IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, vs. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	No. 4:16-cv-03113

NOTICE OF SUPPLEMENTAL AUTHORITY

The Department of Justice's Civil Appellate Division recently filed a brief in the D.C. Circuit that directly contradicts FHFA's position in this case that a violation of the President's constitutional removal power can never provide a basis for vacating a final agency decision. The Department of Justice's brief acknowledges that a "second proceeding [is] necessary" when an agency official is "unconstitutionally insulated from presidential control at the time of the initial proceeding." Brief of the Securities and Exchange Commission at 37, *Laccetti v. SEC*, No. 16-1368 (D.C. Cir. Mar. 31, 2017) (attached as Exhibit A). The Department of Justice's brief also says that "the Constitution and [D.C. Circuit] precedents require . . . an independent decision on the administrative record by a validly constituted tribunal" when an agency official who enjoys unconstitutional removal protection makes a final decision. *Id.* at 35. Thus, if an agency's "structure was unconstitutional at the time it issued its determination," the proper remedy is to "vacate and remand the determination" for de novo reconsideration by a

constitutionally structured agency. *Id.* at 35–36 (emphasis omitted) (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012)). These statements directly contradict FHFA's lead constitutional argument. *See* FHFA Opposition to Pls.' Summary Judgment Motion at 5–8 (Feb. 27, 2017), Doc. 36. The Department of Justice's recent filing further supports Plaintiffs' position that the Net Worth Sweep must be vacated if the Court concludes that FHFA's Director is unconstitutionally unaccountable to the President. *See* Pls.' Summary Judgment Response and Reply at 3–6 (Mar. 20, 2017), Doc. 41.

Date: April 10, 2017

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CERTIFICATE OF SERVICE

I certify that this filing was served on all parties' counsel by the Court's Electronic Filing System on April 10, 2017.

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EXHIBIT A

[Initial Brief]

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1368

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mark E. Laccetti,
Petitioner,

v.

Securities and Exchange Commission,
Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici*

All parties appearing before the Securities and Exchange Commission and in this Court are listed in the Brief for Petitioner. There are no intervenors or *amici*.

B. Rulings Under Review

On September 2, 2016, the Commission issued the order under review, *In the Matter of the Application of Mark E. Laccetti, CPA for Review of Disciplinary Action Taken by the PCAOB*, Exchange Act Release No. 78764 (Sept. 2, 2016).

C. Related Cases

The case on review has not previously been before this, or any other, Court. Counsel is not aware of any related cases currently pending in this, or any other, Court.

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GLOSSARY

APA	Administrative Procedure Act
Board or PCAOB	Public Company Accounting Oversight Board
Br.	Petitioner's opening brief
Commission or SEC	Securities and Exchange Commission
Division	Public Company Accounting Oversight Board's Division of Enforcement and Investigations
E&Y	Ernst & Young LLP
FEC	Federal Election Commission
OIP	Public Company Accounting Oversight Board's Order Instituting Disciplinary Proceedings

No. 16-1368

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STATUTORY AND REGULATORY ADDENDUM

The pertinent statutes and regulations are set forth in the Addendum to the Petitioner's opening brief.

INTRODUCTION AND STATEMENT OF THE ISSUES

This appeal arises from a Securities and Exchange Commission ("Commission" or "SEC") order sustaining sanctions imposed by the Public Company Accounting Oversight Board ("Board" or "PCAOB") based on the Board's findings that Mark Laccetti, a certified public accountant, recklessly violated numerous professional auditing standards when supervising the audit of a

public company's financial statements. The Board found, for example, that Laccetti failed to obtain evidence to substantiate the company's sales data, even though he knew that this was an area of high risk for the audit, and the audit team had specifically raised concerns about the company's analysis. JA__[Op.3-4, 6]. The Board rejected Laccetti's defenses, including his claim that PCAOB staff had violated his "right to counsel" by not allowing an accounting partner from his firm to attend his investigative testimony as a technical consultant. JA__[Op.6]. The Board also rejected Laccetti's argument that the proceeding against him should be dismissed because the Board's structure during the initial stages of the proceeding (but not during his hearing or the Board's subsequent de novo review of the hearing officer's decision) violated the separation of powers. JA__[Op.6].

On appeal to the Commission, Laccetti raised only procedural and constitutional challenges and did not contest the Board's findings on either liability or sanctions. JA__[Op.6]. The Commission rejected Laccetti's right-to-counsel and separation-of-powers claims, as well as a third argument Laccetti raised for the first time only on appeal: that the Board lacked constitutional authority to impose sanctions because its members had not taken oaths of office or received presidential commissions. JA__[Op.8-30].

The issues presented in this appeal are:

1. Whether the Commission correctly concluded that Laccetti's "right to counsel" was not violated when PCAOB staff exercised discretion granted by PCAOB rules to deny his firm's request to have an accounting partner attend his investigative testimony, and that, in any event, Laccetti was not prejudiced by the staff's action.

2. Whether the Commission correctly concluded that previous restrictions on the removal of Board members, which were struck by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), prior to the Board's determination in this case, did not require dismissal of the sanctions against Laccetti.

3. Whether the Commission correctly concluded that Laccetti waived his other constitutional arguments, and that, in any event, the failure to receive a presidential commission or take an oath of office does not invalidate otherwise lawful acts taken by validly appointed officers.

STATEMENT OF THE CASE

A. Nature of the case

Laccetti petitions this Court to review a Commission order sustaining PCAOB disciplinary sanctions against him. The Commission found that the record supported the Board's findings that Laccetti "repeatedly failed to adhere to" the

PCAOB's auditing standards, thereby violating PCAOB rules. JA__[Op.7]. The Commission also found that the sanctions imposed by the Board—a bar, with leave to petition to associate after two years, and an $85,000 civil penalty—"were not excessive, oppressive, or otherwise inappropriate because, among other things, 'Laccetti's reckless conduct ill-served the investor interests and public interest that an audit should serve'" and fell "'far short of the rigorous, objective inquiry and analysis required by PCAOB standards.'" JA__[Op.7-8] (quoting JA__[PCAOB Op.93]).

B. The regulatory scheme

With the passage of the Sarbanes-Oxley Act in 2002, Pub. L. No. 107-204, 116 Stat. 745, Congress established the PCAOB and charged it with "oversee[ing] 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 in the preparation of informative, accurate, and independent audit reports," 15 U.S.C. § 7211(a). The Act authorizes the PCAOB to conduct investigations and initiate disciplinary proceedings subject to the "oversight and enforcement authority" of the Commission. *Id* . § 7217(a); *id.* § 7215(b)(1), (c); *see also id.* § 7211(c).

When the PCAOB initiates disciplinary proceedings and, upon a finding of violation, imposes a sanction, that finding and sanction are subject to review by the

Commission. 15 U.S.C. § 7217(c)(2) (making 15 U.S.C. § 78s(d)(2) and (e)(1), which govern Commission review of sanctions imposed by self-regulatory organizations, generally applicable to PCAOB disciplinary sanctions); *see also id.* § 7215(e) (Commission may review upon application by a petitioner or on its own initiative). The Commission must determine that the record supports the Board's finding of violation and may "enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board" if it concludes that the proposed sanction "is not necessary or appropriate" under the Sarbanes-Oxley Act or the securities laws or is "excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed." *Id.* § 7217(c)(3), (c)(2).

In 2010, the Supreme Court considered a challenge to the constitutionality of the PCAOB which alleged, in part, that statutory restrictions on the Commission's authority to remove members of the Board violated the separation of powers. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). The Court agreed. As the Court explained, the statutory scheme impermissibly limited the President's supervisory authority because both the Commissioners and members of the Board were removable only for cause. *Id.* at 498, 508-09. The Court then severed the provisions restricting the removal of Board members but sustained the Act's remaining provisions, holding that the Act "remain[ed] fully

operative as a law" with the "tenure restrictions excised." *Id.* at 509. In doing so, the Court thus rejected petitioners' claims that the violative provisions had rendered "all power and authority exercised by" the PCAOB unconstitutional. *Id.* at 508 (internal quotation marks omitted).

C. Statement of facts

1. The PCAOB's investigation

In 2007, Taro Pharmaceutical Industries Ltd., an Israeli pharmaceutical company, restated its 2004 financial statements, largely in order to correct errors relating to its U.S. subsidiary, Taro USA. JA__[Op.2-4]. Ernst & Young LLP ("E&Y"), a U.S.-based public accounting firm registered with the PCAOB, had performed the 2004 audit for Taro USA. JA__[Op.2-3]. Laccetti was E&Y's engagement partner on the audit and held ultimate responsibility for the firm's audit report. JA__[Op.3].

Laccetti acknowledged that when planning the Taro USA audit, he knew "that the company's 'accounts receivable allowances was an area of high risk and focus,'" and as the audit progressed, he became aware of concerns relating to the company's "sales allowance estimates, chargebacks, and year-end reserves." JA__[Op.3] (quoting Laccetti hearing testimony). To address some of those concerns, the audit team sought more information from company officials about

Taro USA's accounts receivable reserves—but they never received the requested analysis. JA__[Op.3].

Meanwhile, Laccetti directed the audit team to prepare a draft memorandum concluding that Taro USA's accounts receivable reserves appeared reasonable. JA__[Op.3-4]. Then, despite never receiving the requested documentation—and having never addressed the fact that the company's "process for preparing and reviewing accounts receivable allowance estimates was deficient"—Laccetti approved and released a final audit memorandum stating that the company's "net accounts receivable [wa]s fairly stated" in the company's financial statements. JA__[Op.3-4]. His memorandum also asserted that his team had completed all of its planned audit work, that the scope of the audit was adequate, and that the company's financial data were "presented fairly, in all material respects, in conformity with [U.S. Generally Accepted Accounting Principles]." JA__[Op.4].

In June 2007, the PCAOB began investigating E&Y's audit work for Taro USA, and, in July, the PCAOB's Division of Enforcement and Investigations ("Division") ordered Laccetti to produce documents and appear for sworn testimony. JA__[Op.4]; JA__[Doc.233 Ex.A&B]. In September, two months before Laccetti was scheduled to appear for his testimony, E&Y requested permission for all of its witnesses "to be accompanied by a technical expert consultant"—specifically, an accounting partner in E&Y's general counsel's office

who, E&Y asserted, could provide accounting and auditing expertise, similar to "an outside technical consultant, but at substantially less cost." JA__[Doc.182 Ex.A]. E&Y acknowledged that PCAOB Rule 5102(c)(3) expressly limits the individuals who may attend PCAOB investigative testimony to the witness, his or her counsel, Board personnel, and "such other persons as the Board, or the staff . . . determine are appropriate." JA__[Doc.182 Ex.A].[1] But E&Y claimed it was nevertheless "appropriate" to allow E&Y's designated accounting partner to attend in this case because of the complex accounting and auditing principles at issue. JA__[Doc.182 Ex.A].

The Division denied E&Y's request, explaining that in its view, under PCAOB Rule 5102(c)(3), the presence of the requested individual "at the testimony sessions of present and former E&Y personnel in the . . . investigation is not appropriate at this time." JA__[Doc.180 Att.1]. In particular, the Division noted, denying E&Y's request to have a senior accountant present was consistent with Rule 5102's adopting release. JA__[Doc.180 Att.1]. That guidance states that while PCAOB staff should attempt to "accommodat[e]" witness requests when possible, it nevertheless may be "appropriate" *not* to permit non-lawyer technical consultants who are employed by "the firm with which the witness is associated"

[1] Pertinent PCAOB rules are available at https://pcaobus.org/Rules/Pages/Section_5.aspx. Rules 5102 and 5109 are also reproduced in the Addendum to Laccetti's opening brief.

to attend, in part to avoid a scenario in which firm leaders can effectively "monitor an investigation by sitting in on testimony of all firm personnel." PCAOB Release No. 2003-015, at A2-18–A2-19 (Sept. 29, 2003), *available at* http://pcaobus.org/Enforcement/Documents/ Release2003-015.pdf.

The Division also pointed out that it had issued its requests for testimony months before the investigative interviews were scheduled, thereby affording witnesses ample time to consult with technical experts before they appeared. JA__[Doc.180 Att.1]. The Division advised further that if, after the testimony, "a witness believes that his testimony should be clarified or corrected (whether on the basis of consultation with technical experts or otherwise), the [Division] staff is amenable to reasonable requests to resume the testimony for that purpose if necessary." JA__[Doc.180 Att.1].

Laccetti neither sought clarification of the Division's position nor designated a different "technical consultant" to attend his testimony. *See, e.g.*, JA__[Doc.180 at 107] (Lacetti post-hearing brief); JA__[Doc.204 at 12-13] (Laccetti opening brief to the Board); JA__[Doc.232 at 4-6, 24-27] (Laccetti opening brief to the Commission). Accordingly, during his examination, Laccetti was accompanied by both outside counsel and attorneys from E&Y, but not a technical consultant. *See* JA__[Doc.232 at 4-6].

2. Proceedings before the PCAOB

In October 2009, the PCAOB issued an Order Instituting Disciplinary Proceedings ("OIP"), alleging that Laccetti had violated PCAOB rules and auditing standards in connection with the Taro USA audit. JA__[Doc.1]; JA__[Op.4]. In particular, the OIP claimed that Laccetti had failed to exercise due professional care, failed to obtain sufficient competent audit evidence, and committed other violations, all of which had resulted in multi-million dollar overstatements of Taro USA's net sales and related receivables. JA__[Doc.1]; JA__[PCAOB Op.1].

Laccetti's hearing before a PCAOB hearing officer was initially scheduled to begin on June 28, 2010. JA__[Op.4 n.7]. That morning, however, the Supreme Court issued its decision in *Free Enterprise Fund*, striking down the provisions of the Sarbanes-Oxley Act restricting the removal of Board members. 561 U.S. at 498, 508-09; JA__[Op.4 n.7]. The hearing officer thus postponed Laccetti's hearing until the following day, at which point Laccetti's counsel argued that *Free Enterprise Fund* required complete dismissal of the PCAOB action. JA__[Op.4 n.7]. The hearing officer rejected that request, and the proceeding continued as scheduled. JA__[Op.4 n.7].

Following a nine-day hearing, the hearing officer issued an initial decision finding that, as alleged, Laccetti had violated PCAOB rules and auditing standards and that it was in the public interest to impose a suspension and civil penalty.

JA__[Doc.197]; *see* 15 U.S.C. § 7211(a). Both Laccetti and the Division sought Board review of that decision. JA__[PCAOB Op.1-2]. Laccetti contested the findings of liability and the imposition of sanctions, as well as the rejection of his affirmative defenses. JA__[PCAOB Op.1-2, 27]; JA__[Doc.204]. Those defenses included, *inter alia*, that the Division had violated his "right to counsel" by denying E&Y's request to have a senior partner attend Laccetti's investigative testimony, and that under *Free Enterprise Fund*, the Board's structure during the proceeding's initial phases was unconstitutional. JA__[PCAOB Op.1, 30]; JA__[Doc.204].

The Board conducted a de novo review of the hearing officer's findings and issued a final decision in January 2015. JA__[PCAOB Op.1]. It agreed that Laccetti had violated PCAOB rules and auditing standards and that sanctions were warranted. JA__[PCAOB Op.30-73, 87-103]. The Board also rejected Lacetti's procedural and constitutional arguments. JA__[PCAOB Op.73-82].

D. Proceedings before the Commission

Laccetti appealed to the Commission, again raising constitutional and procedural objections, but this time declining to challenge either the Board's findings of liability or its imposition of sanctions.[2] JA__[Op.2]; JA__[Doc.232].

[2] Nevertheless, pursuant to its statutory obligation, the Commission conducted an independent, de novo review of the record and determined that the record supported the PCAOB's findings of violations and that the sanctions imposed were

Like the Board, the Commission rejected Laccetti's right-to-counsel claim, explaining that there is "no constitutional or statutory right to counsel . . . in PCAOB investigatory proceedings," and that PCAOB Rule 5102(c)(3) (which limits those who may accompany witnesses for investigative testimony) expressly affords staff the "discretion to exclude anyone other than certain enumerated individuals." JA__[Op.17]. The Commission found that the PCAOB staff's decision to deny E&Y's request to have a senior partner attend Laccetti's testimony was consistent with this rule and that Laccetti was not prohibited from designating a non-E&Y expert to attend if he so chose. JA__[Op.20-21]. Moreover, the Commission noted, Laccetti could not show that he was prejudiced by the denial of E&Y's request, particularly given that the Board's opinion had expressly disavowed any reliance on Laccetti's investigative testimony. JA__[Op.22-24].

The Commission rejected Laccetti's claim that the Board's final decision in his case was "'tainted' by the separation of powers problems identified" in *Free Enterprise Fund*. JA__[Op.8]. The offending statutory provisions were struck by the Supreme Court before Laccetti's hearing began; thus, the Commission found, "[t]he Board was subject to adequate executive oversight during Laccetti's hearing

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not excessive, oppressive, or otherwise inappropriate under the relevant statutes. JA__[Op.6-8]; *see id.* § 7217(c)(2); *id.* § 78s(d)(2), (e)(1).

and, more importantly," during the Board's own de novo review. JA__[Op.8]. That subsequent review, the Commission explained, effectively ratified the Board's pre-*Free Enterprise Fund* actions. JA__[Op.10].

Finally, the Commission addressed Laccetti's claim that Board members lacked constitutional authority to impose sanctions because, at the time they rendered their decision against Laccetti, they had not taken oaths of office or received Presidential commissions. JA__[Op.24]. The Commission found this argument waived, since Laccetti had failed to raise it before the Board. JA__[Op.24-25]. And it determined that the challenge was meritless in any event because neither the oath of office nor a Presidential commission is a prerequisite to validly exercising the powers of an office. JA__[Op.25-30].

STANDARD OF REVIEW

The Commission's factual findings, "if supported by substantial evidence, are conclusive." 15 U.S.C. § 78y(a)(4). "Substantial evidence does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Koch v. SEC*, 793 F.3d 147, 151 (D.C. Cir. 2015) (internal quotation marks omitted). "The Commission's other conclusions may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 152 (internal quotation marks omitted); *see* 5 U.S.C. § 706(2)(A).

SUMMARY OF ARGUMENT

I. The Commission correctly rejected Laccetti's claim that he was denied the "right to counsel" when PCAOB staff declined E&Y's request to have an E&Y accounting partner attend the investigative testimony of all E&Y witnesses. JA__[Op.17-24]. The PCAOB's rules expressly provide that while witnesses in investigative proceedings may be accompanied by counsel, staff retain discretion to decline to allow other individuals to attend, including other personnel from the witness's firm. And, contrary to Laccetti's claims, neither the Sarbanes-Oxley Act nor the Fifth Amendment's Due Process Clause confers a more expansive right or otherwise countermands the PCAOB rules' express limitations.

The Commission reasonably determined that PCAOB staff properly applied the PCAOB's rules in this case when denying E&Y's request. JA__[Op.20-22]. As the Commission noted, the staff appropriately heeded PCAOB guidance advising that technical consultants should not be permitted when they are associated with the same firm as the witness, because allowing such individuals to attend could enable the witness's employer to indirectly monitor or influence the investigation. JA__[Op.21]

Even if it was improper not to permit the E&Y accountant to attend Laccetti's testimony—which it was not—the Commission correctly found that Laccetti failed to establish prejudice from this action. JA__[Op.22-24]. The

Board's final decision expressly disclaimed reliance on Laccetti's investigative testimony, and Laccetti's claim that the testimony improperly influenced the Board's decision to *initiate* the enforcement action is meritless. He identifies no concrete way in which that decision might have differed had he been accompanied during his testimony by his preferred consultant. And, even if he could, his argument fails because any prejudice he suffered was rendered harmless by the Board's ratification of its charging decision in its final order.

II. Laccetti's constitutional arguments are similarly without merit. He contends that the Board's decision must be set aside because the Board was improperly insulated from presidential control for the reasons addressed by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). By the time the Board issued its decision in this case, however, the Supreme Court had already announced its decision in *Free Enterprise Fund* and declared inoperable the aspects of the statutory scheme that violated the separation of powers. Indeed, Laccetti's disciplinary hearing did not commence until one day after the Supreme Court's judgment was announced. The validly constituted Board then reviewed the evidence in the record de novo, addressed Laccetti's objections, and issued its final determination. Nothing more was required: this Court has repeatedly held that a final decision rendered by a

properly appointed agency head will not be set aside simply because an error existed at some earlier point in the administrative process.

III. Laccetti is similarly wide of the mark in arguing that the Board lacked the constitutional authority to perform its functions because its members did not receive commissions from the President or take an oath of office. As the Commission found, Laccetti forfeited these arguments by failing to raise them before the Board. If Laccetti had raised these objections at the appropriate time under Board practice, the Board could have taken steps to cure the alleged flaws before issuing its decision. Having failed to give the Board that opportunity, Laccetti cannot now seek relief from this Court on these grounds.

In any event, while the Constitution provides that the President shall issue commissions to all officers of the United States, the Supreme Court has explained that receipt of such a commission is not a condition precedent to exercising the powers of a government office. Indeed, that was the holding of *Marbury v. Madison* itself: Marbury's appointment was valid even in the absence of a commission. *See* 5 U.S. (1 Cranch) 137, 156–157 (1803). Likewise, the Constitution provides that officers shall take an oath. But the text of the Constitution and the relevant historical evidence make clear that, at a minimum, taking an oath is not an indispensable prerequisite to exercising the powers of an inferior office in the Executive Branch. *See, e.g.*, Act of June 1, 1789, § 3, 1 Stat.

23, 23–24 (1789) (allowing certain officers to take an oath one month after they enter into duty). The inadvertent—and now remedied—failure of the Board members to take such an oath is consequently not a basis for setting aside the Board's decision.

ARGUMENT

I. Laccetti's "right to counsel" argument lacks merit.

A. Laccetti did not have the right to an expert consultant at his investigative testimony.

Laccetti erroneously claims (Br. 15) that he was deprived of his "right to counsel" when PCAOB staff declined E&Y's request to have an E&Y accounting partner attend his investigative testimony. None of the authorities he cites—"the Board's rules, the Sarbanes-Oxley Act, [or] the Due Process Clause" (Br. 16)—confers the right to have a technical consultant attend investigative testimony. Rather, as the Commission correctly determined, while Laccetti was entitled to be accompanied by counsel, PCAOB staff retained discretion not to permit others to attend, including other personnel from his accounting firm. JA__[Op.17].

1. PCAOB rules do not afford the right to have a technical consultant attend investigative testimony.

PCAOB Rule 5109(b) provides that a person giving investigative testimony in a Board investigation "may be accompanied, represented and advised by counsel, *subject to Rule 5102(c)(3)*" (emphasis added). Rule 5102(c)(3), in turn,

limits those who may attend such testimony to the witness and his or her counsel, any Board member or staff, the reporter, and "such other persons as the Board, or the staff of the Board . . . determine are appropriate to permit to be present." The PCAOB's adopting release for these rules also advises that while Board staff should attempt to "accommodat[e]" witness requests to have technical consultants attend their testimony when possible, the staff retain discretion to decline such requests, especially when necessary to prevent "a firm's internal personnel" from "monitor[ing] an investigation by sitting in on testimony of all firm personnel." PCAOB Release No. 2003-015, at A2-18–A2-19 (Sept. 29, 2003), *available at* http://pcaobus.org/Enforcement/Documents/Release2003-015.pdf

Laccetti contends (Br. 16-18) that Rule 5109(b) is "identical" to—and should therefore be read as broadly as—a provision of the Administrative Procedure Act ("APA") providing that "[a] person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel," 5 U.S.C. § 555(b). As the Commission noted, Laccetti has previously acknowledged that the PCAOB is not subject to the APA's procedural requirements (JA__[Op.18]; JA__[PCAOB Op.75]), so 5 U.S.C. § 555(b) does not itself establish the right to counsel he claims. *See* 15 U.S.C. § 7211(b) (providing that the Board "shall not be an agency or establishment of the United States Government"). Moreover, as the Commission found, PCAOB Rule 5109(b) and

§ 555(b) are not, in fact, "identical": Although they contain similar language providing for the presence of an attorney during testimony, § 555(b) does not qualify that right, whereas Rule 5109(b) expressly states that the right to counsel in PCAOB proceedings is "subject to" the limitations set forth in Rule 5102(c)(3). *See* JA__[Op.19-20].

Laccetti's reliance on *SEC v. Whitman*, 613 F. Supp. 48 (D.D.C. 1985), is similarly misplaced. In *Whitman*, a district court construed § 555(b) to confer an "absolute" right to counsel—including the right to have an expert consultant attend testimony, at least on "those limited occasions when a technical adviser is deemed by the [attorney] to be essential." 613 F. Supp. at 50. Laccetti asserts (Br. 18) that given the textual similarities between § 555(b) and Rule 5109(b), *Whitman*'s reading of § 555(b) must "authoritatively" govern the construction of Rule 5109(b). But again, as the Commission observed (JA__[Op.20]), Laccetti overlooks the crucial textual differences between § 555(b) and Rule 5109(b)—and the fact that those differences render *Whitman* inapposite when interpreting Rule 5109(b).[3]

[3] Moreover, as the Commission noted, E&Y's letter requesting that its accounting partner attend investigative interviews for all of its witnesses "did not assert that the presence of the consultant was 'essential,' but merely that it was 'appropriate.'" JA__[Op.20 n.76] (quoting JA__[Doc.182 Ex.A]).

The history of the PCAOB's rules confirms that, since their inception, the Board has understood them *not* to provide a witness with an unqualified right to be accompanied by a technical consultant, but rather to leave that decision in the hands of Board staff. As proposed, Rule 5109(b) provided a right to counsel that was expressly qualified by the limitations in Rule 5102(c)(3). *See* PCAOB Release No. 2003-015, at A2-18. Commenters, citing *Whitman*, sought a more expansive right and requested that the Board modify the rule to "allow a witness and his or her counsel to be accompanied by a technical consultant during testimony as a matter of right." *Id.* The Board declined, observing that it was not bound by *Whitman*, because the case "rests on the requirements of the Administrative Procedure Act, which is not applicable to Board proceedings." *Id.* at A2-19 n.1; 15 U.S.C. § 7211(b).

The Board also explained that the requested revisions were unnecessary, given that, as proposed, the rules already provided "sufficient flexibility for the staff to permit a technical consultant to be present during investigative testimony . . . in appropriate circumstances and on appropriate terms." PCAOB Release No. 2003-015, at A2-18. Staff should generally try to "accommodat[e]" witness requests to have technical consultants attend testimony, the Board advised, provided that the designated "consultant [is] *not* a partner or employee of the firm with which the witness is associated." *Id.* (emphasis added). Indeed, the Board

directed "the staff to be vigilant about not permitting a firm's internal personnel effectively to monitor an investigation by sitting in on testimony of all firm personnel." *Id.* at A2-18–A2-19.

2. The Sarbanes-Oxley Act does not establish a right to a technical consultant during investigative testimony.

Laccetti urges (Br. 18) that even if the PCAOB's rules do not themselves afford the expansive right to counsel he imagines, Section 105(a) of the Sarbanes-Oxley Act, 15 U.S.C. § 7215(a), does so through its requirement that the Board "establish . . . fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms." Again, he is mistaken.

Laccetti's argument seems to rest on the premise that *Whitman*'s interpretation of 5 U.S.C. § 555(b) was animated by constitutional due process concerns—and that those same concerns necessarily infuse the Sarbanes-Oxley Act's conception of "fair[ness]." *See* Br. 19-22 ("Fairness concerns drove *Whitman*."); *id.* 25-26 ("The Due Process Clause . . . ensure[s] fairness in administrative proceedings."). But, as discussed above, *Whitman* was not a constitutional due process case; its holding that the APA creates an "absolute" right to counsel in agency proceedings derives solely from the text of the APA. *See* 613 F. Supp. at 49 (citing *SEC v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976) and *United States v. Weiner*, 578 F.2d 757, 773 (9th Cir. 1978), both of which also

consider the scope of *the APA*'s right to counsel). *Whitman* therefore offers no support for the proposition that the Sarbanes-Oxley Act encompasses a right to have a technical expert attend investigative testimony.

Laccetti's suggestion (Br. 20-21) that the PCAOB's enforcement regime is generally "unfair" is similarly meritless. Contrary to his view, it is not inherently problematic for the Board to have given its staff discretion over whether to allow individuals other than a witness's lawyers to attend investigative testimony. Courts have long recognized that agencies have broad discretion to "fashion their own rules of procedure," *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978), and to tailor those rules "to the peculiarities of the industry and the tasks . . . involved," *FCC v. Schreiber*, 381 U.S. 279, 290 & n.19 (1965).

It is also not unlawful that the rules governing Board investigations differ from those that apply to the Commission. Laccetti takes issue with the fact that Congress gave the Board and the Commission "concurrent enforcement jurisdiction over auditor conduct" (Br. 21; *see* 15 U.S.C. § 7215(b)(4)(A)), resulting in potential procedural differences for prospective respondents, depending on whether an action is initiated by the Commission or the PCAOB. But that is a complaint for Congress, not grounds for any claimed deficiency in the Board's rules. *Cf. Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988) (rejecting claim that it violated due process for the Commission to

proceed administratively rather than in district court; observing that to accept such challenge "would do violence to the core value of flexibility (coupled with appropriate procedural protections) that has been the hallmark of the modern administrative process").

3. Due process does not require access to a technical consultant during investigative testimony.

Laccetti's assertion (Br. 25-26) that the Fifth Amendment's due process clause establishes the right to a technical consultant during PCAOB investigative testimony is also flawed. Even if he had preserved this claim by raising it to the Commission—which he did not (*see* JA__[Op.18])—the argument fails on the merits.

As the Commission explained, there is no constitutional right to counsel in administrative investigative proceedings. JA__[Op.18]. In *Hannah v. Larche*, the Supreme Court held that although due process rights may attach during administrative *adjudicatory* proceedings, in *investigatory* proceedings, "it is not necessary that the full panoply of judicial procedures be used." 363 U.S. 420, 440-51 (1960). Decades later, in an appeal from a Commission action, the Court confirmed that "[t]he Due Process Clause is not implicated" by an agency's efforts merely to *investigate* potential legal violations "because an administrative investigation adjudicates no legal rights." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984). Thus, while due process may require access to counsel once an

adjudicatory proceeding has been instituted, that right does not attach when an agency is merely investigating possible legal violations.

Laccetti's effort to distinguish *Hannah* (Br. 26) is unavailing. Though, as he notes, the procedural rights claimed in *Hannah*—*e.g.*, the right to know the charges and to cross-examine witnesses appearing at the hearing—arguably are more "disruptive" than the "right" Laccetti claims here (363 U.S. at 449; Br. 26), the Court's decision did not hinge on the particular procedures at issue. Rather, the Court focused on the distinction between adjudicative actions, "which directly affect the legal rights of individuals," and "fact-finding investigation[s]," which do not. 363 U.S. at 442; *see also Aponte v. Calderon*, 284 F.3d 184, 193 (1st Cir. 2002) ("Without an adjudication of legal rights, *Hannah* and *Jerry T. O'Brien* are clear: the Due Process Clause does not require that 'the full panoply of judicial procedures be used.'" (quoting *Hannah*, 363 U.S. at 442)). Accordingly, because Laccetti's only claim is that he was denied access to counsel during the Board's investigation—but not during its subsequent adjudication—his due process argument fails.[4]

[4] For the same reasons, Laccetti's plea for constitutional avoidance (Br. 26) also fails. Because he has identified no viable "due process concerns" arising from the Board's application of Rules 5102 and 5109, there is no reason to construe either the Sarbanes-Oxley Act or the PCAOB's rules in the manner Laccetti suggests.

B. The Commission reasonably rejected the challenge to the PCAOB staff's decision not to allow Laccetti's proposed consultant to attend his testimony.

Laccetti erroneously contends (Br. 22-25) that even if the Board's rules do in fact give its staff discretion not to allow an expert consultant to attend a witness's investigative testimony, the staff's decision in this case was nevertheless arbitrary and capricious in violation of the APA. He misunderstands the relevant inquiry. Under the statutory scheme, it is only the *Commission's* final order, not the Board's—much less a PCAOB staff determination—that is subject to review in this Court. *See* 15 U.S.C. § 78y(a); *see also, e.g.*, *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 877-78 (7th Cir. 1985); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952).

But even construing Laccetti's challenge as one to the Commission's decisionmaking, it still falls short. The APA's "deferential" arbitrary-and-capricious standard requires that agency decisionmaking be "reasonable and reasonably explained." *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency." (internal quotation marks omitted)). The Commission's opinion amply satisfies that

standard: Its analysis was careful and considered, and its findings are well supported by the record.

The Commission appropriately rejected Laccetti's claim (which he reprises here) that the Board's staff improperly "refused to allow Laccetti's counsel to be assisted by *any* expert consultant during Laccetti's investigative testimony." JA__[Op.20]; Br. 23. As the Commission explained, the record shows that the Division denied only Laccetti's request to have a *particular* E&Y accountant attend his testimony; it did not issue a general denial extending to all potential consultants. JA__[Op.20].

E&Y's letter requesting attendance for its proposed expert specified that the "consultant we have in mind" was a particular E&Y accounting partner. JA__[Doc.182 Ex.A]. The Division, in response, stated that it understood the request to pertain only to the designated individual (whom the Division's letter mentioned by name). JA__[Doc.180 Att.1]. And, as discussed, the Division explained that "[t]he staff's decision to exclude [that person] is fully consistent with the rationale set forth in" PCAOB guidance that specifically advised staff not to allow other personnel from the same firm as the witness to attend investigative testimony. JA__[Doc.180 Att.1]. Thus, regardless of whether E&Y may have intended a broader request, the Division's letter made clear that its denial pertained only to the named individual.

As he did below, however, Laccetti reads far more into the Division's statement that the "presence of a technical expert consultant . . . is not appropriate at this time." Br. 23 (quoting JA__[Doc.180 Att.1]). But as the Commission reasonably found, when the Division's letter is read in its entirety, its "context . . . makes clear" that the staff's decision was driven only by a concern over letting the *designated* E&Y partner appear at the testimony. JA__[Op.21]; *accord* JA__[Doc.197 at 88] (PCAOB initial decision; similarly finding "as a factual matter, [that] the Division did not preclude Laccetti's counsel from having any technical consultant attend Laccetti's investigative testimony, but rather prohibited only the attendance of a specific individual").

The Commission also reasonably concluded that it was not improper for Division staff to decline E&Y's request regarding the designated accountant, even though attorneys from E&Y's General Counsel's office were permitted to attend investigative testimony. *See* JA__[Op.21-22]. As noted, PCAOB Rule 5102(c)(3) expressly provides that while a witness's "counsel" may attend an examination, others may do so only if Board personnel deem it "appropriate." Here, E&Y's witnesses were represented, in part, by in-house counsel. JA__[Doc.182 Ex.A]. Under Rule 5102(c)(3), therefore, those in-house attorneys were entitled to attend witness testimony; the staff lacked discretion to exclude them. By contrast, the staff had the discretion to decline requests to allow other, non-attorney personnel—

including E&Y's proposed consultant—to attend. *See* PCAOB Release No. 2003-015, at A2-18–A2-19.

Laccetti complains (Br. 24) that it is not "rational[]" to admit the former, but not the latter, but the distinction the rules draw between attorneys and other firm personnel is reasonable. Indeed, as the Commission observed, it is consistent with civil litigation practice, where the presence of non-attorneys during testimony may "raise concerns even where in-house counsel is already present." JA__[Op.21]. Courts have, accordingly, excluded individuals from depositions where they are concerned that the presence of those individuals may have "'an intimidating influence on the deponent's testimony.'" JA__[Op.21-22 & n.81] (quoting *In re Shell Oil Refinery*, 136 F.R.D. 615, 615 (E.D. La. 1991)). Several federal agencies have also adopted regulations that, like the Board's, expressly limit the non-attorney individuals who may attend investigative testimony. *E.g.*, 12 C.F.R.§ 747.807(b) & (c)(2) (National Credit Union Administration rule providing that while it may sometimes be appropriate for a "technical expert" to attend witness testimony, those "circumstances should be rare [and] are left to the discretion of the officer conducting the investigation"); *see also* 12 C.F.R. § 1080.7(c) (Consumer Financial Protection Bureau); 16 C.F.R. § 2.7(f)(3) (Federal Trade Commission); 18 C.F.R. § 1b.16(b) (Federal Energy Regulatory Commission); 17 C.F.R. § 11.8 (Commodity Futures Trading Commission).

Given this precedent supporting the Board's approach—as well as the record evidence supporting the decision in this case—the Commission's decision to sustain the application of the Board's rules was reasonable, and its analysis of the issue more than satisfied its obligation to establish "a rational connection between the facts found and the choice made." *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 249 (D.C. Cir. 2013) (quoting *State Farm*, 463 U.S. at 43). Moreover, to the extent there is ambiguity in the PCAOB rules, the Commission's reading of them is entitled to deference. *See Gurfel v. SEC*, 205 F.3d 400, 402 (D.C. Cir. 2000).

C. Laccetti was not prejudiced by the denial of E&Y's request that its accounting partner attend investigative testimony.

For the reasons discussed above, Laccetti was not entitled to have an expert consultant attend his investigative testimony. But even if the right to counsel were as expansive as he claims, the Commission correctly found that the Division's decision not to allow his proposed consultant to attend was not prejudicial, and Laccetti's claims to the contrary lack merit.

For example, Laccetti mistakenly contends (Br. 27-28) that he was not required to show *any* prejudice from this asserted violation. Although he concedes that the Sixth Amendment is inapplicable in administrative proceedings, he nevertheless argues that because violation of the Sixth Amendment right to counsel is "structural" and thus inherently prejudicial, *United States v. Gonzalez-Lopez*,

548 U.S. 140, 150 (2006), the same holds true for violations of a statute or rule conferring a right to counsel in administrative proceedings. But, as the Supreme Court has explained, the Sixth Amendment "right to counsel exists to protect the accused during trial-type confrontations with the prosecutor." *United States v. Gouveia*, 467 U.S. 180, 190 (1984). Violations of that right have been deemed "structural" because they "affect the framework within which" a criminal trial proceeds. *Gonzalez-Lopez*, 548 U.S. at 149.

Where there is no trial (or other adversary proceeding), however, there is no Sixth Amendment right to counsel. *See Gouveia*, 467 U.S. at 188-89; *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 198 (2008). Indeed, the Court has explained that it "fundamentally misconceive[s] the nature of the right," to suggest that it applies during the investigative phases of a proceeding merely so that counsel may "help a defendant prepare a better defense" in anticipation of later charges. *Gouveia*, 467 U.S. at 189-191. Because the violation Laccetti claims occurred only *before* any adversary proceedings were initiated, the Sixth Amendment case law he cites is therefore inapposite—and the Commission correctly rejected his claim that the asserted error was "structural." JA__[Op.23].

The Commission also correctly determined that, in any event, Laccetti could not establish prejudice when his proposed expert was not permitted to attend his testimony. JA__[Op.22-24]. The Board's final decision expressly disclaimed any

reliance on Laccetti's investigative testimony (JA__[PCAOB Op.74]), and the Commission agreed that the "'other (and ample) record evidence'" independently established Laccetti's liability (JA__[Op.22-23] (quoting JA__[PCAOB Op.74]). Laccetti does not dispute that finding, nor does he argue that the alleged right-to-counsel violation otherwise affected the Board's final decision.

And the claim he makes (Br. 27)—that his "injury lies in" an error infecting the Board's decision to *institute* proceedings against him—cannot survive this Court's recent decision in *Combat Veterans for Congress Political Action Committee v. Federal Election Commission*, 795 F.3d 151 (D.C. Cir. 2015). In *Combat Veterans*, a respondent in an administrative proceeding sought to set aside the agency's liability finding, alleging that the agency had violated a statutory procedural requirement when voting to make its initial allegations. *Id.* at 152, 157. The Court acknowledged that, if true, the agency's violation "may be a substantial one" but it nevertheless determined that "any error was harmless." *Id.*

The Court found, first, that the respondent had failed to show that the asserted error caused cognizable harm, holding that the agency's "mere allegation of wrongdoing" by the respondent—even if "erroneously made"—did not suffice. 795 F.3d at 157. The Court also faulted the respondent for failing to demonstrate that adherence to a different procedure would have led to a different charging decision. *Id.* Laccetti likewise fails to identify the precise harm he suffered or

explain how the outcome might have differed had the alleged error not occurred. He complains (Br. 27) that his "testimony may well have been different" had his consultant attended his interview, and he speculates that, as a result, "the Board might have chosen not to institute disciplinary proceedings at all, or . . . might have raised different charges." But he points to no actual testimony that might have changed, nor does he identify any concrete way in which different testimony might have altered the Board's charging decision. Indeed, the suggestion that an unspecified different result "might have" come to pass—and that this alone suffices to show prejudice—is, practically speaking, just another way of saying (erroneously) that the asserted violation is "structural" and thus requires automatic reversal.

Laccetti's claim of prejudice is also undermined by his failure to avail himself of the other procedural mechanisms that were available to him. He could have proposed a different consultant in the two months between the Division's denial of E&Y's request and his scheduled testimony, or he could have sought to correct or clarify his testimony after the fact upon consultation with any expert of his choosing. *See* JA__[Doc.233 Ex.A&B]; JA__[Doc.182 Ex. A]; JA__[Doc.180 Att.1]. He did neither. *See* JA__[Doc.180 at 107] (Lacetti post-hearing brief); JA__[Doc.204 at 12-13] (Laccetti opening brief to Board); JA__[Doc 232 at 4-6, 24-27] (Laccetti opening brief to Commission).

Finally, Laccetti's claim of prejudice fails under *Combat Veterans*'s separate holding that an agency's final decision on liability can effectively ratify a flawed charging decision. 795 F.3d at 157-58. The Court explained that, in that case, "any prejudice [respondent] might have suffered" from the agency's decision to initiate the proceeding "was rendered harmless by the [agency's] subsequent ratification of its [initial allegations] with a concededly valid" finding on liability. *Id.* (citing *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996)). So too here. The Board found (and the Commission agreed) that the evidence established Laccetti's liability. JA__[Op.7-8, 22-23]. Therefore, under *Combat Veterans*, any prejudice Laccetti suffered from the allegedly erroneous issuance of the OIP "was rendered harmless" by the Board's subsequent ratification of its allegations in its final order. *See* 795 F.3d at 157-58.

II. The Commission properly rejected Laccetti's arguments concerning *Free Enterprise Fund*.

Laccetti contends that the Board's decision is incurably tainted by the constitutional error addressed by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). As the Commission explained, *see* JA__[Op.8-17], that contention is without merit. The Board's decision was free of any error under *Free Enterprise Fund* because, as Laccetti does not dispute, the Board was validly constituted when it reviewed the

evidence in the record, addressed Laccetti's objections, and entered its final determination.

1. The Supreme Court held in *Free Enterprise Fund* that statutory restrictions on the Commission's authority to remove members of the Board violated the separation of powers, reasoning that two layers of for-cause removal protection impermissibly limited the President's supervisory authority. 561 U.S. at 498, 508-09. The Court also concluded, however, that the offending removal restrictions were severable from the remainder of the statute. *Id*. at 508. Thus, rather than declare "'all power and authority exercised by [the Board]' in violation of the Constitution," as the petitioners in *Free Enterprise Fund* advocated, the Supreme Court held invalid only the removal provisions, leaving the Board otherwise "fully operative" as an agency. *Id*. at 508-09; *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd*., 684 F.3d 1332, 1341 (D.C. Cir. 2012) (*Intercollegiate I*), *cert. denied*, 133 S. Ct. 2735 (2013).

Laccetti does not dispute that, by the time the Board entered its decision in this case, the Supreme Court had already issued its decision in *Free Enterprise Fund* and the offending removal restrictions had already been declared invalid. The Supreme Court issued its decision on June 28, 2010, and the Board's decision was not entered until January 2015. *See* JA__[Op.6, 9]. Indeed, Laccetti's

disciplinary hearing did not commence until after the Supreme Court's judgment was announced. *See* JA__[Op.4 n.7].

Laccetti accordingly does not and cannot contend that the Board was unconstitutionally insulated from presidential control at the time it entered its decision against him. In reviewing the record evidence de novo, addressing Laccetti's arguments and objections, and rendering their decision, the Board members were fully aware that they were subject to removal by the Commission at will.

That is all that the Constitution and this Court's precedents require: an independent decision on the administrative record by a validly constituted tribunal. This Court's resolution of an analogous dispute involving the Copyright Royalty Judges is illustrative. In *Intercollegiate I*, this Court held that the Copyright Royalty Judges, a tribunal within the Library of Congress, were unconstitutionally insulated from presidential control at the time they issued a final copyright royalty rate-making determination. 684 F.3d at 1340. Like the Supreme Court in *Free Enterprise Fund*, this Court declared the offending removal restrictions invalid, explaining that the Copyright Royalty Judges would thereby "become validly appointed inferior officers." *Id.* at 1341. The Court then remanded the case for a decision by a properly constituted tribunal. *Id.* at 1342 ("Because the Board's structure was unconstitutional *at the time it issued its determination*, we vacate and

remand the determination." (emphasis added)); *see also Kuretski v. Commissioner*, 755 F.3d 929, 938 (D.C. Cir. 2014) (describing *Intercollegiate I* as remanding "so that the appellants' claims could be heard by a constitutionally valid tribunal").

On remand from this Court, a validly appointed panel of Copyright Royalty Judges reviewed the existing record evidence de novo and issued a new determination. In the subsequent appeal, this Court rejected the contention that the Copyright Royalty Judges' new determination was still tainted by the original error because the Judges had based their new decision on the existing administrative record: the "independent, de novo decision" by a "properly appointed panel," the Court explained, satisfied the requirements of the Constitution. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.* (*Intercollegiate II*), 796 F.3d 111, 124 (D.C. Cir. 2015) ("In sum, because the Judges' determination was an independent, de novo decision by a properly appointed panel seized with the full authority of the prior Board, we reject Intercollegiate's challenge to its constitutionality."). The Court stressed that the Copyright Royalty Judges' thorough de novo review and new written decision on remand was more than sufficient for that purpose. *See id.* at 123 n.5 ("Although we have focused on Intercollegiate's many criticisms of the scope of the review undertaken by the new Board, we do not mean to suggest that a review of similar scope (which was, in fact, quite expansive) was required to ensure the absence of an Appointments Clause problem on remand.").

Like the appellant in *Intercollegiate II*, Laccetti received an independent, de novo review of the administrative record and a final written decision by a validly constituted tribunal. After the *Free Enterprise Fund* decision, the Board had the ability, unaffected by the constitutional error corrected in that decision, to dismiss the proceedings against Laccetti if it wished. It chose not to do so. *See* JA__[Op.5-6, 10]. Rather, the hearing officer conducted a full evidentiary hearing while subject to proper oversight, and issued an initial decision. JA__[Op.4-5, 10]. The Board itself then conducted a de novo review of the hearing officer's findings, declined to dismiss the charges against Laccetti, and instead found him in violation of the Board's auditing standards and issued sanctions. JA__[Op.6, 10]. This "independent, de novo decision by a properly appointed panel" was more than adequate to obviate any taint from the constitutional error found by the Supreme Court in *Free Enterprise Fund*. *Intercollegiate II*, 796 F.3d at 124.

Laccetti suggests (Br. 36) that *Intercollegiate II* is distinguishable because the relevant officers in that case held a "second proceeding" to address the constitutional flaw, whereas he received only one. As already explained, however, the second proceeding was necessary in *Intercollegiate* only because the Copyright Royalty Judges were unconstitutionally insulated from presidential control at the time of the initial proceeding. Here, by contrast, Laccetti's entire hearing, and the Board's subsequent de novo review of it, was conducted after *Free Enterprise*

Fund and was free of the error that the Supreme Court there addressed. No second proceeding was necessary.

2. Although Laccetti does not dispute that the Board was validly structured at the time of his hearing, he nonetheless asserts that the sanctions against him must be dismissed because the Board was unconstitutionally structured at the time it investigated and initiated disciplinary proceedings against him. These initial actions, Laccetti contends, "tainted" the entire process and therefore require vacatur of all sanctions against him. Br. 29-33.

This Court, however, has repeatedly rejected such contentions. Laccetti received a decision on the merits from a validly constituted Board based on the Board's de novo evaluation of the administrative record. Nothing more was required. As this Court explained in *Intercollegiate II*, which rejected a nearly identical claim of incurable taint, any lingering constitutional error is cured "when—as here—a properly appointed official has the power to conduct an independent evaluation of the merits and does so." 796 F.3d at 117.

This Court's decision in *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), is particularly instructive. There, a notice of charges was filed by an invalidly appointed Director of the Office of Thrift Supervision. After the administrative enforcement action had proceeded for several years (including discovery and a hearing before an administrative law

judge), a new, validly appointed director issued a final order based on the administrative law judge's findings and recommendation. *Id.* at 204, 213. The final order, this Court held, "was necessarily an affirmation of the validity of the charges, and hence a 'ratification,' even though [the director] did not formally invoke the term." *Id.* at 213. Furthermore, the Court noted, to require another Director to "sign a new notice containing charges already found to be supported, not merely by probable cause, but by substantial evidence would do nothing but give the Bank the benefit of delay." *Id.* at 214. Accordingly, the Court found no error, and affirmed the validity of the final order. *Id.*

Here, as in *Doolin*, the decision to initiate the enforcement action was made by a constitutionally infirm entity, but the deficiency was corrected before the issuance of the final order. And here, as in *Doolin*, the new Board had full authority to dismiss the charges against the petitioner, but it declined to do so. Instead, it found Laccetti in violation of several auditing standards. JA__[Op.6]. That finding "was necessarily an affirmation of the validity of the charges" and remedied any infirmity in the commencement of the proceeding. *Doolin*, 139 F.3d at 213-14; *see also Combat Veterans*, 795 F.3d at 157-58 (explaining that the "ratification" of an initial decision to initiate an enforcement action through a "subsequent, valid . . . vote" on liability "is sufficient to remedy the earlier error"); *Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987) (holding that the

plaintiffs suffered no injury where a properly appointed official who had only been in office three days implemented a program that had been extensively planned by his improperly appointed predecessor).

Similarly, in *Federal Election Commission v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), the Court addressed an enforcement proceeding that the Federal Election Commission ("FEC") had commenced before this Court concluded that the agency's structure violated the separation of powers. The Court rejected the argument that the agency was required to re-start the enforcement proceeding after the constitutional error had been remedied. *Id.* at 707. The Court recognized that, "no matter what course was followed," "some effects" of the earlier constitutional defect would linger. *Id.* at 708-09. Nevertheless, the Court upheld the FEC's decision to ratify and maintain the existing enforcement proceeding. *Id.* at 709. It did so, moreover, "despite misgivings about whether the new FEC had engaged in a 'real fresh deliberation.'" *Doolin*, 139 F.3d at 213.

3. Laccetti's attempts to distinguish these and other decisions on various grounds are unpersuasive.

First, Laccetti argues that *Doolin* is inapplicable because, in his view, that case dealt with only a statutory violation subject to harmless error review, not an error of constitutional dimensions. But this Court has previously rejected an effort to distinguish *Doolin* on that basis. *See Intercollegiate II*, 796 F.3d at 119 n.3

(noting that "the new director could ratify the previous director's decision" regardless "whether the previous director was validly appointed under either the Vacancies Act or the Appointments Clause"). Furthermore, although the Court in *Doolin* referenced principles of harmless error, it did not rest its ruling on that ground. *See* 139 F.3d at 212 (noting that harmless error analysis "may mean" that irregularities in the institution of charges could be disregarded, but "[b]ecause the parties have not addressed the question, we will say no more"). Instead, the Court in *Doolin* expressly rested its holding on "principles of agency law, and in particular the doctrine of ratification." *Id.*; *see id.* at 213-14 (discussing the ratification of constitutional errors in *Legi-Tech*, 75 F.3d at 707-09 and *Andrade v. Regnery*, 824 F.2d at 1257).

Laccetti's attempt to distinguish *Legi-Tech* similarly misses the mark. He claims that here, unlike in *Legi-Tech*, "none of the Board's members that issued the final decision was in office when the Board began investigating Petitioner." Br. 35. But as this Court noted in rejecting the same contention in *Intercollegiate II*, Laccetti's argument "proves too much." 796 F.3d at 118-19. "It implies that the Board's determination would be less vulnerable" if the same Board members remained, though it seems unlikely that the petitioner "would regard those original [members] as more independent than their replacements." *Id.*

In sum, because the decision on review was issued by a validly constituted Board based on its independent review of the administrative record, the Commission correctly rejected Laccetti's arguments based on *Free Enterprise Fund*.

III. The Board members validly exercised the powers of their office.

The Commission properly rejected Laccetti's contention that the Board members could not validly exercise the powers of their office because they did not receive presidential commissions or take oaths of office. JA__[Op.24-30]. As the Commission explained, Laccetti forfeited these arguments by failing to present them to the Board. Having failed to give the Board an opportunity to correct or address the alleged deficiencies, Laccetti cannot seek relief from this Court on either ground now. In any event, neither a formal presidential commission nor the taking of an oath is an indispensable prerequisite for an otherwise validly appointed Board member to exercise the powers of his office.

A. The Commission properly found that Laccetti waived his commission and oath arguments.

The Court should decline to address Laccetti's commission and oath arguments because it is undisputed that neither argument was presented to the Board, as he was required to do. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the

course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 88-89, 90 (2006). This principle "allow[s] an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). This Court has repeatedly declined to address challenges to an agency's constitutional or jurisdictional authority that were not first raised before the agency. *See Nebraska v. EPA*, 331 F.3d 995, 997-98 (D.C. Cir. 2003) (declining to address constitutional challenges to an agency regulation which were not presented to the agency); *see also BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 479 (D.C. Cir. 2006) ("Even a defect in the jurisdiction of an agency, however, when not timely raised before that agency is forfeit."); *USAir, Inc. v. Dep't of Transp.*, 969 F.2d 1256, 1260 (D.C. Cir. 1992) (declining to address a challenge to the agency's authority to act when petitioners failed to timely raise the issue before the agency).

Under the Board's rules, Laccetti was required in his answer to the OIP to raise any affirmative legal defense he intended to raise in the enforcement proceeding. *See* PCAOB Rule 5421(c).[5] The argument that Laccetti now raises—

[5] "Unless otherwise directed by the hearing officer or the Board, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. . . . A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the

i.e., that the Board members could not exercise the powers of their office for lack of a commission or oath—is such a defense. *See Legi-Tech*, 75 F.3d at 707 (the "assertion that the FEC is unconstitutionally composed cannot be regarded as anything other than an affirmative defense against an enforcement proceeding" which "must be raised in the pleading"); *see also Canady v. SEC*, 230 F.3d 362, 364-65 (D.C. Cir. 2000) (declining to address an affirmative defense that the petitioner failed to raise in his pleadings). Although Laccetti raised other constitutional challenges to the Board's enforcement proceeding in his answer, he did not raise any objection concerning a commission or oath. JA__[Doc.10]. Nor did Laccetti raise either argument at any point prior to the Board's final determination, as he was required to do to satisfy the SEC's own exhaustion requirements. JA__[Op.24-25]; *see MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004) ("The Commission has frequently applied an exhaustion requirement in its review of disciplinary actions . . . [which] promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review.").

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answer. Any allegation not denied shall be deemed admitted." PCAOB Rule 5421(c).

If Laccetti had raised either objection before the Board, the Board could have addressed and potentially even remedied the alleged errors. We are informed, for example, that the Board members' failure to take an oath of office was inadvertent, and that this oversight has since been remedied. If Laccetti had timely raised his objection before the Board, the Board could have addressed that concern promptly, obviating any need for this Court's review. Likewise, the Board members could have requested, or asked the SEC to request on their behalf, formal commissions from the White House—or explained why, in their view, neither step was necessary. Laccetti now complains that there is no evidence in the record on these questions. *See* Br. 39 ("[T]here is no indication that the Board's members have [or have not] satisfied either the oath or the commission requirements."). The purpose of the rules requiring exhaustion of administrative remedies, however, is precisely to ensure that the record contains such information by the time it reaches this Court.

Even in this Court, Laccetti makes no attempt to justify his delay. He argues only that this Court has the discretion to consider otherwise waived, non-jurisdictional constitutional challenges. Br. 42 (citing *Freytag v. Commissioner*, 501 U.S. 868, 879 (1991)). But while it is true that courts may excuse the waiver of constitutional issues in "rare cases," this Court has expressly refused to do so where, as here, the petitioner has failed to provide any reasonable explanation for

the delay. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). The Court should decline to address arguments that Laccetti did not raise until after he had already lost his case before the Board. *See Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (discussing the importance of enforcing waiver and forfeiture rules where, as here, the litigant "remain[ed] silent about his objection and belatedly rais[ed] the error only if the case does not conclude in his favor").

B. Neither receiving a commission nor taking an oath is an indispensable condition precedent to performing the functions of a public office.

In any event, Laccetti's arguments rest on the faulty premise that an officer of the United States must both receive a commission and take an oath of office as a prerequisite to exercising any function of his office.

1. Contrary to Laccetti's argument, it is well settled that receipt of a commission is not an essential prerequisite for a valid appointment. The Constitution places a duty on the President to "Commission all the Officers of the United States." U.S. Const. art. II, § 3. In *Marbury v. Madison*, the Supreme Court rejected the contention that the receipt of such a commission was a necessary element of an officer's appointment. 5 U.S. (1 Cranch) 137 (1803). There, President John Adams had signed a commission to appoint William Marbury as a justice of the peace, and the seal of the United States had been affixed to the

commission, but the commission had never been delivered. The Court held receipt of the commission was not necessary for Marbury to perform the functions of the office. Instead, it was the public act of making the appointment that mattered. *Id.* at 156-67.

A signed and delivered presidential commission, *Marbury* explained, is evidence that an appointment has been completed, but a commission is not essential to establish that fact. *Id.* Rather, the Court reasoned, the valid completion of an appointment may also be evidenced by some other "open" and "unequivocal" act. *Id.*; *see also Dysart v. United States*, 369 F.3d 1303, 1311-13 (Fed. Cir. 2004) (explaining that the appointment of a rear admiral is complete on the transmission of an appointment letter on the President's behalf because "the granting of a commission is not always required for a Presidential appointment"); *cf. Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 26 C.I.T. 1025, 1031 (2002) (holding that no commission was necessary to complete the recess appointment of a Commissioner of the International Trade Commission); *Appointments to Office—Case of Lieutenant Coxe*, 4 Op. Att'y Gen. 217, 219-20 (1843) ("To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, *the commission issued being the evidence* that the purpose of appointment signified by the nomination has not been changed." (emphasis added)).

Marbury accordingly held that it is not the commission itself, but the "performance of such public act" of appointment that "create[s] the officer," and therefore "enable[s] him to perform the duties" of the office. 5 U.S. (1 Cranch) at 156. In the case of inferior officers not appointed by the President—like the members of the Board, who are appointed by the Securities and Exchange Commission—the evidence that an appointment has been made granting the officer authority to act will likely not come from the President himself. *Cf. id.* As in *Marbury*, however, the lack of a presidential commission is not an impediment to an otherwise lawfully appointed inferior officer's ability to perform the functions of his office. *See id*. So long as the Head of the appropriate Department performed the last open and unequivocal act required of the appointment, the officer may "perform the duties [of the office] without [a Presidential commission]." *Id.*

Laccetti's argument to the contrary (Br. 41-44) is based on misreadings of *United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1856), *Case of Franklin G. Adams*, 12 Op. Att'y Gen. 304, 306 (1867), and *Case of Lieutenant Coxe*, 4 Op. Att'y Gen. 217. *Le Baron*, like *Marbury*, actually states that "[t]he transmission of the commission to the officer is *not essential* to his investiture of the office." 50 U.S. (19 How.) at 78 (emphasis added). That the commission is merely evidence of an appointment is further supported by *Case of Lieutenant Coxe*, 4 Op. Att'y

Gen. at 120 ("[T]he commission issued being the evidence that the purpose of the appointment signified by the nomination has not been changed."). And *Case of Franklin G. Adams* addressed an entirely distinct scenario in which the President signed, but later revoked, a commission, thereby preventing the final appointment of an officer. 12 Op. Att'y Gen. 304.

In this case, there is no dispute that the members of the Board were appropriately appointed by the Commission and thereby empowered to exercise the functions of their office. It is the practice of the SEC to take a formal vote on the approval of a Board member as the last "open" and "unequivocal" act designating that person's appointment. *See* U.S. Secs. & Exch. Comm'n, Procedures for Appointment of a Member or Chairperson of the Public Company Accounting Oversight Board, *available at* https://go.usa.gov/xX4vD ("At the completion of the interview and evaluation process . . . the Chairman seeks a vote of the Commission to approve appointment of a candidate."). Although evidence of that vote is not in the record here—because Laccetti failed to raise this argument below—Laccetti does not contend that the Commission failed to formally approve the members of the Board who issued the decision in this case, nor does he suggest that there was any other deficiency in the appointment of the relevant Board officers. He challenges only the Board members' lack of a presidential

commission. As *Marbury* makes clear, the absence of such a commission does not affect the Board members' authority to exercise the functions of their office.

2. Laccetti's arguments (Br. 39-41) concerning the Constitution's "Oath or Affirmation" requirement, U.S. Const. art. VI, are likewise without merit. It is undisputed that the members of the Board are executive officers of the United States subject to the oath requirement of the Constitution. It does not follow, however, that the Board members' inadvertent failure to take that oath rendered them legally incapable of performing the functions of their office.

To the contrary, the Constitution indicates that officers, with the possible exception of the President, may validly exercise the powers of the offices to which they are appointed even before they have taken an oath. Unlike Article II, Section 1 of the Constitution, which explicitly requires the President to take an oath of office "[b]efore he enter[s] on the Execution of his Office," Article VI has no temporal requirement. And although the "first statute enacted by Congress was 'An Act to regulate the Time and Manner of administering certain Oaths,'" *Department of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1235 n.* (2015) (Alito, J., concurring), that Act expressly allowed some officers to take an oath up to one month after they had assumed office. Act of June 1, 1789, § 3, 1 Stat. 23, 23-24 ("And be it further enacted, [t]hat . . . all executive and judicial officers of the several States, who have been heretofore chosen or appointed, or who shall be

chosen or appointed before the first day of August next, and who shall then be in office, shall, *within one month thereafter*, take the same oath or affirmation." (emphasis added)).

Consequently, although taking the oath is a desirable and regular requirement of public officers, such an oath, like a presidential commission, "is not an indispensable criterion and the office may exist without it, for . . . the oath is a mere incident and constitutes no part of the office." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers*, bk. 1, ch.1, § 6 (1890); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 119, 2007 WL 1405459, at *36 (Apr. 16, 2007); *Vaccari v. Maxwell*, 28 F. Cas. 862, 864 (C.C.S.D.N.Y. 1855) ("Although the law is peremptory, that all custom-house officers shall be duly sworn or affirmed, before entering upon the duties of their offices, yet such provisions in respect to public officers have not been regarded by the courts as conditions precedent to their rightful authorization, or more than merely directory.").

Laccetti states no persuasive authority suggesting otherwise. He relies (Br. 40) on two Attorney General Opinions, *Representatives-Elect—Compensation*, 14 Op. Att'y Gen. 406, 408 (1874), and *Delegate to Congress—Government Contract*, 15 Op. Att'y Gen. 280, 281 (1877), for the proposition that members of the House of Representatives are not members of the House until they have taken an oath of

office. But the question addressed by the Attorney General in those cases was not whether Article VI forbids members of Congress from performing their duties as elected officials until they have taken an oath, but rather whether persons elected to Congress could be subject to rules prohibiting certain actions by members of Congress before the representative-elect had begun serving his term. In *Delegate to Congress–Government Contract*, for example, the Attorney General opined that a man who had been elected a delegate to the forty-fifth Congress was not barred by Article I, Section 6 of the Constitution from contracting with the United States because the forty-fifth Congress had not yet met, and that Congress, which "is the judge of its own elections," might not accept him as member when it finally did meet. 15 Op. Att'y Gen. at 281. Similarly, in *Representatives-Elect—Compensation*, the Attorney General opined that a man was not barred by Article I, Section 6 of the Constitution from drawing a salary from his employment as counsel for the United States until he took the oath of office as a representative. 14 Op. Att'y Gen. at 406. Further, the fact that the Attorney General found the taking of an oath to be significant evidence that the representatives' terms had begun within the meaning of Article I, Section 6 makes sense, given the historic practice of taking a statutorily mandated oath at the start of that term. *See, e.g.*, Act of June 1, 1789, § 2, 1 Stat. at 23–24 ("*And be it further enacted*, That at the first session of Congress after every general election of Representatives, the oath or affirmation

aforesaid, shall be administered by any one member of the House of Representatives to the Speaker; and by him to all members present . . . and to the members who shall afterwards appear, previous to taking their seats.").

Laccetti also highlights (Br. 40) the Supreme Court's statement in *Glavey v. United States*, 182 U.S. 595 (1901), that the plaintiff's appointment in that case was complete "[a]fter taking the oath, evidencing thereby his acceptance of the appointment," such that he was "entitled to proceed in the execution of the duties of his office." *Id*. at 604-05. But that statement simply reflects the facts of *Glavey*, in which the Secretary of the Treasury sent the plaintiff a letter appointing him to the position of inspector of steam vessels and specifying that the appointment was "to take effect from date of oath." *Id.* at 600 (quoting Secretary's letter). Even on its own terms, moreover, the Court's characterization of the oath in *Glavey* as simply "evidencing" the acceptance of an appointment, *id.* at 604-05, does not support Laccetti's contention that an oath is an inseparable aspect of the appointment *itself*. Just as a presidential commitment evidences an appointment, yet a valid appointment can be evidenced by other means, taking an oath may evidence the acceptance of an office, but the same acceptance can be expressed in other ways—for example, by accepting a salary and performing the functions of the office under the terms of the governing statute, as the members of the Board have done.

CONCLUSION

The Commission's order should be affirmed.

Respectfully submitted,

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March 31, 2017

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,943 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally-spaced, 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Service on petitioners was accomplished on the same date through the CM/ECF system.

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