IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Case No. 1:17-cv-00497 **Oral Argument Requested**

BRIEF OF FHFA DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN REPLY SUPPORTING FHFA DEFENDANTS' MOTION TO DISMISS
(ORAL ARGUMENT REQUESTED)

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Plaintiffs' opposition to dismissal and their motion for summary judgment fail to overcome the fundamental jurisdictional defects with their claims, much less establish that Plaintiffs would be entitled to summary judgment on the merits.

With regard to standing, Plaintiffs essentially take the position that traceability can be presumed and redressability is automatic in structural constitutional challenges. But that is not the law. Those core standing requirements apply just as much to Plaintiffs as to any other litigant.

For the merits of their removal-restrictions claim, Plaintiffs rely almost entirely on a single vacated D.C. Circuit panel decision. They ignore that every other court to have addressed the issue squarely rejected the notion that there is any constitutional problem with an agency having a single director removable for cause.

Plaintiffs try to resuscitate their novel claim challenging the length of Mr. DeMarco's service as Acting Director by extending limitations in the Recess Appointments Clause to him, even though all parties agree Mr. DeMarco was not a recess appointee. And they attempt to add a new claim that the statute never allowed the President to designate Mr. DeMarco as Acting Director in the first place. These arguments have no support and reflect that Plaintiffs are simply searching for a claim that might fit. Nor do Plaintiffs offer any authority for their nondelegation claims, which simply convey disagreement with the D.C. Circuit's *Perry Capital* decision rejecting prior challenges to the Third Amendment.

FHFA incorporates the arguments set forth in the Treasury Department's concurrently filed brief that Plaintiffs' claims are barred by claim preclusion and because FHFA has succeeded to claims by shareholders of the Enterprises. The Court should grant FHFA's motion to dismiss and deny Plaintiffs' motion for summary judgment.

I. PLAINTIFFS' CLAIMS CHALLENGING FHFA'S STRUCTURE ARE WITHOUT MERIT (COUNTS I AND II)

A. Plaintiffs Lack Standing

1. Plaintiffs' Injury Is Not Traceable to Statutory Removal Protection

Plaintiffs' alleged injury stems from an action by an Acting Director to whom the "for cause" protection from Presidential removal they challenge did not apply. Plaintiffs allege, moreover, that FHFA's contractual counterparty, the Treasury Department—which is indisputably under plenary Presidential control—favored the Third Amendment. As a result, Plaintiffs' injury is not traceable to the removal protection they claim is unconstitutional.

a. Plaintiffs do not dispute that Mr. DeMarco was designated to act as Director under 12 U.S.C. § 4512(f), which, unlike the separate provision covering Senate-confirmed Directors, does not contain any for-cause protection from removal without cause. Plaintiffs ask the Court to adopt an "inference . . . that Congress intended for the acting Director to enjoy the Director's removal protections." ECF No. 32, PageID.884. But "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Vander Boeghe v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Plaintiffs rely on *Wiener v. United States*, 357 U.S. 349 (1958), in which a War Claims Commissioner appointed by the President and confirmed by the Senate to serve for a term of years was deemed to have removal protection, notwithstanding the lack of an express provision in the statute, because of the "adjudicatory" functions of the Commission. *See id.* at 356. However, the situations are not comparable: FHFA is not a primarily quasi-judicial body, and Mr. DeMarco was temporarily designated to perform the functions of the Director rather than

permanently appointed and confirmed by the Senate like the Commissioner in *Wiener*. Most importantly, the statute in *Wiener* did not deliberately omit for-cause removal language in the relevant provision, while including such language in other, inapplicable provisions.[1]

Plaintiffs contend that regardless of whether Mr. DeMarco had statutory protection from removal, their injury is still traceable to that statute because Mr. DeMarco's predecessor (Mr. Lockhart) and successor (Mr. Watt) each took actions that "resulted in the nullification of Plaintiffs' economic rights." ECF No. 32, PageID.885. However, Plaintiffs identify no concrete harm separable from the Third Amendment executed by Mr. DeMarco. The specific injury Plaintiffs actually allege in this case flows from the Third Amendment, not from the initial appointment of the Conservator by Mr. Lockhart in 2008. Mr. Watt's declaration of dividends since 2014 likewise does not cause Plaintiffs new or separate injury because those dividends flow from the terms of the Third Amendment executed by Mr. DeMarco. By the Complaint's own description, the agreements define when dividends are to be paid and how the amount of the dividend is to be calculated, and if such a dividend is not made, the amount is simply added to Treasury's liquidation preference. Am. Compl., ECF No. 17, PageID.214 ¶ 47, 233 ¶ 84. Plaintiffs make no claim that their alleged injury would be lessened if Mr. Watt declined to declare a dividend and Treasury's liquidation preference was increased by the same amount instead.

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[1] The Court should disregard the news stories that Plaintiffs cite as reflecting "[t]he Administration's legal analysis" that the Acting Director had statutory protection from removal. ECF No. 32, PageID.884-85. When "called upon to judge the constitutionality of an Act of Congress—the gravest and most delicate duty that this Court is called upon to perform," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted), the Court must go by the text Congress enacted, not by what *Politico* or other media outlets report.

b. Plaintiffs argue that the Administration's and Treasury's support for the Third Amendment is irrelevant because standing "cannot be defeated by speculation about what decision the government might have reached had it followed the procedures the Constitution requires." ECF No. 32, PageID.882. But it takes no speculation to understand that greater Administration control over the FHFA would not make FHFA more likely to *diverge* from the Administration over whether to enter into the Third Amendment. The problem is not a lack of "precise proof of what [the Conservator]'s policies might have been in that counterfactual world," *Free Enter. Fund. v. PCAOB*, 561 U.S. 477, 512 n.12 (2010), it is that the very notion of a different outcome collapses under Plaintiffs' own theory of the case. Plaintiffs have no answer to the simple observation that if the President did not approve of the Third Amendment, it was always in his power to direct Treasury not to enter into it.

Plaintiffs rely on *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). But that case not only confirms that the traceability requirement applies fully to separation-of-powers claims, it also shows why Plaintiffs here do *not* have standing. In *Airports Authority*, local residents challenged the constitutionality of an airport board of review that favored airport expansion and had veto power over the airport's plans. Although the Court held those plaintiffs had standing, it did so only after specifically concluding that injury in the form of "increased noise, pollution, and danger of accidents" from airport expansion was "'fairly traceable' to the Board of Review's veto power because knowledge that the master plan was subject to the veto power undoubtedly influenced MWAA's Board of Directors when it drew up the plan." *Id.* at 264-65. Here, Plaintiffs have provided no comparable explanation of how any protection the FHFA Acting Director had from

being removed by the Administration could have "influenced" him to agree to the Third Amendment with the Administration.[2]

2. Plaintiffs Do Not Satisfy the Redressability Requirement

Plaintiffs cannot satisfy redressability either, because success on Plaintiffs' constitutional challenge to the for-cause removal provision would not provide a basis for *invalidating* the Third Amendment. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

a. As FHFA demonstrated in its motion to dismiss, when a restriction on the President's removal power is determined to be unconstitutional, it does not follow that past, completed actions by the agency while that restriction was in effect are rendered invalid. ECF No. 25, PageID.402-403. Plaintiffs contend that any past action by an agency "structured in violation of the separation of powers" is "*ultra vires* and must be vacated." ECF No. 32, PageID.890. But Plaintiffs' cases simply invalidated criminal convictions or other quasi-judicial proceedings on direct appeal because the adjudicator was unconstitutionally appointed and lacked the power to

[2] Plaintiffs also maintain that regardless of whether the President could remove Mr. DeMarco at will or only for cause, he was nevertheless "prevented . . . from using any removal power he had to effect a policy change at the agency" because under statutory provisions not challenged in the Complaint, Mr. DeMarco could only have been replaced by another Deputy Director. ECF No. 32, PageID.885-886 (citing 12 U.S.C. § 4512(c)-(f)). However, Plaintiffs cannot amend to add new claims via their briefs. *See, e.g.*, *McCarrick v. Lapeer Cmty. Sch.*, 2012 WL 3600377, at *4 (E.D. Mich. Aug. 21, 2012). In any event, this new argument simply further undercuts traceability as to the claim Plaintiffs did make in the Complaint. If the agency was "unconstitutionally insulate[d]" (ECF No. 32, PageID.886) irrespective of the applicability of the challenged removal restriction, then Plaintiffs' injury is not traceable to that removal restriction.

act.[3] In contrast to an invalid appointment, protection from removal—even if it exceeds constitutional limits—does not oust an official of the power to hold the office and act. *See Free Enter. Fund*, 561 U.S. at 508-09. At a minimum, no case suggests someone can wait nearly five years after an official's action, then demand retroactive invalidation through a freestanding lawsuit just because the President's ability to remove that official was qualified at the time of the action.

Plaintiffs attempt to distinguish *Free Enterprise Fund* by suggesting that "vacatur was not needed for the constitutionally restructured agencies to decide whether to continue investigating." ECF No. 32 at 11, PageID.891. But no trace of any such rationale appears in the Court's opinion. The plaintiffs in *Free Enterprise Fund*, like Plaintiffs here, argued that the removal restrictions in that case meant that "the Board and all power and authority exercised by it violate the Constitution," and accordingly pressed for "an order and judgment enjoining the Board and its Members from taking any further action against Plaintiff Beckstead and Watts and nullifying and voiding any prior adverse action against Beckstead and Watts." Ex. 1, at 2, 23 (prayer for relief in *Free Enterprise Fund* complaint); *compare* Am. Compl., ECF No. 17, PageID.271 (prayer for "an order and judgment" "[e]njoining Defendants . . . [from] taking any action whatsoever pursuant to the third amendment" and [v]acating and setting aside the third

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[3] *See*, *e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014) (NLRB adjudicatory decisions rendered by a board consisting mostly of members held to be invalidly appointed and invalidly serving); *Nguyen v. United States*, 539 U.S. 69 (2003) (criminal appeal heard by panel that included non-Article III judge); *Ryder v. United States*, 515 U.S. 177 (1995) (criminal appeal heard by invalidly appointed military judges); *IBC, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012) (copyright board members appointed in violation of Appointments Clause); *cf. Kuretski v. Comm'r*, 755 F.3d 929 (D.C. Cir. 2014) (indicating that a challenge to the President's *power* to remove Tax Court judges as violating Article III's life tenure requirement, if successful, could be a basis for invalidating a ruling of the Tax Court on direct appeal of that ruling, but proceeding to reject that claim).

amendment"). The Supreme Court disagreed and rejected the requested relief, leaving the PCAOB's prior actions intact. 561 U.S. at 508-09. As the Court explained, the relief for unconstitutional removal restrictions simply "affects the conditions under which those officers might someday be removed." *Id.* at 508. So too here.[4]

b. Even if success on a removal-restrictions claim could void agency action in some other context, it would not void the Third Amendment because FHFA was not exercising the executive power that Article II vests in the President when FHFA entered into that contract as Conservator. ECF No. 25, PageID.403-404. Indeed, courts have frequently held in a variety of contexts that government agencies do not act as the Government at all when they step into the shoes of financial institutions as conservators or receivers. *Id.* (citing cases).

Plaintiffs offer only a half-response on this issue. They argue at length that FHFA as Conservator acted as the federal government when it entered into the Third Amendment. ECF No. 32, PageID.887-890. That is not so, but more importantly, nowhere do Plaintiffs grapple with the fact that FHFA as Conservator was not exercising *the type of executive powers that demand Presidential supervision* when it entered into the Third Amendment.

Plaintiffs rely on a Federal Circuit case holding that the FDIC as receiver could be sued for a Fifth Amendment taking, *Slattery v. United States*, 583 F.3d 800 (Fed. Cir. 2009). But

[4] Plaintiffs argue that in addition to vacatur of the Third Amendment, they "seek an order declaring that FHFA may no longer operate as an independent agency." ECF No. 32, PageID.891. However, such an order would not redress their alleged injury arising from the Third Amendment, and Plaintiffs do not identify any current or future FHFA action unconnected with the Third Amendment that causes them concrete injury. Plaintiffs rely on a clip from an Internet video of remarks by Mr. Watt to the effect that shareholder interests are not his utmost priority, but do not seriously contend such commentary gives them any "concrete," "particularized," and "actual or imminent" injury as necessary for standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs have not asserted a takings claim here, and they concede that "whether a federal conservator 'should be treated as the United States depends on the context.'" ECF No. 32, PageID.887 (quoting *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 748 (D.C. Cir. 1997)). Here, the relevant context is a claim of interference with the President's performance of his executive duties under Article II of the Constitution; nothing in any case cited by Plaintiffs suggests that Article II requires the President to have control and supervision over a conservator who steps into the shoes of a financial institution. And contrary to Plaintiffs' judicial estoppel argument, promoting the public interest does not necessarily make the Conservator a governmental actor, let alone an executive one.

Plaintiffs also insist that they are challenging "a series of actions by FHFA, some of which the agency took in its *regulatory* capacity." ECF No. 32, PageID.886. Specifically, Plaintiffs explain that FHFA's 2008 action as regulator placing the Enterprises in conservatorship was "in violation of the separation of powers" and that all of "its subsequent decisions as conservator . . . are likewise invalid." *Id.* But Plaintiffs cite no authority for this farfetched domino theory of invalidation. As already discussed, *Free Enterprise Fund* repudiated the notion that removal restrictions mean the agency "and all power and authority exercised by it violate the Constitution" and left the PCAOB's past actions intact even as it invalidated the unconstitutional provisions in that case. 561 U.S. at 508-09 (internal quotation marks). Plaintiffs' argument that ongoing dividend payments are subject to regulatory approval fails to establish redressability because, as discussed above, the result of withholding regulatory approval of a dividend would simply be to add to Treasury's liquidation preference. *See supra* at 3. Plaintiffs do not claim that distinction affects their alleged injury, which, after all, arises from the very existence of the Third Amendment entered into by the Conservator.

B. FHFA's Structure Is Constitutional

Plaintiffs' request for summary judgment on Counts I and II rests by and large on a single authority, cited far more times than any other: the split panel decision of the D.C. Circuit in *PHH Corp. v. CFPB*, 839 F.3d 1 (2016). As Plaintiffs concede, however, the full D.C. Circuit vacated the panel judgment in *PHH* and reheard the case *en banc* in May. Meanwhile, the D.C. Circuit itself is not treating the panel opinion as having any force. *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131-32 (D.C. Cir. 2017). There is no reason for this Court to give it any greater weight.

More importantly, Plaintiffs do not even acknowledge, much less confront, the wall of precedent that stands against them. Plaintiffs do not grapple with the reasoning of the Texas court that rejected the very same claim by other shareholders. *Collins v. FHFA*, 254 F. Supp. 3d 841 (S.D. Tex. 2017), *appeal docketed*, No. 17-20364 (5th Cir.). Nor do they even recognize the existence of the many cases that have rejected the same claim as brought against the Consumer Financial Protection Bureau, which also has a single director with for-cause removal protection. *See* ECF No. 25, PageID.406 (providing citations).

Other than the vacated *PHH* panel opinion, the only case Plaintiffs cite that found removal restrictions unconstitutional is *Free Enterprise Fund*. However, the outcome in *Free Enterprise Fund* is distinguishable from this case, and its reasoning supports the constitutionality of FHFA's structure (as well as undercutting Plaintiffs' standing, *see supra* at 6-7). The Court addressed a unique agency structure giving members of the PCAOB two layers of removal protection: the PCAOB members could only be removed by the SEC only for cause, and the SEC commissioners in turn could only be removed by the President for good cause. *Free Enter. Fund*, 561 U.S. at 486-87. The Court held that this unusual structure was unconstitutional because "[t]he added layer of tenure protection *makes a difference*." *Id.* at 495 (emphasis added).

In particular, with just one layer (*i.e.*, only the SEC commissioners protected from removal), "the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does." *Id.* "The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does." *Id.* at 495-96. However, "[a] second level of tenure protection *changes the nature* of the President's review" and "does not merely add to the Board's independence, *but transforms it*." *Id.* at 496 (emphases added). "Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board." *Id.*

Here, in contrast to the double removal restrictions in *Free Enterprise Fund*, FHFA's leadership by a single Director rather than a multi-member board does not "make a difference" to the President's supervision of FHFA, much less "change the nature" of that review or "transform" it. As FHFA showed in its opening brief and numerous courts have held, the President's degree of control over a single individual with removal protection is no less than over a board of multiple individuals with removal protection. ECF No. 25, PageID.407-408.

Plaintiffs speculate that a President might have more influence over a multi-member board that had staggered terms and a mandatory bipartisan composition. But that depends on those particular add-on features, not anything inherent in leadership being shared by multiple individuals. And Plaintiffs ignore important countervailing effects: staggered terms may well *impede* control by forcing the President's chosen appointee to share power with other members aligned with the previous administration. Bipartisanship both forces the President to nominate members from the opposition party and guarantees that opposition party's permanent presence on the board. *See CFPB v. Navient Corp.*, 2017 WL 3380530, at *17 (M.D. Pa. Aug. 4, 2017)

(observing that single-head structure gives President more control "because the appointee, and the appointee alone, now heads the agency"); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376-77 (2001) ("[T]he gap between the agency and the President almost inexorably widens" when "insulation from presidential removal power combines . . . with . . . multiple agency heads of diverse parties serving staggered terms.").

To be sure, depending on particular facts, a multi-member board structure might be more conducive to Presidential supervision in some situations, while a single agency head is preferable in others. *See CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 974 (C.D. Cal. 2017) (observing that "there are many potentially competing trade-offs and no empirical evidence that establishes the superiority" of either structure), *appeal docketed and stay granted*, No. 17-55721 (9th Cir.). But Plaintiffs have not come close to carrying their burden to establish that Presidential control over an agency is necessarily or inherently diminished when one individual, rather than several, leads an agency. These are policy choices for Congress, not dictated by Article II of the Constitution.

Plaintiffs also contend that "FHFA's structure finds no support in historical precedent." ECF No. 33, PageID.908. That argument is misguided because even if there were no historical precedents at all, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989). But it is also wrong. In addition to the examples conceded by Plaintiffs' brief, Congress created the Office of the Comptroller of the Currency as an independent agency with a single head over 150 years ago, well before the advent of independent multi-member commissions. The Comptroller holds office "for a term of five years unless sooner removed by the President, *upon reasons* to be communicated by him to the Senate," a precondition not substantively distinguishable from

cause. 12 U.S.C. § 2 (emphasis added).[5] Congress did not violate any constitutional stricture by following this time-honored model when it created FHFA.

II. PLAINTIFFS' APPOINTMENTS CLAUSE CLAIM IS WITHOUT MERIT (COUNT III)

A. Count III is Precluded by the De Facto Officer Doctrine

As established in FHFA's motion to dismiss, Count III is a textbook example of a claim suited for application of the *de facto* officer doctrine, which insulates agency action against stale attacks on the ground that the officers taking the action lacked authority. ECF No. 25, PageID.416-418. Plaintiffs waited nearly five years to make any claim that the Third Amendment was invalid because Mr. DeMarco stayed Acting Director too long. That is fatal because challenges to officers' authority generally must be asserted "at or around the time that the challenged government action is taken." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015), *aff'd on other grounds*, 137 S. Ct. 929 (2017).

Plaintiffs responded that the *de facto* officer doctrine is "ancient" and applies only to "merely technical" claims, not constitutional claims. ECF No. 32, PageID.896-897. On the contrary, "the Supreme Court recognized the doctrine as recently as 2003." *Hooks v. Remington Lodging & Hosp., LLC*, 8 F. Supp. 3d 1178, 1189 (D. Alaska 2014) (citing *Nguyen v. United States*, 539 U.S. 69, 72 (2003)). In *Nguyen*, the Supreme Court reaffirmed that "[t]he *de facto* officer doctrine, we have explained, 'confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient.'" 539 U.S. at 77 (quoting *Ryder v. United States*,

[5] *See Case of Dist. Atty. of U.S.*, 7 F. Cas. 731, 737 (E.D. Pa. 1868) (confirming this reading); *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 713 & n.27 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); 12 U.S.C. § 1(b)(1) (further confirming OCC's independence by barring the

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515 U.S. 177, 180 (1995)). While the Court held that the doctrine did not bar the particular claim in *Nguyen*—that the Ninth Circuit panel from which a certiorari petition was taken was invalid for including a non-Article III judge—the Court said nothing to cast doubt on the doctrine's overall continued vitality.

Nor is there any doubt that the *de facto* officer doctrine applies fully to constitutional challenges. *See Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (holding that the Federal Election Commission as then constituted violated the Appointments Clause but nevertheless shielding "past acts" of the FEC from invalidation); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (observing that "[i]n *Buckley*, the Supreme Court accorded *de facto* validity to all FEC proceedings and allowed the FEC to continue to function" despite "severe" constitutional violation).

Plaintiffs' cases are not to the contrary. In those cases, appellate courts simply held that the *de facto* officer doctrine did not bar them from considering arguments (some constitutional, some statutory) that lower court judges were improperly appointed or sitting and therefore lacked jurisdiction in the case on appeal, regardless of whether the issue was raised in the lower court. *Nguyen*, 539 U.S. at 77; *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality); *Wrenn v. Dist. of Columbia*, 808 F.3d 81, 84 (D.C. Cir. 2015). That appellate courts consider jurisdictional issues and sometimes excuse the appellant's failure to raise the issue in a lower court does not suggest constitutional claims like Count III in this original action are exempt from the *de facto* officer doctrine.

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Secretary of Treasury from intervening in OCC matters); 44 U.S.C. § 3502(5) (classifying OCC as independent).

In fact, Plaintiffs' cases are fully consistent with the requirement *de facto* officer doctrine's requirement that challenges to an officer's authority be made "at or around the time that the challenged government action is taken." *SW Gen.*, 796 F.3d at 81. Where, as in Plaintiffs' cases, the challenged action is a judicial decision, an appeal within 60 days or a petition for certiorari within 90 days meets that requirement. These cases provide no support for entertaining a collateral attack nearly *five years* after the action challenged—and only after legion other cases challenging the Third Amendment, in which this claim could have been brought but was held back, have failed. *Cf. Abbott v. Smolenski*, 2013 WL 3806654, at *1 (W.D. Mich. July 22, 2013) (applying *de facto* officer doctrine to bar habeas claim attacking trial judge's capacity to preside over trial). It is irrelevant that plaintiffs sued within a general statute of limitations. The *de facto* officer doctrine, which is animated by the unique concerns raised by claims retroactively attacking government officials' authority, is independent of and not subsumed by the statute of limitations.

B. Count III Raises Non-Justiciable Political Questions

Plaintiffs' Count III asserts that Mr. DeMarco served as Acting Director longer than "reasonable under the circumstances," which they claim was unconstitutional. Am. Compl., ECF No. 17, PageID.264 ¶¶ 157, 158. That claim raises non-justiciable political questions, because the reasonableness of Mr. DeMarco's tenure cannot be separated from the reasonableness of the time the President and Senate took to appoint and confirm a permanent Director. ECF No. 25, PageID.414-416.

Plaintiffs do not seriously contend that the Court is in a position to judge the President's and Senate's efficiency in discharging their constitutionally assigned appointment functions. However, they argue that their claim does not necessarily require addressing those issues. That is wrong; the non-justiciable issues are unavoidably implicated.

1. Plaintiffs first argue that the Court can avoid considering reasonableness by dispensing with the "reasonable under the circumstances" standard altogether. Plaintiffs urge the Court to hold instead that the Recess Appointments Clause "set[s]" a *per se* "two-year ceiling" on acting official service. ECF No. 32, PageID.894. The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. Plaintiffs equate "the End of their next Session" with a "two-year ceiling" because under the Twentieth Amendment, which addresses different subject matter and was ratified some 144 years later, Congress convenes at least once a year.

As FHFA previously pointed out, the Recess Appointments Clause is simply irrelevant because Mr. DeMarco was not appointed by the President during a recess of the Senate. ECF No. 25, PageID.413 n.7. When the President does not use the Recess Appointments Clause, the limitations on the recess appointment power do not apply. Mr. DeMarco's ability to serve was no more terminated by the "End of [the Senate's] next Session" limitation than his designation in the first place was dependent on the existence of a "Recess of the Senate."

Plaintiffs concede that Mr. DeMarco was not a recess appointee, but theorize that "the Recess Appointments Clause reflects a constitutional judgment that . . . officers commissioned without Senate confirmation ought to serve just long enough to give the President a full session of the Senate in which to attempt to secure confirmation for a regular appointment." ECF No. 33, PageID.919 n.4. However, Plaintiffs offer not a single authority—not a case, not a commentator, not even a law review article—supporting this specious mix-and-match theory of constitutional interpretation. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), defined what

qualifies as a "recess" activating the President's recess appointment power, but said nothing about extending limitations on that power to wholly different contexts.

Indeed, the Department of Justice's Office of Legal Counsel has specifically rejected Plaintiffs' theory. As OLC explained, the suggestion that "the End of [the Senate's] next Session" bounds the permissible tenure of an acting officer "ignore[s] the differences between holding an office and acting in it. An acting official does not hold the office, but only perform[s] the functions and duties of the office." *Designation of Acting Solicitor of Labor*, 2002 WL 34461082, at *3 (O.L.C. Nov. 15, 2002) (internal quotation marks omitted). An acting official "is not 'appointed' to the office, but only direct[ed] or authorized to discharge its functions and duties, and he thus receives the pay of his permanent position, not of the office in which he acts," whereas a recess appointee "is appointed by one of the methods specified in the Constitution itself; he holds the office; and he receives its pay." *Id.* (internal quotation marks and citations omitted). Because "subordinate officer[s] . . . charged with the performance of the duty of the superior for a limited time," *United States v. Eaton*, 169 U.S. 331, 343 (1898), do not actually hold the office or have the same status as appointees, there is no basis for extending the Recess Appointments Clause to them by analogy.

2. Plaintiffs also suggest that even under a "reasonable under the circumstances" standard, the Court "need not decide whether the President waited too long to nominate a successor." ECF No. 32, PageID.895. But that position, which is advanced in Plaintiffs' response to FHFA's motion to dismiss, cannot be squared with Plaintiffs' Complaint and motion for summary judgment, which insist that a temporal limit is needed to prevent the President from "abus[ing] the appointments power" by withholding a regular nomination and thereby "frustrating the Senate's constitutional role," Am. Compl., ECF No. 17, PageID.263 ¶ 155;

accuse President Obama of making "little effort to replace Mr. DeMarco," *id.* at PageID.265, ¶ 158; speculate about what "factors might have influenced President Obama's choice," ECF No. 33, PageID.922; and assume there were no limits on his "time or attention to devote" to the selection of an FHFA Director nominee, *id.*

Of course Plaintiffs cannot avoid dismissal by arguing that the very factors they ask the Court to rely on in granting them summary judgment are irrelevant. Nor can they win summary judgment by making conclusory assertions about the President's efforts that would be impossible to test without intruding on non-justiciable and privileged matters.

Moreover, the very OLC opinions Plaintiffs rely upon for the "reasonable" standard treat the time for acting official service as directly linked with the "reasonable time" for appointment of a successor. For example, Plaintiffs cite a statement in *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287 (1977), that the tenure of an acting officer "'may not continue indefinitely.'" ECF No. 33, PageID.920. But that phrase was immediately followed by the explanation that "[w]ithin a reasonable time after the occurrence of a vacancy in the office of Director, the President should submit a nomination to the Senate." *Id.*

Plaintiffs' position that how long an Acting Director can reasonably serve is unrelated to how long it takes to appoint and confirm a permanent Director is based on their refusal to accept the premise that an acting official is needed during a vacancy. But as they concede, HERA provides that "the President *shall* designate [a Deputy Director] to serve as acting Director *until* . . . the appointment of a successor." 12 U.S.C. § 4512(f) (emphasis added). Whether Mr. DeMarco served longer than reasonable under the circumstances is thus intimately bound up with whether the President and Senate unduly delayed or acted reasonably in their appointment efforts—matters that are not suitable for adjudication in this proceeding.

3. Plaintiffs also insist that "[c]ourts have long adjudicated similar challenges under the Appointments Clause" even though constitutional lines were "far from clear." ECF No. 32, PageID.894; *see*, *e.g*. *Noel Canning*, 134 S. Ct. 2550 (deciding minimum duration for a Senate recess to trigger recess appointment power). But the political questions in this case do not stem from difficult line-drawing problems or durational issues. Rather, the fundamental problem is that testing the reasonableness of the President's and Senate's nomination and confirmation efforts in a particular situation would not be judicially manageable.

Plaintiffs do not seriously contend that it would be appropriate to subpoena, demand documents from, or examine the former President, then-Members of the Senate Banking Committee, or their respective staffs about their appointment processes. No comparable factual inquiry into the President's and Senate's performance of their constitutionally assigned duties was necessary to resolve the issues before the Court in *Noel Canning* and the other supposedly "similar" Appointments Clause cases Plaintiffs rely on. The Court should leave matters of senior government personnel selection and appointment with the political branches, where they have been for the last 220 years.

C. Count III Is Without Merit

If the Court finds Count III not barred by the *de facto* officer doctrine or non-justiciable political questions, it should hold that the claim has no legal or factual merit in any event. No court has ever held that an acting official's service was unconstitutional because of its duration, let alone invalidated long past agency action on that basis. Plaintiffs rely on *Eaton*'s description of acting officers as being "charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions." 169 U.S. at 343. But that descriptive statement of an acting official's situation was never intended to create a new implied cause of action in which courts would set and enforce specific durational limits on acting officers' tenure.

The Court should reject out of hand Plaintiffs' argument for a *per se* two-year ceiling based on the Recess Appointments Clause. As established above, there is no tenable basis for imposing a durational limitation derived from the Recess Appointments Clause on individuals who were not appointed using that power. *See supra* at 15-16.

The Court should also reject the alternative "reasonable under the circumstances" test proposed by Plaintiffs. Plaintiffs admit that test is derived not from any constitutional text or case law, but entirely from two OLC opinions. The relevant portions of those opinions interpreted statutory language addressing OMB's governance, not the Constitution. *See Status of the Acting Director*, 1 Op. O.L.C. at 289-90 ("In our view, it is implicit *in 31 U.S.C. § 16 (Supp. V 1975)*, that a Deputy Director may not properly serve indefinitely as Acting Director. . . . [T]he tenure of an Acting Director should not continue beyond a reasonable time." (emphasis added)). Those opinions, moreover, were designed to provide legal and policy advice to the Executive as it makes personnel decisions, not establish a new cause of action for litigants to challenge past government actions.

Indeed, to create such an indeterminate cause of action would sow profound instability and unpredictability. Because no one could know in advance what duration might be deemed "reasonable" under a particular set of "circumstances," practically every action by an acting government official who served for more than a short time would be under a cloud and susceptible to opportunistic litigation.

If this Court nevertheless recognizes Plaintiffs' proposed new cause of action and adopts their "reasonable under the circumstances" standard as a constitutional imperative, it should find that Plaintiffs have not met their burden of showing that Mr. DeMarco's tenure as Acting Director as of the time of the Third Amendment was unreasonable. As FHFA has explained, that

amount of time is comparable with other acting heads of important agencies, the President submitted two nominations during Mr. DeMarco's tenure, and the President faced major structural challenges in connection with both of those nominations. ECF No. 25, PageID.418-420. Plaintiffs dispute none of these dispositive facts.

As detailed in FHFA's motion to dismiss, acting officials have often headed major agencies for comparable periods in a variety of contexts. For instance:

- The Social Security Administration, another independent agency, had one Acting Administrator from February 2013 to January 2017, and has had another for approximately the last ten months. Soc. Sec. Comm'rs, Soc. Sec. Admin., https://www.ssa.gov/history/commissioners.html (last visited Nov. 6, 2017).
- The Centers for Medicare and Medicaid Services had an Acting Administrator from October 2006 to July 2010 and again from February 2015 to March 2017. CMS, Adm'r Tenure Dates & Biographies 1965-2015 (July 2015), https://www.cms.gov/About-CMS/Agency-Information/History/Downloads/Administrator-Tenure-Dates-and-Biographies-1965-—-2015.pdf; CMS, CMS Leadership, https://www.cms.gov/About-CMS/Leadership/index.html (last visited Nov. 6, 2017).[6]
- Acting Comptrollers of the Currency served from August 2010 to April 2012, February 1992 to April 1993, and numerous other intermittent periods since the OCC's formation in 1863. Past Comptrollers of the Currency, OCC, https://www.occ.gov/about/who-we-are/leadership/past-comptrollers/index-past-comptrollers.html (last visited Nov. 6, 2017).

Plaintiffs brush off such examples as "modern practice" that carries "little to no weight" in the face of supposed "textual, structural, and longstanding doctrinal support" for the proposition that acting officials "may serve only for a limited time." ECF No. 33, PageID.923-24. But even if a claim never before accepted by a court could be characterized as having "longstanding" support, these examples demonstrate that service by acting officials for periods of years in appropriate circumstances is widely accepted and not seen as violating any "limited

[6] Since its inception in 2001, CMS has been led by an acting administrator almost as often as by a permanent one (approximately 90 out of 196 months). FHFA's opening brief mistakenly stated that CMS has had an acting administrator more often than a permanent one.

time" or "reasonableness" requirement. Plaintiffs cannot simply ignore the data points that are inconvenient to them.

Plaintiffs also concede both that "whether the President has sent a nomination to the Senate" is a key factor, and that the President in fact sent *two* nominations to the Senate during Mr. DeMarco's service as Acting Director. ECF No. 33, PageID.920. Plaintiffs appear to consider the first nomination irrelevant because it was rejected quickly. But far from helping their position, the speedy rejection of a qualified nominee only serves to show the intractable gridlock the President faced. To the extent Plaintiffs contend that a nomination had to be pending at all times, or at the time of the Third Amendment, the President was not required to submit serial nominations destined for rejection just to stave off the possibility of unprecedented claims that might surface years later. Indeed, Plaintiffs have nothing to say about the length of time and impediments the nomination of the current Director overcame. ECF No. 25, PageID.419.

Plaintiffs suggest "political opposition in the Senate" is irrelevant to the reasonableness of the President's nomination efforts and Mr. DeMarco's tenure. ECF No. 32, PageID.894-895 (citing *Noel Canning*). But *Noel Canning* simply remarked that political opposition would not justify altering the definition of "recess" adopted in that opinion. *See* 134 S. Ct. 2567. Unlike the considerations relevant to the length of a Senate recess, the reasonableness of the President's efforts to get a nominee confirmed could not possibly be assessed without considering opposition to confirmation. In short, Plaintiffs have not carried their burden of establishing that the President's and Senate's appointment efforts, and Mr. DeMarco's tenure as Acting Director, were unreasonable under the circumstances.

III. PLAINTIFFS' STATUTORY CHALLENGE TO MR. DEMARCO'S DESIGNATION AS ACTING DIRECTOR IS AN IMPROPER AMENDMENT TO THE COMPLAINT AND FAILS IN ANY EVENT

The last two pages of Plaintiffs' summary judgment brief advance a new claim that is not in the Complaint: that Mr. DeMarco's designation as Acting Director "was invalid for the additional reason that it did not comply with 12 U.S.C. § 4512(f)." ECF No. 33, PageID.924-25. Plaintiffs cannot enlarge their complaint by adding new claims in their briefs. Moreover, the *de facto* officer doctrine would bar this newly added claim with even greater force than it bars the acting-director claim that *was* pleaded. *See supra* Section II.A.

In any event, the claim has no merit. The crux of the new claim is that the President's power to designate an Acting Director was not triggered because there was no preceding "death, resignation, sickness, or absence of the Director." 12 U.S.C. § 4512(f). According to Plaintiffs, James Lockhart's resignation did not qualify because Lockhart was an Acting Director himself under HERA's transitional provision, 12 U.S.C. § 4512(b)(5). That is wrong and has been rejected by every court that has considered similar arguments. *See FHFA v. UBS Ams., Inc.*, 712 F.3d 136, 144 (2d Cir. 2013) (holding that "Lockhart had been earlier nominated by the President and confirmed by the Senate to serve as Director of OFHEO," FHFA's predecessor agency; the transitional provision met all constitutional requirements; and consequently "the President was authorized to appoint Deputy Director DeMarco as Acting Director upon Lockhart's resignation"), *aff'g* 858 F. Supp. 2d 306, 322 (S.D.N.Y. 2012); *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1053-55 (N.D. Ill. 2013) (following *UBS* as "persuasive").

Plaintiffs do not even acknowledge this contrary authority, let alone provide this Court any sound reason to go into conflict with three others over a claim they did not even bother to include in their Amended Complaint. Instead, Plaintiffs offer a *cf.* citation to a case that construed a different statute and that has now been superseded. Even if that case were relevant,

it simply held that "an officer of the Executive Branch who had been appointed by the President" needed to resign to trigger an acting designation power contained in the pre-1998 Vacancies Act. *Doolin Sec. Sav. Bank v. OTS*, 139 F.3d 203, 208 (D.C. Cir. 1998). As the Second Circuit explained, Lockhart *was* appointed by the President and confirmed by the Senate as the Director of OFHEO, a post then statutorily converted to Director of FHFA. *UBS*, 712 F.3d at 144. Whether Lockhart would be more accurately characterized as a full or acting Director of FHFA under § 4512(b)(5) does not affect the application of § 4512(f) because Plaintiffs concede that acting officers have "all the powers of the office." ECF No. 32, PageID.884 (internal quotation marks omitted).

IV. Plaintiffs' Nondelegation Claims Are Without Merit (Counts IV and V)

Plaintiffs' nondelegation claims fail because the powers FHFA as Conservator exercised when entering into the Third Amendment were neither legislative, executive, nor governmental at all in nature. In addition, HERA supplies the necessary "intelligible principles" to avoid a nondelegation problem. ECF No. 25, PageID.420-423.

In the exceedingly rare cases where courts have found an impermissible private nondelegation, the problem was that Congress authorized industry participants to make the equivalent of laws binding on their competitors. Plaintiffs do not argue that Congress conferred such powers on FHFA. Moreover, Plaintiffs concede that at a minimum a private nondelegation claim requires a delegation of "essentially governmental" powers to a private entity. ECF No. 33, PageID.913. Entry into a contract providing for extraordinary financing is not "essentially governmental," regardless of whether Plaintiffs consider the contract a good deal or bad.

Plaintiffs protest that the power to enter into the Third Amendment must be considered sovereign because "FHFA exercised authority under a federal statute to alter the legal rights and obligations of third parties . . . and promote what is deemed to be in the public interest." ECF

No. 33, PageID.913-914. But legal rights and obligations are altered when private entities enter into contracts, and the fact that actions promote the public interest does not necessarily make those actions sovereign in character.

Plaintiffs' argument that "FHFA's actions cannot be treated as an exercise of powers it merely inherited from the Companies" (ECF No. 33, PageID.914) is still more misdirection. There is no dispute that the Conservator acted pursuant to HERA and not merely powers inherited from the Enterprises. But the relevant issue is whether those functions were so inherently sovereign and governmental that the Constitution forbids them from being exercised by a financial institution conservator. As FHFA established in its motion to dismiss and Plaintiffs have not refuted, they were not.

More than anything else, Plaintiffs' nondelegation claims seem to be about mounting a collateral attack on the D.C. Circuit's decision in *Perry Capital*. Plaintiffs charge that the D.C. Circuit created a private nondelegation problem by supposedly ruling that "FHFA suspended the applications of provisions of the APA and HERA that would have otherwise restricted Treasury's legal authority" and a conventional nondelegation issue by holding that FHFA as Conservator has "permissive, discretionary authority." ECF No. 33, PageID.914. Plaintiffs invite this Court to join the dissenting member of the D.C. Circuit panel in criticizing her colleagues for purportedly "'eras[ing] any outer limit to FHFA's statutory powers.'" *Id.* (quoting *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 642 (2017) (Brown, J., dissenting)).

Of course, the remedy for any objection to the D.C. Circuit's decision would lie with the U.S. Supreme Court. In any event, Plaintiffs' arguments rest on a distorted exaggeration of the *Perry Capital* decision, rather than what that court actually held. The court did not hold that FHFA could "suspend" the application of statutes to Treasury, simply that HERA's bar on

litigative interference with conservatorship operations prohibits injunctive relief against Treasury that would interfere with conservatorship operations. *See Perry Capital*, 864 F.3d at 616 ("Treasury's action . . . cannot be enjoined without simultaneously unraveling FHFA's own exercise of its powers and functions"), *pets. for cert. filed* (Oct. 16, 2017). That natural and logical reading of HERA's anti-injunction provision has nothing in common with the constitutionally problematic issues that can arise if Congress vests a private business with sovereign power to regulate its competitors.

Nor does the D.C. Circuit's recognition of the permissive, discretionary authority that HERA confers on FHFA give rise to any nondelegation problem. FHFA's prior brief detailed the numerous "intelligible principles" in HERA. ECF No. 25, PageID.423. Plaintiffs' only response is to suggest that "powers that FHFA 'may' but is not required to exercise" cannot suffice. ECF No. 33, PageID.914. However, courts consistently reject nondelegation claims based on statutory grants framed in permissive and mandatory language alike.[7]

CONCLUSION

For the foregoing reasons, the Court should grant the FHFA Defendants' motion to dismiss and deny Plaintiffs' motion for summary judgment.

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[7] *See*, *e.g.*, *United States v. Lawrence*, 735 F.3d 385, 419-20 (6th Cir. 2013) (rejecting nondelegation challenge to Federal Death Penalty Act provision giving prosecutors discretion to "propose and argue for jury consideration of non-statutory aggregating factors" without substantive limitation); *Hachem v. Holder*, 656 F.3d 430, 438-39 (6th Cir. 2011) (rejecting nondelegation challenge to statute providing that "Attorney General *may* by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection" (8 U.S.C. § 1229c(e))); *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007) (upholding statute authorizing agency to grant waivers of laws as "*he determines* necessary to ensure expeditious construction'' of barriers on Mexico border) (internal quotation marks omitted) (all emphases added).

Dated: November 6, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE ENTERPRISE FUND, Suite 800 1850 M Street, N.W. Washington, DC 200036 and BECKSTEAD AND WATTS, LLP, 2425 W. Horizon Ridge Parkway Henderson, NV 89052 Plaintiffs, v. THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD 1666 K Street, N.W. Washington, DC 20006 and BILL GRADISON, KAYLA J. GILLAN, DANIEL L. GOELZER, and CHARLES NIEMEIER, in their official capacities as Members of the Public Company Accounting Oversight Board 1666 K Street, N.W. Washington, DC 20006 Defendants.	Case No. ___________

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Free Enterprise Fund and Beckstead and Watts, LLP, by and through their undersigned attorneys, allege as follows:

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INTRODUCTION

1. This is an action challenging the formation and operation of the Public Company Accounting Oversight Board (the "Board"), an entity created by the Sarbanes-Oxley Act of 2002 (the "Act") to "oversee the audit of public companies that are subject to the securities laws." In carrying out this mandate, the Board is authorized to and does exercise broad governmental power, including the power to "enforce compliance" with the Act and the securities laws, to regulate the conduct of auditors through rulemaking and adjudication, and to set its own budget and to fund its own operations by fixing and levying a tax on the nation's public companies. As a result, and notwithstanding the Act's effort to characterize the Board as a private corporation, the Board is a government entity subject to the limits of the United States Constitution, including the Constitution's separation of powers principles and the requirements of the Appointments Clause. The Board's structure and operation, including its freedom from Presidential oversight and control and the method by which its members are appointed, contravene these principles and requirements. For this reason, the Board and all power and authority exercised by it violate the Constitution.

2. Referred to by one Senator as an entity with "massive unchecked powers," the Board exercises broad discretion to set policy and impose regulations governing the conduct of public accounting firms. In connection with its open-ended mandate, the Board's five members — appointed for five-year terms by the Securities Exchange Commission (SEC) — have the power to set the Board's budget at any level they desire, and to fund the Board's operations through a "fee" levied on all public companies. The Board also has the power to promulgate auditing standards and rules, including rules that expand upon the Act's list of nonaudit services that accounting firms are prohibited from offering to a client contemporaneously with an audit. Under the Act, moreover, any violation of the Board's rules constitutes a violation of the federal

securities laws, subjecting accountants and accounting firms to potential civil and criminal liability.

3. The Board also exercises core executive powers to "enforce compliance" with the Act by conducting periodic inspections of accounting firms and subjecting those firms to investigations and disciplinary proceedings. In connection therewith, the Board has the power to punish accounting firms and individual accountants for the violation of the Board's rules, professional accounting standards or federal law, with sanctions of up to $2,000,000 for inadvertent violations and up to $15,000,000 for knowing or reckless ones.

4. The Board has exercised its broad powers to impose burdensome standards that accounting firms are required to follow when auditing public companies, which ultimately bear the costs of these added procedures. In the Board's first year of operation alone, the Act's regulations resulted in more than $35 billion in compliance costs imposed on the nation's businesses.

5. In addition to wielding broad rulemaking and enforcement powers, the members of the Board have the authority to set their own salaries. The Board in 2003 paid its chairman an exorbitant salary of $556,000, and paid each of its other four members a similarly excessive salary of $452,000.

6. Because the Board exercises governmental powers, it is, for constitutional purposes, a part of the federal government, and its members — who exercise significant authority pursuant to the laws of the United States — are officers of the United States.

7. Despite its vast authority and the far-reaching consequences of its actions, the Board is immune from the supervision and control of the President. The Board's members are not appointed or removable by the President or by the head of any executive department answerable

to him. They are, rather, appointed by the SEC, itself an independent agency. Even the SEC, moreover, exercises only limited review of Board actions. The SEC may only remove Board members if they have "willfully violated" applicable laws or regulations, "willfully abused" their authority, or "failed to enforce" applicable laws and regulations "without reasonable justification or excuse." The SEC's other review functions are similarly circumscribed. Thus, the Board exercises wide-ranging, core governmental powers immune from presidential oversight in contravention of the most fundamental elements of the Constitution's separation of powers principles.

8. In addition, although the Board members exercise significant, core governmental powers, they are appointed by the SEC rather than in the manner required by Article II of the Constitution. Their appointments, and the Board's exercise of its delegated powers, are therefore contrary to the Appointments Clause of the Constitution.

9. The Board is also the recipient of improperly and unconstitutionally delegated legislative power, including, but not limited to, its broad power to enact law, its authority to set its own budget without any constraint or legislative cap, and its authority to fund that budget through the imposition of a tax on all public companies.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (e).

PARTIES

11. Plaintiff Free Enterprise Fund ("FEF") is a non-profit public-interest organization under Section 501(c)(4) of the Internal Revenue Code with offices in the District of Columbia. FEF promotes economic growth, lower taxes, and limited government through television and radio issue advertising campaigns, providing timely and tactical policy guidance to members of

Congress and publishing strategic game plans on vital economic and fiscal issues. In bringing this lawsuit, FEF seeks to vindicate the interests of its members, who are subject to the Board's authority and have been injured by the regulations imposed by the Board.

12. Plaintiff Beckstead and Watts, LLP ("Beckstead and Watts"), is a public accounting firm that specializes in audits of small publicly traded corporations. Beckstead and Watts is registered with the Board pursuant to Section 102 of the Act and, as a result, is subject to the Board's regulatory authority.

13. Defendant Public Company Accounting Oversight Board purports to be a private, nonprofit corporation established by the Act and subject to, and having the powers conferred upon nonprofit corporations under, the District of Columbia Nonprofit Corporation Act. The Board has a principal office located in the District of Columbia. Notwithstanding the Act's declarations to the contrary, the Board is an agency and/or establishment and/or instrumentality of the United States.

14. Defendant Bill Gradison is a Member of the Board and is the Board's Acting Chairman. As a member, he is responsible for carrying out the powers delegated to the Board by the Act. Mr. Gradison is sued in his official capacity.

15. Defendant Kayla J. Gillan is a Member of the Board. As a member, she is responsible for carrying out the powers delegated to the Board by the Act. Ms. Gillan is sued in her official capacity.

16. Defendant Daniel L. Goelzer is a Member of the Board. As a member, he is responsible for carrying out the powers delegated to the Board by the Act. Mr. Goelzer is sued in his official capacity.

17. Defendant Charles D. Niemeier is a Member of the Board. As a member, he is responsible for carrying out the powers delegated to the Board by the Act. Mr. Niemeier is sued in his official capacity.

FACTS

I. The Creation of the Board

18. In 2002, in reaction to the highly publicized accounting scandals involving Enron and other public companies, Congress hastily enacted new legislation regulating the accounting industry and creating standards and oversight for public accountants and auditors.

19. During congressional discussions of various proposals for an agency to regulate accountants and auditors, Senator Gramm, a supporter of the Act, remarked that the agency would be "a strange kind of entity [in that we] want it to be private, but we want it to have governmental powers."

20. Senator Gramm also remarked that the proposed entity "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 the country."

21. Congress passed the Act on July 25, 2005, and President Bush signed it into law on July 30, 2005.

22. Among other things, the Act imposes significant new rules governing auditor independence and corporate responsibility for financial reports. It requires enhanced financial disclosures, imposes new and enhanced criminal penalties for corporate fraud and white-collar crime and provides the SEC with new enforcement powers. In addition, Title I of the Act creates and empowers the Board.

II. The Organization of the Board

23. Section 101(a) of the Act makes clear that the Board's purpose is the furtherance of governmental objectives. That provision establishes the Board "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate and independent audit reports for companies the securities of which are sold to, and held by and for, public investors." Section 101(a) of the Act further provides that the Board "shall be a body corporate, operate as a nonprofit corporation, and have succession until dissolved by an Act of Congress."

24. Section 101(b) of the Act provides that, except as otherwise provided in the Act, the Board shall be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act.

25. The Act purports to establish the Board's status as a non-governmental entity and the status of its officers and employees as non-governmental actors. To this end, the Act declares in Section 101(b) that "[t]he Board shall not be an agency or establishment of the United States Government" and "[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service."

26. Section 101(e) of the Act provides that the Board shall have five full-time members, including a chairperson. The same provision imposes the conditions that two, and no more than two, of the Board's members must be (or have been) certified public accountants, and that, if one of those two members is the chairperson, he may not have been a practicing certified public accountant for at least five years prior to his appointment to the Board.

27. Section 101(e) of the Act vests in the SEC as a whole the power to appoint the Board's initial members and fill all subsequent vacancies. The SEC shall make such

appointments "after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury."

28. The Act provides that the members of the Board shall serve for staggered five-year terms. It provides that a member of the Board may be removed only by the SEC and only for "good cause shown," which the Act narrowly defines as a finding, after notice and an opportunity for a hearing, that such member "(A) has willfully violated any provision of th[e] Act, the rules of the Board or the securities laws; (B) has willfully abused the authority of that member; or (C) without reasonable justification or excuse, has failed to enforce compliance [by a registered firm or associated person] with any such provision or rule, or any professional standard."

29. Section 101(c) sets forth the following duties of the Board: (i) to register public accounting firms that prepare audit reports for issuers; (ii) to establish and/or adopt quality control, ethics, independence and other standards relating to the preparation of audit reports for issuers; (iii) to conduct regular inspections of registered public accounting firms; (iv) to conduct investigations and disciplinary proceedings concerning, and to impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms; (v) to perform such other duties or functions as the Board or the SEC determines are necessary or appropriate to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof, or otherwise to carry out the Act, in order to protect investors, or to further the public interest; (vi) to enforce compliance with the Act, the Board's rules, professional standards, and the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, by registered public accounting firms and

associated persons thereof; and (vii) to set the Board's budget and manage the operations of the Board and its staff.

30. Section 101(f) of the Act provides that the Board shall have, *inter alia*, the additional powers to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the SEC, in any federal, state or other court; to conduct operations and maintain offices without regard to any provision of state law; to acquire property; and to enter into contracts.

31. Section 101(h) of the Act requires the Board to submit an annual report to the SEC, which in turn is required to transmit a copy of that report to specified committees of the Senate and House of Representatives.

III. The Regulatory Authority of the Board

32. As detailed below, the Act grants the Board substantial regulatory authority over public accounting firms and their employees, including the authority to "enforce compliance" with federal law, to promulgate rules, to inspect, to investigate, to conduct disciplinary proceedings and to impose sanctions. The Act even provides that failure to comply with a rule of the Board constitutes a violation of federal law, thereby subjecting accounting firms and individual accountants to potential civil and criminal liability.

33. Section 102 of the Act establishes a mandatory system of registration for public accounting firms by making it unlawful for any person that is not a registered firm to prepare or issue, or to participate in the preparation or issuance of, any audit report with respect to any issuer. (The Act's broad definition of "issuer" includes all companies whose securities are registered under the Securities Exchange Act of 1934.) Section 102 establishes procedures for, and provides that the Board may by rule prescribe additional procedures for, the submission of applications for registration.

34. Each registered corporation is required to submit an annual report to the Board, and may be required to provide the Board with such additional information as the Board or the SEC may demand.

35. As of January 26, 2006, 1,611 accounting firms were registered with the Board.

36. Section 103 of the Act grants the Board the authority, through its rulemaking powers, to establish "such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the [SEC], or as may be necessary or appropriate in the public interest or for the protection of investors." The Act specifies certain requirements that must be included in these standards.

37. Section 103 of the Act also grants the Board the authority, through its rulemaking powers, to "establish such rules as may be necessary or appropriate in the public interest or for the protection of investors," to implement the auditor-independence requirements set forth in Title II of the Act. Those requirements prohibit a registered accounting firm performing an audit for an issuer from providing certain non-audit services contemporaneously with the audit, including bookkeeping, financial-information-systems design and implementation, appraisal or valuation services, actuarial reports, investment services, legal services, and "any other service that the Board determines, by regulation, is impermissible."

38. In addition to its sweeping authority to ban auditor practices that it deems inappropriate, the Board has broad discretion to "on a case by case basis, exempt any person, issuer, public accounting firm, or transaction from the [Act's] prohibition on the provision of services" to the extent that the Board deems such exemption "necessary or appropriate in the public interest and . . . consistent with the protection of investors."

39. Section 3 of the Act provides that a violation of the Board's rules "shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934" and that the person committing such violation "shall be subject to the same penalties, and to the same extent, as for a violation of that Act." Such penalties include civil fines and, for willful violations, criminal sanctions, including up to twenty years in prison.

IV. The Enforcement Authority of the Board

40. Section 104 of the Act grants the Board the authority to "conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm with th[e] Act, the rules of the Board, the rules of the [SEC], or professional standards, in connection with its performance of audits, issuance of audit reports, and related matters involving issuers." The frequency of such inspections shall depend upon the number of issuers for which the registered public accounting firm regularly provides audit reports, with firms that regularly provide audit reports for more than 100 issuers to be inspected annually. Upon uncovering a violation, the Board is required to report that violation, "if appropriate," to the SEC and appropriate state regulatory authority, and to begin a formal investigation or take disciplinary action, "if appropriate," with respect to any such violation.

41. Section 105 of the Act grants the Board the power to "conduct an investigation of any act or practice, or omission to act, by a registered public accounting firm, any associated person of such firm, or both, that may violate" the Act, the rules of the Board, the securities laws, or professional standards. The Act also grants the Board the authority to establish, through its rulemaking power, "fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms."

42. In conducting an investigation under Section 105 of the Act, the Board is empowered to require testimony and demand documents, including audit work papers, from a registered

public accounting firm or associated person. The Act allows the Board to sanction firms or associated persons who refuse to produce testimony or documents or to otherwise cooperate in an investigation.

43. In addition, the Board is empowered to request testimony and documents from any other person, including any client of a registered public accounting firm, and to seek the issuance of a subpoena by the SEC to require such testimony and documents.

44. If the Board determines that a registered public accounting firm or associated person has violated the Act, the Board's rules, the relevant securities laws or professional standards, "the Board may impose such disciplinary or remedial sanctions as it determines appropriate," including temporary suspension or permanent revocation of an accounting firm's registration or of an associated person's right to further association with any registered firm; civil monetary penalties of up to $2,000,000 for inadvertent violations and up to $15,000,000 for knowing or reckless violations; and "any other appropriate sanction provided for in the rules of the Board."

V. The Funding Authority of the Board

45. The Act also grants the Board the extraordinary power to set its own budget and fund its own activities by levying a tax on public companies.

46. Section 109(b) of the Act empowers the Board to establish a budget for each fiscal year. The Act provides no guidance as to or statutory cap on the size of the budget.

47. Section 109(c) of the Act provides that funds to cover the Board's annual budget, less any registration or annual fees collected from public accounting firms, are to be payable from annual "accounting support fees" collected from issuers pursuant to standards established by the Board.

48. Section 109(d) of the Act empowers to Board to establish a "reasonable" annual accounting support fee, or a formula for the computation thereof, as may be necessary or

appropriate to establish and maintain the Board. Section 109(d) further provides that rules of the Board relating to the annual accounting support fee shall provide for the equitable allocation, assessment, and collection by the Board (or an agent thereof) of the fee among issuers, allowing for differentiation "among classes of issuers." Section 109(g) of the Act provides that any amount due from issuers shall be allocated among and payable by each issuer (or, if applicable, by each issuer in a particular class) in an amount based on the ratio of the issuer's average monthly equity market capitalization to the overall average monthly equity market capitalization of all such issuers.

49. On April 18, 2003, the Board issued final rules with respect to the allocation, assessment and collection of its accounting fees. These rules were approved by the SEC on August 1, 2003.

50. Pursuant to the Board's rules, the Board calculates an accounting support fee for each year, equal to the budget of the Board less the sum of all registration fees and annual fees received during the previous calendar year from public accounting firms.

51. Pursuant to the Board's rules, the Board subjects to the accounting support fee, with certain exceptions, (i) all non-investment-company issuers whose average monthly market capitalization during the preceding calendar year is greater than $25 million and whose share price on a monthly or more frequent basis is publicly available, and (ii) all investment-company issuers whose average monthly market capitalization is greater than $250 million and whose share price on a monthly or more frequent basis is publicly available.

52. Pursuant to Board rules, each issuer is required to pay its share of the accounting support fee. The Board will use its best efforts to send a notice to each issuer, but the failure to

send such notice does not relieve the issuer of the obligation to pay or otherwise waive the Board's right to seek payment of the issuer's share.

53. Subject to certain narrow exceptions, no registered public accounting firm shall sign an unqualified audit opinion with respect to an issuer's financial statements, or issue a consent to include a previously issued audit opinion, unless the registered public accounting firm has ascertained that the issuer has outstanding no past-due share of the accounting support fee or has petitioned the Board for a correction.

54. The failure of an issuer to pay the accounting support fee constitutes a violation of Section 13(b)(2) of the Securities Exchange Act of 1934, as amended by the Act. The Board is required to refer to the SEC the failure by an issuer to pay its share of the accounting support fee.

VI. The SEC's Nominal Oversight of the Board

55. SEC oversight of the Board's activities is limited to only some of the Board's functions. The SEC does not exercise day-to-day control over the Board, has no control over the conduct of the Board's regular inspections, and exercises no oversight over decisions to bring an investigation or the manner in which an investigation is carried out. As noted above, moreover, the SEC's power to remove Board members is extremely limited, with removal permitted only for a member's willful violation of the law, willful abuse of authority, or inexcusable failure to enforce the Act.

56. Even where SEC approval or oversight of Board action exists, the SEC's role is minimal. For example, the SEC is required by the Act to approve any rule proposed by the Board so long as it is merely "consistent with the requirements" of the Act and the securities laws, "or is necessary or appropriate in the public interest or for the protection of investors."

57. The SEC's power to censure or impose limitations upon the activities, functions and operations of the Board is also extremely limited and may only be exercised if the SEC finds, on

the record and after notice and opportunity for a hearing, that the Board "(A) has violated or is unable to comply with a provision of this Act, the rules of the Board, or the securities laws; or (B) without reasonable justification or excuse, has failed to enforce compliance [by a registered firm or associated person] with any such provision or rule, or any professional standard."

58. The SEC's review of Board sanctions is similarly limited. The Board is required by the Act to file notice of a final sanction with the SEC, which is empowered to review the sanction on its own motion or by application by the sanctioned party. The SEC must affirm a sanction if the sanction was "applied in a manner, consistent with the purposes" of the Act. By contrast, the SEC may modify or set aside the sanction only if "having due regard for the public interest and the protection of investors, [it] finds . . . that the sanction—(A) is not necessary or appropriate in furtherance of this Act or the securities laws; or (B) is excessive, oppressive, inadequate, or otherwise not appropriate to the finding or the basis on which the sanction was imposed."

59. The Act also permits a public accounting firm to seek review by the SEC if it disagrees with any final assessments contained in a final inspection report prepared by the Board. The Act does not set forth the applicable standard of review.

60. SEC review of the Board's budgetary decisions is similarly minimal. The Act provides that the Board's budget and the annual accounting support fee are subject to the approval of the SEC, but does not provide any standards for the SEC to use in evaluating the budget and the fee. Moreover, because the Board's budget is funded through a tax on public companies, rather than through limited appropriations, the SEC has every incentive to allow the Board to spend freely.

VII. The Board's Operations

61. On October 25, 2002, the five commissioners of the SEC voted on the appointment of the first five members of the Board. The chairman of the Board was appointed by a vote of three to two, and the other four members of the Board were appointed by votes of four to one. One of the SEC commissioners stated that the selection process was "inept and seriously flawed."

62. The Board thereafter promulgated a series of rules and auditing standards, all of which were approved by the SEC.

63. The Board's auditing standards impose specific and substantial new duties on registered accounting firms and persons associated with such firms. For example, Auditing Standard No. 1 requires accounting firms to affirm, in each audit report, that the audit was performed in accordance with the standards of the Board. Auditing Standard No. 2 sets forth over 150 pages of detailed requirements concerning the scope and reporting of an accounting firm's audit of a public company's internal controls over financial reporting. And Auditing Standard No. 3 prescribes detailed requirements for the documentation that a registered accounting firm is required to prepare and retain in connection with its audits of public companies.

64. These burdensome standards have imposed substantial compliance costs on registered accounting firms and their public-company clients. Smaller accounting firms have been especially hard hit by the costs of complying with the Board's standards. As a result, many smaller accounting firms have been forced to give up auditing public companies altogether, reducing public companies' range of choices among accountants and increasing concentration in the accounting industry.

65. The Board has funded its activities through the assessment on issuers of "accounting support fees." In 2003, for example, approximately 8,424 companies paid approximately $51 million to support the Board during its first year of operations.

66. In 2004, the Board's budget was approximately $103 million and was financed by the payment of fees by issuers. The Board started that year with 126 employees and ended the year with 262 employees.

67. The Board's budget for 2005 calls for expenditures of approximately $136 million, again financed through the collection of accounting support fees from issuers. The Board expected to end the year with 450 employees.

68. As of February 1, 2006, approximately 10,000 issuers had paid an accounting support fee.

VIII. Beckstead and Watts's Efforts to Comply With the Board's Standards

69. Plaintiff Beckstead and Watts is an accounting firm located in Henderson, Nevada, and engaged in the business of auditing companies and issuing audit reports.

70. As a small "niche" firm, Beckstead and Watts focuses its auditing business on "micro-cap" and "development stage" companies. Such companies generally have no operations, limited assets and insignificant market capitalization. They present a comparatively high level of investment risk, as is understood by investors. Indeed, at the time of the events described herein, a majority of Beckstead and Watts's clients had "going-concern" audit reports and significant non-operating losses, facts which highlight the degree of risk posed to the potential investor.

71. Beckstead and Watts's client base has typically included public companies with securities trading on the Over-the-Counter Bulletin Board Exchange. Because these clients are

issuers under the Act, Beckstead and Watts registered with the Board pursuant to Section 102 of the Act.

72. The Board's promulgation of the Auditing Standards described above has caused substantial increases in the time and expense of the public-company audits conducted by Beckstead and Watts. For example, the Board's standards have added numerous layers of additional audit steps and documentation requirements above those imposed by existing professional standards.

73. Because its typical audit clients are generally too small to absorb the entirety of these increased costs and compliance standards, Beckstead and Watts lost a substantial amount of clients and profits as a result of the Board's actions.

74. Seven inspectors from the Board visited the office of Beckstead and Watts over a two-week period, from May 17 to 28, 2004. These inspectors evaluated Beckstead and Watts's audits in the same manner that one would evaluate the audits of a Fortune 1000 company, notwithstanding the costs issues discussed above and the relative benefits (or lack thereof) to the investing public of applying such strict standards to this segment of the marketplace.

75. Applying the Board's standards in such a manner, the Board's inspectors identified numerous auditing deficiencies with respect to Beckstead and Watts's audits of its clients.

76. The Board prepared a draft inspection report and permitted Beackstead and Watts to comment upon it.

77. In an effort to remedy some of the defects identified by the Board, Beckstead and Watts reduced the number of clients with which it had an auditor relationship from over sixty SEC-reporting companies to just over ten. This reduction in Beckstead and Watts's public-

company client base led to a further reduction in Beckstead and Watts's revenues and profits for the fiscal year ended 2005 as compared to the fiscal year ended 2004.

78. On September 28, 2005, the Board issued the final report based on the May 2004 inspection. This report requires Beckstead and Watts to address the Board's concerns to the Board's satisfaction within twelve months of the issuance of the report.

79. At the same time it issued the final report, the Board initiated formal investigation proceedings against Beckstead and Watts, subjecting the company to burdensome discovery, including the pulling of company files and the taking of testimony from one of its principals and one of its employees. This investigation and discovery is currently ongoing.

80. Beckstead & Watts has incurred legal fees in defending itself against the investigation proceedings, and its professional reputation has been damaged by the inspection report posted on the Board's public website.

COUNT I

(Violation of the Separation of Powers — Improper Exercise of Executive Power)

81. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

82. The Constitution provides that "[t]he executive Power shall be vested in a President," U.S. Const., art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const., art. II, § 2. These provisions vest all executive power, including the power to enforce the law, in the President of the United States.

83. As set forth above, the Board exercises wide-ranging executive power, including the power to "enforce compliance" with the Act and the securities laws, to enact wide-ranging rules and regulations, to conduct inspections of registered public accounting firms, to conduct investigations and disciplinary proceedings, and to impose sanctions and otherwise to enforce

compliance with the Act, the rules of the Board, professional standards, and the securities laws. In addition, the Board is entitled to sue and be sued, complain and defend, in its corporate name and through its own counsel, with the approval of the SEC, in any federal, state, or other court.

84. The Board's wide-ranging exercise of executive or administrative power is immune from Presidential supervision or control. The Board's members are not appointed or removable by the President. They are, rather, appointed by the SEC, itself an independent agency. Even the SEC, moreover, exercises only limited review of Board actions. The SEC may remove Board members only if they have "willfully violated" applicable laws or regulations, "willfully abused" their authority, or "failed to enforce" applicable laws and regulations "without reasonable justification or excuse." The SEC's other review functions are similarly circumscribed.

85. The Board's exercise of wide-ranging, core executive power, immune from Presidential oversight, impermissibly impedes and undermines the President's ability to perform his constitutional duties and prerogatives. As a result, the creation of the Board, as well as its implementation of its delegated responsibilities under the Act, violates the separation of powers.

COUNT II

(Violation of the Appointments Clause of the U.S. Constitution)

86. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

87. Notwithstanding the Act's statements to the contrary, the Board is a public entity and/or an agency and/or an instrumentality of the United States subject to the constraints imposed on the federal government by the Constitution. Facts supporting the status of the Board as a public rather than a private entity, set forth more fully in the preceding paragraphs, include:

- The Board was created by special law.

- The SEC was authorized to appoint the Board's five initial members and is authorized to appoint all subsequent members.
- The Board was created to further government objectives of "protect[ing] the interests of investors and further[ing] the public interest."
- The Board has the authority to engage in quintessentially governmental tasks, including making rules the violation of which constitutes a violation of federal law; enforcing federal law through investigation and adjudication; and setting its own budget and funding that budget through the imposition of taxes on public companies.

88. Because the Board is an agency and/or instrumentality of the United States, and because, as described in the preceding paragraphs, its members exercise significant authority pursuant to the laws of the United States, those members are, notwithstanding provisions of the Act to the contrary, officers of the United States whose appointments must comply with the Appointments Clause of the United States Constitution (art. II, sec. 2).

89. The Appointments Clause provides in relevant part that the President of the United States "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."

90. By virtue of the wide-ranging discretion, duties, functions and independence of the Board, members of the Board are principal officers whose appointments must be made by the

President by and with the advice and consent of the Senate. Accordingly, the appointment of Board members by the SEC violates the Appointments Clause.

91. In the alternative, the members of the Board are inferior officers whose appointments must be made by the President, a court of law, or the head of a department. Because the SEC is not a department within the meaning of the Clause and, in all events, the appointment power is not vested in the head of the SEC but rather in the SEC as a whole, the appointment of Board members by the SEC violates the Appointments Clause.

92. The Act's requirements that the SEC consult with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury prior to appointment of the members of the Board, that two of the members of the Board must be members of the accounting profession, and that three of the members must not be members of the accounting profession, constitute improper limitations on the power to appoint, in further violation of the Appointments Clause.

COUNT III

(Unconstitutional Delegation)

93. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs.

94. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

95. By virtue of the grant of wide-ranging authority to the Board, the Act improperly and unconstitutionally delegates legislative power to an entity outside the Legislative Branch. This delegation is unconstitutional if the Board is deemed part of the federal government, and is even more problematic if the Board is deemed to be a private entity.

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PRAYER FOR RELIEF

Wherefore, plaintiffs pray for the following relief:

1. an order and judgment declaring unconstitutional the provisions of the Act creating and empowering the Board;

2. an order and judgment enjoining the Board and its Members from carrying out any of the powers delegated to them by the Act;

3. an order and judgment enjoining the Board and its Members from taking any further action against Plaintiff Beckstead and Watts and nullifying and voiding any prior adverse action against Beckstead and Watts;

4. costs and attorneys' fees pursuant to any applicable statute or authority;

5. any other relief that this Court deems just and appropriate.

Date: February 7, 2006

Respectfully submitted,

/s/

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