No. 08-____

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

## PETITION FOR A WRIT OF CERTIORARI


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## 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 identified in the caption of the case.

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.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-104a) is reported at 537 F.3d 667. An order denying rehearing and rehearing *en banc* (Pet. App. 1a) is unreported. The district court's memorandum and order granting Respondents' motions for summary judgment (Pet. App. 105a-117a) are unreported but available electronically at 2007 WL 891675.

## JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on August 22, 2008. Rehearing and rehearing *en banc* were denied on November 17, 2008. 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 at 15 U.S.C. §§ 7201 *et seq.*), reprinted at Pet. App. 118a-182a, and the Appointments Clause of the Constitution (Pet. App. 183a).

## STATEMENT OF THE CASE

Petitioners seek review of the D.C. Circuit's decision rejecting their contention that, by stripping the President of all power to appoint, remove or otherwise supervise the members of the Public Company Accounting Oversight Board ("PCAOB" or "Board"), the Sarbanes-Oxley Act ("SOX" or "Act")

violates the Constitution's separation of powers and Appointments Clause.

1. Congress passed the 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 PCAOB, a new organization specifically designed to be free from any and all political influence—including that of both the President and the already independent SEC. Pet. App. 34a.

The Act gives the PCAOB, a putatively private corporation, *see* SOX § 101(b), 15 U.S.C. § 7211(b), "massive power, unchecked power, by design," 148 Cong. Rec. S6327-06, S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm). The Board exercises its authority through five members who serve for staggered five-year terms. SOX § 101(e), 15 U.S.C. § 7211(e). These members are neither appointed nor removable by the President, but instead are appointed and removable 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 PCAOB with broad regulatory and enforcement authority over all accounting firms that audit publicly traded companies. 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* 15 U.S.C. § 78ff(a) (made applicable by SOX § 3(b), 15 U.S.C. § 7202(b));

- to conduct a "continuing program of inspections" that involves the selective inspection and review of an accounting firm's audit engagements, SOX § 104(a), 15 U.S.C. § 7214(a);
- to 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," *id.* § 105(c)(4), 15 U.S.C. § 7215(c)(4); and
- to sets its own budget, funded through a tax that it levies on publicly traded companies, SOX § 109(b)-(d), 15 U.S.C. § 7219(b)-(d).

The Act gives the President absolutely no oversight over PCAOB activities, through the power of removal or otherwise. The Act also imposes numerous constraints on the independent SEC's ability to exercise any meaningful oversight. 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 the 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 its 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, *id.* § 105(b)(2), 15 U.S.C. § 7215(b)(2);
- the SEC has no authority to direct the PCAOB to investigate or to impose sanctions on the target of an investigation; instead, SEC review occurs only if the PCAOB 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 this 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, delete, or add to" such rule

only through notice-and-comment rulemaking, 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 the 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 PCAOB's regulations, inspections and investigations, and Free Enterprise Fund, an organization with members subject to the PCAOB'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 carrying out their powers. Pet. App. 8a, 109a-110a.

The district court entered summary judgment in favor of Respondents on all claims. Pet. App. 112a-117a. By a 2-1 decision, the Court of Appeals affirmed, concluding that the PCAOB does not violate

either the Appointments Clause or separation of powers. On the former point, the panel held that PCAOB 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, 483 (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 PCAOB 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.

On November 17, 2008, the full circuit, voting 5-4, denied rehearing *en banc*. Pet. App. 1a.

## REASONS FOR GRANTING THE PETITION

### I. This Case Is Important and Warrants Review

As the dissenting opinion below correctly recognized, this is "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years." Pet. App. 41a. The case's importance, and the panel majority's profound constitutional errors, are further confirmed by the D.C. Circuit's closely divided 5-4 vote on rehearing *en banc*.

At every level, it is clear that this Court's review is warranted. The issues presented go to the heart of the relationship between the Legislative and Executive Branches and all agree that this is a "case of first impression" (Pet. App. 26a) because it involves a wholly unprecedented model for federal agencies.[1] The manner in which the court below resolved these novel issues is not only irreconcilable with this Court's precedent and basic separation-of-powers principles, but also expressly authorizes Congress to enact a sea change in the structure of the federal government and strip the President of his most basic means for carrying out his constitutional duties through subordinates. Finally, the Board exercises

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[1] All agree as well that the Board is a government entity for constitutional purposes notwithstanding its statutory description, *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), and that its members are officers of the United States exercising executive power, *see Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (per curiam).

an extraordinarily important regulatory function vital to the Nation's economy, so resolution of its constitutional status is imperative for that reason alone.

In creating the Board, Congress deliberately sought to test the outer boundaries of its ability to reduce Presidential power, by establishing a "'Fifth Branch' of the Federal Government" (Pet. App. 72a) over which the President has markedly less control than he exercises over traditional "Fourth Branch" independent agencies like the SEC, which "up to now have [reflected] the outermost constitutional limits of permissible congressional restrictions" on the President (Pet App. 67a). As the court below acknowledged, the only reason for this additional diminution of the "level of Presidential control" over executive officers was "Congress' intention to insulate the Board from partisan forces" that the President (and perhaps Congress) was purportedly able to somehow exert on a traditional independent agency like the SEC. Pet. App. 34a. Thus, Congress rejected proposals to lodge the Board's enforcement function in the SEC, *see, e.g.*, H.R. 5184, 107th Cong. (2002); H.R. 3795, 107th Cong. (2002); S. 2056, 107th Cong. (2002); S. 1896, 107th Cong. (2002), and instead designated the Board a private corporation with the same autonomy from Presidential control as private "self-regulatory-organizations (SROs) . . . such as the New York Stock Exchange," upon which it was explicitly "modeled." Pet. App. 35a n.13.

The tangible way in which Congress secured the Board's independence from the President was to prevent the President from either appointing or removing Board members, as he does for *every* other independent agency, and to deprive him of any authority to review the Board's work product or even its budget. *See supra* pp. 2-5. The Board's extremely important and concededly executive law-enforcement function is to prevent future Enron-like accounting scandals by aggressively investigating and inspecting the auditors of publicly traded companies, pursuant to an open-ended "public interest" mandate. SOX § 101(a) & (c), 15 U.S.C. § 7211(a) & (c).

The fundamental constitutional flaws in Congress' novel experiment are apparent. Since it is not possible to control or supervise subordinates whom one can neither appoint nor remove, Congress' decision to "completely strip[]" the President of *both* of these essential tools, by definition, "impermissibly burdens the President's power to control or supervise . . . an executive official[] in the execution of his or her duties." *Morrison v. Olson*, 487 U.S. 654, 692 (1988). Relatedly, since Board members have clearly been granted "massive power, unchecked by design," 148 Cong. Rec. at S6334, it seems self-evident that they are principal officers under the Appointments Clause, who must be appointed by the President and confirmed by the Senate.

The court below, however, upheld this scheme pursuant to a series of rulings that are contrary to precedent and, at a minimum, raise such serious and

novel constitutional questions that this Court should resolve them directly. First, with respect to removal, the panel majority made the truly astonishing ruling that the President has *no* constitutional prerogative to remove inferior officers because Congress has plenary authority to "'limit and restrict the power of removal as it deems best for the public interest.'" Pet. App. 17a, 36a (quoting *Perkins*, 116 U.S. at 483).

Moreover, according to the court, stripping the President of the removal (and appointment) power is perfectly acceptable because the SEC, an agency concededly independent of Presidential control, has those powers. Pet. App. 29a-31a. It is purportedly of no moment that the SEC is designed precisely to pursue policies "independent" of the President, because this Court has upheld placing the removal power in "alter ego" Cabinet officers such as the Attorney General, and "nothing in *Morrison* suggests" that there is a constitutionally cognizable difference between "the Attorney General—[who] serve[s] at the pleasure of the President"—and "independent agencies" whose Commissioners may only be removed for cause. Pet. App. 33a-34a. Finally, the fact that even the *SEC's* power to supervise the Board's policy judgments is precluded—by virtue of the Act's prohibition against removing Board members unless they engage in "willful" legal violations or abuses, or unreasonable failures to enforce—is unimportant because the SEC has the power to veto the Board's *work product* and allegedly has the *unexercised* statutory authority to usurp the Board's functions. Pet. App. 30a, 35a-36a.

With respect to the Appointments Clause, the court concluded that the same SEC power of review and unexercised power to supplant renders the Board "inferior" to SEC Commissioners—and thus allows appointment by the Commissioners—notwithstanding that Congress deliberately made the Board independent of the SEC, and severely circumscribed the Commissioners' removal power, precisely to ensure that the Board was *not* directed or supervised by an SEC subject to "partisan pressures." Pet. App. 34a.

The decision below, then, quite expressly authorizes Congress to create independent agencies that are "supervised" by *other* independent agencies, rather than by the President himself. The President's Article II prerogative to control through appointment and removal, as well as his Appointments Clause prerogative to appoint, are all satisfied if independent agencies like the SEC are provided with those powers. The Appointments Clause is satisfied because "Fifth Branch" independent agencies like the Board are "inferior" to "Fourth Branch" independent agencies like the SEC, and the SEC may appoint such "inferior officers" because it is a "Department." Under separation of powers, Congress may transfer the President's removal authority to independent agencies like the SEC both because they are no different than Presidential "alter egos" like the Attorney General (who may share the President's removal power) and because Congress can impose any removal restriction it "deems best."

If the panel majority is correct that 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 Cabinet officers may be transferred to independent agencies like the SEC. Thus, as the dissenting opinion emphasized and the panel majority did not contest, the decision below grants "Congress . . . [a] license to create a series of independent bipartisan boards appointed by independent agencies and removable only for cause by such independent agencies." Pet. App. 71a. This, of course, is true with respect to *every* executive function—from State to Education—so, for example, Congress could vest the authority to prosecute all federal crimes in a "Criminal Prosecution Board" whose members would be appointed and removable for cause by an independent "Criminal Justice Commission." Neither Respondents nor the panel majority even attempted to suggest any limiting principle to this analysis. There certainly is no implicit exception to the ruling below for "core" executive functions because the panel majority affirmatively stated that its analysis was *not* affected by the type of function performed by the officer at issue (Pet. App. 34a) and relied principally on this Court's decisions in *Morrison* and *Perkins*, which involved the core executive functions of criminal prosecution and military service.

It is therefore clear that the panel majority "green-li[t] Congress to create a host of similar entities" (Pet. App. 71a) to perform any executive function, allowing Congress to reduce the President to the largely symbolic and hortatory role of appointing bipartisan independent commissioners with defined tenure who, in turn, would appoint independent Boards that do the actual governing, but cannot be removed by the President in any circumstance or even by the independent agency absent offenses which would justify impeachment.

This dramatic alteration of the rules governing the organization of the federal government should not be implemented absent review by this Court, even if the panel majority's constitutional analysis were not so seriously flawed for the reasons detailed below.

Finally, while there is no split in the lower federal courts concerning the constitutional status of the recently created Board, none of the Court's cases on the Constitution's structural protections have, so far as we can discern, involved such a split. This reflects not only the rarity of such splits, but the need for the judiciary to be vigilant in policing Congress' efforts to impinge on coordinate branches even when the potential encroachment seems "innocuous." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) ("*MWAA*"). This is because, "as James Madison presciently noted," Congress will continually seek to "mask under complicated and indirect measures the encroachment which it makes on the co-ordinate

departments." *Id.* Here, there is nothing "innocuous" about Congress' effort to transfer a vital law enforcement function from a politically accountable President to a "private" entity precisely for the purpose of shielding it from any political accountability or "pressure" (save that from the legislators who control its existence). To the contrary, this "wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

## II. The Decision Below Is Contrary to the Court's Separation-of-Powers Precedent

"'[A]rticle [II] grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws, *including the power of appointment and removal of executive officers* . . . .'" *Buckley*, 424 U.S. at 136 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926) (emphasis added)); *see also* 1 Annals of Cong. 481 (Joseph Gales ed., 1834) (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."). This power is granted to the President "to protect the liberty and security of the governed" (*MWAA*, 501 U.S. at 272) by "ensur[ing] that those who wield[]" potentially tyrannical government power are "accountable to the political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch . . . allows the citizen to know who may be

called to answer for making, or not making, those delicate and necessary decisions essential to governance."). To achieve that accountability, all government officers who wield the President's executive power must "act for him under his direction in the execution of the laws." *Buckley*, 424 U.S. at 136; *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"); Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005) ("Article II *did* make emphatically clear from start to finish . . . that the President would be personally responsible for his branch").

Congress thus violates the separation of powers when 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. The essential tool for such control is obviously the power to remove 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 Myers*, 272 U.S. at 131 ("'[i]f the President should possess *alone* the *power of removal* from office, those who are employed in the execution of 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'" (quoting 1 Annals of Cong. 499 (remarks of Madison)) (emphasis added)).

1. Here, the Board constitutes a wholly unprecedented effort by Congress to eliminate the President's control of executive officers to the maximum possible extent, short of assigning the appointment and removal power to itself. The panel majority's endorsement of this unprecedented encroachment is squarely at odds with this Court's decisions.

The heads of *every* other independent agency exercising the executive function are appointed and removed by the President (Pet. App. 62a), yet here the President has been deprived of both of these fundamental means of control. 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' salaries which, at $654,000 for the Chairman and $532,000 for the other members, *see* David Katz, *Hot Times for Accounting Officials*, CFO.com (Mar. 11, 2008), far exceed that of the President and are nearly four times greater than that of SEC Commissioners. Consequently, the President is deprived of the "additional levers of influence" that, according to the panel majority, he has over traditional independent agencies, such as lending his

"'presidential goodwill' to obtain budgetary and legislative support" or using his "administrative tools" such as "centralization of . . . personnel requirements." Pet. App. 28a-29a.

Congress was also vigilant in depriving the President of any ability to influence the Board *through* the SEC. As the opinion below correctly notes, the SEC Chairman "dominates Commission policymaking," "directs the administrative side of Commission business" and "command[s] staff loyalties." Pet. App. 29a (internal quotation marks omitted; alteration in panel opinion). The Chairman, in turn, is 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 PCAOB members in the entire Commission, a bipartisan body 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, permitting removal only for "willful" law violations or "abuses" or for "fail[ing] to enforce compliance" with the Act absent "reasonable . . . excuse." SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3). Thus, whatever indirect influence the President has over SEC Commissioners cannot be transformed into influence over Board members.

Congress did not pretend that this severe departure from the independent-agency norm was done for any neutral purpose or because of some peculiar characteristic of financial-accounting regulation. As noted, the avowed and exclusive purpose of modeling the Board after private organizations like the New York Stock Exchange, over whom the President obviously has no supervisory power, was to "insulate" it from the democratic process and the democratically elected President. *See supra* p. 8. Neither the panel majority nor Respondents even attempted to offer any reason why the level of Presidential control over a traditional independent agency was insufficient "insulation" or otherwise problematic.

2. Since the Act strips the President of every potential means of controlling or supervising Board members, it necessarily "impermissibly interferes with the President's exercise of his constitutionally appointed functions." *Morrison*, 487 U.S. at 685; *see also Loving*, 517 U.S. at 757; *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The panel majority's contrary conclusion is irreconcilable with *Morrison* and this Court's other precedent, as well as with any conception of separated powers that provides cognizable protection to the Executive against congressional encroachments.

Under *Morrison*, the test in this area is whether a congressional enactment "impermissibly burdens the President's power to control or supervise . . . an executive official[] in the execution of his or her

duties," either by virtue of a removal restriction, "taken by itself," or, if the removal restriction is acceptable, by the statute "taken as a whole." *Morrison*, 487 U.S. at 685, 692. The Act must be unconstitutional under *Morrison* because it strips the President of removal power to the maximum extent possible and, alternatively, violates *every* one of the additional, non-removal factors identified by that opinion as relevant to the separation-of-powers analysis.

*First*, the opinion below violates *Morrison's* threshold requirement that the *President* must have *some* power to remove. The Court's precedent and common sense establish that officers will only "obey" those who may remove them. *Bowsher*, 478 U.S. at 726. Indeed, the one constant in the Court's separation-of-powers jurisprudence is that the power to control a subordinate is dictated by the scope of the removal power. *See Edmond v. United States*, 520 U.S. 651, 664 (1997) ("[t]he power to remove officers . . . is a powerful tool for control"); *Wiener v. United States*, 357 U.S. 349, 355-56 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625-26 (1935); *Parsons v. United States*, 167 U.S. 324, 342 (1897). Since the President cannot "control or supervise an executive official" absent the ability to remove him, "the President's power to remove Executive officers . . . is . . . a necessary part of the grant of the 'executive Power.'" *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring). Thus, Article II is violated if the removal power is "completely stripped" from the President or an "alter-

ego" Cabinet official, for then there are "*no means* for the President to ensure the 'faithful execution' of the laws." *Morrison*, 487 U.S. at 692 (emphasis added).

Here, the President's removal power has plainly been "completely stripped." In light of the SEC's independent policy discretion,[2] it is clear—and undisputed by both the panel majority and Respondents—that the President has no power to direct the SEC to exercise its discretion to remove a Board member, any more than he could issue such directions on the "countless other discretionary decisions" the SEC makes. PCAOB D.C. Cir. Br. at 46.

While the panel majority found that the President had influence over the SEC, it did not, to its credit, suggest that such influence could somehow coerce the SEC to exercise its discretion to remove Board members. Since the President cannot order the independent SEC, unlike an "alter ego" Cabinet member, to remove a Board member, vesting the removal authority in the SEC, standing alone, clearly "completely strips" the President of any power to remove. Moreover, even the Commission cannot control or supervise how Board members choose to execute the law because the Act allows removal of Board members only for willful abuses akin to

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[2] The SEC is one of the agencies "independent of the Executive in [its] day-to-day operations." *Buckley*, 424 U.S. at 133; *see also Freytag*, 501 U.S. at 916 (Scalia, J., concurring in part and concurring in the judgment); *Bowsher*, 478 U.S. at 739 (Stevens, J., concurring in the judgment).

impeachable offenses, not for any policy disagreement. *See supra* pp. 3-4.

Moreover, even if the President could justify removing a *Commissioner* for failing to fire a Board member, this would still not cause removal of the *member*. To accomplish that, the President would have to remove *all* the recalcitrant Commissioners and nominate new ones who he hoped would effectuate the removal (even though they would be obliged to remain neutral on that question because removal can only be accomplished after an *impartial* hearing, *see* SOX § 107(d)(3), 15 U.S.C. § 7217(d)(3)). And then the Senate would have to *confirm* such Commissioners, in contravention of the established principle that the "Constitution prevents Congress" from "gain[ing] a role in the removal of executive officials." *Morrison*, 487 U.S. at 686.

In short, the President cannot realistically effectuate the removal of any Board member, directly or indirectly, and any unrealistic removal scenario necessarily requires Senate concurrence. The panel majority did not attempt the Sisyphean task of explaining why this scheme does not "completely strip" the President of removal power, contenting itself with the observation that *Morrison* "did not purport to establish what removal restrictions would 'completely strip[]' the President of removal authority." Pet. App. 34a n.12 (alteration in panel opinion).

*Second*, even assuming *arguendo* that the removal deprivation, "taken by itself," did not unduly infringe

the executive power, *every* other factor considered in *Morrison* demonstrates that the Act, "taken as a whole," plainly does so. First, the President has no other means of influencing the Board's personnel since he cannot appoint like-minded individuals. *See Buckley*, 424 U.S. at 133, 135-36; 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"). Second, unlike the Independent Counsel statute, the Act is not a temporary or limited interference with the President's ability to execute the law in special circumstances, but a permanent reallocation of broad policymaking authority in a free-standing agency. *See Morrison*, 487 U.S. at 691 (Independent Counsel has only "limited jurisdiction and tenure and lacks policymaking or administrative authority"). Third, far from being "justified by an overriding need" (*Nixon*, 433 U.S. at 443), such as the necessity of avoiding "conflicts of interest . . . when the Executive Branch is called upon to investigate its own high-ranking officers," *Morrison*, 487 U.S. at 677, the only explanation for not vesting the SEC or a traditional independent agency with the Board's functions is, as noted, the bare and improper desire to make the Board more "independent" of the President. *See supra* p. 8.

In short, because the Act violates both the threshold requirement of preserving some form of Presidential removal and every other factor bearing

on whether the President's ability to "control and supervise" officials has been improperly trammeled, the result below is irreconcilable with any plausible interpretation of *Morrison*.

3. Perhaps even more troubling than the holding below is the panel majority's reasoning, which fundamentally skews the proper separation-of-powers analysis by ignoring the central question of the extent of Presidential control over his subordinates and substituting an analysis which eviscerates any serious protection of executive power.

First, and most dramatically, the panel majority explicitly holds that the Constitution allows Congress to impose *any* restriction on the President's ability to appoint *or* remove inferior officers, no matter how important their function.

At Respondents' urging, the court below repeatedly stated that Congress may impose *any* restriction on the President's authority to remove an inferior officer "that Congress deems best for the public interest." Pet. App. 17a, 36a (quoting *Perkins*, 116 U.S. at 485); *see also* Pet. App. 17a ("no case prescrib[es] the ways in which Congress can restrict a principal officer's removal of his inferiors"). This rule squarely conflicts with *Morrison's* holding that Congress may not impose removal restrictions on inferior officers like the Independent Counsel to the extent they "impermissibly interfere with the President's exercise of his constitutionally appointed functions" (487 U.S. at 685), as well as this Court's consistent recognition that the President's removal

authority, far from being subject to Congress' plenary control, is a "*necessary* part of the . . . 'executive Power,'" *Pub. Citizen*, 491 U.S. at 484 (Kennedy J., concurring) (emphasis added); *see also Edmond*, 520 U.S. at 664; *Myers*, 272 U.S. at 117. And, of course, the court below also upheld completely stripping the President of his *appointment* power by vesting it in an agency which concededly makes appointments *independent* of the President. Pet. App. 28a. Thus, under the opinion below, executive officers may be appointed by independent agencies who make those selections free from Presidential influence and may be wholly immunized from removal (at least absent extraordinary wrongdoing) by either the President or the independent agency.

This complete deprivation of the *President's* control over executive *officers* necessarily prevents him from performing his constitutional duties. Contrary to the panel majority's conclusion, this deprivation is not somehow cured or rendered permissible by vesting an agency *independent* of the President with the ability—especially the *unexercised* ability—to review or supplant the *work product* of those officers. Pet. App. 29a-31a, 36a. The panel's contrary ruling is fundamentally mistaken because it erroneously equates (1) the SEC with the President or a Presidential "alter ego"; (2) supervising *officers* with reviewing an office's *work product*; and (3) *actually supervising* with a *theoretical* ability to *supplant*.

At the threshold, because the SEC is not the "hand of the President" analogous to a Cabinet officer (*In re*

*Sealed Case*, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922)), *rev'd sub nom. Morrison*), vesting it with control over Board members or policies could not possibly ameliorate the President's deprivation since, at most, it would simply mean that the Board would follow the *SEC's independent* policies. Moreover, even assuming that *SEC* control over Board members would satisfy Article II, the SEC cannot require Board members to pursue even the SEC's policies because it cannot remove members for pursuing policies the SEC views as fundamentally misguided. *See supra* pp. 3-4.

The panel majority found that the SEC's inability to control how *Board* members performed *their* regulatory functions through removal was not a "functional concern [of] constitutional dimension" because "the Commission can *withdraw* or *preempt* any aspect of the Board's *substantive* regulatory authority." Pet. App. 30a (quoting U.S. D.C. Cir. Br. at 50 (emphasis added)). But the question under separation of powers and the Appointments Clause, respectively, is whether executive officials are "control[led] or supervised" or "directed and supervised" by the President or one of his department heads. *See Morrison*, 487 U.S. at 692; *Edmond*, 520 U.S. at 663. Such supervision requires some ability to direct or control how the officers perform *their* functions in the first instance. The SEC's ability to "preempt" the Board's proposed rules and sanctions is not supervision of how Board members do their job; it

is a *post hoc* review of the Board's collective work product.

Even more obviously, the SEC's purported and wholly unexercised statutory authority to "*withdraw*" and *take over* the Board's inspection and investigative functions cannot possibly be equated with supervising the Board's exercise of those functions. Nor does it change the fact that the Board *is* performing those functions free from Presidential control. The only relevant question is whether the President has sufficient control over "those executing the laws" against Petitioners (*Buckley*, 424 U.S. at 136), not whether he adequately controls those who might theoretically execute the laws in the future.

Yet, under the panel majority's revolutionary regime, Congress can authorize officers who are concededly beyond any Presidential control to perform critical executive functions simply by vesting a constitutionally compliant agency with the *discretion* to assume that executive function in the future. The panel majority apparently believed that it must treat the SEC's theoretical ability to take over the Board's functions as if the SEC had actually done so because such fictions are somehow required in "facial" challenges to unconstitutional entities. Pet. App. 37a n.14. But, of course, Petitioners need only show that "no set of circumstances *exist*" in which the *Board*—the entity actually regulating Petitioners—is constitutional, *United States v. Salerno*, 481 U.S. 739, 745 (1987); they obviously need not show that a *different* regulator would also be unconstitutional if

the circumstances dramatically change—*i.e.*, if the SEC ever does assume the Board's regulatory functions. For example, if a statute empowered an agency's ALJs to adjudicate Article III controversies, affected litigants could challenge the propriety of the ALJ's adjudication as "facially" unconstitutional, even if the statute authorized the Department Head to transfer the cases to the proper Article III courts.

In short, the panel majority's bizarre requirement that separation-of-powers litigants show that any conceivable alteration of the present unconstitutional situation would also be unconstitutional, by itself, warrants review and reversal by the Court.

## III. The Decision Below Is Contrary to the Court's Appointments Clause Precedent

The foregoing establishes that the Act violates separation-of-powers principles even assuming that Board members are inferior officers who may be appointed by "Heads of Departments" under the Appointments Clause (and even assuming that SEC Commissioners are Department Heads). It is quite clear, however, that Board members are principal officers who may only be appointed by the President with the advice and consent of the Senate, and the panel majority's fundamentally mistaken contrary conclusion separately warrants this Court's review.

At the most basic level, common sense and historical practice compel the conclusion that Board members are principal officers, not subordinates of the SEC Commissioners. The Board is not subject to

any governmental chain of command, or public oversight, because Congress designated it a "corporation" whose members are *not* "officer[s] . . . or agent[s] for the Federal Government." SOX § 101(b), 15 U.S.C. § 7211(b). As noted, Congress consciously chose this private New York Stock Exchange model precisely to render the Board independent of the SEC and its attendant "partisan" pressures. *See supra* p. 8. Moreover, Board members exercise extraordinary autonomy and power, raising their own revenue through direct taxation and establishing standards for "all accountants and everyone they work for, which directly or indirectly is every breathing person in the country," 148 Cong. Rec. at S6334, pursuant to a broad "public interest" mandate, *see* SOX § 101(a), 15 U.S.C. § 7211(a). Board members' salaries are also nearly four times larger than their alleged "superiors" at the SEC. *See supra* p. 16.

As even the panel majority conceded, if the Board is acknowledged to be the "independent agency" it so obviously is, the conclusion that its members are principal officers "conveniently follows." Pet. App. 30a n.9. This is because the heads of *all* such agencies or quasi-governmental corporations are appointed by the President with Senate confirmation (Pet. App. 62a)—reflecting the historical consensus that those who run their own "shops" are necessarily superior officers. Consequently, in order to avoid the inexorable conclusion that Board members are principal officers if the Board is "independent," the panel majority mischaracterized the Board as a "heavily controlled component of the SEC." Pet. App.

29a-30a; *see also* Pet. App. 33a (Board is "entity within the Executive Branch"). This basic error, particularly when coupled with the court's related error that independent agencies are "Departments" under the Appointments Clause, both undermines *every* purpose of that Clause identified by *any* Justice and provides a blueprint for Congress to dramatically remake the *status quo* by stripping the President of his ability to appoint officials exercising extraordinary executive power.

Under the panel majority's opinion, the head of an agency whose work product is subject to review by another federal officer is *ipso facto* an inferior officer. Pet. App. 12a-13a. Under this standard, officials as powerful and autonomous as the heads of the CIA, IRS, FDA, FAA and Joint Chiefs of Staff—all currently Presidential appointees—are inferior officers because their work product is, or at least potentially is, subject to review by higher-ranking executive officers.[3] Thus, the panel majority's test for inferior officers, if left unattended, would directly undermine the fundamental purposes of a "Clause designed to preserve political accountability relative to important Government assignments." *Edmond*, 520 U.S. at 663. Permitting such important officers to take office without "the joint participation of the President and Senate" would allow the political branches to evade "public accountability for both the making of a bad appointment and the rejection of a

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

good one." *Id.* at 660; *see also Freytag*, 501 U.S. at 884; *Weiss v. United States*, 510 U.S. 163, 188 n.3 (1994) (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"). Further, granting the appointment power to *independent* agencies, for whom the democratically elected President is *not* responsible, would undermine the "Framers' determination to limit the distribution of appointment power" in order to "ensure that those who wield[] it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884. "This process . . . 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).

Indeed, the opinion below 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 failures of officials he could not select or replace; the SEC Chairman would not be responsible because his appointment powers have been diffused to all the Commissioners; and the Commissioners would also 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) 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 (analogous to our most recent election), the incumbent would not be accountable for the Board's failures, and the new President could not remove the members that he, and the American public that elected him, view as incompetent.

Finally, the Act commits the cardinal sin of "aggrandiz[ing] [Congress'] own appointment power" by allowing it to influence "through indirection" (*Weiss*, 510 U.S. at 187 (Souter, J., concurring)) the SEC Commissioners who, because they are not the President's "direct lieutenants," have no "means to resist legislative encroachment[s] upon th[e] [appointment power]." *Freytag*, 501 U.S. at 906 (Scalia, J., concurring). At the same time, Congress would bear no accountability for the Commission's bad appointments because the Senate has not confirmed them.

In short, a definition of inferior officer which ensnares such autonomous and powerful officials must be wrong. The panel majority arrived at this unprecedented and extraordinarily counter-intuitive result only by mangling *Edmond's* "direction and supervision" test, for reasons similar to those that skewed its separation-of-powers analysis.

*First*, particularly since the Appointments Clause deals only with "Officers," it is clear that a superior must directly supervise the *Officer*, not just review

the Officer's substantive work, in order for that official to be inferior. Thus, for example, it is well-established that "United States district judges cannot be inferior officers, since the power of appellate review does not extend to them personally, but is limited to their judgments." *Edmond*, 520 U.S. at 667 (Souter, J., concurring). Here, in stark contrast to the Judge Advocate General's power to remove the judges in *Edmond* "*without cause*" and to otherwise exercise extensive "administrative oversight" of them, *id.* at 664 (majority opinion) (emphasis added), the SEC has no supervisory power over the Board members personally, since it cannot review their individual performance or remove them for inefficiency or policy mistakes.

As noted, the panel majority did not find that the SEC is authorized to remove for poor performance, but simply discounted this "powerful tool for control" (*Edmond*, 520 U.S. at 664) as having any real significance, because it concluded that "what is key under the *Edmond* analysis is the fact that Board members 'have no power to render a final decision on behalf of the United States.'" Pet. App. 13a (quoting *Edmond*, 520 U.S. at 665). This is plainly incorrect. The extremely narrow removal provision here necessarily precludes any finding of "direction and supervision" because removal *is* key and the entire point of such restrictive provisions is to make clear that Board members are free from SEC policy direction. And many principal officers, like the heads of the FDA and IRS, cannot take "final," legally

binding action absent potential review by other officials. *See supra* note 3.

*Second*, and in any event, the SEC does not direct and supervise even the Board's work product, since there is concededly no statutory provision, analogous to those authorizing SEC review of the Board's rules and sanctions, for reviewing or supervising the Board's critical investigative and inspection functions. As the dissenting opinion correctly noted, the SEC's power to review *rules* and *sanctions* is not remotely sufficient to "direct and supervise" the Board's key decisions on whether to initiate or drop an *investigation*, any more than "[a]fter-the-fact judicial or quasi-judicial review" of a prosecutor's decision suggests that the court is somehow "supervising" the prosecutor. Pet. App. 92a. Moreover, if the SEC ever does exercise its alleged authority to transfer the Board's investigative activities to itself, this would simply *supplant* the Board's functions; it would not supervise how the Board conducts those functions. *See* Pet. App. 93a ("Congress may switch regulatory authority from one agency to another, but that does not make the initial agency 'directed and supervised' by Congress").

*Third*, it is clear that direction and supervision by a superior, particularly of the officer's work product, while "necessary for inferior officer status," is "not sufficient to establish it." *Edmond*, 520 U.S. at 667 (Souter, J., concurring). Again, the contrary view would mean that officials such as the Solicitor General and all Deputy Secretaries are inferior

officers simply because they are subject to oversight by the head of a department.

*Fourth*, the panel majority found that the Board satisfied the "direction and supervision" test principally because the "Board's ability to act independently is dwarfed by the 'independent discretion [of the Independent Counsel] to exercise the power delegated to her under the [Ethics in Government] Act.'" Pet. App. 14a (quoting *Morrison*, 487 U.S. at 681); *see also* Pet. App. 14a n.3. But *Morrison* "explicitly" did "*not* purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause" (*Edmond*, 520 U.S. at 661 (emphasis added)), did not even consider whether the Independent Counsel was directed and supervised as part of its "inferior officer" analysis, and applied a four-factor test that would necessarily render the Board members principal officers because it primarily focused on whether the officer has "limited duties" and "tenure" and "jurisdiction." *Id.* (citing *Morrison*, 487 U.S. at 671-72.)

Thus, the Independent Counsel obviously cannot be used as a benchmark for assessing how much direction and supervision is adequate where, as here, the offices at issue are permanent and have broad jurisdiction. Any such rule would render the *Edmond* test utterly toothless because the Independent Counsel had virtually no "direction and supervision" over her case-specific judgments. At a minimum, if there is tension between *Morrison* and *Edmond* on how to determine the inferior status of permanent

offices, the Court needs to resolve that fundamental confusion.

Finally, the panel majority's sharp departure from precedent and historical practice raises a host of unresolved issues and creates the potential for chaos. Here, for example, if Board members truly are "inferior," then all officers working at the Board—such as the Chief Auditor, who plainly "exercise[s] significant authority pursuant to the laws of the United States" (*Buckley*, 424 U.S. at 126)—are appointed unconstitutionally because "inferior officers" have no power to appoint. Similar issues would occur at the other agencies, mentioned above, *see supra* p. 29 & note 3, whose heads are erroneously designated "inferior officers" under the decision below. For this reason alone, it is important for the Court to review the decision below and provide guidance on this and similar complications.

## IV. The Opinion Below Commits Other Basic Legal Errors

Although the opinion below should be reviewed and reversed based on the fundamental errors set forth above, the panel majority's statutory and Appointments Clause analysis contains additional, important flaws also warranting review.

1. First, with respect to the Act, the panel was plainly wrong in concluding that Congress, at the same time it was consciously separating the Board from the SEC and vesting it with its own specific statutory responsibilities, nonetheless simultane-

ously authorized the SEC, at its discretion, to render the Board a Potemkin village full of idle, well-paid officers, by usurping all of the Board's functions. It is the Board, not the Commission, that is expressly given the authority and duty to "register," "investigate" and "establish standards" for "registered public accounting firms" and to "assess and collect accounting support fees" from publicly registered corporations. SOX § 101(c)(1)-(4) & (f)(5), 15 U.S.C. § 7211(c)(1)-(4) & (f)(5). While the Board exercises this statutory authority "'subject to action by the Commission under section [107, 15 U.S.C. §] 7217,'" that section "gives the SEC power to review only Board *rules*," but "does not give the SEC power to direct or supervise Board *inspections, investigations, and enforcement actions*." Pet. App. 94a-95a (quoting SOX § 101(c), 15 U.S.C. § 7211(c); footnotes omitted). And while, as the panel majority correctly noted, the Act "*preserves*" the Commission's existing authority (Pet. App. 19a) by saying that the new "Act" did not "impair or limit" SEC authority (SOX § 3(c), 15 U.S.C. § 7202(c)), this manifestly does not *grant* the Commission any new authority or any ability to usurp the Board's new authority. Thus, the Commission has no power to implement the Act's new requirements concerning inspection, investigation and sanctioning of auditors, or to collect the fees that support such activity.

Moreover, with respect to the Commission's ability to *limit* (rather than usurp) the Board's activities, the panel majority simply ignored the statutory provision which deals directly with that very issue, presumably

because that provision makes clear that such "limitations" may be imposed *only* if the SEC finds, after a hearing, that the Board has "violated" the securities laws, is "unable to comply" with those laws or, "without reasonable justification or excuse," has failed to enforce them. SOX § 107(d)(2), 15 U.S.C. § 7217(d)(2). The SEC may stop the Board from acting, then, only where the Board has grossly abused its authority. Contrary to the opinion below, the SEC's general power to issue regulations "in furtherance of the Act" plainly does not allow it to limit or take over the Board's functions. Pet. App. 19a-20a. Any such SEC action cannot "further some aspect of the Act" both because it would render the specific provision governing Board "limitations" a nullity and because the Act "nowhere gives the SEC authority to direct and supervise Board inspections, investigations, and enforcement actions." Pet. App. 95a. Thus, the Commission could no more directly supervise or take over the Board's investigatory powers than it could directly collect fees from public corporations.[4]

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[4] The panel majority was so intent on expanding the SEC's supervisory powers that it interpreted the statutory requirement that the SEC "shall" approve all Board rules that are either consistent with the Act "*or*" the public interest, SOX § 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added), to require SEC approval only if the SEC finds the rule consistent with the statute "*and*" the public interest. Pet. App. 15a (emphasis in panel opinion). But it obviously constitutes "radical surgery" and "distorts the plain meaning of the [Act] to substitute the word 'or' for the word 'and.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

2. In addition, contrary to the panel majority's conclusion, the Act violates the Appointments Clause even if Board members are inferior officers because the SEC is not a "Department" and its Commissioners, acting collectively, are not the SEC's "Head."

As this Court made clear in *Freytag*, the term "Department" in the Appointments Clause is confined only to those agencies that resemble a cabinet department and, most significantly, only those the "heads [of which] are subject to the exercise of political oversight and share the President's accountability to the people." 501 U.S. at 886; *see also id.* at 906-07 (Scalia, J., concurring) (noting that the key defining factor of a "department" is an office run by someone who is a "direct lieutenant[]" "directly answerable" to the President). As an independent agency over which the President has limited control, the SEC has the exact same characteristics that caused this Court to hold in *Freytag* that the Tax Court did not qualify as a "Department." *See id.* at 885-87.

As the district court held (Pet. App. 113a-114a), the five SEC commissioners are also not the "Head" of the SEC because the "Framers recognized the dangers posed by an excessively diffuse appointment power" beyond a single person. *Freytag*, 501 U.S. at 885. Rather, if there is a "Head" of the SEC, it is the Chairman, who, as the panel recognized, "directs" administrative and personnel actions and "dominates commission policymaking." Pet. App. 28a-29a; *see*

*also* Pet. App. 113a-114a; Reorganization Plan No. 10 of 1950 § 1(a), 15 Fed. Reg. 3175 (May 25, 1950), *reprinted in* 5 U.S.C. app. at 567-68 (2006) (delegating Chairman "executive and administrative functions" under President's power to "provi[de] for the appointment and compensation of the *head* . . . of any agency," Reorganization Act of 1949, Pub. L. No. 109, § 4(2), 63 Stat. 203, 204, *codified as revised at* 5 U.S.C. § 904(2) (emphasis added)). The panel majority's contrary conclusion renders *all* inferior officers at the SEC unconstitutional, because they have been appointed by the *Chairman*, not the multi-member Commission "Head."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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