No. 08-861

In The
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,
Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT
BOARD AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Association of State Boards of Accountancy (hereinafter "NASBA") is a non-profit corporation with its headquarters in Nashville, Tennessee. Its members are all of the state boards of accountancy of the fifty states, as well as the District of Columbia and the territories of Puerto Rico, Guam, the Northern Mariana Islands, and the Virgin Islands. For over a hundred years NASBA's primary mission has been to enhance the effectiveness of these state boards of accountancy. NASBA is also concerned with effective public protection through state regulation of public accounting. Some of the goals of NASBA are to preserve the public trust and confidence in the Certified Public Accountant (hereinafter "CPA") title, fostering compliance with ethical and all professional standards, and promoting the rights of boards of public accountancy to regulate licensees in all their professional activities.

Like the Public Company Accounting Oversight Board (hereinafter "PCAOB"), the state boards of accountancy are charged with protecting investors and other members of the public that rely on the financial statements and audits of private companies. *See* 15 U.S.C. § 7211(a). To this end, NASBA's member boards cooperate with the PCAOB in its inspection and

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[1] The National Association of State Boards of Accountancy files this brief with the consent of all parties. Letters granting consent have been filed with this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus curiae, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

investigation of registered public accounting firms and associated CPAs. *Id.*, §§ 7214(c)(2) & (g)(1), 7215(b)(4)(B)(iii)(III). Indeed, federal laws require that the PCAOB report findings and refer appropriate cases to state boards. Thus, NASBA has a strong interest in asserting the constitutionality of the PCAOB as an essential partner in public protection.

SUMMARY OF ARGUMENT

The Court should rule in favor of Respondents because the District Court lacked subject matter jurisdiction or on the merits. The District Court should have dismissed Petitioners' claims at the outset because those claims are not yet ripe for review and their case before this Court is not justiciable due to their failure to pursue the extensive and exclusive review procedures of the Act. Therefore, this Court should not address the merits of Petitioners' claims and remand this case to the District Court with instructions to dismiss Petitioners' complaint for want of jurisdiction. Allowing Petitioners to proceed with their claims without utilizing the administrative review process could provide a precedent for similar lawsuits against state boards of accountancy. Such lawsuits could prove disruptive to the orderly progression of disciplinary cases before the state boards of accountancy.

Regardless, Petitioners' constitutional claims must necessarily fail on the merits. The Act does not violate the Appointments Clause as Petitioners contend because the PCAOB board members are inferior officers, the SEC is a "department," and the SEC commissioners are its "head." The Act also does not completely strip the President of the power to remove

PCAOB members, Petitioners' assertion to the contrary notwithstanding. As long as the President retains some removal power, there is no violation of the separation of powers doctrine. In short, the Act's limitations on the President's power to appoint and remove PCAOB board members comply with the Appointments Clause and the separation of powers doctrine.

This Court's evaluation of the constitutional issues should be tempered by judicial restraint. As matter of policy, this Court should refrain from judicially abolishing the PCAOB. Given the ongoing economic crisis, the PCAOB is vital to the protection of U.S. financial markets. The SEC and state boards might not have the resources to step in and fill the regulatory void that would be left by the judicial abolition of the PCAOB, and it could take Congress several months or longer to enact new legislation conforming to the Court's decision, thus leaving the public unprotected in the interim. Moreover, all past actions of the PCAOB might be called into question, thereby creating legal uncertainty for the subjects of those actions. Petitioners' purported concern that Congress will create a number of other similar agencies that collectively erode executive power if the Court approves the challenged provisions of the Act is unfounded since the PCAOB's structure has been tailored to its unique functions and would most likely be unsuitable in other regulatory arenas.

ARGUMENT

I. PETITIONERS' CASE AS IT NOW STANDS BEFORE THE COURT IS NOT JUSTICIABLE.

Amicus is concerned that any decision by this Court allowing Petitioners to bring suit challenging the constitutionally of the PCAOB without going through the administrative review process could provide precedent for similar suits at the state level challenging state boards of accountancy and thereby disrupt the orderly progress of disciplinary cases before the state boards of accountancy. Accordingly, amicus argues that the Act provides extensive and exclusive administrative remedies which Petitioners failed to pursue, and their failure to pursue those administrative remedies means that their constitutional claims are not yet ripe for review and their case before this Court is not justiciable.

A. The Act Incorporates Self-Regulatory Organization Review Provisions.

As stated previously, the Act provides extensive and exclusive administrative remedies of which Petitioners failed to avail themselves. For instance, section 107(c)(2) of the Act, 15 U.S.C. § 7217(c)(2), reads

> The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(d)(2) and (e)(1)) shall govern the review by the Commission of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory organization and the Commission were the appropriate

> regulatory agency for such organization for purposes of those sections.

Meanwhile, section 19(d)(2) of the Exchange Act, 15 U.S.C. § 78s(d)(2), provides

> Any [disciplinary] action with respect to which a self-regulatory organization is required . . . to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine.

In addition to disciplinary sanctions, the Act also provides a mechanism for SEC review of proposed Board rules. Section 107(b)(4) of the Act, 15 U.S.C. § 7217(b)(4), states that "[t]he provisions of paragraphs (1) through (3) of section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78s(b)) shall govern the proposed rules of the Board, as fully as if the Board were a "registered securities association" for purposes of that section" while paragraph (1) of Section 19(b) of the Exchange Act, 15 U.S.C. § 78s(b)(1), reads

> Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this

> subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. **The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change.** No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection. (emphasis added)

The SEC then has 35 days to approve by order the proposed rule change or initiate proceedings to determine whether the proposed rule change should be disapproved. 15 U.S.C. § 78s(b)(2). At the conclusion of proceedings to determine whether the proposed rule change should be disapproved, the SEC shall by order approve or disapprove the proposed rule change. *Id.*

The Act also provides mechanisms for SEC review of other Board actions in addition to rulemaking and disciplinary proceedings. Section 102(c)(2) of the Act, 15 U.S.C. § 7212(c)(2), provides "[a] written notice of disapproval of a completed application . . . for registration [as a registered public accounting firm] shall be treated as a disciplinary sanction for purposes of sections 105(d) and 107(c) (15 USCS §§ 7215(d), 7217(c))." In addition, section 104(h)(1), 15 U.S.C. § 7214(h)(1), provides for SEC review of Board inspection reports. It states in pertinent part that

> [a] registered public accounting firm may seek review by the Commission . . . if the firm . . . has provided the Board with a response . . . to the substance of particular items in a draft inspection report, and disagrees with the assessments contained in any final report prepared by the Board following such response . . . or . . . disagrees with the determination of the Board that criticisms or defects identified in an inspection report have not been addressed to the satisfaction of the Board within 12 months of the date of the inspection report.

However, any SEC decision made with respect to such a review is not reviewable under section 25 of the Exchange Act, 15 U.S.C. § 78y, and is not a "final agency action" for purposes of 5 U.S.C. § 704. 15 U.S.C. § 7214(h)(2).

Nevertheless, SEC orders made with respect to Board actions are generally subject to judicial review. 15 U.S.C. § 78y(a)(1) provides

> [a] person aggrieved by a final order of the Commission entered pursuant to [the Exchange Act] [15 USCS §§ 78a et seq.] may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

15 U.S.C. § 78y(b)(1) also provides that

> "[a] person adversely affected by a rule of the Commission promulgated pursuant to section . . . 19 of this title [citations omitted] may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside."

Upon the filing of a petition pursuant to 15 U.S.C. § 78y(a)(1), the court has exclusive jurisdiction to affirm or modify and enforce or set aside the order in whole or in part. 15 U.S.C. § 78y(a)(3). Likewise, upon the filing of a petition pursuant to 15 U.S.C. § 78y(b)(1), the court has exclusive jurisdiction to affirm and enforce or to set aside the rule. 15 U.S.C. § 78y(b)(3). In short, Petitioners could have raised their constitutional claims before a United States Court of Appeals on a petition for judicial review.

B. The District Court Lacked Subject Matter Jurisdiction Over Petitioners' Constitutional Claims Due to Their Failure to Pursue Exclusive Administrative Remedies.

This Court has long recognized that the failure of a party to pursue its exclusive administrative remedies precludes a trial court from exercising subject matter

jurisdiction over that party's claims.[2] It does not matter whether the statute in question expressly provides that the statutory review procedure is the exclusive means of review. *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965). This principle has been applied to the SRO review mechanisms discussed above. For instance, in *Swirsky v. NASD*, the First Circuit said

> The Exchange Act creates a comprehensive procedure to safeguard due process in disciplinary hearings, and for administrative and judicial review of NASD disciplinary actions. We agree with other circuits that have considered the question that the "comprehensiveness of the review procedure suggests that the doctrine of exhaustion of administrative remedies should be applied to prevent circumvention of established procedures."

124 F.3d 59, 62 (1st Cir. 1997) (*quoting First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 695 (3rd Cir. 1979)) (other citations omitted). In addition, constitutional claims may also be subject to exclusive administrative

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[2] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) ("We conclude that the Mine Act's administrative structure was intended to preclude district court jurisdiction over petitioner's claims and that those claims can be meaningfully reviewed through that structure consistent with due process."); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419 (1965) ("We believe Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested.").

review procedures. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citations omitted) (noting that petitioner's constitutionally claims could be meaningfully address in the Court of Appeals on a petition for judicial review). Moreover, it does not matter whether the constitutional claim is a facial or an as-applied challenge. *See, e.g., Nat'l Taxpayers Union v. SSA*, 376 F.3d 239, 243-244 (4th Cir. 2004).

In the present case, Petitioners brought suit directly in the United States District Court challenging the constitutionality of the PCAOB without utilizing the Act's administrative review procedures. However, the District Court allowed the suit to proceed despite Respondents' arguments to the contrary and the D.C. Circuit upheld this decision on appeal. Nevertheless, Petitioners could have had meaningful review of their constitutional claims in the Court of Appeals on a petition for judicial review and the District Court should not have exercised jurisdiction over those claims.

C. Petitioners Have Not Suffered a Cognizable Injury, and Their Claims Are Not Yet Ripe for Review.

More importantly, Petitioners' failure to pursue the exclusive administrative review procedures of the Act mean there claims are not yet ripe for review and their case before this Court is not justiciable. It is well-settled that "Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies.'" *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599-598 (2007). With respect to the ripeness element of justiciability, the Supreme Court has said "the ripeness requirement

is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (citation omitted). In addition, "[t]he ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of -- even repetitive -- post-implementation litigation." *Id.* at 735. This Court has generally stated the ripeness requirement as follows:

> In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court . . . examine[s] both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' To do so . . . [the Court] must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) *whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented*.

Id. at 733 (emphasis added).

In the present case, judicial intervention would inappropriately interfere with further administrative action because the PCAOB and the SEC have not yet been given an opportunity to weigh in on these important issues. Moreover, the courts would benefit

from further factual development of the issues presented since the SEC or PCAOB may interpret or apply the challenged provisions in such a way that they are not constitutionally suspect. Regardless, *Ohio Forestry Association* suggests Petitioners' failure to utilize the administrative review process means their constitutional claims are not yet ripe for review and their case before this Court is not justiciable.

II. THE ACT DOES NOT VIOLATE THE APPOINTMENTS CLAUSE.

The structure of the PCAOB is similar to that of many state boards of accountancy and PCAOB board members are similar to members of state boards of accountancy in the sense many state boards of accountancy are agencies with quasi-judicial powers that perform functions similar to those of the PCAOB. In fact most if not all of the U.S. based accounting firms and their associated persons registered with the PCAOB are also subject to the jurisdiction of one or more state boards of accountancy.[3] Section 105(d)(1)(B) actually requires the PCAOB to report disciplinary sanctions to "any appropriate State regulatory authority or any foreign accountancy licensing board with which [the] firm or person [sanctioned] is licensed or certified." NASBA is concerned that the invalidation of the PCAOB on Appointments Clause grounds could provide analogous precedent for similar state constitutional challenges to state boards of

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[3] The Uniform Accountancy Act jointly adopted by NASBA and the American Institute of Certified Public Accountants (hereinafter "AICPA") includes engagements performed pursuant to PCAOB standards in its definition of "attest," which must be performed by licensed CPAs. Unif. Accountancy Act § 3(b)(4) (2007).

accountancy in the majority of states having comparable state constitutions mandating the separation of powers. Therefore, NASBA argues that the PCAOB does not violate the Appointments Clause for the following reasons.

A. The PCAOB Board Members Are Inferior Officers.

First, the PCAOB board members are inferior officers under this Court's Appointments Clause jurisprudence. The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in *the Heads of Departments*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The Ninth Circuit has summed up the analysis as follows:

> The proper method of appointment hinges upon the nature of the position in question. The Appointments Clause "divides all its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1878). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by *the heads of departments*, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). These requirements apply to "any appointee exercising significant authority pursuant to the laws of the United States." *Id.* at 126. Individuals who are merely employees of the United States government do not implicate the Appointments Clause. *Id.* at 126 n.162.

Silver v. U.S. Postal Serv., 951 F.2d 1033, 1037 (9th Cir. 1991). In *Edmond v. United States*, 520 U.S. 651, 653 (1997), this Court defined the term "inferior officer" as follows:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

This Court also considers the following factors in determining whether an officer is "principal" or "inferior":

> We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the "inferior officer" side of that line. Several factors lead to this conclusion ... [f]irst, appellant is subject to removal by a higher Executive Branch official . . . [s]econd, appellant is empowered by the Act to perform only certain, limited duties . . . [t]hird, appellant's

> office is limited in jurisdiction . . . [f]inally, appellant's office is limited in tenure . . . [i]n our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel . . . are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

Morrison v. Olson, 487 U.S. 654, 671-672 (1988) (citations omitted). Applying the *Morrison* factors to the Postmaster General, the Ninth Circuit in *Silver* concluded

> Inherent in the corporate model is a split between those who control the organization and those who run the business. The [Postmaster General] performs many tasks and has many responsibilities, but he does not have "control." The corporate structure "limits" the [Postmaster General]. He is a management agent, tenuously serving at the pleasure of the [Board of Governors of the U.S. Postal Service]. As a management agent, the [Postmaster General] must be considered an "inferior" officer.

Id. at 1040.[4] Other circuits have reached similar conclusions. For instance, in the case of *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*,

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[4] The Ninth Circuit also noted that "[t]o conclude that the PG is a principal agent would, in effect, prohibit Congress from ever adopting a corporate model of organization" and "[g]iven the strict control that the GOVERNORS have over the [Postmaster General], we do not believe that the Appointments Clause dictates that result." *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1040, n.3 (9th Cir. 1991).

80 F.3d 796, 804 (3d Cir. 1996), the Third Circuit applying the *Morrison* factors held that "the [HHS] Appeals Board members are 'inferior officers' for purposes of the Appointments Clause."

Applying the *Morrison* factors to this case, it is clear that the PCAOB members are inferior officers. They are directed and supervised by the SEC whose members are appointed by the President with the advice and consent of the Senate. Section 107(d)(1) of the Act reads "[t]he [SEC] may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards." 15 U.S.C. § 7217(d)(1). In addition, section 107(b)(2) of the Act provides that "[n]o rule of the Board shall become effective without prior approval of the [SEC]," 15 U.S.C. § 7217 (b)(2), while section 107(c)(3) of the Act empowers the SEC to "enhance, modify, cancel, reduce, or require the remission of a [PCAOB] sanction" if the SEC finds that the sanction is "not necessary or appropriate in furtherance of [the Act] or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed," 15 U.S.C. § 7217(c)(3). Taken together these provisions make clear that the PCAOB board members cannot do anything without at least tacit approval from the SEC. Therefore, they perform limited duties and have limited jurisdiction within the meaning of *Morrison*.

Petitioners make much of the fact that the PCAOB's members can be removed only for cause. However, removal power is not dispositive to the Appointments Clause issue. In *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000), the First

Circuit attempting to reconcile *Morrison* and *Edmond* held

> United States Attorneys are to be regarded as inferior officers if their work is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *Edmond*, 520 U.S. at 663, and, if not, might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority, *see Morrison*, 487 U.S. at 671-72. Measured against those benchmarks, United States Attorneys are inferior officers.

More importantly, the *Hilario* court also noted

> the Attorney General does not have the authority to discharge a United States Attorney. But this fact, standing alone, does not tip the balance. Although the "power to remove officers . . . is a powerful tool for control," it is not a necessary adjunct to the exercise of control. In all events, the case law does not require "control" by a superior officer, but only direction and supervision. Given the Attorney General's broad array of supervisory powers, *the absence of the power of removal is not fatal to the government's position in this case*.

United States v. Hilario, 218 F.3d 19, 26 (1st Cir. 2000) (citations omitted) (emphasis added). *Hilario* strongly supports the proposition that removal power is not the exclusive means of control for purposes of determining whether an officer is principal or inferior. Moreover, the power of the SEC to completely strip the PCAOB

of its responsibilities under section 107(d)(1) of the Act, 15 U.S.C. § 7217(d)(1), is no less effective than removal power in ensuring control. At any rate given the SEC's extensive control over the PCAOB's members, the PCAOB are clearly inferior officers for Appointments Clause purposes.

B. The SEC Is a Department, and the SEC Commissioners Are a Department Head.

Congress may vest the appointment of inferior officers in department heads. Because the PCAOB board members are inferior officers, the question then becomes whether the SEC is a department and if so, whether the SEC commissioners are collectively its head.[5] This Court has long held that "the term 'Department' refers only to 'a part or division of the executive government, as the Department of State, or of the Treasury,' expressly 'created' and 'giv[en] . . . the name of a department' by Congress." *Freytag v. Comm'r*, 501 U.S. 868, 886 (1991) (citations omitted). In *Silver v. United States Postal Service*, 951 F.2d 1033, 1038 (9th Cir. 1991), the Ninth Circuit noted that "[w]hile the [US Supreme] Court never defined exactly what constitutes a 'department' for Appointments Clause purposes, it suggested that

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[5] *Silver v. U.S Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) ("Because we find that the Postal Service is a 'department' capable of receiving appointment authority; that, within the corporate structure adopted by Congress, the GOVERNORS are the head of the department; and that, as management agents, the [Postmaster General] and the [Deputy Postmaster General] are 'inferior' officers, we hold that the [Postal Reorganization Act of 1970] conforms with the requirements of the Appointments Clause and is therefore constitutional.").

departments are 'executive divisions like the Cabinet-level departments.'" Nevertheless, the Ninth Circuit held that "the Postal Service is a 'department' that is capable of receiving the ability to appoint inferior officers under Article II § 2 cl. 2." *Id.*

With respect to identifying the "head" of a department, the Ninth Circuit has noted that

> [w]ithin the corporate framework explicitly established by Congress, the GOVERNORS are the head of the department. Congress carefully vested ultimate control and authority of the Postal Service in the GOVERNORS. The GOVERNORS hold three key trump cards: (i) the power to appoint and remove the [Postmaster General], 39 U.S.C. § 202(c), (ii) *the unilateral power to revoke any authority delegated* by the Board, 39 U.S.C. § 402, and (iii) the authority to designate mail classifications and to set postal rates, 39 U.S.C. § 3621.

Id. at 1039.

Silver clearly supports the proposition that an independent agency such as the SEC can be a department and a collective body such as the SEC commissioners can be a department head for Appointments Clause purposes. Like the Board of Governors at issue in *Silver*, the SEC commissioners have the unilateral power to revoke any authority delegated to the PCAOB. *See* 15 U.S.C. § 7217(d)(1). They also have the power to appoint and remove PCAOB board members subject to certain limitations. Therefore, the SEC is a department and the SEC

commissioners are its head. Since the SEC is a department, the SEC commissioners are its head, and the PCAOB board members are inferior officers for purposes of the Appointments Clause, the structure of the PCAOB does not violate the Appointments Clause.

III. THE ACT DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

As mentioned previously, the structure of the PCAOB is similar to that of many state boards of accountancy and PCAOB board members are similar to members of state boards of accountancy in the sense many state boards of accountancy are agencies with quasi-judicial powers that perform functions similar to those of the PCAOB. In fact most if not all of the U.S. based accounting firms and their associated persons registered with the PCAOB are also subject to the jurisdiction of one or more state boards of accountancy. Section 105(d)(1)(B) actually requires the PCAOB to report disciplinary sanctions to "any appropriate State regulatory authority or any foreign accountancy licensing board with which [the] firm or person [sanctioned] is licensed or certified." NASBA is also concerned that the invalidation of the PCAOB on separation of powers grounds could provide precedent for similar state constitutional challenges to state boards of accountancy. Therefore, NASBA argues that the PCAOB does not violate the separation of powers doctrine for the following reasons.

Petitioners make much of the fact that the PCAOB is a "private sector, nonprofit corporation" (according to the PCAOB website) modeled on self-regulatory organizations (SROs) such as the New York Stock Exchange although the PCAOB has governmental

authority unlike SROs. They would have the Court believe that the PCAOB exercises massive unchecked executive power. However, the D.C. Circuit below noted that the grant of governmental authority is duly accompanied by government accountability because PCAOB members are appointed by the SEC. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008). Furthermore, according to the D.C. Circuit, the statute creating the PCAOB "fully preserves the Commission's authority to regulate the accounting profession, set standards, and take any action against a company or individual" since the SEC can preempt any regulatory action taken by the PCAOB. *Id.* at 680-81. Therefore, the D.C. Circuit held Congress can constitutionally limit the President's authority to remove as well as appoint PCAOB members since the SEC has effective control over the PCAOB.

It is well-settled that independent agencies such as the SEC and the Federal Trade Commission (hereinafter "FTC") are constitutional for separation of powers purposes. In *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935), this Court described the FTC as follows

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the

> statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition' -- that is to say in filling in and administering the details embodied by that general standard -- the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

Regarding the President's power to remove members of the FTC, the Court said

> [w]e think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For

> it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

Id. at 629. In the end the Court held

> [t]he result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

Id. at 631-632.

The Court expanded upon *Humphrey's Executor* in *Morrison v. Olson*, 487 U.S. 654, 692 (1988). There the Court said

> Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. 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. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. . . . We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

Morrison, 487 U.S. at 692. In addition, the *Morrison* Court noted

> The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel

> to ensure that the President is able to perform his constitutionally assigned duties.

Id. at 696.[6]

These precedents make it clear that the separation of powers issue ultimately comes down to a question of control. Here the SEC can remove PCAOB board members for cause and the President can likewise remove SEC commissioners for cause. So it can hardly be said the President has been completely stripped of his removal power with respect to the PCAOB board members. However, as alluded to previously, removal is not the exclusive means of control. The SEC exercises extensive power over the PCAOB separate and apart from its removal power.

For instance, PCAOB disciplinary orders are subject to SEC review. According to 15 U.S.C.

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[6] It is well settled 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.

United States v. Perkins, 116 U.S. 483, 485 (1886); *see also, Myers v. United States*, 272 U.S. 52, 161 (1926) ("Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal.").

§ 7215(d)(1)(A), the PCAOB is required to report its disciplinary sanctions to the SEC, and 15 U.S.C. § 7215(c)(2) provides,

> The provisions of sections 19(d)(2) and 19(e)(1) of the Securities Exchange Act of 1934 . . . shall govern the review by the Commission of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory organization and the Commission were the appropriate regulatory agency for such organization for purposes of those sections 19(d)(2) and 19(e)(1).

Section 19(d)(2) of the Exchange Act reads

> Any action with respect to which a self-regulatory organization is required . . . to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, **on its own motion**, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine.

15 USCS § 78s(d)(2) (emphasis added). In addition, application to SEC for review of a PCAOB disciplinary order or the institution of review by the SEC on its own motion operates as a stay of the order unless the SEC orders otherwise, 15 U.S.C. § 7215(e)(1), and the SEC is empowered to "enhance, modify, cancel, reduce, or require the remission of a [PCAOB] sanction" if the

SEC finds that the sanction is "not necessary or appropriate in furtherance of [the Sarbanes-Oxley Act] or the securities laws" or "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed," 15 U.S.C. § 7217(c)(3). Furthermore, the SEC's decision on review is itself subject to further judicial review in a US Court of Appeals. 15 U.S.C. § 78y(a)(1).

Other provisions of the Act also provide for extensive SEC control over the PCAOB. For example, section 107(b)(2) of the Act, 15 U.S.C. § 7217(b)(2), reads "[n]o rule of the Board shall become effective without prior approval of the [SEC]." In addition, section 107(d)(1) of the Act, 15 U.S.C. § 7217(d)(1), provides that "[t]he [SEC] . . . may relieve the Board of any responsibility to enforce compliance with any provision of this Act, the securities laws, the rules of the Board, or professional standards." Taken together these provisions make it clear that the PCAOB cannot do anything without at least tacit approval from the SEC. They belie Petitioners' assertion that the PCAOB exercises extensive unchecked executive power. In short, the structure of the PCAOB does not violate separation of powers principles since the SEC has control over the PCAOB and the President has control over the SEC.

IV. THE COURT SHOULD REFRAIN FROM JUDICIALLY ABOLISHING THE PCAOB.

Amicus asserts that the Sarbanes-Oxley Act provisions regarding the PCAOB are entirely constitutional. However, if the court does find any of these provisions to be unconstitutional, it is imperative that the PCAOB nevertheless be permitted to continue

to function. To that end, others have advocated for the severability of any provisions of the Sarbanes-Oxley Act that may be found unconstitutional. *See* Brief Amici Curiae Counsel of Institutional Investors *et al.* p. 32. NASBA concurs; the following section details why the PCAOB's continued functioning is critical to the regulation of accountancy on the state and federal level.

The PCAOB is vital to the protection of U.S. financial markets, and its abolishment would leave a serious regulatory void. In its absence, the responsibility for regulating the accounting industry would fall largely to the SEC and state boards of accountancy. The SEC does not have the resources or the mandate to fill that void. Thus, much of the oversight of accounting firms would fall to state boards of accountancy, which are empowered to sanction CPAs for unethical conduct and incompetent work. However, state boards in turn rely on the PCAOB to play a crucial role in their investigation and discipline of CPAs. Under the Sarbanes-Oxley Act, the PCAOB is required to inspect registered public accounting firms and submit the findings of these investigations to the appropriate state board, including a report on any possible Sarbanes-Oxley Act violations. 15 U.S.C. §7214 (c)(2); 15 U.S.C. § 7214 (g)(1). Further, the PCAOB may refer ongoing investigations to state boards. 15 U.S.C. §7215 (b)(4)(B)(iii)(III). To date, PCAOB violations have been the basis for state accountancy board discipline in at least a half dozen cases.[7] Abolishing the PCAOB would hamper state

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[7] *See, e.g., In re Fazio*, PCAOB Release No. 105-2007-006 (Dec. 10, 2007*); see also In re Nardi*, PCAOB Release No. 105-2007-008

boards of accountancy in their efforts to regulate the practice of accountancy and protect the public.

The PCAOB is also important to state boards' regulatory efforts because its decisions and standards have been incorporated into state statutes and rules on the practice of accountancy. At least 15 U.S. states and one territory have adopted statutes expressly referencing PCAOB auditing standards in their respective definitions of "professional standards."[8] Most others have adopted PCAOB auditing standards into their rules.[9] States have also adopted rules making PCAOB disciplinary orders prima facie evidence of violations of state accountancy laws. *See, e.g.,* 21 N.C. Admin. Code 8N.0204. Lastly, all states have also provided by statute or rule that the failure to comply with any such applicable standards may subject licensees to disciplinary proceedings.

The PCAOB's standards are also incorporated in the Uniform Accountancy Act (hereinafter "UAA"), which was jointly adopted by NASBA and the AICPA. The UAA authorizes state boards to cooperate with the

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(Dec. 14, 2007) and *In re Kantor, Geisler & Oppenheimer, P.A., et al.*, PCAOB Release No. 105-2007-009 (Dec. 14, 2007).

[8] These include: Alabama, Arkansas, Connecticut, Guam, Kansas, Louisiana, Mississippi, Missouri, Montana, New Hampshire, New Jersey, Pennsylvania, South Carolina, South Dakota, Utah, and Vermont.

[9] Adopting states include: Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, and Wyoming.

PCAOB and other appropriate authorities to investigate violations of the UAA and comparable acts of other states. Unif. Accountancy Act § 4(g)(1) (2007). Further, the UAA identifies the "[r]evocation or suspension of the right to practice ... by the PCAOB" as a ground for state board disciplinary action. Unif. Accountancy Act §10(a)(4) (2007); *see also, e.g.,* Unif. Accountancy Act §§ 3 (b)(4), 12(k), 18 (2007) (also citing the wording of PCAOB standards or otherwise involving the PCAOB in state disciplinary actions).

The PCAOB's critical role in regulating the practice of accountancy is also illustrated by the circumstances surrounding its creation. Prior to the enactment of the Sarbanes-Oxley Act in 2002, the now-defunct Public Oversight Board (hereinafter "POB") was charged with regulating the accountancy profession, along with the SEC and state boards of accountancy. However, the POB was created by and funded by a private trade association of accountants, the AICPA. [About the POB, http://www.publicoversightboard.org/about.htm.] The POB's disciplinary processes were "slow and ineffective" and suffering from "a number of limitations." U.S. Gen. Accounting Office, No. GAO-02-742R, The Accounting Profession: Status of Panel on Audit Effectiveness Recommendations to Enhance the Self-Regulatory System at 22 (May 3, 2002); *see also id.* The PCAOB improved upon the POB in a number of ways. Another of the positive aspects of the PCAOB's current structure is its disentanglement from the profession it regulates. Further, while the PCAOB is accountable to the SEC, its unique funding structure reduces direct congressional influence. Similarly, many state boards enjoy comparable autonomy to the extent that some are exempt from

state budget or personnel acts and members can only be removed for cause.

In short, the PCAOB, like state boards, is an integral component of accountancy regulation in the United States. It plays a vital role in regulating accounting firms and accountants who audit publicly traded companies. Any decision by this Court to judicially abolish the PCAOB would leave this segment of the accounting profession largely unregulated. Therefore, amicus respectfully asks this Court to sever any provisions of the Act it may hold are unconstitutional in lieu of declaring the Act unconstitutional in its entirety.

CONCLUSION

Since Petitioners' constitutional claims are not yet ripe for review and their case before this Court is not justiciable, amicus respectfully requests that the Court remand this case with instructions to dismiss Petitioners' complaint for want of jurisdiction due to Petitioners' failure to pursue exclusive administrative remedies. Similar lawsuits challenging the constitutionality of state boards of accountancy have the potential to disrupt the orderly progression of disciplinary cases. Alternatively, the Court should hold that the PCAOB and the Act creating it are constitutional under the Appointments Clause and separation of powers doctrine and affirm the Court of Appeals ruling which affirmed the District Court order granting summary judgment to Respondents. If the Court, however, holds that the challenged provisions are unconstitutional, amicus respectfully asks that this Court sever the challenged provisions and not judicially abolish the PCAOB.

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