

No. 07-5127

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE ENTERPRISE FUND, *ET AL.*,

Plaintiffs-Appellants,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *ET AL.*,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Columbia

**BRIEF FOR APPELLEES PUBLIC COMPANY
ACCOUNTING OVERSIGHT BOARD, *ET AL.***

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**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the appellants' brief.

Ruling Under Review. The ruling under review is listed in the appellants' brief.

Related Cases. The case under review was not previously before this Court. No related cases are currently pending.

CORPORATE DISCLOSURE STATEMENT

Appellee Public Company Accounting Oversight Board is a nonprofit corporation established by Congress to oversee the audit of public companies that are subject to the securities laws and related matters. The Board has no parent company, and no publicly held company owns 10% or more of the Board's stock.

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GLOSSARY

A. ___	Appendix
Act	Sarbanes-Oxley Act of 2002
Beckstead	Beckstead and Watts
Board	Public Company Accounting Oversight Board
Br. ___	Appellants' Brief
FEF	Free Enterprise Fund
NASD	National Association of Securities Dealers
PCAOB	Public Company Accounting Oversight Board
Sarbanes-Oxley	Sarbanes-Oxley Act of 2002
SEC	Securities and Exchange Commission
SRO	Self-Regulatory Organization
WLF Br. ___	Brief of <i>Amicus Curiae</i> Washington Legal Foundation

STATEMENT OF JURISDICTION

The district court lacked jurisdiction because plaintiffs failed to comply with the exclusive review provisions of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201 *et seq.*) (“Sarbanes-Oxley” or “the Act”), and the Securities Exchange Act of 1934, 15 U.S.C. § 78y. *See* pp. 12-18, *infra*.

STATEMENT OF ISSUES

In addition to those identified by plaintiffs, this case presents the following issue: Whether this Court lacks jurisdiction because plaintiffs failed to comply with the exclusive review provisions of Sarbanes-Oxley and the Exchange Act.

STATUTES AND REGULATIONS

All applicable statutes are contained in the appellants’ brief.

STATEMENT OF FACTS

A. Audit Regulation and the Sarbanes-Oxley Act

Since 1934, the Securities and Exchange Commission (“SEC”) has regulated the financial disclosures made by public companies. For many years, the SEC relied primarily on the accounting profession to establish its own auditing standards. *See* S. Comm. Print No. 107-75, at 17 (2002). Recurring scandals led to efforts to improve audit oversight but, until this decade, standards were still largely set by the profession itself. *See id.* at 17-19.

In 2001, a new rash of 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: A Legislative History of the Sarbanes-Oxley Act of 2002*, at xi-xxi (Manz ed., 2003). Witnesses acknowledged the “repeated failures” of prior reform efforts. S. Rep. No. 107-205, at 2 (2002).

The result was the Sarbanes-Oxley Act of 2002, passed by an overwhelming majority of 423 to 3 in the House and 99 to 0 in the Senate. 148 Cong. Rec. H5480, S7365 (daily ed. July 25, 2002). Hailing the Act as a way to “uphold the integrity of public audits”—and noting no concerns about intrusion on presidential powers—President Bush signed the bill into law. *Remarks on Signing the Sarbanes-Oxley Act of 2002*, 2002 Pub. Papers 1319, 1320 (July 30, 2002).

B. The Public Company Accounting Oversight Board and the SEC’s Oversight and Control

Title I of Sarbanes-Oxley established the Public Company Accounting Oversight Board (“PCAOB” or the “Board”) to “oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest.” Sarbanes-Oxley § 101(a), 15 U.S.C. § 7211(a). In establishing the Board and providing for its oversight by the SEC, Congress borrowed from its experience with self-regulatory organizations (“SROs”) like the New York Stock Exchange and the National Association of Securities Dealers (“NASD”). Under the Exchange Act, SROs help oversee the securities industry by promulgating rules, investigating violations, and disciplining their members—but always subject to comprehensive SEC oversight. *See* 15 U.S.C. §§ 78f(b)(5)-(6), 78o-3(b)(6)-(7), 78s; *NASD v. SEC*, 431 F.3d 803, 804-08 (D.C. Cir. 2005).

Sarbanes-Oxley follows a similar pattern. The Board has duties comparable to an SRO's: It registers public accounting firms; sets auditing and related standards for those firms; conducts inspections of those firms; and investigates and sanctions specified violations by those firms or associated persons. Sarbanes-Oxley § 101(c), 15 U.S.C. § 7211(c). As with SROs, the SEC has comprehensive "oversight and enforcement authority over the Board." *Id.* § 107(a), 15 U.S.C. § 7217(a). The "rules for SEC oversight of the Board are generally the same as those that apply to SEC oversight" of SROs. S. Rep. No. 107-205, at 12. In important respects, SEC oversight over the Board is more expansive. The SEC controls *every* significant exercise of Board authority.

SEC Authority over Board Members. The SEC appoints the Board's five members, Sarbanes-Oxley § 101(e)(4), 15 U.S.C. § 7211(e)(4), and can remove them "for good cause," *id.* § 101(e)(6), 15 U.S.C. § 7211(e)(6). Cause exists where a Board member "(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof." *Id.* § 107(d)(3), 15 U.S.C. § 7217(d)(3). The SEC may also censure Board members, censure the Board, or limit Board activities. *Id.* § 107(d)(2)-(3), 15 U.S.C. § 7217(d)(2)-(3).

SEC Authority over Board Rules. The Board's rules, including its auditing standards, have no effect unless approved by the SEC, following the same notice-and-comment process that governs SRO rules. Sarbanes-Oxley § 107(b)(2), (4), 15 U.S.C.

§ 7217(b)(2), (4) (incorporating 15 U.S.C. § 78s(b)(1)-(3)). The SEC will approve a Board rule only if it determines that the rule is “consistent with the requirements of th[e] Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors.” *Id.* § 107(b)(3), 15 U.S.C. § 7217(b)(3). Like SROs, the Board may adopt internal “housekeeping” rules without prior SEC approval, although the SEC may abrogate those rules “summarily.” *Id.* § 107(b)(4), 15 U.S.C. § 7217(b)(4) (incorporating 15 U.S.C. § 78s(b)(3)).

On its own initiative, the SEC may also abrogate, delete from, or add to Board 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.” Sarbanes-Oxley § 107(b)(5), 15 U.S.C. § 7217(b)(5). Any person aggrieved by an SEC decision on a Board rule may seek review within 60 days in the court of appeals; arguments not raised before the SEC are waived. 15 U.S.C. § 78y(a)-(b), (c)(1).

SEC Authority over Board Investigations and Sanctions. Board investigations and disciplinary proceedings must be conducted under rules approved by the SEC. Sarbanes-Oxley § 105(a), 15 U.S.C. § 7215(a); *Order Approving Proposed Rules Relating to Investigations and Adjudications*, 69 Fed. Reg. 29,150 (May 20, 2004). If a Board investigation involves a potential securities-law violation, the Board must notify and coordinate with the SEC. Sarbanes-Oxley § 105(b)(4)(A), 15 U.S.C. § 7215(b)(4)(A).

The Board must notify the SEC if it imposes a sanction. Sarbanes-Oxley § 107(c)(1), 15 U.S.C. § 7217(c)(1). The SEC can review the sanction on its own

initiative or upon request. *Id.* § 107(c)(2), 15 U.S.C. § 7217(c)(2) (incorporating 15 U.S.C. § 78s(d)(2)). Sanctions are automatically stayed pending any SEC review unless the SEC orders otherwise. *Id.* § 105(e)(1), 15 U.S.C. § 7215(e)(1).

Review procedures are similar to those for SRO sanctions. Sarbanes-Oxley § 107(c)(2), 15 U.S.C. § 7217(c)(2) (incorporating 15 U.S.C. § 78s(d)(2), (e)(1)). The scope of review, however, is broader: The SEC may “enhance, modify, cancel, reduce, or require the remission of a sanction” if the SEC finds it “not necessary or appropriate in furtherance of th[e] Act or the securities laws” or “excessive, oppressive, inadequate, or otherwise not appropriate.” *Id.* § 107(c)(3), 15 U.S.C. § 7217(c)(3). Any party aggrieved by the SEC’s order may seek review in the court of appeals within 60 days; arguments not raised before the SEC are waived. 15 U.S.C. § 78y(a), (c)(1).

SEC Authority over Board Inspections. Board inspections must be conducted under rules approved by the SEC. Sarbanes-Oxley § 104(c), 15 U.S.C. § 7214(c); *Order Approving Proposed Rules Relating to Inspections of Registered Public Accounting Firms*, 69 Fed. Reg. 31,850 (June 7, 2004). Inspection reports are subject to SEC review upon request. Sarbanes-Oxley § 104(h), 15 U.S.C. § 7214(h).

SEC Authority over Registration. No accounting firm can audit public companies unless registered with the Board. Sarbanes-Oxley § 102(a), 15 U.S.C. § 7212(a). Registration is governed by rules approved by the SEC. *Id.* § 102(b), 15 U.S.C. § 7212(b). Denial of registration is subject to SEC and judicial review. *Id.* § 102(c)(2), 15 U.S.C. § 7212(c)(2).

SEC Authority over Board Jurisdiction. The SEC controls the Board's jurisdiction. The SEC can relieve the Board of any responsibility to enforce the Act if doing so is "consistent with the public interest, the protection of investors, and the other purposes of th[e] Act and the securities laws." Sarbanes-Oxley § 107(d)(1), 15 U.S.C. § 7217(d)(1). The SEC can likewise add to the Board's duties or functions. *Id.* § 101(c)(5), 15 U.S.C. § 7211(c)(5).

SEC Authority over Board Budget and Fees. The Board's budget is subject to annual SEC approval. Sarbanes-Oxley § 109(b), 15 U.S.C. § 7219(b). That process is governed by detailed SEC rules that allow the SEC to condition approval on the Board's acceptance of specific SEC changes. *PCAOB Budget Approval Process*, 71 Fed. Reg. 41,998, 42,000 (July 24, 2006). The Board is funded primarily by an accounting support fee paid by public companies. The Board's rules for allocating, assessing, and collecting that fee are subject to SEC and judicial review. Sarbanes-Oxley § 109(d), 15 U.S.C. § 7219(d); 15 U.S.C. § 78y(a).

SEC Authority over Internal Board Processes. The Board began operations only once the SEC found it ready to carry out its responsibilities. Sarbanes-Oxley § 101(d), 15 U.S.C. § 7211(d). The Board's bylaws must be approved by the SEC. *Id.* §§ 2(a)(13), 101(g)(1), 15 U.S.C. §§ 7201(a)(13), 7211(g)(1). The SEC may impose record-keeping and reporting requirements on the Board. *Id.* § 107(a), 15 U.S.C. § 7217(a) (incorporating 15 U.S.C. § 78q(a)(1)). And the SEC may conduct examinations of Board records. *Id.* § 107(a), 15 U.S.C. § 7217(a) (incorporating 15 U.S.C. § 78q(b)(1)). Even the Board's ability to initiate or defend a lawsuit is subject to SEC approval. *Id.*

§ 101(f)(1), 15 U.S.C. § 7211(f)(1). In granting approval for the Board to defend this very lawsuit, 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 Retained Authority. The SEC retains its pre-existing authority to set accounting or auditing standards. Sarbanes-Oxley § 3(c), 15 U.S.C. § 7202(c). The SEC can also promulgate its own rules to implement the Act. *Id.* § 3(a), 15 U.S.C. § 7202(a). And because a violation of Board rules is “treated for all purposes in the same manner as a violation of the Securities Exchange Act,” *id.* § 3(b)(1), 15 U.S.C. § 7202(b)(1), the SEC has independent authority to enforce Board rules.

C. This Lawsuit

Plaintiff Beckstead and Watts (“Beckstead”) is a public accounting firm registered with the Board. A.25-26. In 2004, a Board inspection “identified numerous auditing deficiencies with respect to Beckstead and Watts’s audits.” A.26. In half the audits reviewed, the deficiencies were “of such significance that it appeared to the inspection team that the Firm did not obtain sufficient competent evidential matter to support its opinion on the issuers’ financial statements.” *Inspection of Beckstead & Watts, LLP*, PCAOB Release No. 104-2005-082, at 3 (Sept. 28, 2005). Following the inspection, two of Beckstead’s clients restated their financial statements. *Id.* at 4. The Board initiated a formal investigation. A.27.¹

¹ Although plaintiffs claim the investigation “has since terminated,” Br. 8, no evidence in the record supports that statement.

On February 7, 2006, Beckstead filed this suit, together with plaintiff Free Enterprise Fund (“FEF”). A.9; A.31. FEF claims to be a free-market public interest group, but has identified only one member—Beckstead. A.12-13; A.35-36.

The suit contends that Sarbanes-Oxley violates separation of powers, the Appointments Clause, and the non-delegation doctrine. A.27-30. Beckstead alleged that the Board’s auditing standards increased the time and expense of audits; that the inspection report had damaged its reputation; and that the investigation subjected it to “burdensome discovery” and “legal fees.” A.26-27. FEF alleged that unidentified members are “subject to the Board’s authority and have been injured by the regulations imposed by the Board.” A.13.

So far as the record shows, neither plaintiff ever sought relief from the SEC. They did not participate in the rulemaking proceedings on the Board’s auditing standards under Section 107(b)(4), 15 U.S.C. § 7217(b)(4), or seek judicial review of the SEC orders approving those standards, 15 U.S.C. § 78y(a). Nor did they seek review of the Board’s rules for allocating, assessing, and collecting support fees. Beckstead did not seek SEC review of the inspection report under Section 104(h), 15 U.S.C. § 7214(h). And neither plaintiff asked the SEC to withdraw the Board’s enforcement authority under Section 107(d)(1), 15 U.S.C. § 7217(d)(1).

D. The District Court’s Decision

The United States intervened to defend the Act’s constitutionality, A.5, and on March 21, 2007, the district court granted summary judgment upholding the Act, A.37.

1. The court first rejected the argument that it lacked jurisdiction because plaintiffs had bypassed Sarbanes-Oxley's exclusive review mechanism, finding the argument "colorable but ultimately unsuccessful." A.42-43. The court did not dispute that Sarbanes-Oxley establishes a comprehensive review scheme that requires challenges to be raised before the SEC and then in the court of appeals. But it held that "plaintiffs' facial constitutional challenges, which take aim at [the] very structure of the PCAOB, are collateral to the Act's statutory scheme" and were therefore not "subject to the implicitly exclusive administrative review established by the Act." A.43.

2. Turning to the merits, the court first addressed plaintiffs' Appointments Clause challenge. It rejected plaintiffs' claim that Board members are principal officers who must be appointed by the President and confirmed by the Senate. Instead, it held that they are inferior officers who can be appointed by "Heads of Departments." A.44 (citing U.S. Const. art. II, § 2). Like the Coast Guard judges held to be inferior officers in *Edmond v. United States*, 520 U.S. 651 (1997), "PCAOB members 'have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers' and are subject to administrative oversight and removal" by their superiors. A.45 (citation omitted).

The court also held that the SEC was a "department" whose head could constitutionally appoint inferior officers. A.46. The court questioned whether the "head" of the SEC was the five Commissioners collectively or the Chairman alone. *Id.* But it held that plaintiffs lacked standing on that issue because "the SEC Chairman," like the Commission as a whole, "ha[d] voted for each PCAOB member." A.47.

The court likewise rejected plaintiffs’ separation-of-powers challenge. It held that the President did not have to have direct removal authority over inferior officers. A.47. And it held that the President had constitutionally sufficient indirect authority “because SEC Commissioners can be removed by the President for cause, and PCAOB members can be removed by the SEC ‘for good cause shown.’” A.47 (citation omitted). Notwithstanding plaintiffs’ claim that the SEC’s removal authority is narrow, the court concluded that the SEC could “plausibly interpret” its authority more broadly and that, as a result, plaintiffs’ facial challenge failed. A.48. Finally, the court rejected plaintiffs’ non-delegation challenge, A.49, a ruling plaintiffs have not appealed.

SUMMARY OF ARGUMENT

Plaintiffs attack a statute that bears no resemblance to the legislation Congress actually enacted. While plaintiffs paint the Board as a rogue agency with massive, unchecked powers, their arguments ignore the plain text of the Act, which grants the SEC comprehensive and plenary oversight. The SEC appoints Board members and can remove them for cause. Board rules and sanctions are subject to SEC review and are ineffective pending such review. The Board can conduct inspections and investigations only under rules approved by the SEC. And the SEC controls the Board’s budget and can withdraw its enforcement authority.

That comprehensive oversight is fatal to plaintiffs’ claim that Board members are principal officers who must be appointed by the President. Board members are subject to greater supervision than the Coast Guard judges held to be inferior officers in *Edmond v. United States*, 520 U.S. 651 (1997). And they are subject to far more oversight than the

independent counsel held to be an inferior officer in *Morrison v. Olson*, 487 U.S. 654 (1988). To the extent plaintiffs acknowledge the SEC’s extensive oversight mechanisms at all, they distort them by contriving constructions designed to create rather than avoid constitutional difficulties. That distortion ignores both the standards that apply to facial challenges and the rule of constitutional avoidance. Under any reasonable construction, the SEC’s oversight is plenary.

Because Board members are inferior officers, they can be appointed by the “heads of departments.” U.S. Const. art. II, § 2. The SEC is a “department,” and the Commission is its “head.” Plaintiffs’ contrary arguments ignore the clearly expressed position of all three branches of government, and instead rely on dubious inferences from abstract, incomplete, and inapposite historical quotations.

Plaintiffs’ separation-of-powers challenge is equally meritless. Their arguments rest on a novel vision of presidential power, under which the President himself must have virtually unfettered authority to remove and supervise even inferior officers appointed by department heads. That flies in the face of nearly two centuries of precedent. In *In re Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839), the Supreme Court made clear that the power to remove follows the power to appoint, and that the President therefore has “no power” to remove inferior officers appointed by department heads. Rather, sole removal power rests with the appointing department head. Here, the appointing department head is the SEC, which can remove Board members for a wide range of misconduct.

Although the Act is clearly constitutional, this Court should not even reach the issue. The same provisions that establish the SEC’s comprehensive oversight also set

forth a detailed and exclusive review scheme that channels challenges to the SEC and then the court of appeals. Because plaintiffs bypassed that review scheme, this suit should have been dismissed for lack of jurisdiction.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION

Sarbanes-Oxley sets forth a comprehensive review scheme, carefully specifying when and where challenges must be brought—first before the SEC and then in the court of appeals. Those avenues were capable of providing complete relief for the injuries plaintiffs assert here. By suing in district court instead, plaintiffs impermissibly bypassed the review scheme established by Congress and failed to exhaust administrative remedies.

A. Sarbanes-Oxley Sets Forth an Exclusive Statutory Review Scheme

When Congress channels review through a specified statutory 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). “[T]he specific statutory method [of review], if adequate, is exclusive.” *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983).

Congress’s intent to make a review mechanism exclusive need not be explicit; it need only be “‘fairly discernible in the statutory scheme.’” *Thunder Basin*, 510 U.S. at 207. A statute that comprehensively specifies where, when, and how challenges may be brought is strong evidence that Congress intended to preclude challenges by other means. In *Thunder Basin*, for example, the Court held that the Mine Act’s “comprehensive enforcement structure, combined with the legislative history’s clear concern with

channeling and streamlining the enforcement process, establishe[d] a ‘fairly discernible’ intent to preclude district court review.” *Id.* at 216. Similarly, in *Whitney National Bank*, the Court held that Congress’s “carefully planned and comprehensive method for challenging [Federal Reserve] Board determinations” indicated that “the statutory procedure is to be exclusive.” 379 U.S. at 420-22; *see also Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871-73, 877 (D.C. Cir. 2002).

Sarbanes-Oxley likewise establishes a comprehensive, and thus exclusive, review scheme. For every exercise of Board authority—and every injury plaintiffs allege—the Act specifies both a time and a place for review. Plaintiffs complain that the Board’s auditing standards are too burdensome, A.26, but those standards are subject to review before the SEC and then in the court of appeals, Sarbanes-Oxley § 107(b), 15 U.S.C. § 7217(b); 15 U.S.C. § 78y(a). Judicial review must be sought within 60 days, and arguments not raised before the SEC are waived. 15 U.S.C. § 78y(a), (c)(1). Plaintiffs complain that the Board’s investigations and support fees are costly, A.26-27; A.35, but both are governed by rules likewise subject to review by the SEC and the court of appeals, *see pp. 4-6, supra*. Beckstead claims that the Board’s inspection report damaged its reputation, A.27, but reports are also subject to SEC review, Sarbanes-Oxley § 104(h), 15 U.S.C. § 7214(h). Other provisions address Board sanctions, *id.* § 107(c), 15 U.S.C. § 7217(c); 15 U.S.C. § 78y(a), and withdrawal of the Board’s enforcement authority, Sarbanes-Oxley § 107(d)(1), 15 U.S.C. § 7217(d)(1).

The comprehensive nature of Sarbanes-Oxley’s review scheme alone shows that Congress intended it to be exclusive. But that intent is particularly clear given that

Sarbanes-Oxley incorporates Exchange Act provisions governing review of SRO decisions. *See* Sarbanes-Oxley § 107(b)(4)-(5), (c)(2), 15 U.S.C. § 7217(b)(4)-(5), (c)(2) (incorporating 15 U.S.C. § 78s(b)(1)-(3), (c), (d)(2), (e)(1)). Courts have repeatedly construed those provisions to be exclusive. *See, e.g., Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. NASD*, 616 F.2d 1363, 1370 (5th Cir. 1980); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 696 (3d Cir. 1979); *cf. Nassar & Co. v. SEC*, 566 F.2d 790, 792 n.3 (D.C. Cir. 1977). By incorporating those same provisions in Sarbanes-Oxley, Congress undoubtedly intended the same result here.

B. Plaintiffs’ Challenges Are Not “Collateral” to the Review Scheme

The district court did not dispute that Sarbanes-Oxley creates an exclusive statutory review mechanism. Instead, the court opined that plaintiffs’ claims were exempt because “plaintiffs’ facial constitutional challenges, which take aim at [the] very structure of the PCAOB, are collateral to the Act’s statutory scheme.” A.43.

The Supreme Court, however, rejected a similar argument in *Thunder Basin*. The plaintiff there asserted, among other things, a broad due process challenge to provisions of the agency’s enabling statute. *See* 510 U.S. at 213-15; Brief for Petitioner in No. 92-896, 1993 WL 337849, at 29-36 (May 10, 1993). The Court found that challenge *not* “collateral” to the review scheme. 510 U.S. at 212-15. The *sole ground* it gave was that the review scheme was adequate to address the challenge: Even if the agency could not resolve the claim, the claim could be “meaningfully addressed in the Court of Appeals.” *Id.* at 215. The Court distinguished *Mathews v. Eldridge*, 424 U.S. 319 (1976), on the ground that the review scheme there was inadequate: “[T]he petitioner had made a

colorable showing that full postdeprivation relief could not be obtained.” *Thunder Basin*, 510 U.S. at 213.

Time and again courts have rejected similar efforts to exempt allegedly “collateral” constitutional challenges from exclusive review schemes. In *National Taxpayers Union v. SSA*, 376 F.3d 239 (4th Cir. 2004), for example, the Fourth Circuit held that a comprehensive review scheme denied the district court jurisdiction over a facial First Amendment challenge to a provision of the agency’s enabling statute. *Id.* at 243-44. *Thunder Basin*, the court observed, “seems to have rested its conclusion on the fact that the plaintiff’s constitutional claim could be meaningfully addressed by the court of appeals” after administrative processes were complete. *Id.* at 243. Likewise, in *Sturm, Ruger*, this Court held that a comprehensive review scheme precluded district court jurisdiction over a Fourth Amendment claim because the claim could be raised on administrative review and then in the court of appeals. 300 F.3d at 874; *see also Am. Fed’n of Gov’t Employees, AFL-CIO v. Loy*, 367 F.3d 932, 936-37 (D.C. Cir. 2004); *Eastern Bridge, LLC v. Chao*, 320 F.3d 84, 88-92 (1st Cir. 2003); *cf. Am. Coalition for Competitive Trade v. Clinton*, 128 F.3d 761, 765-67 (D.C. Cir. 1997) (Appointments Clause challenge).²

² The court below cited *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004), but that case involved a provision that “enumerated only two types of challenges over which federal courts lack jurisdiction.” *Id.* at 191. The plaintiff’s challenge was permitted because it fell outside those two categories. *See id.* Here, by contrast, the comprehensiveness of the review scheme shows that Congress intended to cover *all* challenges, not just two categories.

Sarbanes-Oxley's review scheme offered plaintiffs ample opportunities to raise their constitutional claims. Plaintiffs could have opposed any Board auditing standard before the SEC and then raised their constitutional claims on review of the SEC's decision in this Court under the Exchange Act. Sarbanes-Oxley § 107(b), 15 U.S.C. § 7217(b); 15 U.S.C. § 78y(a); *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001) (addressing non-delegation challenge on review of rulemaking proceeding). Plaintiffs could have opposed the Board's rules governing inspections, investigations, or support fees and then sought judicial review under the same provision. And they could have petitioned the SEC to modify or revoke the Board's authority to conduct inspections or investigations and sought judicial review if the SEC refused. Sarbanes-Oxley § 107(b)(5), (d)(1), 15 U.S.C. § 7217(b)(5), (d)(1); 15 U.S.C. § 78y(b).

Courts have repeatedly considered facial constitutional challenges like plaintiffs' under the same Exchange Act review provision that plaintiffs bypassed here. *See Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104-06 (1946); *Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1103-08 (D.C. Cir. 1988); *Sorrell v. SEC*, 679 F.2d 1323, 1325-26 (9th Cir. 1982); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-13 (3d Cir. 1977); *Intercontinental Indus. v. Am. Stock Exch.*, 452 F.2d 935, 942-43 (5th Cir. 1971); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952). In *First Jersey*, the Third Circuit specifically rejected a non-delegation challenge because the plaintiff had failed to exhaust remedies under the Exchange Act. 605 F.2d at 696-97. The review scheme plaintiffs bypassed here was thus clearly adequate—and, for that reason, exclusive.

C. Respect for Congress’s Review Scheme Is Particularly Important Here

The adequacy of the statutory review mechanism by itself required dismissal of this suit. But Congress’s reasons for creating exclusive review mechanisms apply with special force here.

1. Review schemes that channel claims through an agency help avoid unnecessary constitutional adjudication by allowing the agency to determine whether the claims are “[e]ither invalid for other reasons [or] allowable under other provisions.” *Weinberger v. Salfti*, 422 U.S. 749, 762 (1975). Here, the SEC could have redressed each of plaintiffs’ claimed injuries on statutory grounds—by rejecting or modifying the Board’s auditing standards and rules governing inspections, investigations, and support fees; by reviewing the Board’s inspection report; or by revoking the Board’s enforcement authority. *See* p. 13, *supra*. The very fact that “[t]here are grounds on which appellants could succeed . . . through the administrative process” that would “eliminat[e] any need for the courts to pass on the constitutional issues” is itself “‘a strong reason for not allowing . . . [a] suit’” that bypasses that process. *Wallace v. Lynn*, 507 F.2d 1186, 1190-91 (D.C. Cir. 1974); *see also Am. Coalition for Competitive Trade*, 128 F.3d at 766 & n.6; *Sohm v. Fowler*, 365 F.2d 915, 918 (D.C. Cir. 1966).

2. Channeling review through the agency also prevents premature and disruptive interference in agency proceedings. Courts routinely reject constitutional challenges to agency authority by the subjects of ongoing agency investigations or enforcement proceedings. Simply put, parties cannot “s[eek] to make an end run around [the review] process by going directly to district court.” *Sturm, Ruger*, 300 F.3d at 876;

see also Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1102 (D.C. Cir. 1985); *Nat'l Taxpayers Union*, 376 F.3d at 244 n.3. Plaintiffs brought this suit in the midst of a formal Board investigation. A.27. They challenged the Board's authority to investigate and sought an injunction prohibiting "any further action against Plaintiff Beckstead and Watts." A.31. That effort to end-run the review process cannot be "collateral" to Congress's review scheme.

3. Finally, agency review "is especially important where allowing the litigants to proceed in federal court would deprive the agency of *any* opportunity to exercise its discretion or apply its expertise." *Ass'n of Flight Attendants, AFL-CIO v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007); *see also Marine Mammal Conservancy, Inc. v. USDA*, 134 F.3d 409, 413-14 (D.C. Cir. 1998); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 739 n.11 (D.C. Cir. 1987) (opinion of Edwards, J.). By raising their claims before the SEC, plaintiffs would have allowed the agency to explain the scope of its authority over the Board. The SEC has a half-century of experience applying comparable oversight provisions to SROs. *See* 15 U.S.C. § 78s(b)-(e), (h)(4), pp. 2-5, *supra*. The SEC could take constitutional concerns into account when construing its oversight authority. *See Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988). And the SEC's interpretation would be entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Plaintiffs' suit denied this Court the benefit of the SEC's expertise in a concrete case under Sarbanes-Oxley's review scheme.

II. SARBANES-OXLEY DOES NOT VIOLATE THE APPOINTMENTS CLAUSE

In any event, plaintiffs’ challenges fail on the merits. Plaintiffs argue that Congress violated the Appointments Clause by vesting power to appoint Board members in the SEC. But while *principal* officers must be appointed by the President and confirmed by the Senate, *inferior* officers may be appointed by “heads of departments.” U.S. Const. art. II, § 2. Board members are unquestionably inferior officers, and Congress properly lodged authority to appoint them in the Commissioners of the SEC—the head of the department that comprehensively oversees the Board’s work.

A. Board Members Are Inferior Officers

Plaintiffs’ claim that Board members are principal officers distorts both the Board’s powers and the distinction between principal and inferior officers. *All* officers of the United States exercise “significant authority.” *Edmond v. United States*, 520 U.S. 651, 662 (1997). The line that separates principal from inferior is supervision and control. “[I]nferior 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 are subject to pervasive oversight by presidentially appointed principal officers—the Commissioners of the SEC.

1. The SEC Has Comprehensive Supervisory Power

a. The SEC’s authority over the Board is explicit and extensive. As explained above, the SEC appoints the Board’s members and can censure them, remove them, or limit their activities. All Board rules, sanctions, and inspection reports are subject to SEC

review. Board rules are without effect unless and until approved, and sanctions are automatically stayed pending any SEC review unless the SEC orders otherwise. Inspections and investigations must be conducted under rules approved by the SEC. The SEC controls the Board's budget. And the SEC can relieve the Board of *any* authority to enforce the Act. *See* pp. 2-7, *supra*.

Given those far-reaching powers, any claim that the Board exercises significant authority free from SEC control lacks foundation. In fact, the “rules for SEC oversight of the Board are generally the same as those that apply to SEC oversight of the [NASD].” S. Rep. No. 107-205, at 12. And this Court has emphasized the all-encompassing nature of that oversight:

[The NASD's authority] ultimately belongs to the SEC, and the legal views of the self-regulatory organization must yield to the Commission's view of the law. . . . “The self-regulatory organizations exercise authority subject to SEC oversight. They have *no authority to regulate independently of the SEC's control.*”

NASD v. SEC, 431 F.3d 803, 806-07 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)) (emphasis added). Likewise here, the Board has “no authority to regulate independently of the SEC's control.”

b. Plaintiffs' primary authority—*Edmond*—confirms that Board members are inferior officers. There, the Supreme Court cited four factors to support its conclusion that judges of the Coast Guard Court of Criminal Appeals are inferior officers. Each factor is likewise present here.

First, the Coast Guard's Judge Advocate General “exercise[d] administrative oversight” over the judges. 520 U.S. at 664. Likewise here, the SEC can exercise

administrative oversight over the Board—for example, the SEC can impose record-keeping requirements on the Board; the SEC can require the Board to report to it, and the SEC can conduct examinations of the Board’s records. Sarbanes-Oxley § 107(a), 15 U.S.C. § 7217(a) (incorporating 15 U.S.C. § 78q(a)(1), (b)(1)).

Second, the Judge Advocate General could prescribe “‘rules of procedure’” to govern the judges’ proceedings. 520 U.S. at 664. The SEC likewise can promulgate rules governing the Board. Sarbanes-Oxley § 3(a), 15 U.S.C. § 7202(a). The SEC also reviews the Board’s proposed rules (substantive or procedural); and it can abrogate, delete from, or add to those rules even after they have been approved. *Id.* § 107(b), 15 U.S.C. § 7217(b).

Third, the Judge Advocate General could remove the judges. 520 U.S. at 664. The SEC likewise can remove Board members. Sarbanes-Oxley § 107(d)(3), 15 U.S.C. § 7217(d)(3). The SEC can remove only for cause, *id.*, but the Judge Advocate General’s removal authority was also significantly restricted: He could not remove an officer “to influence . . . the outcome of individual proceedings.” *Edmond*, 520 U.S. at 664.

Fourth, and critically, the judges had “no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.” 520 U.S. at 665. The same is true here: Board rules are not effective unless and until the SEC approves them, and sanctions have no effect pending any SEC review. Sarbanes-Oxley §§ 105(e)(1), 107(b)(2), 15 U.S.C. §§ 7215(e)(1), 7217(b)(2); *see also Landry v. FDIC*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000) (holding that FDIC Administrative Law Judges were *mere employees* because they had no “authority to render [a] *final* decision,”

only a “‘*recommended* decision, *recommended* findings of fact, *recommended* conclusions of law, and [a] *proposed* order’”).

In fact, Sarbanes-Oxley provides for *more* oversight than was present in *Edmond*. The statute there limited review of factual findings to whether there was “some competent evidence in the record to establish each element of the offense.” 520 U.S. at 665. By contrast, Sarbanes-Oxley incorporates provisions long construed to require *de novo* review. Sarbanes-Oxley § 107(c)(2), 15 U.S.C. § 7217(c)(2) (incorporating 15 U.S.C. § 78s(e)(1)); *NASD v. SEC*, 431 F.3d at 804; *Sartain v. SEC*, 601 F.2d 1366, 1371 n.2 (9th Cir. 1979); *Todd*, 557 F.2d at 1012. The SEC can reject Board sanctions whenever it finds them “not appropriate.” Sarbanes-Oxley § 107(c)(3), 15 U.S.C. § 7217(c)(3). The SEC controls the Board’s budget. *Id.* § 109(b), 15 U.S.C. § 7219(b). And the SEC can withdraw the Board’s enforcement authority. *Id.* § 107(d)(1), 15 U.S.C. § 7217(d)(1). If the Coast Guard judges in *Edmond* were inferior officers, Board members surely are as well.

c. Plaintiffs’ reliance on *Morrison v. Olson*, 487 U.S. 654 (1988), fares no better. There, the Court held that the “independent counsel” was an inferior officer, even though (as her title suggested) she was subject to *far less control* than Board members. The independent counsel possessed, for all matters within her jurisdiction, the “‘*full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.*’” *Id.* at 662 (emphasis added). Yet the Attorney General was “not allowed to appoint the individual of his choice; he d[id] not determine the counsel’s jurisdiction; and his power to remove a counsel [wa]s limited.”

Id. at 695-96. The Attorney General had no authority to countermand the independent counsel’s decisions to frame indictments, conduct grand jury proceedings, try cases, take appeals, or otherwise handle “‘all aspects of any case, in the name of the United States.’”

Id. at 662. Nonetheless, the Court held that the independent counsel “clearly falls on the ‘inferior officer’ side of th[e] line” because, among other things, she could be removed for cause and had to follow Department policies “to the extent possible.” *Id.* at 671-73.

Morrison makes this an *a fortiori* case. Unlike the independent counsel, who exercised “‘full power and independent authority,’” 487 U.S. at 662, the Board is subject to comprehensive oversight by the SEC. Unlike the Attorney General, *id.* at 695, the SEC *does* “appoint the individual[s] of [its] choice” to the Board, Sarbanes-Oxley § 101(e)(4), 15 U.S.C. § 7211(e)(4), and *can* “determine the [Board’s] jurisdiction” by rescinding its authority or adding to its duties, *id.* §§ 101(c)(5), 107(d)(1); 15 U.S.C. §§ 7211(c)(5), 7217(d)(1). Unlike the independent counsel, the Board cannot prosecute crimes at all; it cannot even *refer* a case for criminal prosecution unless the SEC so directs. *Id.* § 105(b)(4)(B)(iii), 15 U.S.C. § 7215(b)(4)(B)(iii). And although the Board’s jurisdiction is not limited to a single case, it is limited to a single, technical subject-matter—public-company audits. Any difference in jurisdiction, moreover, pales next to the fact that the Board is subject to pervasive oversight in *all* activities, while the independent counsel was subject to virtually none.

2. *Plaintiffs’ Contrary Arguments Lack Merit*

Plaintiffs’ contrary arguments ignore both the relevant legal standard and the plain text of the Act.

Removal Authority. Plaintiffs assert that Board members are principal officers because they are not removable at will. Br. 33. But where inferior officers appointed by a department head are at issue, Congress has *more*, not less, authority to limit removal. More than a century of precedent makes that clear. In *United States v. Perkins*, 116 U.S. 483 (1886), the Court held:

We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, *it may limit and restrict the power of removal as it deems best for the public interest.* The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed.

Id. at 485 (emphasis added; quotation marks omitted); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 166 (1996) (confirming that *Perkins* “remain[s] good law”).

That is why the Supreme Court in *Morrison* counted the Attorney General’s authority to remove the independent counsel “‘for good cause’” as a factor *in favor of*, not against, inferior-officer status. 487 U.S. at 663, 671, 689 n.27; *see also Pennsylvania v. HHS*, 80 F.3d 796, 802-04 (3d Cir. 1996). Even mere employees are subject to substantial civil service protections. *See, e.g.*, 5 U.S.C. § 7521; *Landry*, 204 F.3d at 1130-34. As explained below, the SEC has broad power to remove for cause. *See pp.* 47-48, *infra*. In light of the SEC’s other extensive oversight powers, that is well within constitutional bounds.

Plaintiffs’ reliance on *Applicability of Executive Order No. 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. Off. Legal Counsel 150 (1993), is

misplaced. That opinion acknowledged that “case law clearly supports the view that ‘for cause’ limitations on removal power can be compatible with the continuing power and duty to supervise.” *Id.* at 156. “Indeed, the very ability to remove for ‘cause’ presupposes that the officer or body that has the removal power must supervise the subordinate officer at least to the extent needed to determine whether ‘cause’ for removal exists.” *Id.* at 156 n.19. The removal restrictions in that case were deemed significant only because they effectively granted fishery councils a *veto* over the removal of their own members. *Id.* at 155. The Office of Legal Counsel “distinguish[ed]” that “unusual” restriction from “more traditional legislation in which some form of ‘cause’ is all that is required before removal can occur.” *Id.* at 157. Sarbanes-Oxley does not grant Board members a veto over their own removal. Rather, it is precisely the sort of statute the OLC endorsed—“traditional legislation in which some form of ‘cause’ is all that is required before removal can occur.” *Id.*

Inspections and Investigations. Plaintiffs claim that the Board “exercises vast prosecutorial authority” in conducting inspections and investigations “subject to no SEC oversight at all.” Br. 33. Again, plaintiffs exaggerate the Board’s power while ignoring the SEC’s oversight. The Board has no “prosecutorial authority”—inspections and investigations are civil, administrative proceedings. And unlike rules or sanctions, inspections and investigations do not themselves have any legally operative effect. *Cf. FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239-45 (1980); *Aerosource, Inc. v. Slater*, 142 F.3d 572, 576-82 (3d Cir. 1998).

Plaintiffs' claim that inspections and investigations are "subject to no SEC oversight at all" (Br. 33) is also untrue. The Board can conduct inspections and investigations only under the rules the SEC approves; the SEC can modify those rules as it sees fit; and the SEC can remove Board members who fail to comply. *See* pp. 3-6, *supra*. The SEC can also relieve the Board of *any* responsibility to enforce the Act if doing so is "consistent with the public interest, the protection of investors, and the other purposes of this Act and the securities laws." Sarbanes-Oxley § 107(d)(1), 15 U.S.C. § 7217(d)(1). The SEC can review *de novo* any sanctions ultimately imposed. *Id.* § 107(c), 15 U.S.C. § 7217(c); p. 22, *supra*. And the SEC has independent authority to sanction violations of Board rules. Sarbanes-Oxley § 3(b)(1), 15 U.S.C. § 7202(b)(1). Those provisions give the SEC ample control.³

Plaintiffs conflate oversight with micromanagement when they insist that the SEC must exercise "ongoing, day-to-day supervision." Br. 32. "The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather . . . the line between officer and nonofficer." *Edmond*, 520 U.S. at 662. As a result, inferior officers need not be "tightly tethered to the appointing entity" in their day-to-day affairs. *Pennsylvania*, 80 F.3d at 805. In *Edmond*, for example, the Coast Guard judges had independent day-to-

³ In addition, the SEC has general rulemaking authority under Sarbanes-Oxley, pursuant to which it "could adopt rules that would enable it to take immediate action to require the PCAOB to stop or start a PCAOB inspection, investigation, or disciplinary proceeding." U.S. Mem. in Opp. to Mot. for Summary Judgment at 8 (Sept. 1, 2006) (Docket No. 41).

day authority over their cases. The Court of Appeals for the Armed Forces reviewed only final decisions, and the Judge Advocate General was specifically prohibited from “attempt[ing] to influence . . . the outcome of individual proceedings.” 520 U.S. at 664-65. That did not transform the judges into principal officers.

Notice and Comment. Plaintiffs assert that the SEC’s oversight is insufficient because the SEC must sometimes use “cumbersome notice-and-comment procedures.” Br. 33. But Board rules have *no effect unless and until they are approved by the SEC*. Sarbanes-Oxley § 107(b)(2), 15 U.S.C. § 7217(b)(2). The sole exception is internal “housekeeping” rules, which the SEC may abrogate “summarily”—*i.e.*, without notice and comment. 15 U.S.C. § 78s(b)(3)(C), *incorporated by* Sarbanes-Oxley § 107(b)(4), 15 U.S.C. § 7217(b)(4). Sanctions are likewise stayed pending any SEC review unless the SEC orders otherwise. Sarbanes-Oxley § 105(e)(1), 15 U.S.C. § 7215(e)(1). Thus, the effect of the notice-and-comment procedures is to *limit* the *Board’s* authority—Board rules and sanctions have no effect until the SEC finishes its review. The SEC, moreover, can forgo notice and comment for rules of “agency organization, procedure, or practice,” 5 U.S.C. § 553(b)(A), or when it would be “impracticable, unnecessary, or contrary to the public interest,” *id.* § 553(b)(B). Indeed, the SEC has done just that. *See* 71 Fed. Reg. at 42,000 (adopting budget rule without notice and comment).

Review of Board Rules. Plaintiffs also claim that the SEC must defer to Board rules because it must approve the rules “so long as it finds them ‘consistent with the requirements of th[e] Act and the securities laws, *or* . . . necessary or appropriate in the public interest or for the protection of investors.’” Br. 34 (quoting Sarbanes-Oxley

§ 107(b)(3), 15 U.S.C. § 7217(b)(3) (emphasis added)). While plaintiffs place great weight on the word “or,” Congress obviously intended to require the SEC to approve Board rules only if they are *both* consistent with the Act and the securities laws *and* in the public interest. Plaintiffs’ contrary reading is absurd. It would require the SEC to approve rules that *violate* the securities laws if they are “in the public interest,” or rules that are *contrary* to the public interest if they do not violate the securities laws. “[C]ourts are often compelled to construe ‘or’ as meaning ‘and’” to avoid absurd results. *United States v. Fisk*, 70 U.S. 445, 447 (1865); *see also Williams Cos. v. FERC*, 345 F.3d 910, 912 & n.1 (D.C. Cir. 2003); *United States v. Pabon-Cruz*, 391 F.3d 86, 105 (2d Cir. 2004); *United States v. Gibson*, 770 F.2d 306, 308 (2d Cir. 1985). The SEC has done just that here, interpreting the Act to require *both* findings before it approves a Board rule. *See, e.g., Order Approving Proposed Auditing Standard No. 4*, 71 Fed. Reg. 7,082, 7,083 (Feb. 10, 2006).

Thus, far from requiring *Chevron* deference to Board rules (Br. 34), the Act contemplates thorough SEC review. Indeed, the Act’s review provision is modeled on an Exchange Act provision that calls for “independent” review of SRO rules. *Belenke v. SEC*, 606 F.2d 193, 198 (7th Cir. 1979); *see NASD v. SEC*, 431 F.3d at 806 (the “legal views of the self-regulatory organization must yield to the Commission’s view of the law”). The SEC thus has ample control over Board rules.

In any event, the SEC can abrogate, delete from, or add to Board 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.”

Sarbanes-Oxley § 107(b)(5), 15 U.S.C. § 7217(b)(5). That broad authority—modeled on an Exchange Act provision that gives the SEC “plenary power” over SRO rules, S. Rep. No. 94-75, at 131—would give the SEC ample control over Board rules even if the standard applicable on *initial* review were as restrictive as plaintiffs suggest.

Miscellaneous. Plaintiffs’ remaining contentions are not arguments but rhetorical flourishes. Plaintiffs cite a single Senator’s floor statement for their repeated claim that the Board exercises “‘massive power, unchecked power, by design.’” Br. 2. But one Senator’s statement cannot overcome the statute’s plain text. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 599 (2004). The Act provides for comprehensive SEC oversight. And while plaintiffs cite witness statements and other references in the legislative history to the Board’s “independence,” Br. 2 n.1, most of those sources refer to independence *from the accounting profession*, not the SEC, *see, e.g.*, S. Rep. No. 107-205, at 4-7.

Plaintiffs’ repeated claim that the Board “finances itself through its own taxation” (Br. 32) also blinks reality. The Board can *propose* a budget and support fee to the SEC. But it cannot *collect* any money unless the SEC approves, and even then it can collect only pursuant to SEC-approved rules. Sarbanes-Oxley § 109(b), (d), 15 U.S.C. § 7219(b), (d). Plaintiffs’ complaint about Board members’ salaries (Br. 6) only underscores the SEC’s authority, since the SEC regulates those too. *See Order Approving PCAOB Budget and Annual Accounting Support Fee for Calendar Year 2008*, 72 Fed. Reg. 73,051, 73,052 (Dec. 26, 2007) (limiting salary increases to 3.3%).

B. The Securities and Exchange Commission Is a “Department”

Because Board members are inferior officers, they may be appointed by “heads of departments.” U.S. Const. art. II, § 2. Although plaintiffs insist that independent agencies like the SEC are not “departments,” every branch of government has rejected that argument. In *Freytag v. Commissioner*, 501 U.S. 868 (1991), all four Justices to address the question concluded that independent agencies are “departments.” *See id.* at 914-22 (Scalia, J., concurring in judgment, joined by O’Connor, Kennedy, and Souter, JJ.). The Ninth Circuit has likewise held that the Postal Service is a “department.” *Silver v. USPS*, 951 F.2d 1033, 1038 (9th Cir. 1991).

The Executive and Congress agree. In 1933, the Attorney General ruled that the independent Civil Service Commission was a “department.” *Authority of Civil Service Commission To Appoint a Chief Examiner*, 37 Op. Att’y Gen. 227, 231 (1933). In 1996, the Office of Legal Counsel reaffirmed that Congress may “vest the power to appoint inferior officers in the heads of the so-called independent agencies” like the SEC. 20 Op. Off. Legal Counsel at 152-53. And Congress routinely grants such authority to independent agencies. *See Freytag*, 501 U.S. at 918 (Scalia, J., concurring in judgment) (collecting statutes).

Plaintiffs, by contrast, cannot point to a single contrary authority. They rely on the majority opinion in *Freytag* (Br. 37-38), but that opinion expressly declined to reach the issue: “We do not address here any question involving an 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. *Freytag* states that “departments” are

limited to “executive divisions *like* the Cabinet-level departments,” *id.* at 886 (emphasis added), but the SEC is “like” a cabinet-level department in all relevant respects: It exercises significant authority over an important part of the national economy; and it is run by principal officers who are appointed by the President, are removable by the President, and report to no one else but the President. 15 U.S.C. § 78d(a); *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004).

Plaintiffs also rely on *United States v. Germaine*, 99 U.S. 508 (1879), and *United States v. Mouat*, 124 U.S. 303 (1888). Br. 36 & n.6. But those cases addressed only whether a *subdivision within* a department could be a “department” capable of appointing inferior officers. *See Germaine*, 99 U.S. at 511 (requiring appointments “by the heads of those departments, and not by the heads of the *bureaus in* those departments” (emphasis added)); *Mouat*, 124 U.S. at 307 (citing *Germaine*). The references to “cabinet members” distinguished department heads from middle management—not department heads in cabinet agencies from department heads in other agencies. *See Freytag*, 501 U.S. at 917 (Scalia, J., concurring in judgment). The SEC is not a division of some other department; it is a department unto itself.

The fact that Commissioners may be removable only for cause does not mean they are “[un]accountable to the President” or “immune” from the “‘will of the people.’” Br. 38. To the contrary, the SEC is constitutional precisely because Congress preserved sufficient accountability to the President. It cannot be that the SEC is sufficiently accountable to the Executive that it may constitutionally exercise significant authority over a critical component of the economy, but insufficiently accountable to appoint its

own subordinates. On plaintiffs’ theory, the inferior officers in every independent agency would have to be appointed by the President, a court, or the head of *some other* department. But it “makes no sense to create a system in which the inferior officers of [an agency] . . . must be appointed by the President, the courts of law, or the ‘Secretary of Something Else.’” *Freytag*, 501 U.S. at 919-20 (Scalia, J., concurring in judgment).

C. The Commission Is the “Head” of the SEC

Plaintiffs also contend that Congress violated the Appointments Clause by vesting authority to appoint Board members in the five-member Commission as a whole rather than the Chairman alone. According to plaintiffs, the Chairman, not the Commission, is the SEC’s “head.”

1. Plaintiffs Lack Standing

To establish standing, a plaintiff must show that its injury is “‘fairly . . . trace[able] to the challenged action.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That requirement applies to Appointments Clause claims. *See Reuss v. Balles*, 584 F.2d 461, 469 (D.C. Cir. 1978); *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 542 (D.C. Cir. 1985). As the district court held, A.47, plaintiffs cannot show that any injury they suffered is fairly traceable to Congress’s decision to lodge appointment power in the full Commission rather than the Chairman alone, because the Chairman is one of the five Commissioners and has voted in favor of every Board member appointed to date. A.33-34.

Plaintiffs’ authorities are not to the contrary. *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984), holds only that a court cannot “assume[.]” that the proper appointing

authority would have made the same appointments. *Id.* at 1495. Here, there is no need to “assume” anything—unlike in *Andrade*, we *know* how the Chairman voted. The remaining cases merely hold that a plaintiff need not show that, if a *different* officer had been appointed, he would have regulated differently. *See Comm. for Monetary Reform*, 766 F.2d at 543; *Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993). Those cases nowhere suggest that a plaintiff has standing even when there is unrefuted evidence that the *same* officer would have been appointed, even if the appointment had been made in the manner the plaintiff demands.⁴

2. Congress May Lodge Appointment Power in Multi-Member Commissions

In any event, plaintiffs’ claims fail on the merits. Notwithstanding plaintiffs’ contention that multi-member commissions cannot be department heads, Congress has long created independent agencies headed by such commissions, *see, e.g.*, 15 U.S.C. § 41, and all three branches of government agree that those commissions are the “heads” of their respective agencies for Appointments Clause purposes. The Executive Branch has concluded that “the three Commissioners, who constitute the [Civil Service] Commission, are the ‘head of a Department’ in the constitutional sense.” 37 Op. Att’y Gen. at 231. In the Reorganization Act of 1949, Congress stated that “the head of an agency [may] be an individual or a commission or board with more than one member.” 5

⁴ The GAO report on which plaintiffs rely (Br. 43-44) shows only that the Chairman’s preferences changed over time, not that he voted for someone other than the candidate he preferred. *See GAO, Actions Needed To Improve PCAOB Selection Process* 9-13 (2002).

U.S.C. § 904. And the Ninth Circuit has held that the nine governors of the Postal Service are the “head” of that agency. *Silver*, 951 F.2d at 1038-39. As Judge O’Scannlain noted: “[M]any independent regulatory agencies are headed by groups with no apparent constitutional infirmity, and the Attorney General determined as early as 1933 that groups could be ‘Heads of Departments.’” *Id.* at 1044 n.3 (O’Scannlain, J., dissenting on other grounds).

Plaintiffs cite no contrary precedent. Their dictionary defines “head” as “one who has the first rank or place.” Br. 39-40. But that does not resolve whether the “one” must be one person rather than one committee. And plaintiffs’ historical sources extolling the “benefits of lodging the appointment power in a single individual” (Br. 39) all address the decision to vest appointment of *principal* officers in the President. The Framers entrenched *that* preference in constitutional text. U.S. Const. art. II, §§ 1, 2. The Framers did not foreclose Congress from granting multi-member commissions authority to appoint *inferior* officers. To the contrary, they expressly authorized appointments by “courts of law,” *id.* § 2, which are often multi-member bodies, *see, e.g.*, Act of Sept. 24, 1789, ch. 20, §§ 1, 7, 1 Stat. 73, 73, 76 (authorizing the six Justices of the Supreme Court to appoint an inferior officer); *Morrison*, 487 U.S. at 661 n.3 (three-judge panel). Multi-member commissions in charge of independent agencies routinely exercise far-reaching regulatory powers. It makes no constitutional sense to grant them those executive powers but deny them power to appoint their own subordinates.

3. *The Commission, Not the Chairman, Is the “Head” of the SEC for Appointments Clause Purposes*

Finally, plaintiffs argue that, even if a multi-member commission *can* be the “head” of an agency, the Chairman is the head of the SEC. The Exchange Act belies that claim. The Commissioners, as a collective body, exercise all the SEC’s most important official powers. The Commission, not the Chairman, promulgates rules. 15 U.S.C. § 78w(a)(1). The Commission, not the Chairman, authorizes formal investigations and sues to enjoin violations of the securities laws. *Id.* § 78u. The Commission, not the Chairman, reviews disciplinary sanctions. *Id.* § 78d-1(b). And the Commission, not the Chairman, registers and supervises SROs. *Id.* § 78s. Sarbanes-Oxley continues that pattern: The Commission, not the Chairman, reviews Board rules, sanctions, and inspection reports; approves the Board’s budget; and disciplines Board members. Sarbanes-Oxley §§ 104(h), 107, 109(b), 15 U.S.C. §§ 7214(h), 7217, 7219(b). Multi-member commissions are the “heads” of other independent agencies, *see* pp. 33-34, *supra*, and Congress doubtless intended the same thing when it established the SEC and required Commission action on its official policymaking functions.

Sarbanes-Oxley reflects that conclusion as well, since Congress granted the Commission authority to appoint Board members. The Executive, having intervened to defend the Act, agrees that the Commission is the SEC’s head. Surely if Congress and the Executive understand that the “head” of the SEC is the Commission, plaintiffs are ill-positioned to disagree.

Plaintiffs invoke the district court’s dicta on this issue (Br. 41), but do not defend its rationale. The court opined that the Chairman is the head of the SEC because “[t]he SEC may neither appoint nor remove the SEC Chairman, nor may the SEC revoke authority delegated to the entire Commission.” A.46. That the “SEC may neither appoint nor remove the SEC Chairman” proves nothing. Just as the Commission cannot appoint or remove the Chairman, the Chairman cannot appoint or remove the other Commissioners. 15 U.S.C. § 78d(a); *MFS*, 380 F.3d at 619. And it is not clear what the court meant by its assertion that the “SEC [may not] revoke authority delegated to the entire Commission.” The statute vests authority in the Commission in the first instance; the Commission may delegate functions to the Chairman, another Commissioner, or SEC staff “by published order or rule,” 15 U.S.C. § 78d-1(a); and the Commission may revoke a delegation by rescinding the order or rule. Far from showing that the Chairman is the head, that confirms that the Commission is the head.

Contrary to plaintiffs’ assertions (Br. 40-41), President Truman’s Reorganization Plan No. 10, 15 Fed. Reg. 3175, 3175 (May 25, 1950), did not make the Chairman the “head” of the SEC for Appointments Clause purposes. It merely transferred certain administrative duties to him. The plan provided that “[i]n carrying out any of his functions under the provisions of this section the Chairman *shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.*” *Id.* § 1(b)(1), 15 Fed. Reg. at 3175 (emphasis added). As President Truman explained, the transferred functions pertained only to “day-to-day direction and internal administration”; “the

substantive aspects of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases . . . are left in the board or commission as a whole.” *Special Message to the Congress Summarizing the New Reorganization Plans (No. 53)*, 1950 Pub. Papers 195, 197 (Mar. 13, 1950). “The fact that under these reorganization plans the commissions retain all substantive responsibilities deserves special emphasis. The plans only eliminate multi-headed supervision of internal administrative functioning. The commissions retain policy control” *Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950 (No. 54)*, 1950 Pub. Papers 199, 202 (Mar. 13, 1950). The agency “head” is the entity that exercises regulatory authority, not day-to-day administrative responsibilities.

Under the Reorganization Act, moreover, if a plan “provide[d] for the appointment and pay of the head” of an agency, the new “head” had to be either a civil-service or Senate-confirmed position. 5 U.S.C. § 904. The position of Chairman is neither. Rather, the President alone selects the Chairman from among the Commissioners. Reorganization Plan No. 10, § 3, 15 Fed. Reg. at 3175. Plaintiffs’ argument thus rests on the implausible premise that President Truman made the Chairman the SEC’s head in violation of the Reorganization Act’s express requirements.

Seeking refuge behind a parade of horrors, plaintiffs argue that holding the Commission to be the SEC’s head would invalidate the Chairman’s appointments of the SEC’s division heads and General Counsel. Br. 41. But SEC staff are employees, not inferior officers. Employees “need not be appointed by heads of departments.” *Landry*,

204 F.3d at 1130. The Chairman has authority to appoint only “personnel *employed*” by the SEC. Reorganization Plan No. 10 § 1(a)(1), 15 Fed. Reg. at 3175 (emphasis added). And SEC staff do not have “positions . . . established by law” or “duties and functions . . . delineated in a statute.” *Freytag*, 501 U.S. at 881; *see Landry*, 204 F.3d at 1133 (office established by law is the “threshold trigger for the Appointments Clause”). Rather, their positions and duties are defined by SEC regulations, *see, e.g.*, 17 C.F.R. § 200.19b, and they exercise only the authority the Commission chooses to delegate, 15 U.S.C. § 78d-1(a).

Moreover, the SEC’s division heads and General Counsel are not appointed, as plaintiffs claim, “by the Chairman *alone*.” Br. 41. Rather, “[t]he appointment by the Chairman of the heads of major administrative units under the Commission [are] subject to the approval of the Commission.” Reorganization Plan No. 10 § 1(b)(2), 15 Fed. Reg. at 3175. President Truman thus may have concluded that, even if the SEC’s heads of major administrative units *were* inferior officers, the Commission’s right to approve the Chairman’s nominees would satisfy the Appointments Clause. *Cf. NTEU v. Reagan*, 663 F.2d 239, 246 n.9 (D.C. Cir. 1981) (“approval” of another person’s selection sufficient to constitute appointment); *United States v. Hartwell*, 73 U.S. 385, 393-94 (1868) (appointment by subordinate with “approbation” of department head).

In any event, the SEC’s staff is not at issue here. The Commission exercises its regulatory authority as a collective body. The Commission is thus the “head” of the SEC for Appointments Clause purposes.

III. SARBANES-OXLEY DOES NOT VIOLATE THE SEPARATION OF POWERS

Finally, plaintiffs assert that Sarbanes-Oxley violates separation-of-powers principles. “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Supreme Court accordingly has taken a “pragmatic, flexible view” when Congress designs novel solutions to pressing social problems. *Mistretta v. United States*, 488 U.S. 361, 381 (1989). That flexibility, however, is unnecessary here because there is nothing novel about Sarbanes-Oxley. Congress created inferior-officer positions subject to plenary oversight by the principal officers of the SEC. It gave the Commission power to appoint and remove its new inferiors. And it prescribed the conditions under which those inferior officers can be removed. That familiar formula is by now so well established as to be beyond constitutional question.

A. The President Has No Constitutional Authority To Remove Inferior Officers Appointed by a Department Head

Plaintiffs’ separation-of-powers argument rests on the repeated premise that “the *President* [must] have broad removal authority” over *any officer* who “wield[s] significant ‘executive power.’” Br. 11-13 (emphasis added). That is incorrect. The settled rule is that the power to remove follows the power to appoint. Thus, where the *President* appoints an officer, the President has power to remove, and restrictions on his power are closely scrutinized. *See, e.g., Myers v. United States*, 272 U.S. 52 (1926). But when Congress “vest[s] the appointment of such inferior officers, as they think proper, in

the . . . heads of departments,” U.S. Const. art. II, § 2, the *department head*, not the President, has the power to remove.

1. The Supreme Court and this Court have repeatedly so held. In *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), the Supreme Court addressed who could remove an inferior officer appointed by a district court. The Court held that, “[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider *the power of removal as incident to the power of appointment.*” *Id.* at 259 (emphasis added).⁵ The Court explained that the same rule applied to executive officers: “[P]ower is given to the secretary, to appoint all necessary clerks; and although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department.” *Id.* (citation omitted). The Court made it clear that, when the department head appoints, *only* the department head—and *not* the President—can remove: “[*T*]he President has *certainly no power to remove.*” *Id.* at 260 (emphasis added). In short, “all inferior officers . . . hold their office at the discretion of the appointing power.” *Id.*

The Supreme Court has repeatedly reaffirmed that rule. *See Sampson v. Murray*, 415 U.S. 61, 70 n.17 (1974); *Burnap v. United States*, 252 U.S. 512, 515 (1920); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903); *Reagan v. United States*, 182 U.S. 419, 424

⁵ The Court’s reference to “constitutional provision, or statutory regulation” means express tenure provisions such as Article III’s life-tenure guarantee. *See* 38 U.S. at 258-59. That the Court did not view Article II as superseding the “removal follows appointment” rule for all executive officers is obvious from the discussion of executive officers that followed. *See id.* at 259-60.

(1901); *Keim v. United States*, 177 U.S. 290, 293-94 (1900); *United States v. Allred*, 155 U.S. 591, 594 (1895). Even *Myers*, the high-water mark of presidential removal power, is in accord. *Myers* involved a *presidentially appointed* inferior officer. All four opinions agreed that, where Congress vests power to appoint inferior officers in a department head, it can vest removal authority in someone other than the President. *See* 272 U.S. at 159-62; *id.* at 238 (McReynolds, J., dissenting); *id.* at 242-43 & n.5 (Brandeis, J., dissenting); *id.* at 295 (Holmes, J., dissenting). The Court struck down the statute only because Congress had tried to limit removal of a *presidentially appointed* inferior officer. *See id.* at 161 (majority opinion); *Morrison*, 487 U.S. at 689 n.27 (“*Myers* itself expressly distinguished cases in which Congress had chosen to vest the appointment of ‘inferior’ executive officials in the head of a department.”).

In *NTEU*, this Court likewise held that “the power to remove is held by the appointing authority, *and only by the appointing authority*. Absent relevant legislation, this continues to be the rule to the present day.” 663 F.2d at 247 (emphasis added). “The only one authorized to revoke an appointment is one authorized to make it. Thus, for example, an appointment authorized to be made by the Secretary of Defense and, in fact, made by the Secretary of Defense, *cannot be revoked by the President*.” *Id.* (citing *Hennen*, 38 U.S. at 259) (emphasis added). The Executive Branch concurs: Reciting *Hennen*’s holding that “inferior officers appointed by a department head [a]re *not removable by the President*,” the Office of Legal Counsel concluded in 1996 that *Hennen* “remain[s] good law.” 20 Op. Off. Legal Counsel at 166 (emphasis added).

That has been the rule since the dawn of the Republic. While plaintiffs invoke the legislative “decision of 1789” (Br. 14-15), that decision addressed power to remove a *presidentially appointed* principal officer—the Secretary of Foreign Affairs. *See* 1 Annals of Cong. 383-99, 473-614 (Gales ed., 1834). The decision of 1789 reflects the broader rule that the power to remove follows the power to appoint: Because the President appointed the principal officer, he had sole authority to remove him. *See Myers*, 272 U.S. at 119 (“It was agreed . . . [that] the power of appointment carried with it the power of removal.”). In fact, the rule that the power to remove follows the power to appoint was acknowledged more than twenty times by speakers on *both sides* of the debate.⁶ But the corollary is that, where a *department head* appoints, only the *department head* can remove. Indeed, when the Postmaster General was given authority to appoint inferior officers shortly thereafter, he also had “sole and exclusive authority” to remove them. 3 Story, *Commentaries on the Constitution of the United States* § 1530, at 387 (1833) (“Story”); *see also Myers*, 272 U.S. at 188-91 (McReynolds, J., dissenting).

2. The settled rule is that inferior officers appointed by a department head are removable *only* by the department head, *not* the President. The rationale for that rule is *not* that the department head is an “alter ego” of the President, as plaintiffs suggest (Br. 18), but that the power to remove follows the power to appoint.

⁶ *See* 1 Annals of Cong. 388-89, 396-97 (Bland); *id.* at 389, 508, 577 (Jackson); *id.* at 391, 473, 485, 537-38 (White); *id.* at 393, 584 (Sylvester); *id.* at 395-96, 596 (Gerry); *id.* at 396, 566 (Livermore); *id.* at 484 (Vining); *id.* at 502-03 (Lawrence); *id.* at 510-11 (Sherman); *id.* at 511-12 (Stone); *id.* at 526 (Benson); *id.* at 542 (Sedgwick); *id.* at 548 (Boudinot); *id.* at 561 (Ames). *But see, e.g., id.* at 579 (Baldwin).

Not one of plaintiffs' authorities is to the contrary. *Amicus* Washington Legal Foundation devotes eight pages to instances in which Presidents have resisted limitations on their removal authority. *See* WLF Br. 5-13. But *not a single one* involved a statute that gave sole removal authority to the department head that appointed an officer. *See id.* That plaintiffs have not cited a single instance in which a President has objected to such a statute reflects the absence of any foundation for their position. Here, moreover, the President signed the Act into law and the Executive is now defending it in court. That is powerful evidence that the Act does not "impermissibly intrude[] into the executive function." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441, 449 (1977).

Plaintiffs nonetheless invoke a single sentence of dicta from *Morrison v. Olson*, 487 U.S. 654 (1988): "This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 692. *Morrison*, however, did not involve a traditional statute granting an executive department head sole power to appoint, supervise, and remove its own subordinates. The independent counsel was an executive officer appointed by a three-judge court *outside* the executive branch. *Id.* at 661 & n.3. This case, unlike *Morrison*, falls squarely within the long line of authority dating back to *Hennen*.

In any event, the dicta from *Morrison* that plaintiffs cite at most *assumed* that depriving the President of all removal power might present a constitutional problem, and then observed that no such issue was presented. *See* 487 U.S. at 692. The notion that *Morrison* overruled over two centuries of precedent *sub silentio*—while *rejecting* a

separation-of-powers challenge—is implausible. Congress did not violate separation of powers by following the centuries-old rule that department heads have exclusive authority to remove the inferior officers they appoint.

B. The President Has Removal Authority Over Board Members Through His Oversight of the SEC

Even if the President must have some power to remove inferior officers appointed by department heads, the President’s oversight of the SEC gives him more than sufficient power here. Board members are removable by the SEC. Sarbanes-Oxley § 107(d)(3); 15 U.S.C. § 7217(d)(3). And SEC Commissioners are removable by the President. *MFS*, 380 F.3d at 619. If a Board member engaged in sufficiently serious misconduct and the Commissioners nevertheless refused to remove him, the President could remove the Commissioners. The Act thus does not “completely strip[]” the President of removal authority. *Morrison*, 487 U.S. at 692. Rather, as with countless other inferior officers, the President has indirect removal authority through his power to remove the department head to which the inferior officer reports.

1. Plaintiffs argue that this type of indirect removal authority is sufficient only where the department head is a presidential “alter ego” removable at will. Br. 18-19. That argument is unpersuasive. It begins with the erroneous premise that lodging removal authority in a department head who is removable at will is equivalent to lodging that authority in the President. Not so: If the President directs a department head to fire an inferior officer and the department head refuses, the President can fire the department head, but he still cannot fire the inferior officer himself. *See NTEU*, 663 F.2d at 247-48.

As the Saturday Night Massacre demonstrates, that is a meaningful difference. *See Nader v. Bork*, 366 F. Supp. 104, 107 (D.D.C. 1973).

Plaintiffs claim that the President could always count on the “next-in-line” or “whomever the President designates as ‘acting’ department head” to carry out a firing. Br. 21. But the Constitution does not require Congress to authorize automatic succession or “acting” appointments. *See* 5 U.S.C. § 3349c (excluding various federal officers from the acting-appointment provisions of the Vacancies Reform Act). Thus, in many cases, the best the President can hope for is that the Senate will confirm a successor willing to do his bidding. The Senate confirmation requirement reflects a careful design: The President can fire his appointees. But he is not without constraints in choosing replacements.

2. Plaintiffs, moreover, overstate the import of the removal restrictions. Commissioners are removable for “‘inefficiency, neglect of duty or malfeasance in office.’” *MFS*, 380 F.3d at 619. As the Supreme Court has noted, those terms are “very broad and . . . could sustain removal . . . for any number of actual or perceived transgressions.” *Bowsher v. Synar*, 478 U.S. 714, 729 (1986). The Commission’s refusal to remove a Board member for sufficiently serious misconduct clearly could constitute grounds for the Commissioners’ removal. *See, e.g., Fernelius v. Pierce*, 138 P.2d 12, 14 (Cal. 1943) (“[T]he power to suspend or discharge . . . subordinates . . . carries with it the correlative duty to vigilantly exercise the power . . .”); *Inefficiency or Misconduct of Deputy or Subordinate As Ground for Removal of Public Officer*, 143 A.L.R. 517 (1943). The only impact of the restrictions on removing SEC Commissioners is that the President

must show that the Board member's misconduct was sufficiently serious that the Commissioners' failure to remove the Board member is cause for removing the Commissioners. That hardly means the President's removal power is limited to "extraordinarily rare case[s]" of "uncontestable" "abuse of power." Br. 22.

Plaintiffs insist that there are "*no* circumstances" where the President can remove a Commissioner for leaving a Board member in office, because the Act says the Commission "may" remove Board members for misconduct. Br. 20. But that is like arguing that a court of appeals can never reverse a trial court's decision to admit prejudicial evidence because Rule 403 says only that the court "may" exclude it. Fed. R. Evid. 403. The grant of discretion implies a duty not to misuse it. *See Fernelius*, 138 P.2d at 14. Finally, plaintiffs' complaint that the President may have to remove multiple Commissioners to change a result (Br. 21-22) is irrelevant. If cause exists, it exists for everyone.

3. Plaintiffs' arguments are not so much an attack on Sarbanes-Oxley as an attack on independent agencies generally. The SEC promulgates rules to govern the securities markets, imposes sanctions for violations, and makes countless other discretionary decisions of national import. All those decisions are made by Commissioners who are removable only for cause. The very concept of an independent agency is that, by limiting removal authority, Congress has placed some limits on the President's control. It is hard to understand why the agency's personnel decisions—its choices about whether to fire or retain the inferior officers *it appoints and supervises*—require greater presidential control.

C. The Act Does Not Unduly Restrict the SEC's Removal Authority

Plaintiffs also argue that Sarbanes-Oxley unduly restricts the *SEC's* removal authority. They claim the Act “permits, at most, removal only of those members who egregiously and deliberately flout their duties or engage in serious misconduct.” Br. 21. That contrived standard has no foundation.

The Act permits removal “for good cause,” Sarbanes-Oxley § 101(e)(6), 15 U.S.C. § 7211(e)(6), which exists whenever a Board member “(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof,” *id.* § 107(d)(3), 15 U.S.C. § 7217(d)(3). The SEC could readily construe that standard to authorize removal in a wide variety of circumstances. Although subsections (A) and (B) refer to “willful[]” misconduct, this Court has defined “willful” in the securities context to mean “‘no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.’” *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000). Willfulness requires conscious, volitional conduct, not bad faith. Under that standard, negligent abuses of authority—including negligent misinterpretations about the scope of one’s legal authority—could be “willful.” *See In re Briggs*, SEC Release No. 34-40506, 1998 WL 668156, at *4 (Sept. 30, 1998) (applying comparable provision to hold that SRO officer “willfully violated” SRO rules because he “knew or should have known” of improper fund transfers). In any

event, the Act also allows removal for failure to enforce “without reasonable justification or excuse,” which clearly covers negligence. Sarbanes-Oxley § 107(d)(3)(C), 15 U.S.C. § 7217(d)(3)(C).

Any ambiguities cannot be grounds for striking down the Act. Plaintiffs’ contrary argument ignores the standard that governs facial challenges: A statute cannot be struck down on its face unless “no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). That rule precludes relief so long as the SEC *could* adopt a constitutional construction of the Act. Plaintiffs’ argument also ignores the doctrine of constitutional avoidance, which requires the Court to reject constructions that raise constitutional doubts. Contrary to plaintiffs’ claim (Br. 29), that doctrine applies with full force in cases of this nature. *See Morrison*, 487 U.S. at 682; *cf. Shurtleff*, 189 U.S. at 316.

Sarbanes-Oxley’s good-cause standard falls well within constitutional limits. As explained above, p. 24, *supra*, the Supreme Court established the governing legal principle over a century ago: “[W]hen congress, by law, vests the appointment of inferior officers in the heads of departments, *it may limit and restrict the power of removal as it deems best for the public interest.*” *Perkins*, 116 U.S. at 485 (emphasis added); *see also* 20 Op. Off. Legal Counsel at 166 (*Perkins* “remain[s] good law”); 3 Story § 1531, at 388 (noting Congress’s authority to “prescribe the term of office, the manner in which, and the persons by whom, the removal [of such officers] . . . shall be made”). Congress can thus limit removal of Board members “as it deems best for the public interest.” Indeed, Congress’s restrictions are more modest than those in *Perkins*.

There, the Secretary of the Navy could remove officers only upon conviction by a court-martial. 116 U.S. at 484. The SEC, by contrast, can remove Board members for a wide range of misconduct. *See* pp. 47-48, *supra*.

The restrictions at issue are particularly appropriate given that the Board conducts rulemaking and adjudications in a narrow technical area, much like an independent agency. The Supreme Court has upheld good-cause removal restrictions even for *principal* officers who perform such functions. *See Humphrey's Executor v. United States*, 295 U.S. 602, 628-29 (1935); *Wiener v. United States*, 357 U.S. 349, 253-56 (1958); *cf. Morrison*, 487 U.S. at 689-91. Clearly, the Act's restrictions—which merely detail particular types of “good cause” that justify removal—are appropriate for the *inferior* officers here.

Finally, even if the enumerated grounds for removal were too restrictive—and they are not—the remedy would be to sever the restrictions. *See City of New Haven v. United States*, 809 F.2d 900, 905 (D.C. Cir. 1987). By striking Section 107(d)(3) and the phrase “in accordance with section 107(d)(3)” from Section 101(e)(6), the Court would leave the SEC with general “good cause” removal authority under Section 101(e)(6), 15 U.S.C. § 2711(e)(6), no different from the authority upheld in *Morrison*, 487 U.S. at 692-93. Clearly, Congress would have preferred a statute with a somewhat vaguer “good cause” removal standard to no statute at all.

D. The Board “As a Whole” Does Not Violate Separation-of-Powers Constraints

Plaintiffs finally argue that the Board “as a whole” violates the separation of powers. Their claim that the Board “exercises extraordinarily broad and very significant authority” (Br. 25) not only exaggerates the Board’s authority but ignores the SEC’s control over every significant exercise of that authority. *See pp. 2-7, supra*. Just as the SEC’s comprehensive oversight makes Board members inferior officers, it also satisfies separation-of-powers constraints. *Compare Morrison*, 487 U.S. at 671-73, *with id.* at 695-96 (relying on essentially the same factors to conclude that the independent counsel was an inferior officer and that the Attorney General’s supervision satisfied separation of powers).

The extent of *direct* presidential oversight over Board members (Br. 26) is beside the point. The President does not supervise inferior officers directly. He supervises the principal officers to whom they report, and who are ultimately accountable to him for any neglect of duty in appointing, removing, or supervising their subordinates. *See The President and Accounting Offices*, 1 Op. Att’y Gen. 624, 626 (1823); *Relation of the President to the Executive Departments*, 10 Op. Att’y Gen. 527, 528-29 (1863); *Jurisdiction of the Accounting Officers*, 5 Op. Att’y Gen. 630, 635-39 (1852). The President supervises Board members the same way—through the SEC.

The fact that the SEC appoints Board members (Br. 23-24) raises no colorable separation-of-powers issue. The Constitution expressly allows Congress to “vest the appointment of such inferior officers, as they think proper, in the . . . heads of

departments.” U.S. Const. art. II, § 2. Congress cannot violate separation of powers by invoking authority the Constitution expressly provides.

Plaintiffs’ claim that Congress had “no legitimate *reason*” to structure the Board the way it did (Br. 26) is unfounded. The Board performs adjudicative and rulemaking functions in a narrow technical area. Congress could reasonably conclude that those duties would be performed more effectively if Board members were not removable at will. *Cf. Humphrey’s Executor*, 295 U.S. at 628-29. Congress’s further decision to create an entity separate from but wholly subordinate to the SEC is reasonably explained by a desire to create a body focused exclusively on the issues Congress sought to address. That model worked for SROs; Congress expected it to work here too.

Finally, plaintiffs’ overwrought hypotheticals about independent “Law Enforcement” or “Foreign Policy” commissions (Br. 27-28) ignore the obvious fact that such commissions would exercise *purely* executive functions. The Supreme Court has never upheld removal restrictions of *any* sort on principal officers exercising purely executive functions. *Cf. Morrison*, 487 U.S. at 690. The heads of any such commissions thus might have to be removable at will. Here, by contrast, the Board performs functions typical of independent agencies, subject to plenary control by the SEC. Plaintiffs offer no reason why restrictions routinely applied to independent agencies become impermissible when applied to the Board.

CONCLUSION

The judgment should be vacated with instructions to dismiss or, alternatively, affirmed.

February 7, 2008

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