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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 OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared before this Court and other federal courts (including the appeals court and district court in this case) to express its view that separation-of-powers principles embedded in the U.S. Constitution bar any branch of the federal government from exercising powers rightfully belonging to another branch. *See, e.g., Exxon Mobil Corp. v. FERC*, No. 08-212, *cert. denied*, 2009 U.S. LEXIS 220 (Jan. 12, 2009); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

WLF has also appeared in numerous federal and State court proceedings to express its views regarding the proper scope of the federal securities laws. *See, e.g., Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, __ U.S. __, 128 S. Ct. 761 (2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 366 (2005). WLF has supported recommendations

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, amicus states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for amicus provided counsel for all parties with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Court.

to relieve smaller public companies from the regulatory burdens of § 404 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley") because the prohibitive costs of compliance place smaller companies at a competitive disadvantage.

REASONS FOR GRANTING THE PETITION

WLF agrees with Petitioners that this is a case of great importance because it presents issues that "go to the heart of the relationship between the Legislative and Executive Branches" and because the opinion of the panel majority, authorizing a "wholly unprecedented model for federal agencies," green-lights Congress to "enact a sea change in the structure of the federal government." Pet. at 7. WLF further agrees that Congress's design of the Public Company Accounting Oversight Board ("PCAOB") – whose members are appointed by the five commissioners of the Securities Exchange Commission ("SEC") and are removable only for cause by those commissioners – suffers from "fundamental constitutional flaws" that do not square with judicial and historical precedent. Pet. at 9.

WLF writes separately to highlight a few particular issues that warrant this Court's review. First, the limits on the Executive's ability to remove PCAOB members are inconsistent with over two centuries of historical precedent. Second, assuming that members of the PCAOB are "inferior officers," their appointments by the commissioners of the SEC conform with the Appointments Clause only if the SEC is a "Department" and its commissioners are the "Head" of that department (as the court below concluded). This Court

has never determined whether a multi-member body can constitute the head of a department. Moreover, the decision below conflicts with this Court's reasoning in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), under which the President must retain ultimate responsibility and political accountability for his appointees. These removal and appointment power issues strike at the heart of our constitutional system of the separation of powers. Indeed, the dissenting opinion below emphasized that 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 is of great practical importance as well because the Constitution's structural principles were designed to safeguard individual liberty. Accordingly, the Court should grant certiorari.

I. THE PRESENT RESTRICTIONS ON THE EXECUTIVE'S REMOVAL POWER ARE INCONSISTENT WITH TWO CENTURIES OF HISTORICAL PRECEDENT

For more than two centuries, the Executive Branch has consistently asserted that the Framers deliberately (and wisely) decided not to place any check on the President's exercise of the removal power. And this history demonstrates that the courts should not endorse congressional intrusions on the Executive's removal power.

This historical analysis is highly relevant because this Court has instructed that the judiciary's constitutional analysis ought to be informed by the

interpretation of constitutional law regularly adhered to by a coordinate branch of the government. Indeed, this Court has employed such an approach as part of its interpretive methodology. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto because, *inter alia*, eleven Presidents who had been presented with the issue went on record challenging its constitutionality); *Myers v. United States*, 272 U.S. 52, 148, 150 (1926) (holding that Congress could not limit the removal power because, *inter alia*, the Executive Branch viewed the power as "unrestricted").

A. For Over Two Centuries, the Executive Branch Has Interpreted the Removal Power Broadly and Resisted Congressional Efforts to Limit the Removal Power

Any historical account of the removal power must begin with the "Decision of 1789." In 1789, the First Congress debated whether to adopt legislation that included a provision expressly authorizing the President to remove certain executive officials. *See, e.g.*, 1 Annals of Cong. 499 (Joseph Gales ed., 1789). After exhaustive debate, both houses of Congress passed – and President Washington signed – a version of the bill that did not include the phrase "removable by the President." James Madison and other members of the House opposed the language because its inclusion would have suggested – contrary to the text of the Constitution – that the President's removal power: (1) could be exercised only pursuant to an express legislative grant; and (2) could be conditioned by Congress. *See, e.g.*, *Parsons v. United States*, 167 U.S. 324, 328-29 (1897);

Myers, 272 U.S. at 112-116; *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

The Decision of 1789 thus established that the removal "power was vested in the president alone." *Parsons*, 167 U.S. at 331. As this Court has explained, the "Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher*, 478 U.S. at 723-724 (quotation marks omitted).

Later presidential administrations have emphasized the significance of the Decision of 1789. President Taft observed that "[i]t was settled, as long ago as the first Congress, . . . that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammeled." William H. Taft, *Our Chief Magistrate and His Powers* 56 (1916). President Tyler's administration held the same view: "It is according to [the settled construction of 1789], from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust." 4 Op. Att'y Gen. 1, 1-2 (1842).

Ever since the Decision of 1789, the Executive Branch has staunchly defended the removal power against congressional encroachments. James Madison, for example, authoritatively stated that the

Constitution's text prohibits the Senate from conditioning the President's removal power:

> If the constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority.
>
> The question now resolves itself into this, Is the power of displacing, an executive power? *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.*

1 Annals of Cong. 481-82 (emphasis added).

President Jackson repeatedly clashed with Congress over proposed restrictions on his removal power. Members of Congress introduced at least four separate measures in the 1830s aimed at limiting his removal power. In a communication to the Senate defending his unconditional power of removal, President Jackson made plain that because the Executive Vesting Clause and the Take Care Clause made him "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands." Andrew Jackson, Message to the Senate Protesti ng Censure Resolution (Apr. 15, 1834), *available at* www.presidency.ucsb.edu/ws/index.php?pid=67039&st=st1=. As President Jackson explained, the "whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence

that he should have a right to employ agents of his own choice to aid him in the performance of his duties, *and to discharge them when he is no longer willing to be responsible for their acts.*" *Id.* (emphasis added). Therefore, "[i]n strict accordance with this principle, the power of removal, . . . [an] executive power, *is left unchecked by the Constitution in relation to all executive officers.*" *Id.* (emphasis added). Significantly, Congress ultimately rejected all of these attempts to limit President Jackson's removal power. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The First Half-Century*, 47 Case Western Reserve Law Review 1451, 1534 (1997).

President Cleveland continued this defense of the removal power by removing United States Attorney Parsons, an inferior officer,[2] from his office even though a federal statute provided that his appointment was "for four years." *Parsons*, 167 U.S. at 327-38. Cleveland's administration defended the President's removal power all the way to this Court, which flatly rejected Parson's argument that the federal act could limit the President's removal power. The Court observed that, beginning with the Decision of 1789, the Executive Branch strongly defended the unrestricted nature of the removal power in a number of significant cases and that Congress had eventually acquiesced in the view that the Legislature could not impose any conditions on the President's removal power. *See id.* 328-334.

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[2] *See* United States Attorneys – Suggested Appointment Power of the Attorney General, 2 Op. Off. Legal Counsel 58, 59 (Feb. 28, 1978 ("U.S. Attorneys can be considered to be inferior officers").

President McKinley also firmly defended the removal power against congressional encroachment. The Customs Administration Act provided that the President could remove certain civil officers "for inefficiency, neglect of duty, or malfeasance in office[.]" *Shurtleff v. United States*, 189 U.S. 311, 313 (1903). When the President removed one of these inferior officers (Shurtleff) without providing a reason for his action, Shurtleff filed suit. *See id.* at 315-16. This Court agreed with President McKinley and rejected the "for cause" removal language because a contrary result "would involve the alteration of the universal practice of the government for over a century." *Id.* at 316.

President Coolidge's administration ranks as one of the most ardent defenders of the removal power, most notably due to its position in *Myers v. United States*. There, this Court addressed "whether under the Constitution the President has the exclusive power of removing executive officers" – a question the Court answered in the affirmative. *Myers*, 272 U.S. at 106. In the administration's brief to this Court, President Coolidge's Solicitor General explained the history of the President's plenary removal power, starting with the Decision of 1789 and continuing through over one hundred years of government practice. Solicitor General Beck wrote that, "[f]rom the Beginning of the Government removal has been recognized as essentially an executive function," and drew the Court's attention to the numerous Attorney General opinions defending the unilateral nature of the Executive removal power. Brief of the United States, *reproduced in Myers*, 272 U.S. at 99, 104-106.

Presidents also have opposed congressional attempts to force particular executive officers out of their positions by disqualifying them from their offices. For example, President Truman argued that allowing Congress to effectively remove officers by arbitrarily enacting new qualifications would impinge on his removal powers. *See* Statement by the President on the Interior Department Appropriation Act (June 30, 1948), *available at* www.presidency.ucsb.edu/ws/index.php?pid=12949. President Truman continued to defend the removal power until Congress finally yielded and deleted the changes in the qualifications for the posts. *See* Interior Department Appropriation Act, 63 Stat. 765, 778-79 (1949).

President Nixon likewise opposed congressional efforts to throw his executive officers out of their offices. He vetoed a bill that attempted to remove two inferior officers – the Director and Deputy Director of OMB – from their offices by abolishing their positions and at the same time recreating them as positions subject to Senate confirmation. President Nixon found the bill to be nothing more than a congressional attempt to circumvent the Executive's removal power. *See* Veto of a Bill Requiring Senate Confirmation of the Director and Deputy Director of the Office of Management and Budget (May 18, 1973), *available at* www.presidency.ucsb.edu/ws/index.php?pid=3851&st=&st1=. Congress failed to override his veto.

More recently, Presidents have stood their ground to defend congressional attacks on the removal power through agency overhauls. In particular, President Clinton opposed a congressional attempt to limit the

President's authority to remove the Administrator of the Social Security Administration. As part of legislation transforming the SSA into an independent agency, Congress made the Administrator removable only for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3) (2000). While signing the bill, President Clinton stated that these limitations on his removal authority were constitutionally problematic, and he recommended "a corrective amendment." *See* Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), *available at* www.presidency.ucsb.edu/ws/index.php?pid =48981.

Likewise, President George W. Bush strongly asserted his removal authority during creation of the Department of Homeland Security. President Bush insisted upon having unfettered power to dismiss lower-level department employees and ultimately defeated Congress on the issue. *See* Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945-2004, 90 Iowa L. Rev. 601, 727 (2005).

B. History Demonstrates That The Courts Should Not Endorse Congressional Intrusions Upon The Executive's Removal Power

As shown above, our nation's Presidents have uniformly rebuffed congressional efforts to interfere with the Executive removal power. The debates surrounding two congressional acts in particular – the Tenure In Office Act and the Ethics In Government Act

– deserve special consideration because in both cases Congress eventually accepted the Presidents' view of the removal power and conceded that interfering with the Executive's Article II removal power was not in our nation's interest.

The Tenure In Office Act. In 1867, Congress passed the Tenure In Office Act, under which no civil officers appointed by the President with the advice and consent of the Senate could be removed from office unless the Senate confirmed a successor. After Congress passed this legislation, however, President Andrew Johnson mounted one of the most vigorous defenses of the removal power in history. President Johnson determined that the text of the Constitution and the unbroken practices of both Congress and the Executive Branch prohibited Congress from interfering with the removal power in the manner attempted. *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During The Second Half-Century*, 26 Harv. J.L. & Pub. Pol'y 667, 748 (2003). Accordingly, President Johnson vetoed the legislation.

In a message accompanying his veto, President Johnson made his position clear: "That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government." Andrew Johnson, Veto Message to the Senate (Mar. 2, 1867), *available at* www.presidency.ucsb.edu/ws/index.php?pid=72071&st=&st1=. Notwithstanding President Johnson's robust defense of the

removal power, Congress overrode the President's veto and enacted the Tenure In Office Act. Remaining steadfast in his position, President Johnson removed his Secretary of War without complying with the Tenure In Office Act. In response, Congress voted to impeach the President of the United States for the first time in our nation's history. However, the Senate voted not to remove President Johnson from office, implicitly acknowledging that he was not wrong to disregard what Congress later conceded was an unconstitutional statute.

After President Johnson left office, Presidents Grant and Cleveland maintained Johnson's defense of the removal power. *See* Ulysses S. Grant, First Annual Message (Dec. 6, 1869), *available at* www.presidency.ucsb.edu/ws/index.php?pid=29510&st=&st1=. Congress acceded to President Grant's view and partially repealed the Tenure In Office Act. *See* Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7. President Cleveland declared that "the power to remove or suspend such officials is vested in the president alone by the Constitution." Grover Cleveland, Special Message to the Senate (Mar. 1, 1886), *available at* www.presidency.ucsb.edu/ws/index.php?pid=71867&st=&st1=. Public opinion eventually turned against the Tenure in Office Act and Congress repealed the Act in its entirety. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

The Ethics In Government Act. The Ethics In Government Act charted much the same course as the Tenure In Office Act. The Carter administration opposed the creation of a judicially appointed

independent counsel[3] designed to ferret out misconduct at the highest levels of the Executive Branch, but it lacked the political power to defeat passage of the Act. President Reagan's subsequent administration, however, launched a vigorous attack on the Act. Executive Branch officials repeatedly challenged the constitutionality of the Act in hearings before Congress, and President Reagan himself challenged the Act's limits on his removal power. *See* Statement on Signing the Independent Counsel Reauthorization Act of 1987 (Dec. 15, 1987), *available at* www.presidency.ucsb.edu/ws/index.php?pid=33827&st=&st1=.

The Reagan administration ultimately launched a full-scale attack on the Act, challenging its constitutionality in court in connection with the Independent Counsel's investigation of then-Assistant Attorney General Theodore Olson. Although the Reagan administration's judicial challenge ultimately was unsuccessful in this Court, *see Morrison v. Olson,* 487 U.S. 654 (1988),[4] President Reagan's Solicitor General vigorously defended his removal power: "Whatever limits Congress may constitutionally impose on the President's various means of holding other officers to

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[3] The independent counsel provisions of the Act were reenacted by the Ethics in Government Act Amendments of 1982, Pub. L. 97-409, 96 Stat. 2039, the Independent Counsel Reauthorization Act of 1987, Pub. L. 100-191, 101 Stat. 1293, and the Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 108 Stat. 732. It has been referred to popularly as the Independent Counsel Act.

[4] Notably, the removal provisions at issue in *Morrison* did not impinge on the Executive's removal power nearly as much as the "double for-cause" limitations, Pet. App. 26a, at issue here. *See* Pet. at 18-23.

account, it may not deny his power to remove purely executive officers like an independent counsel." Brief for the United States as Amicus Curiae Supporting Appellees at 29, *Morrison v. Olson,* 487 U.S. 654 (1988) (No. 87-1279).

President George H.W. Bush and Attorney General William Barr reiterated the Executive Branch's view that the Act was unconstitutional, and President Bush repeatedly threatened to veto any attempt to extend the Act past its scheduled sunset in 1992.

Then, during President Clinton's administration, the Ethics In Government Act engendered a constitutional crisis that resulted in the death of the Act. Attorney General Janet Reno authorized an investigation of President Clinton by Independent Counsel Kenneth Starr, which culminated in a decision by the House to impeach the President. Like President Johnson, President Clinton ultimately was acquitted by the Senate. By then, even initial champions of the Ethics In Government Act recognized that the Act rested on an unconstitutional foundation. Some even campaigned for its demise: "In 1993, as many of you know, I testified in support of the statute . . . . However, after working with the Act, I have come to believe . . . that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework." *Future of the Independent Counsel Act: Hearings Before the Senate Comm. On Governmental Affairs*, 106th Cong. 243, 247-48 (1999) (statement of Attorney General Janet Reno). In light of the bipartisan recognition of the Act's failures – both in

practice and as a constitutional matter – Congress allowed the Act to sunset.

Both the Tenure In Office Act and the Ethics In Government Act remain in the legislative dustbin. The demise of these statutes highlights the "adverse practical consequences" of disregarding the Constitution's structural principles. *Mistretta v. United States*, 488 US 361, 421 (1989) (Scalia, J., dissenting). Moreover, that these statutes were ultimately considered unconstitutional by some of their initial supporters demonstrates that the constitutional crises they engendered might well have been avoidable, had the text and history of Article II been properly considered at the outset. The Court should grant certiorari in this case.

II. THE APPOINTMENT OF PCAOB MEMBERS BY THE SEC IS INCONSISTENT WITH THE CONSTITUTION

Even assuming (as the panel majority found) that PCAOB members are "inferior Officers," review is warranted to determine whether their appointment by the SEC can withstand constitutional scrutiny. Although the Excepting Clause permits inferior officers to be appointed by the "Heads of Departments," it is far from clear that the SEC is a department and that the five commissioners of the SEC, collectively, are its head.

A. Independent Agencies, Like the SEC, Are Not Departments

Although the Court has never decided whether the SEC is a "Department," its jurisprudence strongly suggests that the SEC is not. As the Court explained nearly seventy-five years ago, independent agencies like the SEC simply "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935). Because such agencies are removed from, and thus do not share in, the President's accountability to the citizenry, they are not departments under the Appointments Clause.

In its most recent foray into this area, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Court explained that accountability to the people, through the President, is the principal determinant of whether an entity is a Department within the meaning of the Appointments Clause. In *Freytag*, the Court considered whether the Tax Court – an Article I court and independent agency outside of Executive control – was a "Department" under the Appointments Clause. The Court held that the Tax Court was not a "Department," explaining that the term is limited only to "executive divisions like the Cabinet-level departments." *Id.* at 886. The Court emphasized "the Framers' determination to limit the distribution of the power of appointment" in a manner that "ensure[s] that those who wield[] it [a]re accountable to political force and the will of the people." *Id.* at 884. Acknowledging "the inexorable presence of the administrative state," *id.* at 885, the Court noted that "a holding that every

organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." *Id.* Because such a holding would frustrate the Framers' intent to "limit the distribution of the power of appointment," *id.* at 884, appointment power must reside only with those entities whose "heads are subject to the exercise of political oversight and share the President's accountability to the people," that is, the "Cabinet-level departments." *Id.* at 886. To "[t]reat[] the Tax Court as a 'Department' . . . would defy the purpose of the Appointments Clause" and "the meaning of the Constitution's text." *Id.* at 888.

Under this reasoning, the SEC is not a "Department" under the Appointments Clause because it is an independent agency. Indeed, Justice Scalia made this precise point in his concurrence in *Freytag*, explaining that "independent regulatory agencies" are unlike cabinet departments because they "are specifically designed *not* to have the quality . . . of being 'subject to the exercise of political oversight and sharing the President's accountability to the people.'" *Freytag*, 501 U.S. at 916 (Scalia, J., concurring in the judgment) (citation omitted; emphasis in original); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995).

The panel majority, however, determined that the SEC is "Cabinet-like" because "it exercises executive authority over a major aspect of government policy, and its principal officers are appointed by the President with the advice and consent of the Senate . . . and subject to removal by the president." Pet. App. 22a. The panel majority, however, failed to consider the characteristics

of Cabinet-level departments that are relevant to the Appointments Clause under this Court's precedent: political oversight and a share in the President's accountability to the people. *Freytag*, 501 U.S. at 886. The panel majority's conclusion that the SEC is a "Department" thus contravenes both *Freytag* and the very purpose of the Appointments Clause, by allowing the appointment power to be "diffused" across entities that are, by design, immune "to political force and the will of the people," *Freytag*, 501 U.S. at 884. *See* 148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm) ("This board is going to have *massive power, unchecked power, by design* . . . .") (emphasis added). The Court should grant certiorari to review consider whether treating the SEC as a "Department" under the Appointments Clause is consistent with the constitutional design.

B. The Five Commissioners of the SEC, Collectively, Are Not the SEC's "Head"

Even assuming that the SEC is a "Department" constitutionally authorized to wield appointment power, the SEC's appointment of inferior officers is constitutional only if the five SEC commissioners together constitute the SEC's head. To so hold would conflict with the Framers' constitutional design of the appointment power.

As a textual matter, the Framers' use of the term "head" meant to signify that the power to appoint inferior officers was to rest in an individual rather than a committee or other collective body. Indeed, the term "head" was well-known to be "[a] chief; a principal

person; a leader; a commander; one who has the first rank or place, and to whom others are subordinate[.]" Noah Webster, An American Dictionary of the English Language (New York, S. Converse 1828). Moreover, this meaning of the term "head" is consistent with the meaning of the phrase "Heads of Departments," which was understood to identify the cabinet secretaries – each an individual – who would supervise their respective departments and share in the President's accountability to the people. *See, e.g.*, *United States v. Mouat*, 124 U.S. at 307 ("the heads of the departments were defined in [*United States v. Germaine*, 99 U.S. 508 (1878)] to be what are now called the members of the cabinet"). To hold that the five-member SEC is the "Head" of the SEC thus would not square with the Constitution's text.

Similarly, to hold that the five-member SEC is the "Head" of the SEC would not square with the Framers' intent. As the Court has explained, the "Framers recognized the dangers posed by an excessively diffuse appointment power," and "rejected efforts to expand that power" beyond a single person. *Freytag*, 501 U.S. at 885. Indeed, Alexander Hamilton underscored the benefits of vesting a single individual with the appointment power, explaining that an individual would have "a livelier sense of duty" and "fewer personal attachments to gratify" and thus would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." The Federalist No. 76; *see also* 3 Joseph Story, Commentaries on the Constitution § 1522 (1833) ("[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to

particular offices, than any body of men of equal, or even superior discernment.").

Again, this constitutional design was meant to ensure political accountability, ultimately to the people. Vesting a multi-member group or committee with appointment power would diffuse the appointment power and impede political accountability. This is precisely why the Framers specifically limited the power to appoint inferior officers to "the highly accountable President or the heads of federal departments." *Weiss*, 510 U.S. at 187 (Souter, J., concurring); *see also Freytag*, 501 U.S. at 886 (noting that the "Heads of Departments . . . share the President's accountability to the people").

To hold that the five commissioners of the SEC are its head does not comport with the constitutional design of the appointments power. Yet, the panel majority held that the commissioners are the "head" of the SEC within the meaning of the Excepting Clause. The panel relied upon *Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991), in which the Ninth Circuit held that the nine governors of the Postal Service constituted its head. The panel majority echoed the Ninth Circuit's holding that Congress vested ultimate control and authority of the postal service in its board of governors. Pet. App. 23a-24a.

This Court has not addressed whether a multi-member body may constitutionally appoint officers of the United States under the Excepting Clause. Although the text and purpose of the Appointments Clause strongly suggest that the power to appoint should vest in a single individual, instead of a group, it

is not necessary for this Court to find that Congress could never create a body with a multi-member "head."

Assuming the SEC is a "department," the structure of the SEC suggests that if there is a head of the SEC, it is the SEC's Chairman. In 1950, President Truman exercised his power to "provide for the appointment and pay of the head . . . of any agency," Reorganization Act of 1949, 5 U.S.C. § 904(2), by delegating to the Chairman of the SEC "the executive and administrative functions of the Commission, including . . . the appointment and supervision of personnel employed under the Commission." Reorganization Plan No. 10 of 1950, § 1(a), 15 Fed. Reg. 3175, 64 Stat. 1265 (May 24, 1950), reprinted in 5 U.S.C. app. Control over these executive and administrative functions strongly suggests that the Chairman is the head of the SEC. Indeed, at least one circuit court has recognized this, explaining that, by "control[ling] key personnel, internal organization and the expenditure of funds, the chairman [of the SEC] exerts far more control [over the SEC] than his one vote would seem to indicate." *SEC v. Blinder, Robinson & Co.*, 855 F.2d at 681. Moreover, the SEC itself identifies its Chairman as "the SEC's top executive." Current SEC Commissioners, http://www.sec.gov/about/commissioner.shtml (last visited Feb. 5, 2009).

In addition, treating the Chairman as the head of the SEC vindicates the constitutional design. First, it reinforces the political accountability required by the Appointments Clause, because the Chairman, unlike the SEC commissioners, serves as Chairman at the pleasure of the President. The Chairman therefore has more direct political accountability to the President than the

other SEC commissioners or the five of them as a group. Second (and perhaps more importantly), if the Chairman is not the "head" of the SEC, then his appointment of numerous SEC officials – such as the Directors of the SEC's four main divisions and the agency's General Counsel – is constitutionally questionable. Each of these individuals appears to be an inferior officer because each performs functions vital to the SEC's mandate. See, e.g., 17 C.F.R. §§ 200.18, .19a-b, .20b, .21. And each was appointed by the Chairman alone. *See* Reorganization Plan No. 10 of 1950, § 1(a). If the Chairman is not the "head" of the SEC, then these officers were not appointed by the "Head of a Department" in accordance with the Excepting Clause – thus casting doubt on the legitimacy of their enforcement actions. The Court should grant review to consider these difficult questions concerning the distribution of the appointment power.

III. THE STRUCTURAL PROTECTIONS AT ISSUE ARE DESIGNED TO SAFEGUARD INDIVIDUAL LIBERTY

Congress's attempt to isolate the PCAOB from accountability to the President encroaches upon the powers to appoint, control, and remove federal officers that the Constitution vests in the Executive. In so doing, it implicates structural principles that protect the liberty of the people. *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (explaining that the Constitution structural principles "protect the liberty and security of the governed"). As Justice Kennedy has explained, this Court must vindicate these

principles, "even when . . . no immediate threat to liberty is apparent. When structure fails, liberty is always in peril." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J. concurring).

Accordingly, in order to protect individual liberty, the Court will invalidate actions by government officers if those officers are not appointed in conformance with the clause. For example, the propriety of the Tax Court's appointment of a Special Trial Judge in *Freytag* went to the "validity of the Tax Court proceeding" that was the basis for suit. 501 U.S. at 880. Similarly, criminal convictions can be reversed if the officers adjudicating the prosecution are not appointed in compliance with the clause. Indeed, in *Ryder v. United States*, 515 U.S. 177 (1995), this Court held that a serviceman court-martialed and sentenced to five years' imprisonment for drug offenses had the right to challenge his conviction on the basis of a constitutionally improper appointment to the military judges' panel.

Improper appointment and lack of Presidential control over the PCAOB is especially problematic because its powers reach to the core of individual liberty. The PCAOB has broad powers to define criminal acts, *see* 15 U.S.C. §§ 78u, 7202(b), and to enforce violations of its rules, 15 U.S.C. § 7215(c)(4). Penalties for violating PCAOB rules include criminal sanctions of up to 20 years imprisonment and fines of up to $15 million. 15 U.S.C. §§ 78ff(a), 7215(c)(4)(D).

Moreover, the Board's powers reach broadly throughout the nation. They fall upon the nation's public companies and accountants and, through them, the entire population, which depends on them for jobs, investment, and the goods and services that keep the nation going. The PCAOB's decisions affect "all accountants and everybody everyone they work for, which directly or indirectly is every breathing person in the country." 148 Cong. Rec. at S6334.[5] Because the Board's reach is so broad, and its powers run so deep, it is of vital importance that its members be appointed in conformity with the Constitution. The people of our nation are entitled, under the Constitution's structural protections, to hold accountable officers exercising significant power over the lives of individual citizens and companies and over the whole of the nation's economy.

Importantly, because these questions of Executive appointment and removal power implicate the individual liberty of the people, the Executive Branch's support of the mechanisms for the appointment and removal of PCAOB members cannot save them. As

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[5] Unchecked by political will, the PCAOB has run amuk among the accounting industry and our nation's public companies. *See* Bob Merritt, *The Sarbanes-Oxley Act: A Personal View*, Washington Legal Foundation Legal Opinion Letter, Vol. 15, No. 21 (Oct. 21, 2005) ("This under-supervised and overzealous group of bean counters [the PCAOB] has generated countless regulations and has taken a gun-and-badge attitude toward public company managements, their financial executives, and their auditors."). Notably, the burdens of Sarbanes-Oxley and the PCAOB fall disproportionately on small businesses. *See* John Berlau,, June 7, 2007, *SOXing it to the Little Guy: How Sarbanes-Oxley Hurts Small Investors and Entrepreneurs*, June 7, 2007, *available at* www.cei.org/pdf/5954.pdf.

Justice Blackmun recognized in *Freytag*, "[t]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives[.]" *Freytag*, 501 U.S. at 880. Violations of the clause are therefore not within the power of the Executive to waive. "The structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic." *Id.*

CONCLUSION

For the reasons set forth herein and in the Petition, amicus curiae Washington Legal Foundation requests that the Court grant the petition for a writ of certiorari.

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