Supreme Court, U.S.
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In The
Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT
BOARD AND UNITED STATES OF AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, assuming that PCAOB members are "inferior Officers" who must be appointed by a "Head" of a department according to the Appointments Clause of the Constitution, the PCAOB's collective appointment by five SEC Commissioners unconstitutional?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring that the United States Constitution is interpreted in accordance with the intent of the Framers.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

MSLF has over 5,000 members throughout the United States. Hundreds of these members are shareholders in various public companies that are subject to regulation by the Sarbanes-Oxley Act. The outcome of this case may have serious consequences for these members if the appointment method for members of the Public Company Accounting Oversight Board ("PCAOB") remains unlawful and unconstitutional.

MSLF believes that its members' interest in the outcome of this case, as well as its knowledge regarding various constitutional guarantees, and its commitment to preserving the Framers' intent are such that its *amicus curiae* brief will assist this Court.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case. *See* Pet'r Br. 1-6.

SUMMARY OF THE ARGUMENT

This lawsuit requires an evaluation of the Separation of Powers Doctrine as envisioned by the Framers of the Constitution. It requires an analysis of whether "close enough" is good enough when evaluating the appointment process established by Congress

when creating the PCAOB, or whether the Appointments Clause requires a strict interpretation that heeds the Framers' intent and imparts the plain meaning of the words of the Constitution.

Amicus Curiae MSLF believes that the latter approach is the only appropriate one. The Framers went to exacting lengths to ensure that the Appointments Clause, and the Constitution as a whole, contained structural protections to prevent the abuse of power and thereby preserve liberty. *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). The Appointments Clause represents one of many meticulously-worded sections of the Constitution, in which the meaning of each word is significant and represents an effort by the Framers to preserve the separation of powers. *See* U.S. Const. art. II, § 2, cl. 2. In fact, the Separation of Powers Doctrine has been described as "the heart" of the Constitution, *Buckley v. Valeo*, 424 U.S. 1, 119 (1976), and the Appointments Clause has been labeled as "among the most significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997).

Congress abdicated its responsibility to protect these structural safeguards when drafting the appointment methodology of the PCAOB. As a result, appointment of the PCAOB violated the text of the Appointments Clause as well as the Framers' original intent. Congress's error created an all-powerful, self-funded and self-regulating entity that has no political accountability and whose appointment establishes a

legal precedent for cavalier interpretation of the Appointments Clause in the future.

ARGUMENT IN SUPPORT OF THE PETITION

I. CONGRESS VIOLATED THE CONSTITUTION WHEN IT VESTED THE APPOINTMENT OF THE PCAOB IN THE SEC COMMISSIONERS.

The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the 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.

The Framers structured the Appointments Clause to "preserve political accountability relative to important government assignments." *Edmond*, 520 U.S. 659. *See also* The Federalist No. 76 (Alexander Hamilton) in *The Famous Papers on the Principles of American Government*, 480-84 (Benjamin Fletcher Wright, ed., 1961) ("The Federalist No. 76"). The

Framers sought to achieve this accountability by establishing a preference for single-headed appointment authority. *See* Michael J. Gerhardt, *The Federal Appointments Clause*, 1-44 (2000), The Federalist No. 76, 480-84. As a result, the Constitution requires that "ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" be appointed by the President, solely. U.S. Const. art. II, § 2, cl. 2. It also limits Congress's ability to vest appointment authority in "the President alone, in the Courts of Law, or in the *Heads of Departments*." *Id.* (emphasis added). This emphasis on single-headed appointment authority reflects the Framers' confidence in the integrity of an appointment done by a single person, as well as the Framers' doubt in the reliability of an appointment made by a group. The Federalist No. 76, 480-89.

The Framers believed that a single person was more accountable than a group. *See generally* The Federalist No. 76, 480-84. In The Federalist Papers, Hamilton explained that a single individual has a "livelier sense of duty and a more exact regard to reputation" than a group, and possesses "stronger obligations . . . to investigate with care" a potential appointee's qualifications and reputation. *Id.* at 481. An individual also has "fewer personal attachments to gratify" and is "less liable to be misled by the sentiments of friendship [or] affection . . . [or] distracted and warped by [diverse] views, feelings, and interests which frequently distract and warp the resolutions of a collective body." *Id. See also* Ross E.

Weiner, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 395-96 (2001).

This confidence in appointment by a single person contrasts sharply with the Framers' doubts in the trustworthiness of any selection by a group. *See* The Federalist No. 76, 480-89. Hamilton explained that a collective body "[could not] be regulated" because of a "systematic spirit of cabal and intrigue" and cautioned that a group's decision would always be the result of a "bargain" among the parties, instead of a selection based on the qualifications of the appointee. *Id.* at 481. He noted that "likings and dislikes, partialities and antipathies, attachments and animosities" would influence the decision-making process and, ultimately, the appointment would come only from "a victory gained by one party over the other, or [from] a compromise between the parties." *Id.* Hamilton explained that a collective appointments process would ultimately devolve into a perverse compromise in which the qualifications that unite the votes of the collective body would supersede those that qualified the candidate for the position. *Id.* Rarely will "the advancement of the public service . . . bet the primary object either of party victories or party negotiations." *Id.* Instead, a collective appointment process "would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease in the stability of the administration of the government. . . ." *Id.* at 487-88.

The Framers therefore sought to limit the nature and number of persons who could participate in the appointments process. In this way, they sought to prevent an unaccountable diffusion of power among political entities. *Freytag,* 501 U.S. at 884. *See also* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status, 80* NOTRE DAME L. REV. 975, 1049-59 (2005)

The Supreme Court has recognized this goal and noted that:

> [t]he Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government.

Freytag, 501 U.S. at 885. The Supreme Court has characterized the appointment power as "the most insidious and powerful weapon of eighteenth century despotism." *Buckley v. Valeo*, 424 U.S. 1, 143 (1976). The Court has also described the "manipulation of official appointments" as "one of the American revolutionary generation's greatest grievances against executive power." *Freytag,* 501 U.S. at 883, *citing Buckley,* 424 U.S. at 96 (internal citation omitted). The Appointments Clause allows "Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law." *Freytag*, 501 U.S. at 884.

By constraining appointment power to a limited number of identifiable individuals, the Framers sought to preserve political oversight and democratic accountability. Single-headed appointment authority ensures that the decision-making process is transparent and focused on the qualifications of the appointee. It also ensures that the individual who makes the appointment can be easily identified if the appointee fails in his duties or if the appointment process becomes otherwise corrupted. The structure of the Appointments Clause ultimately preserves the separation of powers of the federal system because it ensures that democratic principles govern the selection of non-elected officials. *Id.* at 878.

II. THE SELECTION OF THE PCAOB VIOLATED BOTH THE LETTER AND THE SPIRIT OF THE APPOINTMENTS CLAUSE.

A. The PCAOB, by design, has massive, unchecked power.

Created in 2002 as part of the Sarbanes-Oxley Act, the PCAOB is a self-funded and self-regulating entity that can inspect, investigate, and punish accounting firms for violations of PCAOB rules or other federal laws. 15 U.S.C. §§ 7211-19. *See also* PCAOB homepage available at http://www.pcaobus.org/Enforcement/index.aspx (last accessed February 4, 2009). In addition to these investigative and punitive powers, the PCAOB can also promulgate binding rules and auditing standards, 15 U.S.C. § 7202, and

provides for its own funding by levying a tax on the nation's public companies. 15 U.S.C. § 7219.

Congress endowed the PCAOB with these significant powers after a series of high-profile accounting scandals shook public confidence in the accounting industry. Congress sought to "protect investors and the public interest by promoting informative, fair, and independent audit reports." PCAOB homepage available at http://www.pcaobus.org/Enforcement/index.aspx (last accessed February 4, 2009). In an effort to "crack down" on the misleading accounting practices, auditor conflicts of interest, and other forms of accounting fraud that had plagued the accounting industry, Congress deliberately tried to insulate the PCAOB from outside political pressure to ensure its autonomy. *Accounting Reform and Investor Protection: Hearings on the Legislative History of the Sarbanes-Oxley Act of 2002: Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies Before the S. Comm. On Banking, Housing and Urban Affairs*, 107th Cong. 44 (2002) (testimony of Arthur Levitt, former Chairman of the SEC). As one Senator noted:

> This board is going to have massive power, unchecked power, by design . . . We are setting up a board with massive power that is going to make decisions that affect all accountants and everybody they work for, which directly or indirectly is every breathing person in this country. They are going to have massive unchecked powers.

Nagy, at 1003, *quoting* 148 Cong. Rec. S6334 (daily ed. July 8, 2002) (statement of Sen. Gramm).

B. The appointment of the PCAOB violated the text of the Appointments Clause.[2]

The first and perhaps most obvious defect in the appointment of the PCAOB is that the process violates the plain meaning of the Appointments Clause. The Appointments Clause provides that inferior officers are to be appointed by the head of a department. U.S. Const. art. II, § 2, cl. 2. The plain meaning of "head" is "[a] chief; a principal person; a leader, a commander; one who has the first rank or place, and to whom others are subordinate; as the head of an army; the head of a sect or party." Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828). However, the PCAOB is not appointed by an individual head of a department. Instead, the PCAOB is appointed by the SEC Commissioners, who must collectively select the PCAOB chairperson and initial members of the PCAOB. 15 U.S.C. § 7211(e). This collective selection process is contrary to the plain language of the Appointments Clause because the five SEC Commissioners are not

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[2] Appellant's brief discusses at length whether the PCAOB's members are principal officers within the meaning of the Appointments Clause. *See* Pet'r Br. 27-35. This *amicus curiae* brief will therefore only address the PCAOB's appointment as inferior officers.

the "Head" of the SEC. Likewise, the SEC Commissioners would not qualify as a "Head" according to the original intent of the Framers. U.S. Const. art. II, § 2, cl. 2. *See generally* The Federalist No. 76.

The "Head" of the SEC is most appropriately the SEC Chairman. The Chairman is responsible for the executive and administrative functions of the SEC, including appointment and supervision of personnel employed by the Commission, internal business of the Commission, and the use and expenditure of funds. *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988). Moreover, the SEC itself recognizes that the Chairman is the SEC's chief executive officer. Securities and Exchange Commission website, available at http://sec.gov/about/whatwedo.shtml#org (last accessed Feb. 4, 2009).

In fact, viewing the Chairman as the head of the SEC makes sense given the Framers' intent when drafting the Appointments Clause. *See* The Federalist No. 76. The SEC Chairman serves at the pleasure of the President and therefore has direct political accountability to the President for appointment of PCAOB members. The President, in turn, is accountable to the public for his selection of the SEC Chairman. If however, the SEC Commissioners can collectively be considered the "Head" of the SEC, no single individual is answerable for his or her choice. The political accountability sought by the Framers cannot be achieved in this way. *Id.*

Given the Framers' original intent, it is illogical that the five SEC Commissioners are the "Head" of the SEC because the Framers would not have diffused the appointment power in such a way. The "Framers recognized the dangers posed by an excessively diffuse appointment power," and sought to limit it to a single person. *Freytag*, 501 U.S. at 885. An individual has "fewer personal attachments to gratify" and is "less liable to be misled by the sentiments of friendship [or] affection . . . [or] distracted and warped by [diverse] views, feelings, and interests which frequently distract and warp the resolutions of a collective body." The Federalist No. 76, at 481. It therefore strains the imagination to think, that given the Framers' deep distrust for appointment by committee, they would have used the phrase "Heads of Departments" to enable appointment by group. *Id.*

C. The selection of the PCOAB violated the spirit of the Appointments Clause because appointment by a collective body is inherently corrupt.

Not surprisingly, the PCAOB's appointment process was a messy experiment in federal appointment authority that bore out the problems anticipated by the Framers. As the Framers would have anticipated, the selection of the PCAOB was "warped by [diverse] views, feelings, and interests . . . of a collective body." *Id.*

In 2002, the Government Accountability Office ("GAO") investigated the PCAOB appointment process "amid allegations that the SEC Chairman withheld relevant information from the other Commissioners concerning the suitability of the newly appointed PCAOB chairman. . . ." Government Accountability Office, *Securities and Exchange Commission, Actions Needed to Improve Public Company Accounting Oversight Board Selection Process*, 21 (Dec. 2002) *available at* http://www.gao.gov/new.items/d03339.pdf (last accessed Feb. 4, 2009) ("GAO Report"). The Report described a "breakdown" in the PCAOB selection process due to a lack of consensus among the Commissioners. *Id.* at 2-3. It indicated that infighting among the Commissioners resulted in delay, a haphazard selection process, and ultimately, inadequately vetted appointees. *Id.* It concluded that "the biggest impediment to the smooth functioning of the selection process was a lack of initial consensus among the Commissioners and key SEC staff on the selection process." *Id.* at 20.

As the Framers anticipated, the collective appointment of the PCAOB "had fallen easy prey to demagogues, provincialism and factions." Gerhardt, at 18. "[E]ach member [had] his friends and connections to provide for, and the desire for mutual gratification [begat] a scandalous bartering for votes and bargaining for places." The Federalist No. 76, at 487. As a group, the SEC was unable to "agree [upon a] process for screening candidates before they were interviewed and appointed by the Commissioners." GAO Report,

at 5. Furthermore, the group was unable to "determine how and what information would, and should, have been developed and passed along for their consideration as they deliberated about candidates." *Id.*

This breakdown in the appointment process was not a victimless no-harm-no-foul technicality. The multi-headed appointment procedures used by the SEC offended the plain language of the Appointments Clause and ignored the elementary principles that the Framers sought to preserve. *See* Gerhardt, at 28. As a group, the SEC Commissioners had no individual responsibility for the PCAOB appointments, or for the chaotic and unreliable process through which they were selected. Perhaps most disturbingly, the SEC Commissioners bear no individual responsibility for the future actions of their appointees. When an individual selects an appointee, his motives and methodology, if not overtly clear, can be discovered through investigation into that person's background, motives, and history. *See* The Federalist No. 76, at 480-84. But when a group, such as the SEC Commissioners, selects a candidate, the individual motives and methodology for their selections are obscured.

The district court held that "since the SEC Chairman has voted for each PCAOB member" the Plaintiff-Appellees' injury was not traceable to the improper PCAOB appointment process – essentially that the errors in the PCAOB appointment process were a no-harm-no-foul technicality. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL

891675 at *5 (D.D.C. 2007). It is impossible to know, however, what bargains were struck and/or what political favors were exchanged as the SEC Chairman bargained, albeit unsuccessfully, with the other Commissioners to reach a consensus on the makeup of the Board. Failure to follow the structure of the Appointments Clause rendered the selection process itself corrupt. In fact, no one, except perhaps the SEC Chairman, knows whether he would have voted for the same individuals had he appointed them on his own. This inability to dissect the appointments process and hold one individual accountable for his choice is exactly why the Framers placed appointment authority in one person – the "Head" of a department. U.S. Const. art. II, § 2.

III. THE PCAOB IS POLITICALLY UNACCOUNTABLE TO BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES.

The PCAOB is a powerful, self-funding and self-regulating entity that is not accountable either to the Legislative Branch or to the Executive Branch. The power of the PCAOB is limited only by the SEC Commissioners, who themselves are one generation removed from the democratically-elected office of President. The PCAOB cannot be disciplined nor controlled by the President, nor can the PCAOB be disciplined or controlled by the SEC Chairman through the President. Rather, the PCAOB is overseen by a group of SEC Commissioners whose

authority and accountability are buried in layers of bureaucracy.

If the PCAOB were selected by the SEC Commissioner, the PCAOB would at least be responsive to the wishes of the Executive Branch. Bad behavior or corruption by the PCAOB could be attributed directly to the SEC Commissioner and his poor selection. Instead, mismanagement or corruption by the PCAOB can be managed only via a bureaucratic review process involving five SEC Commissioners. The horse-trading and lack of accountability that occurred with the selection of the PCAOB will occur again if the PCAOB or its members must be investigated or fired.

Congress by failing to establish political accountability for the PCAOB, has abdicated its responsibility to preserve the separation of powers. While Congress has the authority to enact powerful laws to address perceived national emergencies, Congress cannot exceed the powers granted to it in the Constitution. Although Congress's efforts to ensure that the PCAOB is an autonomous entity insulated from political pressure are perhaps laudable, in this case, Congress went too far. The selection of the PCAOB violated the text of the Constitution and the original intent of the Framers. The result of this mistake removes the PCAOB from any political accountability and offends the Separation of Powers Doctrine. *See* U.S. Const. art. II, § 2, cl. 2.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* MSLF respectfully requests that this Court grant Petitioners' Petition for Writ of Certiorari.

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