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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. Respondents' Exhaustion Argument Is Frivolous

Respondents seek to resurrect the frivolous "exhaustion" argument summarily dismissed by all judges below. They contend the exclusive means for challenging the *Board's* unconstitutional *structure* is to select at random "*any* [Board] rule" and then petition the appellate court to review the *SEC's* approval. Bd. Opp. 14.[1] Petitioners must invent this fictional "controversy" with the SEC over an unobjectionable rule solely to create a vehicle for challenging the Board in an appellate proceeding where the Board is not a necessary or, perhaps, even permissible party. *See infra* p. 3. Of course, no case anywhere has ever hinted that a standard provision for appellate review of agency rulemaking is the exclusive vehicle for challenging the agency's (much less another agency's) constitutionality, thus

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[1] Respondents' alternative suggestion that Petitioners should have challenged a "Board sanction" (*id.*) is disingenuous because the Board's investigation of Petitioner Beckstead did not result in sanctions, reflecting that appealing sanctions is not even an *available* route for those injured by the Board's fees, standards and investigations but not sanctioned. Even more disingenuous is the assertion that Petitioners could have brought their challenge by "seeking SEC review of the Board's inspection report [on Beckstead] or petitioning the SEC to modify or revoke the Board's authority" (Bd. Opp. 14), because appellate courts have no jurisdiction over SEC inspection-report rulings or refusals to initiate rulemaking. 15 U.S.C. §§ 78y, 7214(h)(1)-(2).

displacing a district-court proceeding for "injunctive relief" which, contrary to Respondents' characterization as "a new cause of action" (SG Opp. 13), has "long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *accord Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *Davis v. Passman*, 442 U.S. 228, 241-45 (1979).

It is well-established that a statutory review mechanism is exclusive only for claims "of the type that Congress intended to be reviewed within this statutory structure," but not for "collateral" claims, *Thunder Basin Co. v. Reich*, 510 U.S. 200, 212 (1994), where the agency "lacks institutional competence to resolve the particular type of issue presented, *such as the constitutionality of the statute*," or "lack[s] authority to grant the type of relief requested," *McCarthy v. Madigan*, 503 U.S. 140, 147-148 (1992) (emphasis added). *See also McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 492 (1991); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Johnson v. Robison*, 415 U.S. 361, 373 (1974).

Here, (1) the SEC lacks "institutional competence" and "authority" to opine on separation of powers or invalidate the Board; (2) the SEC's views on the constitutional issues are entitled to no deference, *McCarthy*, 503 U.S. at 148; and (3) both the SEC and the appellate court in a statutory review procedure lack "authority to grant the type of relief requested," because the court can only *invalidate* the challenged

SEC *order*, 15 U.S.C § 78y(a)(3), but cannot enjoin the Board's regulatory authority. Indeed, it is doubtful that the statutory procedure is even an *available* route to challenge the Board's constitutionality, because the Board is not the proper respondent, 15 U.S.C. § 75y(a), and because jurisdiction extends only to "persons aggrieved by final orders of the Commission," *id.* § 78y(a)(1), which might not encompass those aggrieved by Board actions unrelated to the rule on appeal.

Accordingly, a challenge to the Board's structure unrelated to the statutory legitimacy of any SEC rule is plainly "collateral" to a provision designed for reviewing that statutory legitimacy, and produces no judicial economies. The Solicitor General feebly argues that the challenge here somehow "deprived the Commission of the opportunity" to provide an "authoritative construction of the Act." SG Opp. 14-15. But the Commission in the lower courts and here has provided (in the United States briefs it joined) its "construction of the Act," just as it would have in Respondents' statutory-review case, and its views on the Board's constitutional structure are obviously not "authoritative."

Accordingly, there is nothing in precedent, logic or congressional intent which supports treating Respondents' proposed alternative as an *exclusive* mechanism that displaces the "long-recognized" procedure of a district-court equitable action.

II. The Issues Warrant Review

Respondents engage in a feeble effort to convert "the most important separation-of-powers case ... in the last 20 years" (Pet. App. 41a) into a dispute over "narrow statutory issues." Bd. Opp. 2. They contend that if the panel majority's view of the SEC's statutory authority to pervasively control and assume the Board's functions is accepted, then the "constitutional issues" somehow "evaporate." *Id.* This is a blatant distortion of the issues presented.

As the Petition and briefs below make clear, even assuming the SEC has "at-will removal power over Board functions" (Pet. App. 7a, 35a)—the only cognizable statutory disagreement between the parties—this cannot possibly cure the Act's "impermissibl[e] interfere[ence] with the *President's* exercise of *his* constitutionally appointed functions." *Morrison v. Olson*, 487 U.S. 654, 685 (1988) (emphasis added). This is because (1) it is undisputed that the President cannot order the SEC to assume the Board's functions; (2) Article II protects the "President's ... power to control or supervise ... executive *official[s]*," not functions, *id.* at 692 (emphasis added), which is impossible unless the President or his alter ego has some realistic ability to remove those officials; and (3) the SEC's theoretical ability to transfer the Board's functions to itself is a constitutional irrelevance because it is unexercised.

In response, the panel majority and Respondents contend that where, as here, the President has constitutionally "sufficient control" over an

independent agency like the SEC, this necessarily "preserves the President's ability to ensure faithful execution of the laws [by the Board] because the SEC has pervasive control over the Board." Board Opp. 31.

The fundamental flaw in this reasoning is that "the *President's* ability" to execute the laws is plainly not "preserve[d]" unless his control over the SEC is such that he has "sufficient" authority over *Board members* (the officials executing the law) to "control" and "supervise" their functions. *Morrison*, 487 U.S. at 692, 696. And, with respect to *every* mechanism through which the SEC purportedly controls the Board, it is clear that the President has no ability to influence the SEC in a manner that could possibly control the Board. It is undisputed that the President has no ability to force the SEC to usurp or limit the Board's functions, dictate the SEC's review of the Board's rules or influence who is appointed to the Board. The President and the SEC do not even suggest that the President can direct how the SEC performs its discretionary authority to remove. And even the Board contends (Opp. 26) only that the President can weigh in with the SEC when the need to remove a Board member is so clear as to constitute a "duty" (which will not occur absent impeachable conduct given the extraordinarily limited grounds for removing members). And all concede that removal of Board members can be effectuated only if the Senate confirms replacement SEC Commissioners—itself an impermissible congressional interference with the President's removal authority.

Thus, since the panel majority did not even attempt to argue that the President can tell the SEC how to use its various devices to control the Board, the scope of that control is largely beside the point. Accordingly, *regardless* of the scope of SEC power over the Board's investigative functions, this case squarely presents the novel and important question whether a statute vesting an *independent* agency with power to review or supplant another agency's *work product* satisfies the Constitution's requirements for *Presidential* appointment and removal of executive *officers*.

1. Respondents do not dispute that this "case of first impression" (Pet. App. 26a) presents a novel question. They do not contend that any case addresses whether a federal agency whose officers are not appointed or removable by the President becomes constitutional because "supervised" by a Fourth Branch agency. Indeed, no case could have upheld that arrangement because, as Respondents do not dispute, the heads of *every* other enforcement agency are appointed and removed by the President and no other agency is "supervised" by an independent agency. (The Solicitor General notes (Opp. 25) that there is a *private* analogue to the Board—the New York Stock Exchange—but this is irrelevant because such private entities need not be subject to Presidential control and, indeed, reaffirms the Board's invalidity because the President obviously has no ability to supervise the Exchange.)

Similarly, Respondents, like the panel majority, do not pretend that the Board somehow *satisfies* the factors identified in *Morrison* for assessing the validity of removal restrictions or the statute "as a whole." *Morrison*, 487 U.S. at 685, 693; Pet. 21-23. Rather, to the extent they even discuss *Morrison*, Respondents argue only, again, that pervasive SEC "oversight" satisfies separation of powers, rendering the particular *Morrison* factors inapposite. Bd. Opp. 29, 30 n.14; SG Opp. 28. In short, Respondents do not contend that any precedent answers the question presented; they simply argue that the Constitution is satisfied by an independent agency's supervisory authority over the Board—a plainly novel issue.

This issue is also of threshold importance. Respondents do not dispute that if, as they and the panel majority contend, an independent agency's "pervasive" supervision of a Fifth Branch agency's work product is constitutionally acceptable, then Congress is necessarily free to have all executive functions performed by officers neither appointed nor removable by the President, so long as they are "supervised" by independent agencies. Pet. 11-13. The Solicitor General does not dispute this at all, and the Board does not dispute that a "Criminal Prosecution Board" (or similar entity performing a core executive function) is constitutional under the decision below if it is no more "independent" from an independent "Criminal Prosecution Commission" than the Board is "from the SEC." Bd. Opp. at 31. Thus, it remains undisputed that, under the holding below, Congress can require all executive functions to

be carried out by officers whom the President cannot appoint, remove or review if the statute allows a Fourth Branch agency to review or supplant those functions. Congress should not be authorized to so decapitate the Executive's traditional powers without this Court's careful consideration and guidance.

2. Respondents also cannot rebut Petitioner's showing that the decision below is contrary to precedent.

First, without attempting to defend the absurd reasoning of the court below relating to "facial challenge[s]," Pet. App. 37a n.14, Respondents argue that the SEC's "wholly unexercised" "*power* to remove" the Board's *functions* is a "powerful tool for control," because the mere threat to do so will induce the Board to follow "the Commission's guidance." SG Opp. 23 n.6; Bd. Opp. 28-29. But this *SEC* "threat" cannot enable *Presidential* control because *he* cannot order the withdrawal of Board functions. Again, this argument repeats the panel majority's fundamental mistake of equating a Presidential "alter ego" with an independent agency like the SEC. Vesting power in alter egos does not infringe the President's prerogatives because such "hand[s] of the President," *In re Sealed Case*, 838 F.2d 476, 528 n.30 (D.C. Cir. 1988) (Ginsburg, J., dissenting), are functionally indistinguishable from the Chief Executive himself. But vesting executive prerogatives in the SEC *does* infringe the President's Article II power because the *raison d'être* of independent agencies is to be free of the President's policy views, *Freytag v. Comm'r*, 501

U.S. 868, 916 (1991) (Scalia, J., concurring), so their control cannot reasonably be equated with Presidential control.

Second, there is nothing to the Board's and panel majority's contention that *United States v. Perkins*, 116 U.S. 483 (1886), authorizes Congress to foreclose Presidential power to remove inferior officers, solely because the Appointments Clause allows it to assign appointment to Department Heads. Bd. Opp. 31-33.[2] As even the Solicitor General acknowledges, *Morrison* holds that the constitutionality of removal restrictions on inferior officers turns on whether the restriction "sufficiently deprives the President of control over the [officer] to interfere impermissibly with his constitutional obligation to ensure faithful execution of the law," *not* on whether the inferior officer is appointed by a Department Head. SG Opp. 27 (quoting *Morrison*, 487 U.S. at 693).

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[2] The Board contends that the court below did not so hold, a distancing effort which is particularly baffling because the court's *Perkins* analysis (Pet. App. 17a, 36a) precisely echoes the argument the Board vigorously advanced below and repeats here (Bd. Opp. 31-33). Since the opinion below in no way suggested that the President could force the SEC to remove Board members, it necessarily held that the President's inability to remove Board members was constitutionally acceptable. And the opinion thought this permissible precisely because, as it stated *twice*, *Perkins* gives Congress plenary power to control removal of inferior officers (Pet. App. 17a, 36a), and "no case" suggests that "good cause is the greatest restriction Congress may impose" (*id.* 36a) or otherwise "prescrib[es] the ways in which Congress can restrict a principal officer's removal of his inferiors" (*id.* 17a).

Third, with respect to *Perkins*, the Solicitor General makes the wholly irrelevant and undisputed point that the "President's power to remove inferior officers ... [may] be restricted, at least where the appointment had been made by an officer of the Executive Branch." SG Opp. 26-27 (quoting *Morrison* 487 U.S. at 723-24 (Scalia, J., dissenting)). But no one challenges, and this case does not involve, good-cause removal restrictions on Executive Branch inferior officers. Such "for cause" restrictions do not unduly impede executive power because, as was cogently explained by the same opinion on which the Solicitor General relies, the inferior officers are "subject to the supervision of principal officers who (being removable at will) have the President's complete confidence" and must follow this supervision because "*for cause*" removal "would include, of course, the failure to accept supervision"—just as the Naval cadet in *Perkins* could be removed for not following a superior's orders. *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

Here, in stark contrast, the President cannot control Board members through a chain of command consisting of alter egos, because the "supervisors" at the SEC do not follow the President's commands on policy and the "inferiors" on the Board cannot be removed for failing to follow the policies of either the President or the SEC. Pet. 19-21.

3. Similarly, the Board's assertion that "the President has no less ability to ensure faithful execution of the laws than he would if Congress had

lodged the Board's functions in the SEC's own staff" (Opp. 27) is fanciful, and contradicts Congress's own judgment that creating the Board *reduced* "Presidential control." Pet. App. 34a. If the SEC performed the Board's functions, those functions would be performed by Commissioners appointed and removable by the President. SEC staff are purely creatures of the Commissioners, and have no statutory authority or existence. Indeed, the Board itself contends that they are not even "officers," but mere "employees." CADC Br. 37. Moreover, all staff are appointed and removable at will by the Chairman. Pet. 38-39. Thus, the President has the same level of control over SEC "staff" as he does over the Chairman, since they are the Chairman's alter egos, and the President can remove the Chairman (as Chairman) at will. Pet. App. 28a-29a.

In stark contrast, the President's level of control over the Board is only that which he enjoys over the New York Stock Exchange, the entity subject to the same "pervasive" SEC oversight purportedly visited on the Board. Bd. Opp. 18. But no one would suggest that the President "supervises" the Exchange by virtue of that SEC oversight. Thus, while "sufficient control" of the SEC necessarily constitutes "sufficient control" of its powerless staff, it in no way constitutes "sufficient control" of an autonomous entity whose members are neither appointed nor removable by the President.

4. With respect to the Appointments Clause, Respondents argue that this case simply involves

"application" of the "direction and supervision" test of *Edmond v. United States*, 520 U.S. 651 (1997), and that the panel correctly applied it. They are wrong on both counts.

First, the panel erred by concluding that "direction and supervision" renders an officer inferior even though, as *Edmond*'s author has emphasized, "to be sure, it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer." *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting); *accord* Pet. 33. Among all the powerful offices that would be rendered "inferior" under this misguided standard (Pet. 29), the Solicitor General disagrees only with the characterization of the CIA, but plainly the CIA, like the others, is "supervise[d]" at least as much as the Board is. 50 U.S.C. § 403-4a(b).

Respondents' main argument, again, is that the SEC's purported ability to withdraw some of the Board's *functions* has such an *in terrorem* effect on the Board that it is "functionally equivalent to the removal power" necessary for supervision. Bd. Opp. 28; SG Opp. 17-18. This is wrong because supervision must be of the "officer" personally, not his work product. *Edmond*, 520 U.S. at 667 (Souter, J., concurring); Pet. 32. *Morrison* firmly establishes this fundamental distinction. It holds that the Special Division's power to "define" and "expand" the "scope" of the Independent Counsel's "jurisdiction" (487 U.S. at 679, 680 n.18) and to "terminat[e]" the office (*id.* at 680), "simply does not give the Division

the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority" (*id.* at 681), or otherwise vest any supervisory power even "approaching the power to *remove* the counsel" (*id.* at 682).

The ability to narrow or withdraw an office's jurisdiction does not enable one to supervise the "officer" for the tasks remaining within his jurisdiction, and the "threat" of losing one of the office's responsibilities is not remotely equivalent to the threat of losing one's *job*. If anything, the ability to have the same job with *less* responsibility might well be viewed as desirable, particularly given the Board's exorbitant salaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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