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

BRIEF IN OPPOSITION FOR RESPONDENTS PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*

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QUESTIONS PRESENTED

The Sarbanes-Oxley Act of 2002 established the Public Company Accounting Oversight Board ("Board") and subjected it to the comprehensive oversight of the Securities and Exchange Commission ("SEC"). The questions presented are:

1. Whether petitioners' failure to invoke the exclusive statutory review procedures deprives this Court of jurisdiction.

2. Whether the court of appeals correctly held that Board members are inferior officers under the Appointments Clause because they are "directed and supervised" by the SEC.

3. Whether the court of appeals correctly held that the SEC is a "department" and that the Commissioners collectively constitute its "head" within the meaning of the Appointments Clause.

4. Whether the court of appeals correctly held that the Sarbanes-Oxley Act is consistent with separation-of-powers principles because—given the SEC's pervasive control over the Board and the President's oversight of the SEC—the statute preserves the President's ability to ensure faithful execution of the laws.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the petition, Board members Bill Gradison, Daniel L. Goelzer, and Charles Niemeier were defendants in their official capacities in the district court and were appellees in the court of appeals. Former Board member Kayla J. Gillan was a defendant in her official capacity in the district court and was originally an appellee in the court of appeals. Following the conclusion of Ms. Gillan's service to the Board, however, she was dismissed from the case upon stipulation of the parties on April 14, 2008.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Public Company Accounting Oversight Board states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners attack a statute that bears no resemblance to the legislation Congress actually enacted. While petitioners assert that the Public Company Accounting Oversight Board ("Board") has massive, unchecked powers, the court of appeals correctly held that the Securities and Exchange Commission ("SEC") has "pervasive"—indeed, "extraordinary"—control over every Board function. Pet. App. 7a, 30a-31a. That control is fatal to petitioners' claims: It both renders Board members inferior officers under the Appointments Clause and preserves for the

President the same ability to ensure faithful execution of the laws that he has over any other area under the SEC's jurisdiction.

Petitioners alternately ignore the express oversight provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "the Act") and invite the Court to adopt unreasonable constructions that vastly understate the SEC's control. But once the Act is properly construed—as the court of appeals construed it—petitioners' constitutional complaints evaporate. Petitioners reject the court of appeals' construction of the SEC's statutory oversight authority. If the court of appeals' construction is correct, however, the SEC clearly has ample control over the Board. The petition thus is not about the Constitution's meaning but about antecedent questions of statutory interpretation. There simply is no reason for this Court to review those narrow statutory issues. And review is particularly inappropriate here because of a threshold jurisdictional issue that petitioners ignore.

STATEMENT

I. STATUTORY BACKGROUND

Since 1934, the SEC has regulated the financial disclosures of public companies. For many years, it relied primarily on the accounting profession to establish auditing standards. See S. Comm. Print No. 107-75, at 17 (2002). Despite recurring scandals, reform efforts proved largely ineffective. See *id.* at 17-18. In 2001-2002, further audit failures cost investors nearly half a trillion dollars. See Warmus, *Qualitative Disclosure Under Amended Form 8-K*, 89 Marq. L. Rev. 881, 881 (2006).

In response, Congress conducted two dozen hearings and considered more than 20 bills. See 1 *Corporate Fraud Responsibility*, at xi-xxi (Manz ed., 2003). It then

passed Sarbanes-Oxley by a vote of 423 to 3 in the House and 99 to 0 in the Senate. Pub. L. No. 107-204, 116 Stat. 745 (2002); 148 Cong. Rec. H5480, S7365 (daily ed. July 25, 2002). Noting no concerns about intrusion on executive power, President Bush signed the Act into law. *Statement on Signing the Sarbanes-Oxley Act of 2002*, 2002 Pub. Papers 1322 (July 30, 2002).

Title I established the Board to oversee the audit of public companies. 15 U.S.C. §7211(a). In designing the Board, Congress borrowed from its experience with self-regulatory organizations ("SROs") like the National Association of Securities Dealers. S. Rep. No. 107-205, at 12 (2002). SROs have long helped oversee the securities industry, but always subject to pervasive SEC oversight: SROs "'have no authority to regulate independently of the SEC's control.'" *NASD* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)).

Sarbanes-Oxley assigns the Board duties comparable to an SRO's: The Board must register accounting firms, set auditing standards, conduct inspections, and investigate and sanction violations. 15 U.S.C. §7211(c). The Act also sets forth a comprehensive oversight scheme that gives the SEC even more control than it has over SROs.

SEC Control Over Rules. The Board's rules, including auditing standards, have no effect unless the SEC approves them following the same notice-and-comment process that governs SRO rules. 15 U.S.C. §7217(b)(2), (4). The Board can adopt internal "housekeeping" rules without prior approval, although the SEC may abrogate those rules "summarily." *Id.* §78s(b)(3). The SEC may also abrogate, delete from, or add to existing rules "to assure the fair administration of the [Board] * * * or otherwise further the purposes of th[e] Act, the securities

laws, and the rules and regulations thereunder applicable to th[e] Board." *Id.* § 7217(b)(5).

SEC Control Over Sanctions. The SEC can review any Board sanction on its own initiative or upon request under the same procedures that govern SRO sanctions. 15 U.S.C. § 7217(c)(2). Findings are reviewed *de novo*, see *NASD* v. *SEC*, 431 F.3d at 804, and the SEC can "enhance, modify, cancel, reduce, or require the remission of" any sanction it deems "not necessary or appropriate in furtherance of th[e] Act or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate," 15 U.S.C. § 7217(c)(3). Sanctions are automatically stayed pending SEC review unless the SEC orders otherwise. *Id.* § 7215(e)(1).

SEC Control Over Inspections and Investigations. Board inspections and investigations must be conducted according to SEC-approved rules. 15 U.S.C. §§ 7214(c), 7215(a). Investigations involving potential securities-law violations must be coordinated with the SEC. *Id.* § 7215(b)(4)(A). Inspection reports (which lack legally operative effect) are subject to SEC review. *Id.* § 7214(h).

SEC Control Over Registration. Registration of accounting firms is governed by SEC-approved rules. 15 U.S.C. § 7212(b)(1). Denial of registration is subject to SEC review. *Id.* § 7212(c)(2).

SEC Control Over Board Members. The SEC appoints the Board's five members for five-year terms, 15 U.S.C. § 7211(e)(4)-(5), and can remove them "for good cause," *id.* § 7211(e)(6). Cause exists where a Board member has "willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws"; has "willfully abused [his] authority"; or, "without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard."

Id. §7217(d)(3). The SEC can also censure Board members, censure the Board, or limit Board activities. *Id.* §7217(d)(2)-(3).

SEC Control Over Jurisdiction. The SEC has broad power to rescind the Board's authority: It can "relieve the Board of any responsibility to enforce compliance with any provision of th[e] Act, the securities laws, the rules of the Board, or professional standards" whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." 15 U.S.C. §7217(d)(1). The SEC can also add to the Board's duties. *Id.* §7211(c)(5).

SEC Control Over Finances. The Board's budget is subject to annual SEC approval, 15 U.S.C. §7219(b), and the SEC can condition approval on specific changes, see *PCAOB Budget Approval Process*, 71 Fed. Reg. 41,998, 42,000 (July 24, 2006). The Board is funded primarily by a support fee paid by public companies. 15 U.S.C. §7219(d). That fee, and the Board's rules for allocating, assessing, and collecting it, must be approved by the SEC. *Ibid.*

SEC Control Over Internal Processes. The Board began operations only once the SEC found it was ready. 15 U.S.C. §7211(d). The SEC may impose (and has imposed) record-keeping and reporting requirements on the Board, and it can examine Board records. See *id.* §7217(a) (incorporating 15 U.S.C. §78q(a)(1), (b)(1)); 71 Fed. Reg. at 42,000. Even the Board's ability to initiate or defend a lawsuit is subject to SEC approval. 15 U.S.C. §7211(f)(1). In granting approval to defend this very suit, the SEC required that its General Counsel oversee every aspect of the case—from selection of outside counsel to the content of all filings.

The SEC's Independent Authority. Sarbanes-Oxley preserves the SEC's pre-existing authority, 15 U.S.C. § 7202(c), and authorizes the SEC to promulgate rules to implement the Act, *id.* § 7202(a). The Act also gives the SEC independent authority to investigate and discipline violations of Board rules. See *id.* § 7202(b)(1); *id.* § 78u (as amended by Sarbanes-Oxley § 3(b)(2)).

Judicial Review. Sarbanes-Oxley and the Exchange Act establish a comprehensive review scheme. Parties aggrieved by Board actions may generally seek review before the SEC, see, *e.g.*, 15 U.S.C. § 7217(b)(4), (c)(2), and then in the court of appeals under the same provisions that govern SRO actions, *id.* § 78y(a)-(b). Judicial review must be sought within 60 days of the SEC's decision, *id.* § 78y(a)(1), (b)(1), and objections not raised before the SEC are normally waived, *id.* § 78y(c)(1).

II. THIS LAWSUIT

A. Proceedings in District Court

Beckstead and Watts, LLP ("Beckstead") is a Nevada accounting firm registered with the Board. Pet. App. 8a. After an inspection uncovered apparent deficiencies in several Beckstead audits, the Board initiated a formal investigation. *Ibid.*; C.A. App. 26.

Beckstead responded by filing this facial constitutional challenge in district court, together with Free Enterprise Fund. Pet. App. 8a. The complaint alleged that Sarbanes-Oxley violates separation of powers, the Appointments Clause, and the non-delegation doctrine. *Ibid.* Beckstead asserted that it was injured because the Board's auditing standards increased the time and expense of audits; the inspection report damaged its reputation; and the investigation subjected it to "burdensome discovery" and "legal fees." C.A. App. 26-27. Although

Free Enterprise Fund alleged that its members were "subject to the Board's authority" and "injured by the [Board's] regulations," *id.* at 13, the only member it has identified is its co-plaintiff, Beckstead, see *id.* at 35-36. Neither plaintiff sought relief from the SEC.

The United States intervened to defend the Act, Pet. App. 8a, and the district court granted summary judgment upholding it, *id.* at 105a-117a. The court acknowledged a "colorable" argument that petitioners' failure to invoke the Act's review procedures deprived the court of jurisdiction. *Id.* at 111a. The court agreed that Sarbanes-Oxley established an "exclusive administrative review" scheme. *Ibid.* But it rejected the jurisdictional challenge because it deemed petitioners' claims "collateral" to that scheme. *Ibid.* The court nevertheless rejected all of petitioners' claims. *Id.* at 112a-116a.

B. The Court of Appeals' Decision

The court of appeals affirmed. Pet. App. 1a-40a.

1. Addressing jurisdiction first, the court did not dispute that the Act establishes an exclusive review scheme. But, like the district court, it deemed petitioners' claims "collateral" to that scheme. Pet. App. 10a. Noting that the statutory review procedures govern challenges to Board "order[s]" or "rule[s]," the court distinguished petitioners' suit as a "'broad-scale attack' to the Act itself." *Id.* at 9a-10a (citation omitted).

2. The court then rejected petitioners' claims on the merits.

a. The Appointments Clause requires principal officers to be appointed by the President and confirmed by the Senate, but permits Congress to "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, § 2. The court of appeals

rejected petitioners' argument that Board members are principal officers who may only be appointed by the President. Pet. App. 12a-20a. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "'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." *Id.* at 663. Board members, the court held, are inferior officers under that standard because their work is pervasively controlled by the presidentially appointed Commissioners of the SEC. Pet. App. 12a-13a.

The SEC, the court explained, must approve all Board rules and can modify or abrogate them. Pet. App. 12a. The SEC also has "plenary" authority over Board sanctions; it can appoint and remove Board members; and it can "relieve the Board of its enforcement authority altogether." *Id.* at 12a-13a. Like the coast guard appellate judges found to be inferior officers in *Edmond*, "Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" *Id.* at 13a (quoting 520 U.S. at 665). Indeed, the oversight powers here are broader than those in *Edmond*: The SEC can review Board decisions *de novo*, whereas review in *Edmond* was circumscribed. See *ibid.*

The SEC's pervasive control, the court held, extends to inspections and investigations. Pet. App. 18a-20a. The Board must conduct inspections and investigations according to SEC-approved rules that the SEC can alter at any time. See *id.* at 19a-20a. The SEC thus can "modify the Board's investigative authority as it sees fit"—such as by "mandat[ing] that all decisions regarding investigation * * * be approved by the Commission," "'affirmatively command[ing]' an investigation," or "micromanag-

ing" Board operations if necessary in the public interest. *Id.* at 19a-20a & n.6. All inspection reports, moreover, are subject to SEC review, and the SEC itself can investigate violations. *Id.* at 19a. "Because the Board's exercise of its powers under the Act is subject to comprehensive control by the Commission and Board members are accountable to and removable by the Commission," the court held, "Board members are inferior officers." *Id.* at 20a.

The court of appeals also rejected petitioners' alternative Appointments Clause arguments. Citing uniform precedent, the court held that the SEC is a "department" capable of appointing inferior officers and that the Commission (*i.e.*, the Commissioners collectively) is the SEC's "head." See Pet. App. 20a-25a.

b. The court similarly rejected petitioners' separation-of-powers challenge. Sarbanes-Oxley does not impermissibly intrude on the President's executive power, the court held, because the SEC has pervasive control over the Board and the President has constitutionally sufficient control over the SEC. See Pet. App. 26a-37a.

The court first explained that even so-called "independent agencies" like the SEC have only limited autonomy. Pet. App. 28a. The President appoints SEC Commissioners and can remove them for cause. *Ibid.* Cause includes "'inefficiency, neglect of duty, or malfeasance in office,'" criteria this Court has described as "'very broad,'" authorizing removal "'for any number of actual or perceived transgressions.'" *Id.* at 28a & n.8 (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 729 (1986)). The President influences SEC policy in other ways as well. See *id.* at 28a-29a.

The SEC, in turn, has "'sweeping'" control over the Board. Pet. App. 29a. "No Board rule is promulgated

and no Board sanction is imposed without the Commission's stamp of approval." *Id.* at 30a. And the SEC can "'withdraw or preempt any aspect of the Board's substantive regulatory authority at any time,'" essentially wielding "at-will removal power over Board functions." *Id.* at 30a, 35a. Thus, "all Board functions are subject to pervasive Commission control." *Id.* at 30a-31a.

The court noted that "the President is not, as the Fund contends, 'completely stripped' of his ability to remove Board members." Pet. App. 34a. The SEC can remove Board members, and the President in turn can remove SEC Commissioners. *Ibid.* Further, "it is far from clear that the Commission would share the Fund's cramped interpretation of its removal authority." *Id.* at 36a. Most importantly, the "vast degree of Commission control" provided by the Act's other oversight mechanisms "mitigat[ed] [any] concern regarding the scope of the removal restrictions." *Id.* at 36a, 38a.

Finally, the court emphasized that, because this is a facial challenge, petitioners bore a "heavy burden to demonstrate that the Act * * * *cannot* be constitutionally applied." Pet. App. 37a & n.14. The court also noted its "duty to construe statutes to avoid constitutional infirmity." *Id.* at 37a. The court therefore refused to "interpret[] the Commission's powers of oversight narrowly * * * to create constitutional problems where there are none." *Id.* at 39a. Properly construed, the Act leaves "no instance in which the Board can make policy that the Commission cannot override." *Ibid.*

3. Judge Kavanaugh dissented in part. He disagreed with the majority's interpretation of Sarbanes-Oxley's oversight provisions. See Pet. App. 77a-80a, 91a-97a. Construing those provisions narrowly, he argued that the Act violates separation of powers and the Appointments

Clause. *Id.* at 55a-97a. He agreed with the majority, however, that the SEC is a "department" and that the Commission is its "head." *Id.* at 97a n.24.

REASONS FOR DENYING THE PETITION

Disclaiming any circuit conflict (Pet. 13), petitioners urge that Sarbanes-Oxley's alleged intrusion into executive power justifies review. But the Executive Branch—through two different administrations—has consistently denied that its powers have been invaded. And petitioners' assertions reflect a dispute not about constitutional principle but about the proper construction of Sarbanes-Oxley. Petitioners repeatedly invite the Court to adopt unreasonable constructions of the Act to manufacture constitutional defects where none exist, substituting hyperbole about the Board's "independen[ce]" and "unchecked power"—drawn from the *dissent* below and the Act's legislative *opponents*, see Pet. 2, 9, 12, 16[1]—for analysis of the actual statutory text.

When the Act is properly construed, this case is not petitioners' "mountain" but at best a "molehill." Pet. App. 32a n.11. The Act equips the SEC with "extraordinary" control, "essentially granting at-will removal power over Board functions if not Board members." *Id.* at 7a, 35a. The President, in turn, can remove SEC Commissioners for neglect in exercising their oversight powers. He thus has no less control here than in any other area under the SEC's jurisdiction. That SEC and presidential control forecloses petitioners' claims. In any event, petitioners' deliberate bypass of the Act's exclusive review

[1] Former Senator Gramm, the source of petitioners' "'massive power, unchecked power, by design'" comment, Pet. 2, 9, *opposed* the bill for much of the process. See, *e.g.*, S. Rep. No. 107-205, at 2, 66-67.

procedures raises serious jurisdictional questions and militates strongly against review in this case.

I. This Case Is A Poor Vehicle Because There Are Substantial Questions About This Court's Jurisdiction

Petitioners omit any mention of the jurisdictional issue—addressed by both courts below, Pet. App. 9a-11a, 110a-111a—that stands between this Court and the questions presented. When Congress channels review through a specified mechanism, courts lack jurisdiction to entertain challenges by other means. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419 (1965). A statute that comprehensively specifies where, when, and how challenges may be brought evidences Congress's intent that the review scheme be exclusive. See *Thunder Basin*, 510 U.S. at 216; *Whitney Nat'l Bank*, 379 U.S. at 420-422.

Sarbanes-Oxley is precisely such a statute. For every Board action, the Act specifies where, when, and how review may be sought, generally requiring parties to seek review before the SEC, see 15 U.S.C. § 7217(b)(4) (rules); *id.* § 7217(c)(2) (sanctions); *id.* § 7212(c)(2) (denial of registration), and then in the court of appeals, *id.* § 78y(a)-(b). Congress's intent is particularly clear here: The Act incorporates SRO review provisions long construed to be exclusive. See 15 U.S.C. § 7217(b)(4)-(5), (c)(2); *Swirsky* v. *NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (citing cases).

Neither petitioners nor the courts below disputed that Sarbanes-Oxley establishes an exclusive review scheme. The court of appeals nonetheless held that petitioners' claims were "collateral" to that scheme because the statutory procedures "are confined to challenges to an 'order' or a 'rule' of the Board," whereas petitioners' "fa-

cial challenge * * * advances a 'broad-scale attack' to the Act itself." Pet. App. 9a-10a (citation omitted).

This Court, however, rejected the same argument in *Thunder Basin*. There, as here, the review scheme addressed only challenges to specific agency actions—in that case, "order[s]" or "citation[s]." 510 U.S. at 207; 30 U.S.C. §815(a), (d). There, as here, the plaintiff asserted a broad constitutional challenge to provisions of the agency's enabling statute. See 510 U.S. at 213-215; Pet. Br. in No. 92-896, 1993 WL 337849, at 29-36 (May 10, 1993). This Court held that the claim had to be raised through the review scheme nonetheless because it could be "meaningfully addressed in the Court of Appeals" following the agency's decision, as the review scheme required. 510 U.S. at 215; see also *Nat'l Taxpayers Union* v. *SSA*, 376 F.3d 239, 243-244 (4th Cir. 2004) (applying *Thunder Basin* to facial challenge to provision of enabling statute).

Thunder Basin's holding makes sense. Parties have no standing to challenge enabling statutes in the abstract; they have standing only if the defendant takes (or threatens) action that injures them. Petitioners are not injured merely because the Board *exists*. Their claimed injuries derive from the Board's actions—its imposition of auditing standards, its inspection report about Beckstead, and its investigation of Beckstead. See pp. 6-7, *supra*. Consistent with that, petitioners sought a judgment invalidating the Board's prior actions and "enjoining the Board and its Members from taking any further action" against Beckstead. C.A. App. 31. Although their suit asserts that the statute authorizing the Board to take those actions is unconstitutional, it necessarily challenges, and seeks relief from, those Board actions.

And for every action petitioners challenge, the Act specifies a time and place for review. Petitioners could

have opposed any Board auditing standard—or any rule governing inspections, investigations, or support fees—before the SEC and then raised their constitutional claims in the court of appeals. See 15 U.S.C. §§ 7217(b)(4), 78y(a); cf. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001). They could have sought SEC review of any Board sanction and then raised their constitutional claims in the court of appeals. See 15 U.S.C. §§ 7217(c)(2), 78y(a); cf. *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 96, 104-106 (1946). Or they could have sought SEC review of the Board's inspection report or petitioned the SEC to modify or revoke the Board's authority. See *id.* §§ 7214(h), 7217(b)(5), (d)(1). Petitioners cannot bypass the statutory review scheme merely by purporting not to challenge the concrete Board actions that underpin their claim of standing.

The court of appeals invoked *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996), for its contrary conclusion. Pet. App. 10a. Even if *Time Warner* were consistent with *Thunder Basin*, the case is inapposite. The suit there was "entirely independent of any agency proceedings, whether actual or prospective." 93 F.3d at 965; see also *Nat'l Taxpayers Union*, 376 F.3d at 244 n.3. Here, by contrast, petitioners sued the Board during a formal Board investigation, seeking to terminate the investigation. Pet. App. 8a. That is precisely the sort of intrusion into ongoing proceedings that exclusive review schemes are designed to avoid. See *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969). Moreover, by bypassing the review scheme, petitioners prevented the SEC from authoritatively construing its statutory oversight powers and explaining how those powers operate in concrete instances—matters that are not only within the agency's discretion, expertise, and experience,

but could prove important if this Court's review were ever appropriate. See *id.* at 194.

Whether this particular challenge falls within the Act's review scheme, of course, is not an issue that warrants this Court's attention. But that jurisdictional issue stands between this Court and the questions presented and renders this extra-statutory facial challenge an inappropriate vehicle for review.

II. THE APPOINTMENTS CLAUSE CHALLENGE DOES NOT WARRANT REVIEW

A. The Court Properly Applied *Edmond*

The Appointments Clause requires principal officers to be appointed by the President and confirmed by the Senate, but allows Congress to "vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." U.S. Const. art. II, §2. Under *Edmond* v. *United States*, 520 U.S. 651 (1997), "'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." *Id.* at 663. Petitioners do not deny that *Edmond* is controlling. They merely disagree with the court of appeals' application of it. The decision below held that Board members are inferior officers because they are comprehensively "'directed and supervised'" by the SEC. Pet. App. 12a-13a. Construing the SEC's authority narrowly, petitioners insist that Board members have "extraordinary autonomy" and are thus principal officers who must be appointed by the President. Pet. 28. But that dispute over statutory interpretation lacks broad importance. And the plain text of the statute forecloses petitioners' claims.

The text of Sarbanes-Oxley makes clear that Board members are inferior officers subject to the pervasive

direction and supervision of the SEC. As the court of appeals explained, "[t]he Commission's authority over the Board is explicit and comprehensive"—"[i]ndeed, it is extraordinary." Pet. App. 7a. The SEC appoints the Board's members and can censure them, remove them, or limit their activities. 15 U.S.C. §§ 7211(e)(4), (6), 7217(d)(2)-(3). Board rules have no effect unless approved by the SEC, and the SEC can abrogate, delete from, or add to those rules. *Id.* § 7217(b)(2), (5). Sanctions are subject to plenary SEC review and are automatically stayed pending review. *Id.* §§ 7215(e)(1), 7217(c). Inspections and investigations cannot be conducted except under SEC-approved rules. *Id.* §§ 7214(c), 7215(a). The SEC controls the Board's budget. *Id.* § 7219(b). And the SEC can rescind the Board's enforcement authority. *Id.* § 7217(d)(1). The SEC can thus "'withdraw or preempt any aspect of the Board's substantive regulatory authority at any time'" and wields a "vast degree of * * * control at every significant step." Pet. App. 30a, 36a.

Board members are subject to at least as much direction and supervision as the coast guard judges held to be inferior officers in *Edmond*. Just as the Judge Advocate General "exercise[d] administrative oversight" over the judges, 520 U.S. at 664, the SEC exercises administrative oversight over the Board, see, *e.g.*, 15 U.S.C. § 7217(a) (incorporating 15 U.S.C. § 78q(a)(1), (b)(1)). Just as the Judge Advocate General could prescribe "'rules of procedure'" for the judges, 520 U.S. at 664, the SEC can prescribe rules to govern the Board (and modify the Board's own rules), 15 U.S.C. §§ 7202(a), 7217(b)(5). Just as the Judge Advocate General could remove the judges, 520 U.S. at 664, the SEC can remove Board members, 15 U.S.C. § 7217(d)(3). And critically, like the judges,

"Board members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" Pet. App. 13a (quoting 520 U.S. at 665). Rather, Board rules, sanctions, and other determinations stand *only* if the SEC allows.

In fact, Sarbanes-Oxley "subjects Board members to greater supervision than the Coast Guard judges in *Edmond*." Pet. App. 13a. In *Edmond*, review of factual findings was limited to whether there was "some competent evidence in the record." 520 U.S. at 665. Here, by contrast, the SEC reviews findings underlying Board sanctions *de novo*, see p. 4, *supra*, and can reject any sanction it deems "not appropriate," 15 U.S.C. § 7217(c)(3). The SEC can reject proposed Board rules based on its independent determination of whether a rule is "consistent with the statutes *and* the public interest." Pet. App. 15a.[2] It can modify or abrogate existing rules to "further the purposes of th[e] Act" and the securities laws. 15 U.S.C. § 7217(b)(5). And it can rescind the Board's enforcement authority whenever doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." *Id.* § 7217(d)(1). Board members are thus clearly inferior officers under *Edmond*.

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[2] Petitioners suggest that the SEC must approve any rule "consistent with the Act '*or*' the public interest." Pet. 37 n.4. But Congress could not possibly have meant to require the SEC to approve rules that *violate* Sarbanes-Oxley so long as they are consistent with the public interest, or vice versa. The court properly corrected an obvious scrivener's error to avoid that absurd construction. See *United States* v. *Fisk*, 70 U.S. 445, 447 (1866). Besides, even after approving a rule, the SEC can abrogate it under a highly discretionary standard. See 15 U.S.C. § 7217(b)(5).

B. Petitioners' Contrary Arguments Do Not Support Review

1. Petitioners' analysis begins, not with *Edmond* or the statutory text, but with unfounded rhetoric. Petitioners assert that Congress modeled the Board after SROs in order to "render the Board independent of the SEC." Pet. 27-28. But the SRO model confirms that Congress intended *plenary* SEC control: SROs are not only "'subject to SEC oversight'" but "'have no authority to regulate independently of the SEC's control.'" *NASD* v. *SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)).[3]

Petitioners urge that Board members "rais[e] their own revenue" and establish broadly applicable auditing standards. Pet. 28. But the SEC controls both functions: Board support fees and auditing standards are *ineffective* without SEC approval. 15 U.S.C. §§ 7217(b)(2), 7219(d). That SEC control is what makes Board members inferior officers: *All* officers exercise "significant authority"; the line that separates principal from inferior is "direct[ion] and supervis[ion]." *Edmond*, 520 U.S. at 662-663. Finally, while petitioners complain about Board members' salaries (Pet. 16, 28), the SEC regulates those too. See *Order Approving PCAOB Budget*, 72 Fed. Reg. 73,051, 73,052 (Dec. 26, 2007).

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[3] Petitioners repeatedly invoke (Pet. 2, 8, 11, 22, 28) the court of appeals' remark that "the level of *Presidential control* over the Board reflects Congress's intention to insulate the Board from partisan forces" to some degree. Pet. App. 34a (emphasis added). But that comment explains only why the Board was *placed under the control of the SEC*, an independent agency; it nowhere suggests Congress meant to *insulate* the Board from the SEC. The SRO model was a reasonable way to create an entity focused exclusively on one problem—audit oversight—subject to comprehensive SEC control.

2. Petitioners claim the SEC's oversight is inadequate because it extends to the Board's "substantive work" but not to "Board members personally." Pet. 31-33. *Edmond*, however, draws no such distinction: "'[I]nferior officers' are officers *whose work* is directed and supervised at some level" by principal officers. 520 U.S. at 663 (emphasis added). That makes sense: Officers execute the law through their "substantive work."

Besides, the SEC *does* supervise Board members personally. The SEC can remove Board members. 15 U.S.C. § 7217(d)(3). It can censure them. *Ibid.* It can modify their salaries. *Id.* § 7219(b). It can exercise administrative oversight over their day-to-day work. *Id.* § 7217(a). And, if necessary, it can "tighten its reins" and "micromanag[e]" them. Pet. App. 20a & n.6. The SEC's control thus plainly "extend[s] to [Board members] personally," not just their "judgments." *Edmond*, 520 U.S. at 667 (Souter, J., concurring in judgment).

Petitioners' assertion that Sarbanes-Oxley limits removal to abuses "akin to impeachable offenses" (Pet. 20-21) lacks merit. The SEC can remove Board members for *any* failure to enforce the Act "without reasonable justification or excuse," 15 U.S.C. § 7217(d)(3)(C)—a capacious standard that, contrary to petitioners' claim, could often authorize removal for "inefficiency or policy mistakes." Pet. 32. The SEC's authority to remove Board members for "willful[]" violations or abuses of authority, 15 U.S.C. § 7217(d)(3)(A)-(B), is similarly expansive: "Willfulness" in the securities context requires only volitional conduct, not knowing violation of the law. See *Wonsover* v. *SEC*, 205 F.3d 408, 413-415 (D.C. Cir. 2000). The court of appeals properly concluded that the SEC could construe its removal authority broadly. Pet. App. 18a, 36a-37a. And petitioners' disagreement with the

court's construction of this particular removal provision hardly warrants review.[4]

In *Edmond*, of course, the Judge Advocate General could remove judges "without cause," but that removal power was not truly "at will" because he could not "attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings." 520 U.S. at 664. Besides, for-cause removal provisions do not *ipso facto* convert inferior officers into principal officers. Removal authority (and its scope) is *one factor*, but it is not dispositive. See *id.* at 664-665. This Court has repeatedly found for-cause provisions consistent with inferior-officer status. See *United States* v. *Perkins*, 116 U.S. 483, 485 (1886); *Morrison* v. *Olson*, 487 U.S. 654, 663, 671 (1988). So has the Executive Branch. See *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150, 156 & n.19 (1993). Even the dissent below conceded that inferior officers could be removable only for cause. Pet. App. 89a. The dissent claimed such limitations are permissible only if the officer's superior has "statutory authority to prevent and affirmatively command, and to manage the ongoing conduct of, all significant exercises of [his] executive authority." *Ibid.* Even if that were the test, the majority construed the Act to grant the SEC precisely that authority here. See *id.* at 18a-20a & n.6. Given that "vast degree of Commission control," *id.* at 36a, Board members are inferior officers.

3. Finally, petitioners insist that the SEC lacks control over inspections and investigations. Pet. 33. But they again ignore the statutory text. For example, Sec-

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[4] If the limitations on removal were too restrictive, moreover, they could be severed. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984).

tion 7217(d)(1)—a provision petitioners nowhere mention—authorizes the SEC to "relieve the Board of *any responsibility* to enforce" the Act based on a mere public-interest finding. 15 U.S.C. § 7217(d)(1) (emphasis added). And because the SEC has independent enforcement authority, see p. 6, *supra*, it could effectively reassign any Board investigation to its own staff.[5] Petitioners complain that the SEC's power to "*supplant*" Board functions does not enable it to "supervise" them. Pet. 25-26, 33. But the two go hand-in-hand: The mere possibility that the SEC will rescind the Board's authority can ensure the Board acts in a manner the SEC approves. As with removal authority, the existence of the rescission power, not just its exercise, gives it bite. See *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986).[6]

The SEC, moreover, has additional means of control. All Board inspections and investigations must be conducted according to SEC-approved rules. 15 U.S.C. §§ 7214(c), 7215(a). The SEC can modify those rules at any time, or issue its own. *Id.* §§ 7202(a), 7217(b)(5). Construing that authority, the court of appeals held that the SEC could "modify the Board's investigative authority as it sees fit," including by "mandat[ing] that all decisions regarding investigation * * * be approved by the Commission" or by allowing it to "'affirmatively command' an investigation." Pet. App. 19a. "If the public interest demands increased micromanaging of Board op-

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[5] Contrary to petitioners' contention (Pet. 35-36), the Act unambiguously empowers the SEC to conduct "such investigations as it deems necessary to determine whether any person has violated * * * the rules of the Public Company Accounting Oversight Board." 15 U.S.C. § 78u(a)(1) (as amended by Sarbanes-Oxley § 3(b)(2)(A)).

[6] Although the SEC must exercise its rescission power "by rule," 15 U.S.C. § 7217(d)(1), it can forgo notice-and-comment where necessary to the "public interest," 5 U.S.C. § 553(b)(B).

erations, the Act empowers the Commission to respond accordingly." *Id.* at 20a n.6.

Petitioners' solitary response (Pet. 36-37) misreads the statute.[7] And their cramped reading of the SEC's authority ignores the requirement that courts construe statutes to avoid, not create, constitutional problems. See *Morrison*, 487 U.S. at 682. It also ignores the requirement that courts reject facial challenges like this one where the entity charged with interpreting the statute—here the SEC—has had "no occasion * * * to accord the law a limiting construction." *Wash. State Grange* v. *Wash. State Republican Party*, 128 S. Ct. 1184, 1190-1191 (2008).

Most importantly, petitioners' argument demonstrates that their complaint is not about constitutional principle but about statutory construction. Petitioners reject the court's construction of the SEC's authority but do not deny that, if that construction is correct, the SEC has ample control over inspections and investigations. There is no reason for this Court to resolve that narrow dispute over statutory construction, particularly in this jurisdictionally questionable facial challenge.[8]

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[7] Petitioners assert that 15 U.S.C. § 7217(d)(2) provides the only way the SEC may impose "limitations" on the Board. Pet. 36-37. But that provision merely authorizes limitations *as a sanction for Board misconduct*; it does not restrict the SEC's broad authority to regulate Board functions under other provisions. Cf. *Shurtleff* v. *United States*, 189 U.S. 311, 317-318 (1903). Congress required the Board to conduct inspections and investigations pursuant to SEC-approved rules that the SEC can modify at any time. 15 U.S.C. §§ 7214(c), 7215(a), 7217(b)(5). Congress obviously contemplated that those rules would impose "limitations" on how the Board performs those functions.

[8] Petitioners fault the court of appeals' observation that any Board independence is "dwarfed" by the Independent Counsel's autonomy

C. Petitioners' Other Appointments Clause Arguments Lack Merit

Petitioners briefly assert that the SEC is not a "department" capable of appointing inferior officers and that the Chairman rather than the Commission is its "head." Pet. 38-39. The majority explained why both arguments lack merit. Pet. App. 20a-25a. The dissent agreed, declaring the arguments "inconsistent with current Supreme Court precedents." *Id.* at 97a n.24.

Every authority to have addressed whether significant independent agencies like the SEC are "departments" has concluded that they are.[9] Every authority has likewise concluded that the multimember commissions in charge of those agencies are their "heads."[10] And the dis-

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in *Morrison*, stressing the Independent Counsel's limited tenure and jurisdiction. Pet. 34-35. Whatever an officer's tenure and jurisdiction, he is still only an inferior if he has a superior with plenary control. See *Edmond*, 520 U.S. at 663. The court of appeals' discussion of *Morrison*, moreover, did not affect its conclusion. The court correctly held that Board members are subject to greater direction and supervision than the inferior officers in *Edmond*. Pet. App. 12a-13a. That determination compels the conclusion that Board members are inferior officers, *Morrison* aside. Finally, petitioners' contention that Board members must be principal officers to appoint staff such as the Chief Auditor (Pet. 35) is incorrect. Board staff are mere employees who may be hired by inferior officers. See *Freytag* v. *Commissioner*, 501 U.S. 868, 880-882 (1991).

[9] See, *e.g.*, *Freytag*, 501 U.S. at 918-921 (Scalia, J., concurring in judgment, joined by O'Connor, Kennedy, and Souter, JJ.); *Silver* v. *U.S. Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991); *Authority of Civil Service Commission To Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227, 231 (1933). Petitioners rely on *Freytag* (Pet. 38), but *Freytag* expressly distinguished "appointment of an inferior officer by the head of one of the principal agencies, such as * * * the Securities and Exchange Commission." 501 U.S. at 887 n.4.

[10] See, *e.g.*, *Silver*, 951 F.2d at 1038-1039; *id.* at 1044 n.3 (O'Scannlain, J., dissenting); 37 Op. Att'y Gen. at 231. That the Chairman has ad-

trict court held that petitioners lacked standing to pursue this claim, Pet. App. 114a, another jurisdictional defect that petitioners ignore.

III. THE SEPARATION-OF-POWERS CHALLENGE DOES NOT WARRANT REVIEW

A. The SEC's Pervasive Control Forecloses Any Separation-of-Powers Claim

The Constitution vests the President with the "executive Power" and charges him to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§1, 3. Sarbanes-Oxley does not intrude on that authority. There simply is no "law" the Board can "execute"—or refuse to execute—free from the SEC's pervasive oversight and control. And the SEC is accountable to the President, who can remove Commissioners for neglect of their duty to supervise the Board. The President's authority here is no different from his authority over any other area under the SEC's jurisdiction.

Petitioners do not appear to claim that the Constitution requires that the President be able to control Board members *directly*. Any such claim would be foreclosed by centuries of precedent. It has long been the rule, for example, that inferior officers appointed by department heads "hold their office at the discretion of the appointing power"; consequently, the President has "no power" to remove them. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal

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ditional administrative responsibilities (Pet. 38-39) does not make him the SEC's "head"; the Commission as a whole "retain[s] all substantive responsibilities" and "policy control." *Special Message to the Congress*, 1950 Pub. Papers 199, 202 (Mar. 13, 1950). Moreover, contrary to petitioners' claim (Pet. 39), the Chairman alone does not appoint inferior officers. See Pet. App. 25a; PCAOB C.A. Br. 37-38.

Counsel 124, 166 (1996).[11] In *Morrison*, the President could not remove the Independent Counsel directly; he could only instruct the Attorney General to do so. See 487 U.S. at 663. The President exercises his other oversight powers the same way: not by supervising inferior officers directly but by supervising the principal officers to whom the inferior officers report. See *The President and Accounting Offices*, 1 Op. Att'y Gen. 624, 626 (1823).

Petitioners thus apparently contend that Sarbanes-Oxley "completely strip[s]" the President of his *indirect* oversight power—his ability to ensure faithful execution of the laws through his oversight of the principal officers to whom inferior officers report. Pet. i. But the Act plainly does no such thing. The Act gives the SEC vast control over the Board—both pervasive control over all Board functions, see pp. 15-17, *supra*, and broad for-cause removal power, see p. 19, *supra*. And the SEC is just as accountable to the President here as in any other context. The President can remove Commissioners for "'inefficiency, neglect of duty or malfeasance in office,'" *MFS Sec. Corp.* v. *SEC*, 380 F.3d 611, 619 (2d Cir. 2004)—"very broad" terms that "could sustain removal * * * for any number of actual or perceived transgressions," *Bowsher*, 478 U.S. at 729.

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[11] *Hennen*'s holding that the power to remove follows the power to appoint is as old as the Republic itself. In the "Decision of 1789," one of Congress's principal grounds for concluding that the President alone can remove *principal* officers was that he appoints them. See *Myers* v. *United States*, 272 U.S. 52, 119 (1926); 1 Annals of Cong. 383-399, 473-614 (Gales ed., 1834). The corollary is that, where a *department head* appoints, only the *department head* can remove. Thus, the Postmaster General had "sole and exclusive authority" to remove officers he appointed. 3 J. Story, *Commentaries on the Constitution of the United States* § 1530, at 387 (1833).

Such "transgressions" could plainly include neglect of duty in supervising the Board. "A public officer in charge of an office is removable for such inefficiency, neglect of duty, or wrongdoing of subordinates over whom he or she has supervisory control as reasonably indicates inefficiency, neglect of duty, or wrongdoing of the supervising officer herself or himself." 63C Am. Jur. 2d *Public Officers and Employees* § 179, at 610 (1997); see also *Inefficiency or Misconduct of Deputy or Subordinate as Ground for Removal of Public Officer*, 143 A.L.R. 517 (1943) (collecting cases). Tenured federal superiors have repeatedly been removed or demoted for inadequately supervising subordinates. See, *e.g.*, *Holder* v. *Dep't of Army*, 670 F.2d 1007, 1009 (Ct. Cl. 1982); *Della Valle* v. *United States*, 231 Ct. Cl. 818, 820, 822-823 (1982). And a superior's neglect to remove an inferior could be grounds for the superior's own removal, just like any other neglect to supervise: "[T]he power to suspend or discharge * * * subordinates * * * carries with it the correlative duty to vigilantly exercise the power * * * ." *Fernelius* v. *Pierce*, 138 P.2d 12, 14 (Cal. 1943); see also *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984); *Fiacco* v. *City of Rensselaer*, 783 F.2d 319, 328-332 (2d Cir. 1986).[12]

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[12] Petitioners complain that the President might have to remove multiple Commissioners and obtain Senate confirmation for successors. Pet. 21. But that objection does not distinguish the SEC's supervision of the Board from any other SEC function. Besides, the mere threat to remove a Commissioner is a potent tool of control. See *Bowsher*, 478 U.S. at 727 n.5. That Sarbanes-Oxley states only that the SEC "may" remove Board members for cause, 15 U.S.C. § 7217(d)(3), does not mean a failure to remove cannot be a neglect of duty. Even discretionary authority can be abused. A trial judge, for example, can be reversed for failing to exclude unduly prejudicial

Petitioners' assertion that the Act "eliminate[s] the President's control of executive officers to the maximum possible extent" (Pet. 16) is thus groundless. It is not true, for example, that "the President has no power to review the Board's budget." *Ibid.* The SEC reviews the Board's budget, 15 U.S.C. § 7219(b), and the SEC is no less accountable to the President on that issue than on any other. The SEC's control over the Board is plenary, and the President has the same control over the SEC's supervision of the Board as he has over any other SEC function. The President thus has no less ability to ensure faithful execution of the laws than he would have if Congress had lodged the Board's functions in the SEC's own staff (an arrangement petitioners do not contest, cf. Pet. 8, 18). So long as one accepts the SEC's own constitutionality—something petitioners do not explicitly dispute—the Board cannot violate separation of powers.

B. The Court of Appeals Properly Considered the SEC's Comprehensive Oversight

Perhaps recognizing that the SEC has comprehensive control, petitioners urge the Court to focus exclusively on removal authority. Pet. 15-16, 19-20. As an initial matter, even considering removal in isolation, the President's power plainly has not been "completely stripp[ed]." Pet. i. The Act grants the SEC broad for-cause removal power. See p. 19, *supra*. And a Commissioner's refusal to remove a Board member could justify his own removal. See p. 26, *supra*. Petitioners' assertion that "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

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evidence even though the relevant rule states only that he "may" exclude it. Fed. R. Evid. 403.

member" (Pet. 20) is thus both disputed *and* erroneous.[13] This case therefore does not present the removal question on which petitioners actually seek review—whether Sarbanes-Oxley violates separation of powers by "completely stripping" the President of removal authority. Pet. i.

More fundamentally, petitioners' theory—that courts must ignore the SEC's comprehensive control when evaluating its removal authority—is unsupportable. "The analysis contained in [this Court's] removal 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 689-690. Removal is "*a* powerful tool" in discharging that duty. *Edmond*, 520 U.S. at 664 (emphasis added). But it is not the *only* tool.

The power to abolish an officer's *authority*, for example, is routinely treated as functionally equivalent to removal power. In *Morrison*, Justice Scalia contrasted the Independent Counsel with the Watergate Special Prosecutor, observing that "the Attorney General could have removed [the Special Prosecutor] at any time, *if by no other means than amending or revoking the regulation defining his authority*." 487 U.S. at 721 (Scalia, J., dissenting) (emphasis added); see also *United States* v. *Lib-*

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[13] See, *e.g.*, PCAOB C.A. Br. 45. The page petitioners cite states only that the President has the *same* control over the SEC's removal decisions as he does over "countless other discretionary [SEC] decisions"—not that he has *no* control. See *id.* at 46. Petitioners' reliance on manufactured "concessions" is a recurring theme throughout their petition. See Pet. 10, 24 (erroneously asserting the SEC is "concededly" independent of presidential control); *id.* at 33 (erroneously asserting there is "concededly" no provision authorizing control of inspections and investigations).

by, 429 F. Supp. 2d 27, 44 (D.D.C. 2006) (special counsel "essentially removable at will" because "the Deputy Attorney General * * * has complete discretion to take [his] authority away"); cf. *In re Sealed Case*, 829 F.2d 50, 56-57 & n.34 (D.C. Cir. 1987); 20 Op. Off. Legal Counsel at 171. There is no constitutionally significant difference between the power to remove someone from office and the power to abolish the authority of his office. That latter power is precisely what the SEC has here—the power to overturn every Board sanction, abrogate every Board rule, and relieve the Board of *any* enforcement authority whenever the public interest so warrants. See pp. 15-17, *supra*.

Quoting *Bowsher*, petitioners assert that, "'[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.'" Pet. 15 (quoting 478 U.S. at 726). But petitioners' ellipsis omits the phrase "and not the authority that appointed him." 478 U.S. at 726. *Bowsher* was merely observing that the removal power, unlike the appointment power, is an effective tool for ongoing control; not that there are *no* effective alternatives. Petitioners also rely on *Morrison*. Pet. 18-19. But that case noted only that a statute can violate separation of powers for two reasons—because its removal restrictions *plus other limitations* on oversight impermissibly interfere with the President's functions; or because the removal restrictions, even apart from the other *limitations*, have that effect. See 487 U.S. at 685. *Morrison* did not suggest that, in analyzing a removal restriction, courts must ignore affirmative statutory mechanisms of oversight and control.

Sarbanes-Oxley grants the SEC such pervasive means of control, and empowers the SEC to exercise that con-

trol under such broad and discretionary standards, as to eliminate any conceivable concerns over its removal provision. See pp. 15-17, *supra*. As the court of appeals observed, the Act "essentially grant[s] [the SEC] at-will removal power over Board functions if not Board members." Pet. App. 35a. For that reason, this case does not involve "double for-cause removal provisions" in any meaningful sense. *Id.* at 66a (dissent). Whatever the scope of the SEC's power to remove Board members, the SEC's power to remove the Board's *authority* is restricted only by the SEC's own judgment of the public interest. And because the SEC's control is plenary, there is no meaningful difference between the President's control over Board members and the President's control over the SEC's own staff—or the subordinates of any other independent agency.[14]

C. Petitioners Misread the Decision Below

Petitioners finally caricature the decision below as "explicitly hold[ing] that the Constitution allows Congress to impose *any* restriction on the President's ability to appoint *or* remove inferior officers." Pet. 23-24. That

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[14] Petitioners invoke other factors from *Morrison* (Pet. 21-22), but to no avail. That the President does not appoint Board members cannot violate separation of powers; the Constitution expressly permits department heads to appoint inferior officers. U.S. Const. art. II, § 2. Moreover, that factor hardly favors petitioners: Board members are appointed by the presidentially removable SEC Commissioners while the Independent Counsel in *Morrison* was appointed by a *three-judge court*. 487 U.S. at 661 & n.3. The Board's tenure and jurisdiction are likewise immaterial. Those factors mattered in *Morrison* only because of the Independent Counsel's extraordinary autonomy. See pp. 22-23 n.8, *supra*. Lastly, Congress did have an overriding need to structure the Board the way it did. See pp. 2, 18 n.3, *supra*. The strength of that need is irrelevant, however, because the Act raises no separation-of-powers concerns.

was not the court's holding. The court held that the Act preserves the President's ability to ensure faithful execution of the laws because the SEC has pervasive control over the Board and the President has sufficient control over the SEC. See Pet. App. 26a-37a.

Petitioners' contrary claim rests on a *single sentence* of the court's 11-page separation-of-powers analysis. That sentence quoted *this Court's* holding in *United States* v. *Perkins*, 116 U.S. 483 (1886)—that, where Congress vests appointment in a department head, it may "'limit and restrict the power of removal as it deems best for the public interest.'" Pet. App. 36a (quoting 116 U.S. at 485). But the court of appeals quoted *Perkins* only to refute petitioners' suggestion that a generic "good cause" standard is "the greatest restriction Congress may impose on removal of inferior officers." *Ibid.* The court did not apply *Perkins*' "public interest" standard, much less adopt that standard as its "explicit[] hold[ing]." Pet. 23. If it had, the preceding ten pages of its opinion—addressing the scope of the SEC's and the President's control—would be superfluous. Petitioners' assertion that the court's reasoning would authorize an independent "Criminal Prosecution Board" (Pet. 12) is equally fanciful. The court upheld the Board precisely because it is *not* "independent" from the SEC. Pet. App. 30a n.9.

Far from justifying review, *Perkins* provides an alternative ground for affirmance and thus another reason to deny the petition. Notwithstanding the general rule that the President's executive power "includ[es] the power of appointment and removal of executive officers," *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926), Congress's *express* authority to vest appointment of inferior officers in department heads has been understood for well over a century to carry with it *implied* authority to regulate

removal of inferior officers so appointed. Justice Story endorsed that rule as early as 1833. See 3 J. Story, *Commentaries on the Constitution of the United States* § 1531, at 388 (1833). *Perkins* adopted it in 1886, holding that the "'constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal * * * [of] the officers so appointed.'" 116 U.S. at 485. *Myers* accepted that holding, expressly assuming "the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments"; *Myers* merely refused to extend that rule to *presidentially appointed* inferior officers. 272 U.S. at 161. *Morrison* reaffirmed the rule. See 487 U.S. at 689-690 nn.27 & 29. And the Executive Branch has confirmed that it "remain[s] good law." 20 Op. Off. Legal Counsel at 166.[15]

Congress followed that longstanding rule when it established the Board and subjected it to the SEC's pervasive oversight. Consistent with the express terms of the Appointments Clause, Congress granted the SEC sole authority to appoint its new subordinates. See pp. 15-24, *supra*. Consistent with *Hennen*, Congress granted it sole removal power as well. See pp. 24-25 & n.11, *supra*. And consistent with *Perkins*, Congress prescribed the conditions under which it could exercise that power. See pp. 31-32, *supra*. Petitioners in effect urge the Court to disregard the settled rules that have governed all other department-head-appointed inferior officers for over 120

[15] The most notable feature of Washington Legal Foundation's catalogue of removal disputes is that the vast majority involved *presidential appointees*. See WLF Br. 4-15. Those examples cast no doubt on *Perkins*' narrow holding regarding department-head-appointed inferior officers.

years because the SEC is an "independent" agency. But that is precisely the sort of attempt to "adjust[] the remainder of the Constitution to compensate for *Humphrey's Executor*" that should be rejected as a "fruitless endeavor." *Freytag* v. *Commissioner*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in judgment).

In any event, no such endeavor is possible here. The court of appeals upheld the Act, not because of *Perkins*, but because the SEC has pervasive control over the Board and the President has the same control over the SEC here as elsewhere. The Act thus does nothing to diminish presidential authority. The Executive Branch, through two different administrations, has agreed, undermining any claim that the Act "impermissibly intrudes into the executive function." *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 441, 449 (1977). Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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