. § 24302.....	50
50 U.S.C. § 403-4a.....	51
Executive Materials	
<i>Applicability of Executive Order No. 12674 to</i>	
<i>Personnel of Regional Fishery Management</i>	
<i>Councils, 17 Op. Off. Legal Counsel 150</i>	
<i>(1993).....</i>	<i>46</i>

TABLE OF AUTHORITIES
(Continued)

	Page
<i>Common Legislative Encroachments on</i>	
<i>Executive Branch Authority</i> , 13 Op. Off.	
Legal Counsel 248 (1989)	27
<i>The Constitutional Separation of Powers</i>	
<i>Between the President and Congress</i> , 20 Op.	
Off. Legal Counsel 124 (1996)	41
Executive Order No. 12,866, 58 Fed. Reg.	
51,735 (Sept. 30, 1993)	55
<i>Relation of the President to the Executive</i>	
<i>Departments</i> , 7 Op. Att’y Gen. 453 (1855).....	
	57
Reorganization Plan No. 1 of 1980, 45 Fed.	
Reg. 40,561 (June 16, 1980), <i>reprinted in</i> 5	
U.S.C. app.	62
Reorganization Plan No. 8 of 1950, 15 Fed.	
Reg. 3175 (May 25, 1950), <i>reprinted in</i> 5	
U.S.C. app.	62
Reorganization Plan No. 10 of 1950, 15 Fed.	
Reg. 3175 (May 25, 1950), <i>reprinted in</i> 5	
U.S.C. app.	61, 62
Legislative Materials	
1 Annals of Congress (Joseph Gales ed.,	
1834)	
	11, 26, 27, 28
148 Congressional Record 12,112 (2002)	
	2, 35, 49
H.R. 5184, 107th Cong. (2002)	
	34
S. 2056, 107th Cong. (2002).....	
	34

TABLE OF AUTHORITIES
(Continued)

	Page	
Other Authorities		
<i>The Federalist</i>		
(Jacob E. Cooke ed., 1961)	<i>passim</i>	
Elena Kagan, <i>Presidential Administration</i> , 114 Harv. L. Rev. 2245 (2001)	20	
Ian Katz, <i>Sarbanes-Oxley Auditing Board</i> <i>Chairman Olson Resigns</i> , Bloomberg.com, June 8, 2009, http://www.bloomberg.com/ apps/news?pid=newsarchive&sid=aXf1snBpi wzA (last visited July 27, 2009)		3
President's Special Message to the Congress Summarizing the New Reorganization Plans, 1950 Pub. Papers 195 (Mar. 13, 1950).....	61	
<i>The Records of the Federal Convention of 1787</i> (Max Farrand ed., 1st ed. 1911)		14, 44, 47
SEC, <i>Current SEC Commissioners</i> , http://www.sec.gov/about/commissioner. shtml (last visited July 27, 2009)	61	
Joseph Story, <i>Commentaries on the</i> <i>Constitution</i> (1833)	60	
Laurence H. Tribe, <i>American Constitutional</i> <i>Law</i> (3d ed. 2000)	52	
U.S. General Accounting Office, No. GAO-03- 339, <i>Securities and Exchange Commission: Actions Needed to Improve Public Company Accounting Oversight Board Selection</i> <i>Process</i> (2002)	2, 48	

**TABLE OF AUTHORITIES
(Continued)**

	Page
U.S. Office of Personnel Management, Salary Table No. 2009-EX	50
Noah Webster, <i>An American Dictionary of the English Language</i> (photo. reprint 1970) (1828).....	60
<i>The Works of James Wilson</i> (Bird Wilson ed., 1804)	15

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 but available electronically at 2007 WL 891675.

JURISDICTION

The court of appeals entered judgment on August 22, 2008, and denied rehearing and rehearing en banc on November 17, 2008. The petition for a writ of certiorari was filed on January 5, 2009, and granted on May 18, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified, in pertinent part, at 15 U.S.C. §§ 7201-7219) (Pet. App. 118a-169a) and the Appointments Clause of the Constitution (Pet. App. 183a).

STATEMENT OF THE CASE

1. Congress passed the Sarbanes-Oxley Act (“SOX” or “Act”) in reaction to high-profile accounting scandals involving Enron and other companies. Pet. App. 6a. The Act subjects accounting firms that audit public companies to the broad regulatory authority of the Public Company Accounting Oversight Board (“PCAOB” or “Board”), a new organization specifically designed to be free from any and all political influence (Pet. App. 34a)—including that of both the President and the already

independent Securities and Exchange Commission (“SEC”).

Though declaring that the Board shall not be deemed part of the federal government, and its members and employees not deemed federal officers, SOX § 101(b), 15 U.S.C. § 7211(b), the Act delegates to the Board “massive ... unchecked power, by design.” 148 Cong. Rec. 12,112, 12,119 (2002) (statement of Sen. Gramm). The Board exercises this authority through five members serving staggered five-year terms. SOX § 101(e), 15 U.S.C. § 7211(e). These members are *not* appointed or removable by the President, but by a majority vote of the SEC. SOX § 101(e)(4), (6), 15 U.S.C. §§ 7211(e)(4), (6).

The Act permanently vests the Board with broad regulatory and enforcement authority over all accounting firms that audit publicly traded companies, including “broad powers to inspect th[os]e ... firms ..., set rules and standards for such audits, and impose meaningful sanctions if warranted.” U.S. Gen. Accounting Office, No. GAO-03-339, *Securities and Exchange Commission: Actions Needed to Improve Public Company Accounting Oversight Board Selection Process* 1 (2002) (“GAO Report”). Among other things, the Act authorizes the Board to:

- promulgate rules, including professional standards, “as may be necessary or appropriate in the public interest or for the protection of investors,” SOX § 103(a)(1), 15 U.S.C. § 7213(a)(1), the willful violation of which constitutes a felony criminal offense, *see* Securities Exchange Act of 1934

(“Exchange Act”) § 32(a), 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b));

- conduct a “continuing program of inspections” involving selective inspection and review of an accounting firm’s audit engagements, SOX § 104(a), (d), 15 U.S.C. § 7214(a), (d);
- conduct a formal investigation of any act by a regulated accounting firm that “may violate” the Act, Board rules, securities laws or professional standards, SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1), and impose severe sanctions for violations “as it determines appropriate,” SOX § 105(c)(4), 15 U.S.C. § 7215(c)(4); and
- set its own budget and its own members’ salaries—currently \$673,000 for the Chairman and \$547,000 for each of the other members, *see* Ian Katz, *Sarbanes-Oxley Auditing Board Chairman Olson Resigns*, Bloomberg.com, June 8, 2009—funded through a tax that it levies on public companies, SOX § 109(b)-(d), 15 U.S.C. § 7219(b)-(d).

The Act gives the President absolutely no oversight over the Board and its members, through the power of removal or otherwise. And while the Act provides for limited review by the independent SEC of Board rulemaking and sanctions, it imposes numerous constraints on the SEC’s ability to exercise any

meaningful oversight over the Board's members.
Thus:

- the Act allows the SEC to remove a Board member only after notice and a hearing, and then only if the member (i) "has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws," (ii) "has willfully abused [his] authority," or (iii) "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard," SOX §§ 101(e)(6) & 107(d)(3), 15 U.S.C. §§ 7211(e)(6) & 7217(d)(3);
- the SEC exercises no control over the conduct of the Board's regular inspections, including the Board's choices about which firms to investigate, SOX § 105(b)(1), 15 U.S.C. § 7215(b)(1), and the manner and scope of its review, SOX § 105(b)(2), 15 U.S.C. § 7215(b)(2);
- the SEC has no authority to direct Board members to investigate or impose sanctions on the target of an investigation; instead, SEC review occurs only if the Board opts for sanctions, at which point the SEC may modify or cancel the sanctions only if it makes specific statutory findings after notice and a hearing, SOX § 107(c)(2)-(3), 15 U.S.C. § 7217(c)(2)-(3);
- the SEC is *required to* ("shall") approve a proposed Board rule, "if it finds that the rule is consistent with the requirements of th[e]

Act and the securities laws, *or* is necessary or appropriate in the public interest or for the protection of investors,” SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added), and may “abrogate, add to, and delete” Board rules only through notice-and-comment rulemaking, Exchange Act § 19(c), 15 U.S.C. § 78s(c) (made applicable by SOX § 107(b)(5), 15 U.S.C. § 7217(b)(5)); and

- the Act allows the SEC to “censure or impose limitations upon the activities, functions, and operations of the Board,” only if—“*after notice and opportunity for a hearing*”—it finds on the record that the Board (i) “has violated or is unable to comply with any provision of th[e] Act, the rules of the Board, or the securities laws” or (ii) “without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard,” SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2) (emphasis added).

2. Petitioners Beckstead and Watts, an accounting firm subject to and injured by the Board’s regulations, inspections and investigations, and Free Enterprise Fund, an organization with members subject to the Board’s authority, sought a declaratory judgment that the provisions of the Act establishing the Board are unconstitutional and an injunction prohibiting the Board and its members from exercising their powers. JA 45-73, 76-77.

The district court entered summary judgment in favor of Respondents. Pet. App. 112a-117a. By a 2-1 decision, the court of appeals affirmed, finding no violation of the Appointments Clause or separation of powers. On the former point, the panel held that Board members are inferior officers who may be appointed by the SEC because the SEC is a “Department” of which its five commissioners, acting collectively, are the “Head.” Pet. App. 11a-25a. On the latter point, the panel held that in the case of inferior officers, “Congress ‘may limit and restrict the power of removal as it deems best for the public interest.’” Pet. App. 36a (quoting *United States v. Perkins*, 116 U.S. 483, 485 (1886)).

Judge Kavanaugh dissented. He concluded that the Act violates separation of powers because its “unique and apparently unprecedented double for-cause removal [provisions] — an independent agency whose heads are removable for cause only by another independent agency — overruns the boundaries set by Supreme Court precedents in *Humphrey’s Executor* and *Morrison* with respect to congressional encroachment on Presidential removal authority.” Pet. App. 80a. He also concluded that the Act violates the Appointments Clause because its restrictions on the SEC’s ability to remove Board members, coupled with the lack of any other method for the SEC to manage the Board’s inspections and investigations, renders Board members principal officers who must be appointed by the President with Senate confirmation. Pet. App. 90a-97a. The full circuit, voting 5-4, denied rehearing en banc. Pet. App. 1a.

SUMMARY OF ARGUMENT

Separation of powers protects the liberty and security of the people by denying the legislature a role in the enforcement of the laws it enacts and ensuring that each branch is identifiably responsible for its actions and hence accountable to the people. In vesting the executive power in a single President, the Framers sought to ensure accountability at the ballot box and the ability to resist legislative encroachments on execution. Congress thus violates separation of powers when it undermines the authority and independence of the President by reassigning or splintering his executive power. Such splintering increases Congress' power (thereby creating risks of legislative tyranny) and obliterates public accountability by bestowing government power on politically immune officers.

Congress' creation of a novel "Fifth Branch" agency, the PCAOB, to regulate the accounting profession violates these fundamental principles for at least three reasons. First, by vesting the power to appoint, remove and review the work of Board members in the SEC—an independent agency insulated from Presidential oversight—the Act completely and "impermissibly burdens the President's power to control or supervise ... executive official[s]." *Morrison v. Olson*, 487 U.S. 654, 692 (1988). Second, the Act unconstitutionally enhances Congress' powers because (1) the SEC that supposedly supervises the Board is subject to congressional influence, (2) the Board itself is likely more subservient to congressional than to

Presidential direction, and (3) any hypothetical Presidential effort to remove a Board member can be trumped by the Senate. Third, Congress had no overriding need or even legitimate reason to upset the Constitution's balance of powers; the *only* reason for not authorizing Presidential appointment and removal, as is done with *every* other independent agency, was Congress' gratuitous desire to reduce "the level of Presidential control" that the Executive exercises over traditional independent agencies. Pet. App. 34a.

The Act also violates the Appointments Clause, which exists to ensure that the politically accountable President will be responsible for appointments and that no important officer will be appointed without the check of Senate confirmation. Because they exercise widespread, unsupervised governmental power, Board members are principal officers who must be appointed by the President with the Senate's advice and consent. Even assuming Board members are inferior officers whose appointments could be vested in the "Head" of a "Department," their appointment by majority vote of the SEC is still unconstitutional: independent agencies are not "Departments" because their commissioners are not directly answerable to the President, and the "Head" of the SEC is its Chairman, not its five Commissioners.

ARGUMENT

The Public Company Accounting Oversight Board exercises, on a permanent basis, broad and coercive governmental power. It controls an essential feature

of the national economy by prescribing corporate auditing standards (in regulations having the force of criminal law) and conducts burdensome investigations concerning accountants' business activities. Uniquely among government agencies, the Board funds its own operations by levying a tax on public corporations.

The *raison d'être* of the Constitution was, of course, to control and check the sort of power that the Board exercises over the citizenry. The Constitution does this by separating the legislative from the executive power and by ensuring that the citizenry may correct through the ballot box any improvident or ineffective exercise of that power, or of the power to appoint important officers.

In the Act, Congress sought to completely circumvent these basic controls on governmental power, and the accountability of elected representatives for the use of such power, by, for the first time in our Nation's history, vesting this potentially tyrannical authority in a purportedly *private* "corporation" whose members are *not* "officer[s] ... or agent[s of] the Federal Government." SOX § 101(b), 15 U.S.C. § 7211(b).¹ Thus, in one fell swoop, Congress relieved itself of the potentially

¹ Notwithstanding these statutory designations, Respondents have never disputed that the Board is a government actor for constitutional purposes, *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), or that its members are federal officers exercising executive power, *see Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 137-40 (1976) (per curiam).

controversial responsibility to tax and spend the citizens' money and "advise and consent" to the appointment of principal officers.

Worse still, Congress ensured that the citizenry cannot hold the President accountable for Board missteps by stripping him of any power over (and therefore responsibility for) this "private" entity modeled after the New York Stock Exchange. But Article II vests all of the "executive power," as well as the exclusive power to appoint principal officers, in a democratically elected President precisely to ensure both that the people can easily identify and correct any misuses of this power and that such execution is free from congressional influence because conducted by a President with his own constitutional prerogatives and national constituency.

In short, by making the Board "independent" of both the legislature's budget responsibilities and the President's duty to execute the laws, Congress has bestowed on itself power without responsibility and denied the people any ability to correct improvident law enforcement. Since *no* elected representative is involved in appointing or removing Board members, or reviewing the Board's budget, taxation or enforcement policies, no amount of public disapproval can be converted into replacing Board members or reforming any misguided policies. The Act's gratuitous and unprecedented effort to immunize government power from public accountability, by creating a "Fifth Branch" of government neither appointed nor removable by the President, therefore violates every basic precept of separated powers.

I. THE ACT VIOLATES SEPARATION OF POWERS BY INSULATING THE BOARD FROM PRESIDENTIAL SUPERVISION AND CONTROL

A. Separation of Powers Secures Liberty

“[I]f there is a principle in our Constitution ... more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.” 1 Annals of Cong. 581 (Joseph Gales ed., 1834) (remarks of Madison); *see also Buckley*, 424 U.S. at 119 (“separation of powers ... is at the heart of our Constitution”); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“Madison, in writing about the principle of separated powers, said: ‘No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.’” (quoting *The Federalist No. 47*, at 324 (Jacob E. Cooke ed., 1961))).

It is a civics class truism that the “Constitution sought to divide the delegated powers ... into three defined categories, legislative, executive and judicial.” *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995) (“[t]he necessity of a distinct and separate existence of the three great departments of government ... had been proclaimed and enforced by ... Blackstone, Jefferson and Madison, and had been sanctioned by the people of the United States” (internal quotation marks omitted; ellipses in *Plaut*)).

The reason “the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers

recognized by the Framers as inherently distinct,” was “[t]o ensure against ... tyranny.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality). Thus, the “separation of governmental powers into three coordinated Branches is essential to the preservation of liberty.” *Mistretta*, 488 U.S. at 380; *see also Loving v. United States*, 517 U.S. 748, 756 (1996) (“[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny”); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (“*MWAA*”) (“[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed”); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment) (“[w]hen structure fails, liberty is always in peril”); *Bowsher*, 478 U.S. at 730 (“[t]he Framers recognized that ... structural protections against abuse of power [are] critical to preserving liberty”).

Creating separate and distinct governmental powers protects the liberty of the sovereign people in two related ways. First, it prevents the legislature or its agents from exercising executive (or judicial) power, because “there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” *Bowsher*, 478 U.S. at 722 (quoting *The Federalist No. 47*, at 325 (Madison)). Second, segregating governmental powers protects citizens’ liberty by ensuring that the potentially tyrannical government is controlled by the sovereign populace, rather than vice versa. Specifically, by establishing an “Executive Branch”

that is “separate and wholly independent” from the “vigorous Legislative Branch,” the Framers ensured that “each branch [is] responsible ultimately to the people.” *Id.*; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (“[t]he government of the Union, then ..., is, emphatically and truly, a government of the people”).

The people can remain sovereign only if they know which branch to hold responsible for unpopular or ineffective government action and policies, and only if they are able to correct those problems through periodic elections. Consequently, like the Framers, this Court has repeatedly emphasized that the purpose of separation of powers is to “ensure that those who wield[]” potentially tyrannical government power are “accountable to political force and the will of the people.” *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991). “By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable,” because it “allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.” *Loving*, 517 U.S. at 757-58.

Accordingly, as the plain text of Article II makes clear, the Framers vested “the executive power” in a single “President, subject only to the exceptions and qualifications, which are expressed in the instrument,” *Myers v. United States*, 272 U.S. 52, 138-39 (1926) (quoting 7 *Works of Hamilton* 80-81 (John C. Hamilton ed., 1851)), so the people would

know who is responsible for executing the laws (and other executive tasks) and would be able to overturn unpopular execution through the ballot box. Thus, the “insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.” *Printz v. United States*, 521 U.S. 898, 922 (1997).

Indeed, for this reason, the Framers rejected any notion of a plural Executive, or even a Privy Council to advise the President,² because it was well understood that “unity may be destroyed ... by vesting [power] ostensibly in one man, subject in whole or in part to the controul and co-operation of others.” *The Federalist No. 70*, at 472-73 (Hamilton). If the executive power were not placed in a “single hand,” then “the people” would be “deprived ... of the two greatest securities they can have for the faithful exercise of any delegated power”—“the restraints of public opinion” and the “opportunity of discovering with facility and clearness the misconduct of the persons they trust.” *Id.* at 472, 477-78; *see also Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment) (“[t]he Founders ... consciously decid[ed] to vest Executive authority in one person rather than several” “in order to focus ... Executive responsibility thereby facilitating accountability”); *Bowsher*, 478 U.S. at 738 n.1

² The Convention rejected Edmund Randolph’s proposal that the Executive consist of three members drawn from separate regions of the country, 1 *The Records of the Federal Convention of 1787*, at 66, 71-74, 88, 91-92, 97 (Max Farrand ed., 1st ed. 1911), and also rejected proposals for the President to have a Privy Council, 2 *id.* at 335-337, 533, 537, 542.

(Stevens, J., concurring in the judgment) (“If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished.... *Power and strict accountability of its use* are the essential constituents of good government.” (quoting Woodrow Wilson, *Congressional Government: A Study in American Politics* 186-87 (Meridian Books 1956) (1885)); 1 *The Works of James Wilson* 443 (Bird Wilson ed., 1804) (“In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors.... He is the dignified, but accountable magistrate of a free and great people.”).

Finally, the Framers and this Court have been equally explicit about the greatest threat to those separated powers and liberty: Congress. As the Court has often noted, the “constitutional system of checks and balances is designed to guard against ‘encroachment or aggrandizement’ by Congress at the expense of the other branches of government.” *N. Pipeline*, 458 U.S. at 83 (plurality) (quoting *Buckley*, 424 U.S. at 122). This is because, “[i]n republican government the legislative authority, necessarily, predominates,” since, *inter alia*, only it can pass laws that interfere with the Constitution’s scheme. *Mistretta*, 488 U.S. at 382 n.12 (quoting *The Federalist No. 51*, at 350 (Madison)); accord *Chadha*, 462 U.S. at 950. And, as a matter of practical experience, the “legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.” *Plaut*,

514 U.S. at 221 (quoting *The Federalist No. 48*, at 333 (Madison)). The “debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.” *Buckley*, 424 U.S. at 129. Of particular relevance here, the “dangers of congressional usurpation of Executive Branch functions have long been recognized.” *Bowsher*, 478 U.S. at 727. Accordingly, as the Court recently noted, the judiciary has a particular “duty” to act “as the bulwar[k] of a limited constitution against legislative encroachments.” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *The Federalist No. 78*, at 526 (Hamilton) (alteration in *Nw. Austin*)).

Thus, while the Court has not required “hermetic division among the Branches,” *Mistretta*, 488 U.S. at 381, it has emphasized that “separation of powers is” “a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.” *Plaut*, 514 U.S. at 239; *see also id.* at 240 (“Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.”). Again, this is especially true with respect to the legislature because, “[a]s James Madison presciently observed,” Congress will continually seek to “mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate

departments.” *MWAA*, 501 U.S. at 277 (quoting *The Federalist No. 48*, at 334).

B. Impeding the President’s Ability to Execute the Law Violates Separation of Powers

In light of the foregoing principles, the Court has analyzed separation-of-powers questions in two different ways. First, if Congress is engaging in direct “aggrandizement,” where it is “accreting to *itself* judicial or executive power,” *Mistretta*, 488 U.S. at 382 (emphasis added), this is *per se* unconstitutional. See *Bowsher*, 478 U.S. at 726-27 (“congressional control over the execution of the laws ... is constitutionally impermissible”); *Chadha*, 462 U.S. at 958-59; *Springer v. Phil. Is.*, 277 U.S. 189, 201 (1928) (“the Legislature cannot exercise either executive or judicial power”).

Second, even if the law does not directly aggrandize congressional power by assigning executive or judicial power to a legislative agent, Congress may violate separation of powers if it seeks to “undermine the authority and independence of one or another coordinate Branch.” *Mistretta*, 488 U.S. at 382. The Court will thus examine whether the law poses a “danger of either aggrandizement *or encroachment*.” *Id.* (emphasis added); *see also id.* (“[i]t is this concern of encroachment and aggrandizement that has ... aroused our vigilance against the ‘hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power’” (quoting *Chadha*, 462 U.S. at 951)); *Buckley*, 424 U.S. at 122 (“encroachment or

aggrandizement”); *N. Pipeline*, 458 U.S. at 57-58 (plurality) (same).

Thus, “[e]ven when a branch does not arrogate power to itself, ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” *Loving*, 517 U.S. at 757. Accordingly, the test for congressional “encroachment” is whether the law “prevents the Executive Branch from accomplishing its constitutionally assigned functions.” *Mistretta*, 488 U.S. at 383 (quoting *Nixon v. Adm’r*, 433 U.S. 425, 443 (1977)); see also *Morrison v. Olson*, 487 U.S. 654, 685 (1988) (Congress may not “impermissibly interfere[] with the President’s exercise of his constitutionally appointed functions”); *Loving*, 517 U.S. at 757 (“it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another”).

The analysis in these cases is “designed ... 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.” *Morrison*, 487 U.S. at 689-90. In this regard, the Court will assess the “potential for disruption” of the President’s executive prerogatives and whether any negative “impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.” *Nixon v. Adm’r*, 433 U.S. at 443 (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)).

There are two kinds of potential “disruptions” of the President’s ability to perform his functions. Congress may erect *obstacles* to the President’s own performance—most obviously, by burdening the means through “which the President obtains information necessary to discharge his duty assigned under the Constitution.” *Pub. Citizen*, 491 U.S. at 488 (Kennedy, J, concurring in the judgment); *see also Nixon v. Adm’r*, 433 U.S. at 443; *United States v. Nixon*, 418 U.S. at 711-12.

A more direct and dangerous encroachment occurs when Congress seeks to “*reassign* powers vested by the Constitution in either the Judicial Branch or the Executive Branch.” *Mistretta*, 488 U.S. at 382 (emphasis added). Reassigning the “judicial” or “executive power” to persons other than those designated by the Constitution to perform those tasks is obviously in stark tension with the “inexorable command” of the Constitution’s plain language. *N. Pipeline*, 458 U.S. at 59 (plurality). More generally, such reassignment of executive power both enhances legislative power in a manner analogous to forbidden congressional “aggrandizement” and greatly diminishes the political accountability necessary to secure liberty.

Legislative power is enhanced in two ways. First, even if the executive power is not reassigned to a legislative agent, splintering that power inherently creates a correlative and impermissible enhancement of Congress’ power to influence execution of the laws. The Court has repeatedly noted that, “as Madison admonished at the founding,” the “Constitution

mandates that ‘each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or *indirect*, of either of the others.’” *Mistretta*, 488 U.S. at 380 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (emphasis added; alteration in *Mistretta*)). And, as a majority of the Court emphasized just last Term with respect to even *traditional* independent agencies, placing the power to administer laws in officers who enjoy “freedom from presidential oversight (and protection)” simply results in an “increased subservience to congressional direction.” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (plurality); *see also id.* at 1825 (Stevens, J., dissenting). Indeed, Justice Stevens opined that the legislature’s dominance is so profound that an independent agency like the FCC is “better viewed as an agent of Congress.” *Id.* at 1825; *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2271 n.93 (2001) (“[a]s a practical matter, successful insulation of administration from the President—even if accomplished in the name of ‘independence’—will tend to enhance Congress’s own authority over the insulated activities”).

Moreover, even if Congress could not *control* an administrative agency free from Presidential influence, simply creating such an entity enhances congressional power because it diminishes the President’s power—and thus weakens the “check” needed to “balance” legislative power. *See Bowsher*, 478 U.S. at 722 (“[e]ven a cursory examination of the Constitution reveals the influence of Montesquieu’s

thesis that checks and balances were the foundation of a structure of government that would protect liberty”). The whole premise of checks and balances is, of course, that “[t]he greatest security ... against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.” *Mistretta*, 488 U.S. at 381 (quoting *The Federalist No. 51*, at 349 (Madison)); see also *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“[s]eparation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority”). Preventing the President from “administer[ing]” a function within his “department” denies him both the “means” and “motives” to resist congressional encroachment, thus diminishing the “[a]mbition ... counteract[ing] ambition” that was the centerpiece of the Framers’ scheme of divided government. *The Federalist No. 51*, at 349 (Madison); see also *Freytag*, 501 U.S. at 907 (Scalia, J., concurring in part and concurring in the judgment) (although President’s alter egos “are not themselves able to resist congressional encroachment, they are directly answerable to the President, who is responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants”). Thus, even where, as in *Printz*, an executive function such as administering a federal statute is transferred to sovereign *states* that are neither funded nor controlled by Congress, this “reduction” in the “power

of the President” nevertheless skews the “separation and equilibration of powers” in the legislature’s favor, because “Congress [can] act as effectively without the President as with him.” 521 U.S. at 922-23.

Even more obviously, such reassignments also obliterate both aspects of public accountability that the Framers intended. First, if laws are administered by entities free from all Presidential control, or which are jointly influenced by Congress and the President, it is far more difficult for citizens to determine who is responsible for the agency’s policies. *See Fox Television*, 129 S. Ct. at 1825 (Stevens, J., dissenting) (“[s]trict lines of authority are particularly elusive when Congress and the President both exert a measure of control over an agency”).

More important, agencies free from Presidential control are not accountable to the people. Even traditional independent agencies—which are constitutionally compliant because their commissioners are appointed and removable by the President—“are not directly responsible to the voters,” or subject to correction through “ballot-box control,” because they are “insulate[d] ..., to a degree, from ‘the exercise of political oversight’” by the democratically elected President. *Id.* at 1829-30 (Breyer, J., dissenting) (quoting *Freytag*, 501 U.S. at 916 (Scalia, J., concurring in part and concurring in the judgment)); *see also id.* at 1815 (plurality) (“independent agencies are sheltered ... from the President” and have “freedom from presidential oversight”); *Bowsher*, 478 U.S. at 739 (Stevens, J.,

concurring in the judgment) (“[i]t is universally accepted that [FTC commissioners] are independent of, rather than subservient to, the President in performing their official duties”); *Humphrey’s Ex’r*, 295 U.S. at 625 (FTC is “independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official”). This led the four dissenting Justices in *Fox Television* to conclude that such politically unresponsive agencies should be subject to special judicial skepticism, 129 S. Ct. at 1830 (Breyer, J., dissenting), and the plurality to note that such “Headless Fourth Branch” agencies create a “separation-of-powers dilemma” because “of the power that Congress has wrested from the unitary Executive,” *id.* at 1817 (plurality). This lack of democratic accountability to the sovereign people is obviously greatly exacerbated when an agency’s officers are neither appointed nor removable by the President.

Finally, such legislative influence over agencies executing the law makes the government not only less “accountable,” but less “effective” and less cognizant of the general public interest. *Loving*, 517 U.S. at 757. This is because the “President [is] elected by all the people [and] is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local,” *Chadha*, 462 U.S. at 948 (quoting *Myers*, 272 U.S. at 123), so legislative influence creates the “effects of faction” and the “fear that special interests could be favored,” *id.* at 948, 950 (quoting *The Federalist No. 73*, at 495 (Hamilton)); *see also*

The Federalist No. 70, at 474 (Hamilton) (a shared executive “might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy”). And, of course, legislative influence creates all of the inefficiencies and dissensions inherent in a multi-member body trying to execute a law. *See Loving*, 517 U.S. at 758 (quoting Jefferson’s observation that “[n]othing is so embarrassing nor so mischievous in a great assembly as the details of execution”).

C. The Act Impermissibly Impedes Presidential Supervision of Executive Functionaries in Order to Enhance Congressional Influence

In light of the foregoing, it is clear that Article II is violated if the “executive power” is vested in a person wholly unconnected to the President. In such circumstances, the President, by definition, cannot exercise “*his* constitutionally appointed functions.” *Morrison*, 487 U.S. at 685 (emphasis added). Consequently, when analyzing reassignment of executive power, the precise question is whether the officer vested with the executive function is “control[led]” and “supervis[ed]” by the President. *Id.* at 692.

Since it is obvious that the President “must execute [the laws] by the assistance of subordinates,” *Buckley*, 424 U.S. at 135 (quoting *Myers*, 272 U.S. at 117), it is clear that Article II’s grant “to the President [of] the executive power of the government” includes “the general administrative control of those executing the laws.” *Id.* at 136

(quoting *Myers*, 272 U.S. at 163-64). Thus, a congressional limitation on the President's relationship to executive functionaries is improper if it "impermissibly burdens the President's power to control or supervise ... an executive official, in the execution of his or her duties." *Morrison*, 487 U.S. at 692. As indicated above, whether the burden is "impermissibl[e]" depends not only on the extent of the burden, but also on whether Congress' effort was driven by an "overriding need" (*Nixon*, 433 U.S. at 443), or by less justifiable motives.

While the Court's relatively sparse case law has not precisely demarked what constitutes an "impermissible burden on the President's power to control or supervise," this is quite a simple case because (i) the President has *no* ability to control or supervise Board members, (ii) Congress has at least equivalent ability to influence the Board, and (iii) there is no legitimate justification, let alone an "overriding need," for this intrusion.

1. The Act clearly strips the President of all ability to control or supervise Board members. *First*, and most important, unlike with every other independent agency or entity executing federal law, the President is precluded—either directly or through an "alter ego" removable at will—from appointing or removing Board members.³ Standing alone, this

³ Congress often vests appointment and removal authority in an Executive Branch department head removable at will by the President, but doing so in no way impedes the President's authority because such a department head is the President's "alter ego" and subject to his unfettered control. *Myers*, 272 U.S. at 133; *see also In re Sealed Case*, 838 F.2d 476, 528 n.30

violates Article II since “the general administrative control of those executing the laws” necessarily “include[s] the power of appointment and removal of executive officers.” *Buckley*, 424 U.S. at 136 (quoting *Myers*, 272 U.S. at 164); *see also* 1 Annals of Cong. 463 (remarks of Madison) (“I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”). Since it is not possible to “control or supervise” an official whom one can neither appoint nor remove, Congress’ decision to strip the President of both of these essential tools necessarily means that the Act “sufficiently deprives the President of control over the [officer] to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.” *Morrison*, 487 U.S. at 692-93.

(continued...)

(D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting) (“[t]he difference [between vesting removal power in the President and in the Attorney General] is not significant, since the Attorney General ‘is the hand of the President’” (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922))), *rev’d sub nom. Morrison*, 487 U.S. 654. It is therefore quite simple for the President to remove an officer “through” a department head: he simply “order[s]” his alter ego to effectuate the removal, “and can fire the [department head] if he refuses to” do so. *Nat’l Treasury Employees Union v. Reagan*, 663 F.2d 239, 247-48 (D.C. Cir. 1981). In this case, however, Congress has vested appointment and removal authority in the SEC, an independent agency that “cannot in any proper sense be characterized as an arm or an eye of the executive.” *Humphrey’s Ex’r*, 295 U.S. at 628; *see also supra* pp. 22-23; *infra* pp. 35-38.

While appointment is obviously very important, *see Buckley*, 424 U.S. at 124-37, removal is key because “[o]nce an officer is appointed, it is only the authority that can remove him ... that he must fear and, in the performance of his functions, obey.” *Bowsher*, 478 U.S. at 726 (internal quotation marks omitted); *see also Edmond v. United States*, 520 U.S. 651, 664 (1997) (“[t]he power to remove officers ... is a powerful tool for control”). As Madison explained, “[i]f the *President* should possess *alone* the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.” 1 Annals of Cong. 499 (emphasis added), *quoted in Myers*, 272 U.S. at 131. Accordingly, “the President’s power to remove Executive officers ... is ... a necessary part of the grant of the ‘executive Power.’” *Pub. Citizen*, 491 U.S. at 484 (Kennedy, J., concurring in the judgment); *see also Common Legislative Encroachments on Executive Branch Authority*, 13 Op. Off. Legal Counsel 248, 252 (1989) (“restrictions on removal power strike at the heart of the President’s power to direct the executive branch and perform his constitutional duties”).

The famous Decision of 1789 eliminates any doubt about the President’s constitutional prerogative to remove executive officers. There, “the First Congress, after heated debate, deleted from a proposed bill creating the Department of Foreign Affairs language which provided that the Secretary of

Foreign Affairs was ‘to be removable from office by the President.’” *Synar v. United States*, 626 F. Supp. 1374, 1395 (D.D.C. 1986) (three-judge district court), *aff’d sub nom. Bowsher*, 478 U.S. 714. It did so out of fear that “the original text implied”—wrongly—“the absence of a constitutionally conferred power of the President to effect the removal.” *Id.*; *see also Myers*, 272 U.S. at 112-15. But the President’s “duty to see the laws faithfully executed” was intended to encompass “that species of power which is necessary to accomplish that end,” including the broad power of removal. 1 *Annals of Cong.* 496 (remarks of Madison). This removal power was vital to preserve “that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.” *Myers*, 272 U.S. at 131 (quoting 1 *Annals of Cong.* 499 (remarks of Madison)). “Madison’s position ultimately prevailed” in the First Congress. *Bowsher*, 478 U.S. at 723.

“This ‘Decision of 1789’ provides contemporaneous and weighty evidence of the Constitution’s meaning since many of the Members of the First Congress had taken part in framing that instrument,” *id.* at 723-24 (internal quotation marks omitted), and is “recognized” as “settl[ing] the [Presidential removal] question beyond any power of alteration,” *Parsons v. United States*, 167 U.S. 324, 330 (1897). The “construction of the constitution ... as given by the congress of 1789” laid the foundation for the “constant and uniform practice of the government in harmony with such construction.” *Id.* at 339; *see also Myers*, 272 U.S. at 136-48.

Second, Congress systematically eliminated every other means of Presidential control or influence over the Board. The President has no power to review the Board's work product since he cannot direct the independent SEC how to exercise the discretionary oversight function (whatever its scope) that Congress assigned to that agency. The President is likewise denied any direct or indirect influence over the Board's finances. The Board raises its own money outside of the congressional appropriations process through direct taxation of registered corporations, *see* SOX § 109, 15 U.S.C. § 7219, and the President has no power to review the Board's budget, including members' enormous salaries. Consequently, the President is deprived of the "additional levers of influence" that he has over traditional independent agencies, such as lending his "presidential good will" to obtain budgetary and legislative support" or using his "administrative tools" such as "centralization of ... personnel requirements." Pet. App. 28a-29a.

Third, Congress was vigilant in depriving the President of any ability to influence the Board *through* the SEC. As the opinion below correctly notes, the SEC Chairman "dominate[s] commission policymaking," "directs the administrative side of commission business" and "command[s] staff loyalties." Pet. App. 28a-29a (internal quotation marks omitted; alterations in panel opinion); *see also infra* pp. 61-62. The Chairman, in turn, is somewhat beholden to the President because he serves as Chairman "at the pleasure of the President." Pet. App. 33a. Apparently recognizing this, Congress denied the Chairman his traditional statutory

authority to “appoint and supervise personnel” (Pet. App. 25a) by vesting appointment of Board members in the entire Commission, a bipartisan body with fixed terms that is much less subject to Presidential influence. SOX § 101(e)(4), 15 U.S.C. § 7211(e)(4). More important, Congress made sure that the SEC would not be able to impose its policy views on Board members by affirmatively precluding the Commission from removing members for any policy-related reason and permitting removal only for “*willful*” law violations or “abuse[s]” or for “fail[ing] to enforce compliance” with the Act absent “reasonable ... excuse.” SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3) (emphasis added). Thus, whatever indirect influence the President has over SEC Commissioners and policy cannot be transformed into influence over Board members.

In short, Congress has thoroughly plugged each and every potential avenue by which the President could hope to even indirectly control or influence the Board.

2. Worse still, it seems clear that Congress’ influence over the Board is at least equal to, and quite probably greater than, that of the President. Respondents have repeatedly claimed that the SEC “directs and supervises” Board members because it allegedly can transfer the Board’s functions and the threat of so doing is “functionally equivalent to removal power.” Board Br. in Opp. 28; *see also* U.S. Br. in Opp. 17-18; Pet. App. 12a-14a. While this is, in fact, not true of the SEC (and in any event does not constitute “supervision” for Appointments Clause

purposes, *see infra* pp. 55-56), it most assuredly is true of Congress. Unlike the SEC, Congress can reassign the Board's functions to the SEC, terminate the agency and deprive it of funding. Most obviously, Congress could reduce the Board's enormous salaries by imposing a 75% pay cut, so that members make the same amount as SEC Commissioners and Cabinet officers. *See infra* pp. 49-50.

More directly, and much more importantly, Congress has veto power over any Board member's removal, the critical tool for controlling official performance. The only way the President can even try to remove a Board member is to direct a majority of SEC Commissioners to do so. Even under the Board's own analysis, the President can enforce that directive to a recalcitrant Commissioner only if the Commissioner has a "duty" to fire the Board member, such that the failure to do so is a "neglect of duty" justifying Presidential removal of the Commissioner. Board Br. in Opp. 24-26; *see also MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004) (Commissioners removable for "inefficiency, neglect of duty or malfeasance in office" (quoting *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988))). (Significantly, in contrast to the Board, the President and the SEC have not contended in this Court or below that the President has *any* power under any circumstances to direct Commissioners on their discretionary decision to fire a Board member.) But even if the President could remove a Commissioner for failing to fire a Board member, this would still not cause removal of the *member* because there is no next-in-line or "acting" Commissioner to

carry out the President's removal directive. *See* 5 U.S.C. § 3349c. To accomplish that desired goal, the President would have to remove all the recalcitrant Commissioners and nominate new ones. But the Senate would then have to *confirm* such replacement Commissioners.

Accordingly, Presidential removal of a Board member necessarily requires the “advice and consent of the Senate.” There is no functional difference between directly requiring the President to secure the Senate’s advice and consent to remove the Board member and requiring the President to secure the Senate’s advice and consent to have in place officers willing to remove the Board member. Thus, the Senate’s involvement in the removal of Board members is functionally indistinguishable from the removal scheme struck down by the square holding of *Myers*—which invalidated “a federal statute by which certain postmasters of the United States could be removed by the President only ‘by and with the advice and consent of the Senate.’” *Morrison*, 487 U.S. at 686 (quoting *Myers*, 272 U.S. at 107). As the *Morrison* Court emphasized, “Congress’ attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid.” *Id.* The “essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself ... the right to participate in the exercise of that [removal] power.” *Id.* (quoting *Myers*, 272 U.S. at 161; first alteration in *Morrison*). Thus, Congress’ participation in the Board member’s removal is,

standing alone, “sufficient grounds” to “render the statute invalid.”⁴

In short, on the one hand, Congress has plenary authority over Board members’ continued employment and salaries and the Board’s very existence, exerts substantial influence over the SEC that allegedly supervises the Board, and can prevent the President from succeeding in any effort to indirectly remove a Board member. On the other hand, the President concededly has no power to influence the Board’s appointments, budget, work product or existence, and any theoretical power to effectuate removal can be trumped by the Senate (or by a lawsuit by an SEC Commissioner contesting the President’s power to direct the Board member’s removal). In these circumstances, no neutral analysis would suggest that a Board member has more reason to “fear and ... obey” the President than

⁴ This case is actually *worse* than *Myers* because the Senate’s acquiescence in confirming the replacement Commissioners would not result in the removal of the Board member the President wants to fire—it would only be the first, speculative step toward such removal. This is because the Board member is entitled to a full hearing before the replacement Commissioners could finally remove him. SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3). This means both that the replacement Commissioners would have to remain neutral on the Board member’s removal during the confirmation process (or else disqualify themselves from participating in the removal hearing because they prejudged its outcome, *see Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)), and that, in all events, removal could only occur after the uncertainty and delay inherent in an impartial hearing.

he would have to fear and obey Congress. *Bowsher*, 478 U.S. at 726 (internal quotation marks omitted).

Accordingly, the Act not only completely prevents the President from performing his duty to execute the laws, it directly and tangibly involves the legislature in enforcing the laws it passes—the central tyrannical evil that separation of powers was most directly designed to prevent. This is in stark contrast to *Morrison*, where Congress had no cognizable influence over the independent counsel or her removal.

3. Finally, with respect to the other factor assessed in the calculus—whether Congress had an “overriding need” for the intrusion, *Nixon*, 433 U.S. at 443—it is quite clear that Congress’ complete separation of the Board from the President was wholly gratuitous and motivated by nothing other than the improper “intention,” as the court below put it, to reduce “the level of Presidential control over the Board.” Pet. App. 34a. Throughout this litigation, Respondents have been wholly unable to explain why the Board’s power could not be vested in the SEC, as was proposed, *see, e.g.*, H.R. 5184, 107th Cong. (2002); S. 2056, 107th Cong. (2002), or exercised by officials appointed and removable by the President, as with every other independent agency. The reason for this deafening silence is that Congress engaged in this unprecedented scheme solely to create *more* “freedom from [the P]resident[]” and “subservience to [C]ongress[]” than that possessed by traditional independent agencies, *Fox Television*, 129 S. Ct. at 1815 (plurality), which is why the Board was

expressly modeled after private organizations like the New York Stock Exchange, *see* Pet. App. 35a n.13; SOX § 107(a), 15 U.S.C. § 7217(a), over which the President obviously has *no* supervisory influence or control.

Thus, this is “insulation” from the President for its own sake, confirming that the Board’s “massive power” was “unchecked ... *by design*.” 148 Cong. Rec. at 12,119 (emphasis added). This is, again, in stark contrast to *Morrison*, where the independent counsel was obviously needed to avoid the inherent “conflicts of interest ... [created] when the Executive Branch is called upon to investigate its own high-ranking officers.” 487 U.S. at 677. Surely Congress cannot be allowed to suck execution of the law into its “impetuous vortex,” *Plaut*, 514 U.S. at 221 (internal quotation marks omitted), and dispose of the democratic accountability necessary to secure liberty, if it cannot even *articulate* some *reason* for rearranging the Framers’ carefully calibrated scheme (or departing from the independent-agency model that presses the outer limits of that scheme).

II. RESPONDENTS’ DEFENSES OF THE ACT LACK MERIT

A. The SEC’s Purported Control Over the Board Cannot Cure the President’s Deprivation

Respondents’ principal defense of this unprecedented usurpation of executive power is that the *SEC* has the power to appoint and (in extraordinarily narrow circumstances) remove Board members and to supervise their work product. Thus,

according to Respondents' bewildering reasoning, the *President's* power to appoint, remove, control and supervise officers exercising *his* "executive power" is somehow satisfied because an agency that is "free[] from presidential oversight" and "subservien[t] to" (or even "an agent of") Congress can engage in such oversight. *Fox Television*, 129 S. Ct. at 1815-16 (plurality); *id.* at 1825 (Stevens, J., dissenting). This is not much different than arguing that the President's ability to exercise the executive power would not be diminished if Congress had authorized the federal *judiciary* to oversee the Board's members and work product. The fact that judges could control the Board would obviously not cure stripping the President of his power because the judges, although appointed by the President, make decisions independent of his wishes. While the judiciary is obviously more independent of the President than is the SEC, it is also obviously far more independent of Congress than is the SEC—so it is truly not clear whether vesting this oversight power in the SEC is less threatening to separation of powers than vesting it in the judiciary.

Indeed, the Court has noted that the "Executive Branch's involvement in the [Sentencing] Commission"—an "independent commission in the *judicial* branch" where three of the seven Commissioners are sitting federal judges, 28 U.S.C. § 991(a) (emphasis added)—"is *greater* than in other independent agencies, such as the *Securities and Exchange Commission*." *Mistretta*, 488 U.S. at 368, 387 n.14 (emphasis added). But transferring the Justice Department's entire Criminal Division to a

“Criminal Prosecution Board” (identical to the Board here) obviously could not be cured by having that Board “supervised” by the Sentencing Commission, just as the SEC’s allegedly pervasive supervision of the Board cannot possibly cure the Presidential deprivation here.

As this example illustrates, when the various components of Respondents’ piecemeal defense are put together, they plainly authorize a regime in which the President has no influence over how the laws are executed or other executive powers are performed. If, as Respondents contend, the SEC’s supervision of the Board is as constitutionally acceptable as the President’s or a cabinet official’s supervision of inferior Executive Branch officers, this necessarily means that all the functions currently performed by such lower-level Executive Branch officers may be transferred to entities identical to the Board and that the supervisory functions of the cabinet officers may be transferred to independent agencies like the SEC. Thus, with respect to *every* executive Department, from State to Justice, Congress may vest performance of these executive functions in a “corporation” modeled after the New York Stock Exchange and have them overseen by bipartisan commissioners serving fixed terms who are independent of Presidential oversight. Neither Respondent has even offered any hint as to why the arrangement defended here would be at all problematical in any other context, including criminal law enforcement or foreign and military affairs. And any such “limitation” would require the Court to rank-order those “core” executive functions

that cannot be given to Board-like entities—precisely the sort of amorphous and *ad hoc* “function[al]” limitation that the Court eschewed in *Morrison*. See 487 U.S. at 688-91.

Upholding the Board here would therefore plainly authorize Congress to reduce the President to the largely symbolic and hortatory role of appointing bipartisan independent commissioners who, in turn, would appoint independent board members who do the actual governing but could not be removed or supervised by the President in any circumstance, and where any indirect removal effort would necessarily involve the Senate’s participation. This arrangement cannot reasonably be squared with the Constitution’s plain language and is precisely the unaccountable plural executive that the Framers expressly rejected because it would both place the executive under the thumb of Congress and place citizens under the thumb of unelected functionaries. If the Constitution’s express vesting of the “executive power” in the President, and the Court’s consistent endorsement of the Constitution’s liberty-enhancing separated powers, are anything more than meaningless rhetoric, the Act’s complete separation of the executive power from the Executive must be patently unconstitutional.

B. The Act Violates *Morrison v. Olson*

Inexplicably, Respondents contend that *Morrison* somehow *supports* the Board’s validity. But, as established above, the Board is plainly unconstitutional under the general standard reconfirmed in *Morrison*. Moreover, the Act plainly

flunks *every* aspect of the two specific tests *Morrison* used to apply that general standard, *i.e.*, whether the restriction on Presidential removal “by itself” impermissibly prevents his “control [and] supervision” and, if not, whether the Act, “taken as a whole,” does. 487 U.S. at 685, 695.

1. On the threshold question of removal, the Act is facially improper because it “completely strip[s]” the President of removal power, thus ensuring that there are “*no means* for the President to ensure the ‘faithful execution’ of the laws.” *Id.* at 692 (emphasis added). Respondents nonetheless contend that the *President’s* removal power is not completely stripped because the *SEC* can remove.

The fatal flaw in this argument has been described above: any even theoretical ability of the President to effectuate a Board member’s removal over the objection of the SEC requires Senate confirmation of any replacement Commissioners, thus violating the basic prohibition against Congress “gain[ing] a role in the removal of executive officials.” *Id.* at 686. In addition, it is quite doubtful the President could order the SEC to fire Board members at all: removal of Board members is an entirely discretionary act that Commissioners “may” do, SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3), and neither the President nor the SEC has made the unprecedented argument that the President can fire a Commissioner because he disagrees with the Commissioner’s exercise of his discretionary powers.

Even accepting the *Board’s* view that a Commissioner may be removed if his failure to fire a

Board member constitutes a “neglect of *duty*” (Board Br. in Opp. 26 (emphasis added)), such a “duty” would obviously arise only where the member clearly committed a removable offense. *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988). But, since the extraordinarily narrow grounds for removing Board members permit removal only of true miscreants, the only *clear* cases are those where the member has committed a felony (a “willful” law violation) or some extraordinary dereliction tantamount to an impeachable offense. For example, there is clearly no duty to remove a Board member for either egregious *over-enforcement* of the law or for a complete “fail[ure] to enforce” the law if the member had an even arguably “reasonable justification or excuse” for this failure, SOX § 107(d)(3)(C), 15 U.S.C. § 7217(d)(3)(C)—such as a substance abuse problem or family illness.

Accordingly, even under the Board’s formulation, the President can require the removal of a Board member only in cases like those where Congress can impeach the member—flagrant abuses of office. Obviously, this provides the President no power to ensure that the laws are exercised in any way remotely consistent with his enforcement or financial policies and provides no implicit “threat” to Board members cognizably different than the threat of impeachment by Congress. If this does not “completely strip” the President of removal authority, it is quite literally difficult to hypothesize what would: there is no non-legislative government entity more independent of the President than the SEC (save for the Judiciary), and, so far as we can discern,

no statute provides narrower removal grounds than those applicable to Board members.

This is in stark contrast to the removal provision in *Morrison*, which made clear that the independent counsel “may be removed ... for good cause,” 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1)), and also “specifically provide[d]” that the counsel “is to comply to the extent possible with the policies of the [Justice] Department,” *id.* at 672. Accordingly, this provision “provide[d] the Executive with substantial ability to ensure that the laws are ‘faithfully executed’ by an independent counsel” because, among other things, “good cause” would certainly include the counsel’s violation of her “statutory responsibilit[y]” to follow the Attorney General’s enforcement and other policies. *Id.* at 692, 696; *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 169 n.117 (1996) (“a generous reading of the President’s (or a department head’s) power to remove [even] an inferior officer for cause may be essential to the constitutionality of removal restrictions concerning even those officers whose functions are narrow”). Here, in contrast, there is no assertion that the President (or even the SEC) can fire Board members for failing to follow the President’s (or the SEC’s) policies.

2. All the other factors considered in *Morrison* plainly demonstrate that the Act, “taken as a whole,” violates the separation of powers. 487 U.S. at 685. First, while the President did not appoint the independent counsel, “[n]o independent counsel

[could] be appointed without a specific request by the Attorney General,” which was “committed to his unreviewable discretion,” and thus gave “the Executive a degree of control” over whether this executive function was performed at all. *Id.* at 696. The Attorney General also had the power to shape the scope of the independent counsel’s authority from the outset because “the jurisdiction of the independent counsel [was] defined with reference to the facts submitted by the Attorney General.” *Id.*; *see also id.* at 679.

Relatedly, the President at any point could exercise ultimate control over *all* of the independent counsel’s investigative and prosecutorial actions—by *pardoning* those identified individuals the independent counsel was investigating. The President could thus terminate, at any time, any criminal prosecution he deemed ill-advised. Obviously, he has no similar ability to preempt the Board’s investigations by immunizing the multitude of actors subject to the Board’s broad jurisdiction. In short, the President had the unreviewable discretion to never initiate or to shut down the independent counsel’s prosecution—powerful tools for control that are wholly lacking here.

In addition, unlike the independent counsel, who had only “limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority,” *id.* at 691, the Board exercises broad policymaking authority on a permanent basis.

Finally, as noted above, the restriction in *Morrison* was directed at the inherent institutional problem of

Presidential control over prosecuting his own allies, was designed to enhance government accountability to the people by ensuring even-handed enforcement of powerful officers, and was precisely tailored to curing the well-documented problem. *Id.* at 677. Here, the restriction is not aimed at any articulated or plausible concern about Presidential abuses, is designed to *diminish* accountability to the people and any conceivable concern about Presidential bias could be solved by the “less intrusive” alternative of vesting the Board’s power in the SEC. *Nixon*, 433 U.S. at 444.

III. THE ACT VIOLATES THE APPOINTMENTS CLAUSE

In addition to violating Article II’s general grant of executive power, the Act also violates the specific requirements of the Appointments Clause, and its core purpose of ensuring accountability. Board members are plainly principal officers who should not be appointed without the democratically accountable President and Senate taking responsibility. Even if Board members are inferior officers, moreover, Congress has improperly delegated their appointment to an independent agency that does not share the President’s accountability.

“The ‘manipulation of official appointments’” was among the “revolutionary generation’s greatest grievances.” *Freytag*, 501 U.S. at 883 (quoting Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 79 (1969)). Consequently, “[t]hose who framed our Constitution ... carefully husband[ed] the appointment power to limit its

diffusion.” *Id.*; see also *Ryder v. United States*, 515 U.S. 177, 182 (1995); *Weiss v. United States*, 510 U.S. 163, 188-89 (1994) (Souter, J., concurring). “The Framers understood ... that by limiting the appointment power, they could ensure that those who wield[] it [a]re accountable to political force and the will of the people.” *Freytag*, 501 U.S. at 884. Thus, the “Clause [was] designed to preserve political accountability relative to important Government assignments.” *Edmond*, 520 U.S. at 663. And, again, the Framers viewed the Appointments Clause primarily as a check on abuses by Congress. See *Buckley*, 424 U.S. at 129; *Freytag*, 501 U.S. at 904 n.4 (Scalia, J., concurring in part and concurring in the judgment).

To achieve these ends, the Appointments Clause expressly requires appointment by the politically accountable President with the advice and consent of the Senate. See 2 Farrand, *supra*, at 539 (remarks of Gouverneur Morris) (“as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security”). The Excepting Clause, which authorizes Congress to vest the appointment of “inferior Officers” “in the President alone, in the Courts of Law, or in the Heads of Departments,” was added at the end of the constitutional debate merely as an “administrative convenience,” to prevent the Senate from being overwhelmed by having to confirm all officers. *Edmond*, 520 U.S. at 660; see also 2 Farrand, *supra*, at 627-28. “[B]ut that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of”

officers whose stations and duties are such that the officers rank as “inferior.” *Edmond*, 520 U.S. at 660-61. And, even then, the Excepting Clause maintains accountability by limiting the delegation (as relevant here) to the individual heads of executive departments who are themselves directly answerable to the President. *See Freytag*, 501 U.S. at 886 (heads of departments “share the President’s accountability to the people”); *id.* at 907 (Scalia, J., concurring in part and concurring in the judgment) (heads of departments “are directly answerable to the President, who is responsible to *his* constituency for their appointments”); *Weiss*, 510 U.S. at 187 (Souter, J., concurring) (“although they allowed an alternative appointment method for inferior officers, the Framers still structured the alternative to ensure accountability”).

A. Board Members Are Principal Officers Who Must Be Appointed by the President and Confirmed by the Senate

This Court has made clear that the line demarcating principal and inferior officers must be drawn in reference to the Appointments Clause’s core purpose of preserving political accountability. As a threshold matter, “in the context of a Clause designed to preserve political accountability relative to important Government assignments, ... it [is] evident that ‘inferior officers’ are officers 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.” *Edmond*, 520 U.S. at 663 (emphasis added). By permitting diffusion of

appointment authority only with respect to subordinates supervised by others for whom the President is responsible, *Edmond* preserves the political accountability demanded by the Clause.

Supervision requires, at a minimum, two basic components. First, to be “inferior,” an officer must be subject to effective discipline through the power of removal—a power that this Court has regularly described as the “most important[]” means and a “powerful tool” of supervision and control. *Morrison*, 487 U.S. at 696; *Edmond*, 520 U.S. at 664. In *Edmond*, for example, the Court relied upon the Judge Advocate General’s power to remove military judges *without cause* as a principal factor in concluding that these judges were inferior officers. *Edmond*, 520 U.S. at 666; *see also id.* at 668 (Souter, J., concurring in part and concurring in the judgment). Similarly, in *Morrison*, the Attorney General’s authority to remove the independent counsel for good cause was one of the key factors supporting the independent counsel’s characterization as an inferior officer. 487 U.S. at 671; *see also Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 155-57 (1993) (officers are *not* “subject to the supervision of” the Secretary of Commerce because the statute “severely limits the Secretary’s removal power and is [therefore] designed to constrain narrowly the Secretary’s ability to supervise and control the Council members he appoints”).

The second essential component of supervision is the authority of a superior to guide an inferior officer's actions at the outset, through ongoing, day-to-day oversight and "direct[ion]" of the inferior officer's execution of his duties. *See Edmond*, 520 U.S. at 663-65; *Morrison*, 487 U.S. at 671-72. In *Edmond*, for instance, this Court emphasized the Judge Advocate General's significant ongoing, day-to-day supervision of the Coast Guard Judges, noting in particular that the Judge Advocate General exercised "administrative oversight" over the court on which these judges sat and was charged with the responsibility to prescribe uniform rules of procedure and policies for the court. *See* 520 U.S. at 664.

Finally, while "[h]aving a superior officer is necessary for inferior officer status, [it is] not sufficient to establish it." *Id.* at 667 (Souter, J., concurring in part and concurring in the judgment); *see also Morrison*, 487 U.S. at 722 (Scalia, J., dissenting). As Madison observed in connection with the debate over the Excepting Clause, the federal government was to include "Superior Officers *below* Heads of Departments." 2 Farrand, *supra*, at 627 (emphasis added); *accord Morrison*, 487 U.S. at 722 (Scalia, J., dissenting). Indeed, the Appointments Clause *itself* recognizes that there will be principal officers supervised by other principal officers. It defines "Ambassadors, other public Ministers and Consuls" (Pet. App. 183a) as principal officers requiring Senate confirmation, *see Freytag*, 501 U.S. at 884 (noting Clause's inclusion of ambassadors and ministers among "the principal federal officers"); *Morrison*, 487 U.S. at 672 (noting "Clause's specific

reference to ‘Consuls’ as principal officers”); *United States v. Eaton*, 169 U.S. 331, 344 (1898) (certain vice consuls “were ... in reality principal officials”). Such diplomatic officers were principals even though during the Founding era (as now) they were supervised and directed by the Secretary of State. *See* Foreign Affairs Act of 1789, ch. 4, 1 Stat. 28, 28-29 (Secretary shall “perform and execute such duties ... relative to correspondences, commissions or instructions to or with public ministers or consuls”).

Thus, in addition to determining whether an officer has a superior, the Court must look to the nature of the office and its duties, asking whether the officer enjoys broad authority to “formulate policy” in a permanent office with statutory authority, or rather is “empowered ... to perform only certain, limited duties,” in an office “limited in tenure.” *Morrison*, 487 U.S. at 671-72.

1. Measured against these standards, it is clear that Board members are principal, rather than inferior, officers. *First*, at the most basic level, every defining attribute of the Board demonstrates that it is an independent entity with an autonomy and authority requiring that its members be selected and confirmed by the politically accountable President and Senate.

Congress itself recognizes that “the PCAOB is an independent board with sweeping powers and authority.” *GAO Report, supra*, at 6. With respect to autonomy, Congress designated the Board a private “corporation” outside *any* governmental chain of command or public oversight, such as FOIA. SOX

§ 101(b), 15 U.S.C. § 7211(b). With respect to autonomy and power, Board members establish standards for “all accountants and everybody they work for, which directly or indirectly is every breathing person in the country,” 148 Cong. Rec. at 12,119, pursuant to an extraordinarily broad “public interest” mandate, SOX § 101(a), 15 U.S.C. § 7211(a), enforceable through *criminal* sanctions for willful violations of Board regulations, *see* Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b)). Board members are thus the polar opposites of the independent counsel, who had no policy-making or administrative authority in her temporary, case-specific assignment.

Equally important, the Board has the unique power to directly *tax* designated entities to fund itself, SOX § 109(d), 15 U.S.C. § 7219(d), thus both vesting it with tremendous power and freeing it from the normal constraints and oversight inherent in the congressional budget process. It is not remotely plausible that the Framers, who founded this Nation largely because of taxation without representation, would authorize the taxing power to be exercised by officers appointed without any input by the people’s representatives—executive or legislative.

Even the emoluments of the office—a traditional factor in determining officer status, *see, e.g., United States v. Germaine*, 99 U.S. 508, 512 (1878)—support a finding of principal-officer status here, as Board members’ salaries—\$673,000 for the Chairman and \$547,000 for each of the other members, *see supra* p. 3—far exceed that of the President and are roughly

four times greater than those of their alleged “superiors” at the SEC, *see* 5 U.S.C. §§ 5314-15; U.S. Office of Pers. Mgmt., Salary Table No. 2009-EX.

Second, uniform historical practice confirms that the members are principal officers. The heads of *all* agencies or quasi-governmental corporations are appointed by the President with Senate confirmation, *see* Pet. App. 62a⁵—reflecting the historical consensus that those who run their own “shops” are necessarily superior officers. Like all those agencies, the Board is a separate entity with its own budget, statutory responsibilities and personnel.

This consistent practice provides powerful evidence that Board members are principal officers, and not even the Act itself reflects a different judgment about their status under the Appointments Clause. Congress mistakenly believed that the members were not “officer[s] ... or agent[s of] the Federal Government” *at all*. SOX § 101(b); 15 U.S.C. § 7211(b). Thus, Congress’ decision to forego Presidential appointment and Senate confirmation reflects no “congressional determination”—much less one subject to judicial “tolerance”—that the members are “inferior” officers, *Weiss*, 510 U.S. at 194 (Souter, J., concurring) (quoting *In re Sealed Case*, 838 F.2d at 532 (R.B. Ginsburg, J., dissenting)), but rather reflects only the concededly erroneous

⁵ *See also, e.g.*, 12 U.S.C. § 2 (OCC); *id.* § 241 (Federal Reserve Board); *id.* § 1462a(c)(1) (OTS); *id.* § 1812(a) (FDIC); 15 U.S.C. § 41 (FTC); *id.* § 78d(a) (SEC); *id.* § 2053(a) (CPSC); 42 U.S.C. § 2996c(a) (LSC); 47 U.S.C. § 154(a) (FCC); 49 U.S.C. § 24302(a) (Amtrak).

view that members are not public officers even subject to the Appointments Clause.

Third, contrary to the decision below, this principal status is not altered simply because the officers' work is subject to review by a higher authority. That conclusion is not only contrary to Madison's contemporaneous statement and the text's reference to "ambassadors" and "consul" overseen by the Secretary of State, *see supra* pp. 47-48, but would mean that officials as powerful and autonomous as the Secretaries of the Army and Navy and the heads of the CIA, IRS, FDA, FAA and Joint Chiefs of Staff—all currently Presidential appointees subject to Senate confirmation—are inferior officers because their work product is, or at least potentially is, subject to review by higher-ranking executive officers.⁶

Permitting such important officers to take office without "the joint participation of the President and the Senate" would allow the political branches to evade "public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660; *see also Freytag*, 501 U.S. at 884; *Weiss*, 510 U.S. at 188 n.3 (Souter, J., concurring) ("if Congress ... authorizes a lower level Executive Branch official to appoint a principal officer, it ... has adopted a more diffuse and less accountable mode of appointment than the Constitution requires").

⁶ *See* 10 U.S.C. §§ 153(a), 3013(b), 5013(b); 21 U.S.C. § 393(d)(2); 26 U.S.C. § 7801(a)(1); 49 U.S.C. § 106(f)(3)(B)(i); 50 U.S.C. § 403-4a(b).

This is particularly true if the higher authority is an *independent* agency like the SEC, for whom the democratically elected President is *not* responsible. Such an arrangement undermines the Framers' decision to "ensure that those who wield[] [appointment power] [a]re accountable to political force and the will of the people," *Freytag*, 501 U.S. at 884, and "deprives the public of any realistic ability to hold easily identifiable elected officials to account for bad appointments," *Weiss*, 510 U.S. at 191 (Souter, J., concurring). Thus, even assuming *arguendo* that independent agencies can be "Departments" under the Clause, *but see infra* pp. 57-59, oversight by such agencies cannot render the supervised officers "inferior." See Laurence H. Tribe, *American Constitutional Law* § 4-8, at 684 (3d ed. 2000) ("[where] officer is appointed by persons who are themselves not politically accountable ... ongoing supervision by ... the President or by someone serving at [his] pleasure, seems particularly important").

Indeed, the Act's appointment scheme seems consciously designed to guarantee that all involved can *evade* accountability if Board members fail to unearth Enron-like accounting fraud. The President would obviously not be responsible for the failures of officials he does not select or replace; the SEC Chairman would not be responsible because his appointment powers have been diffused to all the Commissioners; and even the Commissioners would not be responsible because there is an inherent "lack of accountability" in appointments by a "multimember executive," *Freytag*, 501 U.S. at 904-05 (Scalia, J., concurring in part and concurring in the

judgment), and, in any event, they have no extant mechanism for reviewing the Board's failures to investigate and cannot remove Board members for such mistakes in judgment. Thus, if the central issue in a Presidential re-election campaign were the Board's failure to adequately police the financial markets, the incumbent would not be responsible for that failure and the new President could not remove the members that he, and the American public that elected him, view as incompetent.

2. In all events, Board members are not "directed and supervised" by the SEC.

First, as discussed above, Board members—unlike the inferior officers in *Edmond*, *Freytag* and *Morrison*—may be removed only for willful abuse of authority, but not for pursuing policies disliked by the SEC. Procedural safeguards cabin the SEC's removal authority even further, as Board members may be removed only after notice and the opportunity for a hearing, *see* SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3), subject to judicial review, *see* Exchange Act § 25(a)(1), 15 U.S.C. § 78y(a)(1). Where a purported subordinate cannot be removed for pursuing policies at odds with the agency's desired policies, then he is not subject to "direction and supervision" under any reasonable understanding of that phrase.

Second, the Act authorizes only facially incomplete and severely restricted day-to-day supervision by the SEC. Board members exercise vast prosecutorial authority that is subject to no SEC oversight at all. The SEC exercises no control over which firms are

subjected to the Board’s “continuing program of inspections” or whether a more formal, burdensome “investigation” is warranted because a violation “may” have occurred. *See supra* pp. 3-4. And the SEC has no authority to direct Board members to impose sanctions on the target of an investigation when they choose not to. *See supra* p. 4. In short, the SEC exercises no control over Board members’ daily exercise of their prosecutorial discretion. It is only *after* Board members have effectively concluded their investigation and decided to impose sanctions that their enforcement operations are subject to any oversight at all.

Third, the SEC’s restricted after-the-fact review of Board sanctions and rules does not constitute direction or supervision because it “does not extend to [the members] personally, but is limited to their judgments.” *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment). The Appointments Clause deals with “Officers,” not offices, making it clear that for an officer to be inferior, a superior must directly supervise *the officer*, and not just review the substantive work product of the office. Thus, for example, it is well-established that “lower federal judges”—despite sitting on “inferior Courts” whose judgments are reviewed by superior courts, U.S. Const. art. III, § 1—“are principal officers’ because they are ‘not subject to personal supervision.’” *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment) (quoting *In re Sealed Case*, 838 F.2d at 483); *see also Weiss*, 510 U.S. at 191 n.7 (Souter, J., concurring).

Moreover, the SEC's passive power to *review* Board rulemaking and sanctions only allows it to veto *mistakes* by the Board, but not to proactively prescribe how Board members *should* act, particularly in case-specific enforcement. It is therefore neither "direction" nor "supervision." *See Edmond*, 520 U.S. at 664-65. After all, the fact that the Office of Management and Budget may review and return proposed regulations by the heads of cabinet departments, *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), does not render those officers "inferior" or suggest that they are "directed or supervised" by OMB.

This is particularly true since the SEC "*shall*" approve Board rules so long as it finds them "consistent with the requirements of th[e] Act and the securities laws, *or* ... necessary or appropriate in the public interest or for the protection of investors." SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added). Federal courts do not supervise and direct agencies by overturning rules not "consistent with" the relevant statute.

The SEC's limited power to "abrogate" the Board's rules or (allegedly) to issue its own rules usurping Board functions, *see supra* pp. 5, 30, likewise does not direct or supervise Board members' activity—it *supplants* it. This no more constitutes the power to supervise members' enforcement conduct than does Congress' ability to amend or provide a new substantive statute. That is why *Morrison* held that the Special Division's power to "define" and "expand" the "scope" of the independent counsel's "jurisdiction"

(487 U.S. at 679, 680 n.18) and to “terminate” the office (*id.* at 680), “simply does not give the Division the power to ‘supervise’ the independent counsel in the exercise of his or her investigative or prosecutorial authority” (*id.* at 681), or otherwise vest any supervisory power even “approaching the power to *remove* the counsel” (*id.* at 682). In all events, the wholly *unexercised* (alleged) authority of the SEC to take over certain powers from the Board hardly suggests that the SEC *now* “supervises” Board members’ continuing exercise of those powers.

Finally, unlike the appellate judges in *Edmond*, who could not affect the public *except* through their “final decision[s],” which were always subject to review by “other Executive officers,” *Edmond*, 520 U.S. at 665, Board members routinely affect the public—through inspections, investigations, “no sanction” decisions—without any oversight by the SEC.

In sum, Board members are principal officers who must be appointed by the President with the advice and consent of the Senate.

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

Even if Board members were inferior officers whose appointment could be lodged in the “Head” of a “Department,” independent agencies like the SEC are not “Departments” because they are not directly accountable to the President. In any event, the five commissioners are not the “Head” of the SEC—the Chairman is.

1. The SEC Is Not a “Department”

As a modest “administrative convenience,” the Excepting Clause must be interpreted in a manner consistent with the Appointment Clause’s core purpose of ensuring Presidential accountability through a chain of command. *See supra* pp. 43-45. Thus, the Court has consistently held that “Departments” includes only those entities that, like the cabinet departments, are directly accountable to the President. *See, e.g., United States v. Mouat*, 124 U.S. 303, 307 (1888) (“heads of departments” consist of “what are now called the members of the cabinet”).⁷ The Executive Branch, too, has long recognized that “departments” are those divisions “with heads thereof discharging their administrative duties in such manner as the President should direct, and being in fact the executors of the will of the President.” *Relation of the President to the Executive Departments*, 7 Op. Att’y Gen. 453, 463 (1855).

In *Freytag*, the Court embraced this understanding and made clear that the *sine qua non* of a “Department” is that the entity be directly accountable to the President. The Tax Court at issue there was, at bottom, “an independent agency ... within the Executive Branch.” 501 U.S. at 885. But

⁷ *See also Buckley*, 424 U.S. at 127 (“[t]he phrase ‘Heads of Departments,’ ... suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch”); *Burnap v. United States*, 252 U.S. 512, 515 (1920); *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890); *Germaine*, 99 U.S. at 510.

the Court held that the term “Department” is confined only to those agencies that resemble cabinet departments, especially in that their “heads are subject to the exercise of political oversight and share the President’s accountability to the people.” *Id.* at 886; *see also Myers*, 272 U.S. at 133 (“[e]ach head of a department is and *must be* the President’s *alter ego*” (emphasis added)).

The Court recognized that, “[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint.” *Freytag*, 501 U.S. at 885. And because, unlike the cabinet departments, the Tax Court was an independent agency beyond the President’s supervisory control, “[t]reating the Tax Court as a ‘Department’ and its Chief Judge as its ‘Hea[d]’ would defy the purpose of the Appointments Clause” and “the meaning of the Constitution’s text.” *Id.* at 888 (second alteration in *Freytag*); *see also id.* at 886-87 (noting other constitutional provisions likewise using “executive department” to refer to cabinet departments).

Justice Scalia’s separate opinion in *Freytag* agreed that the Clause “lodge[s]” the “power of appointment” only in those officers who are “*directly answerable to the President*” because, although “they are not themselves able to resist congressional encroachment,” the President has such independence and has the “motive and means to assure faithful action by his *direct lieutenants*.” *Id.* at 907 (emphasis added). Accordingly, excluding

independent agencies from “Departments” is a “reasonable position” since “much of the *raison d’être* for permitting appointive power to be lodged in ‘Heads of Departments’ does not exist with respect to the heads of *these* agencies, because they, in fact, will not be shored up by the President and are thus not resistant to congressional pressures.” *Id.* at 921 (citation omitted); *see also supra* pp. 20, 22-23. Thus, *all* the Justices in *Freytag* agreed that the Appointments Clause’s clear purpose was to lodge appointive power only in those “directly answerable” to the President.⁸

Consequently, the *independent* SEC is not a “Department” for purposes of the Appointments Clause. To conclude otherwise, and allow the appointment power to be diffused beyond the single, responsible President, would effectively overrule *Freytag* and contravene the very purpose of that Clause.

⁸ Justice Scalia nonetheless opined that independent establishments could be Departments because “adjusting the remainder of the Constitution to compensate for *Humphrey’s Executor*[s]” mistaken endorsement of a “headless Fourth Branch” is “a fruitless endeavor.” 501 U.S. at 921; *see also Morrison*, 487 U.S. at 724-27 (Scalia, J., dissenting). But even if *preserving* the “headless Fourth Branch” *status quo* somehow justifies exacerbating *Humphrey’s Executor’s* diminution of Presidential control by erroneously extending the “Department” designation to agencies that are not the President’s “direct lieutenants” (and thus lack the essential characteristic defining “Departments”), surely it is not “fruitless” to stop Congress’ *novel* effort here to *leverage* non-Department “Fourth Branch” agencies to create an unprecedented “Fifth Branch” of “private” corporations with massive power and no Presidential oversight.

2. The Five Commissioners Are Not the SEC's "Head"

Another independent constitutional impediment to the SEC's appointment of Board members is the fact that the SEC *as a whole* is charged with the appointment responsibility. As noted, the "Framers recognized the dangers posed by an excessively diffuse appointment power," and "rejected efforts to expand that power" beyond a single person. *Freytag*, 501 U.S. at 885; *see also The Federalist No. 76*, at 511 (Hamilton) (one person making appointments would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body"); 3 Joseph Story, *Commentaries on the Constitution* § 1523 (1833) ("one man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to particular offices, than any body of men of equal, or even of superior discernment").

Moreover, the phrase "*Heads* of Departments," does not connote a committee of equals because a "head" was well-known to be "[a] chief; a principal person; a leader; a commander; *one* who has the *first* rank or place, and to whom others are subordinate; as the *head* of an army; the *head* of a sect or party." Noah Webster, *An American Dictionary of the English Language* (photo. reprint 1970) (1828) (emphasis added).

The Court need not decide whether collective bodies may *ever* be "Heads," however, because it is clear that the head of the SEC is its Chairman. In 1950, President Truman exercised his statutorily

defined power to “provide for the appointment and pay of the *head* ... of any agency,” Reorganization Act of 1949, 5 U.S.C. § 904(2) (emphasis added), by delegating to the SEC Chairman “the executive and administrative functions of the Commission, [including] ... the appointment and supervision of personnel employed under the Commission.” Reorganization Plan No. 10 of 1950, § 1(a), 15 Fed. Reg. 3175 (May 25, 1950), *reprinted in* 5 U.S.C. app. In doing so, the President expressly equated “the Chairmen of regulatory bodies” with the “heads of departments,” and noted that he was “placing” the delegated authority “in the *heads* of ... [the] agencies.” President’s Special Message to the Congress Summarizing the New Reorganization Plans, 1950 Pub. Papers 195, 196-97 (Mar. 13, 1950) (emphasis added). He did so to provide the accountability demanded by the Appointments Clause by ensuring that the “Chairmen of regulatory bodies will be made clearly responsible for the effectiveness and economy of Governmental administration and will be given corresponding authority, so that the public, the Congress, and the President may hold them accountable.” *Id.*

Consequently, the Chairman “controls key personnel, internal organization, and the expenditure of funds,” and thus “exerts far more control [over the SEC] than his one vote would seem to indicate.” *Blinder*, 855 F.2d at 681; *see also* Pet. App. 28a-29a (noting Chairman’s “domina[nce]”). Indeed, the SEC itself recognizes that the Chairman is “the SEC’s top executive.” SEC, *Current SEC Commissioners*, <http://www.sec.gov/about/commissioner.shtml> (last

visited July 27, 2009). Viewing the Chairman as the head of the SEC also reinforces the political accountability required by the Appointments Clause, because the Chairman serves (as Chairman) at the pleasure of the President, and is therefore somewhat politically accountable to him.

Indeed, if the Chairman is not the “Head” of the SEC, then any inferior officers at the SEC—which might include the Directors of the SEC’s four main divisions and the agency’s General Counsel—have been unconstitutionally appointed. All were appointed by the Chairman *alone* rather than by the whole Commission. *See* Reorganization Plan No. 10 of 1950, § 1(a). Indeed, because the power to appoint inferior officers at numerous other multi-member agencies is likewise expressly vested in the Chairmen, *see, e.g.*, 7 U.S.C. § 2(a)(6) (CFTC); 46 U.S.C. § 301(c) (FMC); Reorganization Plan No. 8 of 1950, § 1(a), 15 Fed. Reg. 3175 (May 25, 1950), *reprinted in* 5 U.S.C. app. (FTC); Reorganization Plan No. 1 of 1980, § 1(b), 45 Fed. Reg. 40,561 (June 16, 1980), *reprinted in* 5 U.S.C. app. (NRC), a holding that independent agencies are multi-headed for Appointments Clause purposes would create problems across the government.

CONCLUSION

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

Respectfully submitted,

VIET D. DINH
BANCROFT ASSOCIATES
PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
(202) 234-0090

SAM KAZMAN
HANS BADER
COMPETITIVE
ENTERPRISE INSTITUTE
1899 L Street, N.W.
12th Floor
Washington, DC 20036
(202) 331-1010

July 27, 2009

MICHAEL A. CARVIN
Counsel of Record
NOEL J. FRANCISCO
CHRISTIAN G. VERGONIS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

KENNETH W. STARR
24569 Via De Casa
Malibu, CA 90265
(310) 506-4621

Counsel for Petitioners