IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE CORPORATION, *Plaintiff*, v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, *Defendant*.	Civil Action No.: 1:24-cv-02443-JEB

PLAINTIFF'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff John Doe Corporation filed this action against Defendant Public Company Accounting Oversight Board (the "Board") seeking declaratory and injunctive relief from an unconstitutional, secret, and unaccountable nonpublic investigative process that the Board and its staff are pursuing. More specifically, and among other things, Plaintiff seeks to stop the Board from continuing an interminable, meandering nonpublic investigation in which its staff employees have served numerous compulsory investigative demands for private records under threat of draconian statutory penalties (and potential incarceration) using a process that allows for no pre-enforcement judicial review.

In moving to dismiss Plaintiff's First Amended Complaint (cited herein as "FAC __"), the Board asserts that the Court lacks subject-matter jurisdiction over some of Plaintiff's claims, that Plaintiff lacks standing to pursue one of its claims, and that certain other claims are barred by some combination of failure to exhaust administrative remedies, lack of a statutory private cause of action, and the purported pendency of administrative disciplinary proceedings that are neither pending nor instituted. None of the Board's arguments has merit and, therefore, the Board's motion should be denied.

As a prefatory matter, Plaintiff respectfully submits that the Court should hold the Board's motion in abeyance pending its decision on whether to return this case to the Southern District of Texas, where Plaintiff originally filed it, where Plaintiff's sole office and all of Plaintiff's employees and records are located, and where the case properly belongs. As the Court is aware, the Southern District of Texas prematurely and erroneously transferred the case and has—as directed by a mandamus Order from the Fifth Circuit—respectfully requested its return to restore the status quo. Plaintiff respectfully submits that, in the interest of inter-circuit comity and full preservation of appellate rights, dispositive motions should be decided in the district where venue

ultimately will rest and where any appeal from a final judgment would be noticed.

RELEVANT FACTS[1]

Plaintiff, a Texas corporation, is registered with the Defendant Board as a "registered public accounting firm" within the meaning of the Sarbanes-Oxley Act of 2002 ("SOX"), 15 U.S.C. § 7201(a)(12). FAC ¶ 4. The Board is established and organized as a Delaware private, nonprofit corporation under SOX, 15 U.S.C. § 7211, with its headquarters in the District of Columbia. *Id*. ¶5. The Board is not a federal agency, although it is treated as such for constitutional purposes. *Id*. ¶ 19 (citing 15 U.S.C. § 7211(b) and *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 485 (2010)). It is led by five members whom the Securities and Exchange Commission ("SEC"), acting collectively as a "Head of Department" within the meaning of the Appointments Clause of the Constitution, appoints as "inferior" constitutional officers. *Id*. ¶ 20 (citing 15 U.S.C. § 7211 and *Free Enter. Fund*, 561 U.S. at 484-87).

Notwithstanding its nominal status as a private corporation, the Board "is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry." *Id*. ¶ 21 (quoting *Free Enter. Fund*, 561 U.S. at 484-85).

> Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe."

[1] The facts as presented adhere to the well-pled allegations of the First Amended Complaint, which the Board does not dispute for purposes of this motion, and which, in any event, this Court should accept as true in deciding a motion to dismiss at this preliminary stage of the litigation.

Id. (quoting *Free Enter. Fund*, 561 U.S. at 485 (internal citations omitted)). Current Supreme Court justices have variously described the Board as "highly unusual," *Free Enter. Fund*, 561 U.S. at 505, "uniquely structured," *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 668 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), and an "unprecedented extra-constitutional stew," *id*. at 713.

The Board's combined investigative, prosecutorial, and pseudo-judicial adjudicative powers are massive and largely unchecked. FAC ¶ 22. After years of investigation, the Board can impose severe punitive sanctions against individual accountants and accounting firms within its regulatory reach, up to the permanent revocation of a firm's registration, a permanent ban on an individual associating with any Board-registered accounting firm, and civil monetary penalties of up to $750,000 *per* violation for natural persons and $15 million *per* violation for firms. *Id*. (citing 15 U.S.C. § 7215(c)(4); 17 C.F.R. § 201.1001). These felony-sized penalty amounts are *seven and one-half times higher* for natural persons and *30 times higher* for firms than the maximum penalties SEC itself can impose by statute as civil monetary penalties in SEC administrative proceedings. *Id*. (citing 15 U.S.C. § 78u-2(b) and 17 C.F.R. § 201.1001).

As nominally private actors, the Board and its staff function beyond the purview of many of the basic checks, balances, and transparency requirements designed to protect individuals from overzealous governmental coercion and punishment. *Id*. ¶ 24. The Board's staff employees are private citizens, not government employees. *Id*. ¶ 25. On Plaintiff's information and belief, these staff employees carry out the Board regulatory and investigative functions with only minimal and sporadic real-time oversight from the SEC-appointed Board leaders, and none from the SEC commissioners themselves. *Id*. Moreover, on Plaintiff's information and belief, Board staff employees are paid higher compensation than their governmental counterparts and, other than possibly the Board's Chief Hearing Officer, are not required to take an oath to "support and defend

the Constitution" and to "bear true faith and allegiance to the same." *Id*. ¶¶ 24-25 (quoting 5 U.S.C. § 3331).

The massive and unchecked power wielded by the Board's private staff employees is particularly troublesome in the context of Board investigations and disciplinary prosecutions, which are core executive-branch functions typically performed by accountable government actors within the executive branch. Whereas Board rulemakings do not bind regulated parties until *after* both the SEC-appointed Board leaders and the SEC pre-approve them, there is no comparable SEC pre-approval of the dozens of discretionary and highly consequential actions taken by Board staff employees during a typical Board investigation, such as determining: who is investigated; what testimony, documents, and other information is demanded from those under investigation; from whom to demand testimony, documents, and other information; how burdensome to make those demands; who is charged; what charges are leveled; what sanctions are demanded and imposed; and what settlement terms are acceptable. *Id*. ¶30. Indeed, some of these highly consequential discretionary actions—including those that gave rise to this lawsuit—are routinely performed by the Board's unaccountable private staff employees without any prior input from even the SEC-appointed Board leaders. Id. ¶31.

ARGUMENT

I. THIS COURT HAS SUBJECT-MATTER JURISDICTION.

The Board does not challenge the Court's subject matter jurisdiction to adjudicate this case. Indeed, the Court's subject matter jurisdiction over the case is obvious from the literal text of the Constitution and the general statutory grant of federal question jurisdiction dating back to 1875. U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution…"); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

The Board nevertheless argues that the Court lacks subject matter jurisdiction to adjudicate three of Plaintiff's five claims for relief—to wit, the due process and "fair procedures" claims Plaintiff asserts in its third and fourth claims and the jury-trial deprivation claim it asserts in its fifth claim. Def. Br. at 4-8, 17-19. The Board essentially argues that the Court should sever and dismiss those three claims from the case for want of jurisdiction, even as the Court exercises jurisdiction over Plaintiff's other claims. According to the Board, SOX §107 and Section 25(a) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. § 25(a)) reflect a "fairly discernible" intent to "channel" such claims through a years-long statutory review scheme that provides for initial adjudication by the Board itself, then SEC review of any final sanctions order issued by the Board, followed by subsequent judicial review of any final SEC order by a federal appeals court. *See* Def. Br. at 5 (citing 15 U.S.C. §§ 78y(a) and 7217(c)). The Board is wrong for two independent reasons.

First and foremost, the Board's jurisdictional challenge is foreclosed by two controlling Supreme Court decisions. In *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), the Court squarely held that district courts *do* have subject matter jurisdiction to adjudicate lawsuits that challenge the structural constitutionality of the Board. Jurisdiction over such quintessential federal questions is conferred by 28 U.S.C. §§ 1331 and 2201. *Free Enter. Fund*, 561 U.S. at 489. And, as the Court further held, contrary to the Board's argument here, jurisdiction is neither expressly nor implicitly limited by Exchange Act Section 25(a), which does not even come into play unless and until a party is aggrieved by not only a final sanctions order issued by the Board but also a final SEC order affirming the Board's sanctions order. Here, as in *Free Enterprise Fund*, the challenge comes during a Board investigation (that is, before the Board has initiated any formal disciplinary proceeding), and thus there is neither a final SEC order from which Plaintiff could

seek review under Section 25(a) nor even an antecedent final sanctions order by the Board—and there may *never* be either one of those, much less both. Thus, the possibility of future judicial review of any final SEC order is entirely hypothetical and speculative at this point, just as it was in *Free Enterprise Fund*.

Lest there was any doubt that *Free Enterprise Fund* is dispositive, the Supreme Court revisited this issue in *Axon Enterprise, Inc. v. FTC* and its companion case, *SEC v. Cochran*, 598 U.S. 175 (2023) ("*Axon/Cochran*"), and the Court came to the identical conclusion. There, a final SEC order in *Cochran* was slightly less hypothetical and speculative, because an underlying administrative adjudication proceeding was already pending before an SEC administrative law judge and thus was only one procedural milepost away from possible consideration by the SEC commissioners. Still, the Court again squarely held that the district court had jurisdiction to adjudicate a preemptive challenge to the constitutionality of SEC's administrative adjudication process. *Axon/Cochran*, 598 U.S. at 195–96. In doing so, moreover, the Court soundly rejected the same arguments the Board makes here concerning proper application of the *Thunder Basin* factors.

There is no meaningful distinction between these controlling precedents and this case on the question of subject matter jurisdiction. All feature the same exact statutory review scheme, which *Free Enterprise Fund* and *Axon/Cochran* squarely held does *not* reflect any "fairly discernible" intent to channel structural constitutional challenges into, and thus does not strip district courts of jurisdiction they otherwise possess. *Free Enter. Fund*, 561 U.S. at 489 (Section 25(a) "does not expressly limit the jurisdiction that other statutes confer on district courts …, [n]or does it do so implicitly."); *Axon/Cochran*, 598 U.S. at 196 ("The claims are not 'of the type' the statutory review schemes reach.").

Moreover, just like in *Free Enterprise Fund* and *Axon/Cochran*, the Section 25(a) statutory review scheme is not even applicable here, because neither the Board nor the SEC has yet issued any final order that would trigger it—*and there is no certainty that any such order will ever be issued*. Just as in *Axon/Cochran*, Plaintiff here asserts the "here-and-now injury" of being subjected to "an illegitimate proceeding, led by an illegitimate decisionmaker"—an injury that becomes irremediable if the claim must await conclusion of a future disciplinary proceeding and appellate review by the SEC. *Axon/Cochran*, 598 U.S. at 191 (quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 212 (2020)). And, as previously noted, it is entirely possible that at the conclusion of all of the Board's investigative processes and proceedings against Plaintiff, the Board may decline to issue a final sanctions order or, if it does issue one, then the SEC might subsequently set it aside. In either event, Section 25(a) review would never occur, and indeed it would be categorically unavailable to Plaintiff, thus depriving Plaintiff of *any* opportunity for even after-the fact judicial review, much less the "meaningful" judicial review required by *Thunder Basin*.

To the extent the Board attempts to distinguish *Free Enterprise Fund* and *Axon/Cochran* by arguing those cases alleged structural separation of powers violations whereas Plaintiff's third and fourth claims allege structural due process and fair procedures violations, respectively, that distinction makes no material difference. Either way, the constitutional violation is baked into the very structure and processes of the Board's investigative and disciplinary apparatus. It taints every investigation that enters it, with the resulting injury being the same "here-and-now" injury of being subjected to "an illegitimate proceeding, led by an illegitimate decisionmaker," an injury that cannot be undone or remedied after the fact. *Axon/Cochran*, 598 U.S. at 191 (quoting *Seila Law*, 591 U.S. at 212). Indeed, *Axon/Cochran* explicitly treated a similar due process claim asserted by one of the petitioners—challenging the combination of prosecutorial and adjudicative functions in

one agency—as likewise being subject to district court jurisdiction. *Id*. at 189 ("Axon's combination-of-functions claim similarly goes to the core of the FTC's existence, given that the agency indeed houses (and by design) both prosecutorial and adjudicative activities."); *id*. at 905 ("And Axon's constitutional challenge to the combination of prosecutorial and adjudicative functions is of a piece—similarly distant from the FTC's 'competence and expertise.'") (quoting *Free Enter. Fund*, 561 U.S. at 491)).

Here too, the Board's investigative and disciplinary structure systematically, and by design, deprives *all* Board investigative targets of their constitutional right to pre-enforcement judicial review of intrusive and often repetitive Board staff investigative demands for private papers and testimony, which must be obeyed under penalty of debarment, severe fines, and potential incarceration, all of which are consequences that Board staff use to coerce parties during the investigative process. Worse yet, the structure systematically, and by design, deprives all such targets of any avenue to seek pre-enforcement review by even the SEC, or even the SEC-appointed Board leaders, which would still be inadequate. Unlike recipients of subpoenas issued by SEC and other government agencies, who have a right to challenge compulsory demands in federal courts, a Board investigative target's only options are either to obey the Board staff's onerous demands or to defy them and incur virtually certain fines, debarment, and other sanctions.[2]

By choosing the latter option, the target is forced to "bet the farm" on the hope that, years later, a court of appeals—applying the highly deferential "substantial evidence" standard of review—will agree with the target's objections to Board staff demands and set aside the sanctions

[2] As best Plaintiff can tell from public information, the Board has, without exception, imposed sanctions in *every* case where its staff claimed noncooperation and the SEC has, without exception, left those sanctions undisturbed. Additionally, Board staff demands, unlike demands by legitimate federal agencies, typically require firms and individuals to "create narratives," that is to "create documents," not just produce existing documents.

imposed for noncompliance. *That has never happened*.[3] In short, the deprivation of pre-enforcement review of staff demands is, for all practical purposes, the deprivation of any effective review. As the Supreme Court noted in *Free Enterprise Fund*, courts normally do not require regulated parties to "bet the farm" like that. 561 U.S. at 490; *see also Nat'l Env't Developmental Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1008 (D.C. Cir. 2014) ("Petitioner's challenge in this case presents a purely legal question . . . It is unnecessary to wait for the [statute] to be applied in order to determine its legality."); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."). The constitutional defects Plaintiff asserts here are no less structural than the combination-of-functions claim in *Axon* or the removal-protection claims in *Free Enterprise Fund*, *Axon,* and *Cochran*.

The Board's alternative suggestion that Plaintiff's rights to a jury trial and an unbiased adjudication arise only if and when the Board chooses to impose a monetary penalty at the conclusion of its case against Plaintiff is as nonsensical as it is erroneous. *See* Def. Br. at 16-17. The Board's staff employees, acting as "part of the government," *Free Enter. Fund*, 561 U.S. at 486, have explicitly threatened Plaintiff's counsel that they intend to prosecute not just Plaintiff but also Plaintiff's natural-person principals (thus destroying Plaintiff entirely), under a statutory scheme that threatens draconian potential penalties of up to $750,000 *per* violation for natural persons and $15 million *per* violation for firms. 15 U.S.C. §7215(c)(4)(D). That, by itself, unquestionably entitles Plaintiff to a trial by jury under the Seventh Amendment; the Supreme

[3] Indeed, of the 500 or so final sanctions orders the Board has issued since its creation in 2002, only two have ever made it all the way through the vaunted Section 25(a) statutory review process to reach an Article III court. The Board's investigative and disciplinary process is so protracted, burdensome, demoralizing, and costly that nearly all targets eventually default, settle, or just give up—long before they could ever seek post-SEC judicial review.

Court held so unequivocally in *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127–39 (2024).[4] The Board coyly suggests that because it might ultimately decide at the conclusion of its prosecution process not to impose any penalty, that never-before adopted approach might thereby cleanse any jury trial deprivation *nunc pro tunc*. Def. Br. at 17-18. But, neither the Board nor its staff has disavowed their presumptive intention to at least consider imposing a penalty, and any suggestion that Plaintiff's right to a jury trial should turn entirely on what sanctions the Board actually imposes after the fact is absurd.[5]

Finally, even if Plaintiff's structural jury trial, due process claims, and fair procedures claims—in a vacuum—were beyond the Court's subject matter jurisdiction, then the Court would still have "supplemental" jurisdiction to adjudicate them. That is because the Court indisputably has jurisdiction to adjudicate all five of the other claims Plaintiff asserts, all of which arise from the same nucleus of operative facts: the secret, Star-Chamber-like, punitive, investigative and disciplinary process being wielded against Plaintiff in an unconstitutional manner by unconstitutional actors. *See generally* 28 U.S.C. § 1367 ("district courts shall have supplemental

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[4] For present purposes, the Court need not decide whether potential penalties of this staggering magnitude alternatively render the prosecution a *criminal* case for Sixth Amendment purposes notwithstanding their incongruous "civil penalty" label.

[5] Equally absurd is the Board's asserted power to impose "indisputably equitable" sanctions in the form of suspension, revocation of registration, limitation of activities, censure, or mandatory education. Def. Br. at 17. Those are *not* equitable sanctions, but rather legal ones designed at least in part to punish and deter. Indeed, they cannot possibly be equitable sanctions, because a private corporation—even one acting as part of the executive branch of the government—has no constitutional power to adjudicate cases in equity or to dispense equitable relief, and especially not to help itself to such relief. Equitable remedies are granted only by Article III courts. *See* U.S. Const., Art. III, sec. 2 ("The *judicial* Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States …." (emphasis added)). In any event, as noted by the Fifth Circuit in the *Jarkesy* decision the Board cites, "[t]he Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too." *Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy").[6] Courts have subject-matter jurisdiction over "cases"—that is, civil "actions" rather than individual claims—arising under the Constitution and laws of the United States, U.S. Const., art. III, § 2; 28 U.S.C. § 1331, and this is indisputably such a case. There is no legal or logical reason for this Court to exercise indisputable subject matter jurisdiction over five of Plaintiff's seven structural constitutional claims while severing two others and consigning them to the hypothetical, years-long statutory review process that might never materialize.

II. THE AMENDED COMPLAINT STATES VALID CONSTITUTIONAL AND STATUTORY CLAIMS.

The Board argues that Plaintiff fails to state valid claims that the Board is depriving Plaintiff of due process of law as required by the Fifth Amendment (Third Claim for Relief) and of the "fair procedures" required by Sarbanes-Oxley. Def. Br. at 8-12. The Board further argues that Plaintiff's nondelegation claim (First Claim for Relief) and its claim that the Board and its staff employees are wielding core executive power without sufficient direction and supervision from accountable government officers (Second Claim for Relief) also are deficient as a matter of law. Def. Br. at 20-23. Again, the Board is wrong on all counts.

A. Plaintiff Asserts Valid Due Process of Law and Fair Procedures Claims.

The Board does not dispute that when the private citizens who comprise the Board's nongovernmental enforcement staff issue compulsory demands for information and testimony—no matter how burdensome, repetitive, or costly to comply with—the recipients of those demands have no opportunity to seek relief even from the SEC-appointed Board leaders, much less from

[6] The same is true for Plaintiff's subsidiary claim that the Board's enforcement and disciplinary structure systematically violates the Board's statutory obligation to employ "fair procedures."

the SEC itself or a federal court, until long after the recipients of the demands either capitulate to those demands or defy them and incur virtually certain punishment for their defiance, including potential incarceration. The Board equates this Hobson's choice with a litigant having to await a final judgment in order to appeal an unfavorable interlocutory order issued by a presidentially appointed and Senate-confirmed Article III district judge.

But it's *completely* different. The unhappy litigant in an Article III federal court is, by definition, already enjoying the due process of law guaranteed by the Fifth Amendment. The burden of persevering through final judgment may be undesirable, but it is a *feature* of due process, not a violation. In stark contrast, the recipient of a Board staff demand is trapped in a secret Star Chamber, *years* away from any semblance of access to due process in an Article III court. Absent a lawsuit like this one, the recipient has no practical ability to challenge the legality or oppressiveness of the compulsory commands made by the Board's private, unaccountable staff employees. Obeying those commands effectively will moot any objections and render them forever irremediable, while defying them will almost certainly incur draconian sanctions challengeable only long after the fact, through a belated, bet-the-farm appeal with no precedent for success. And by the time that appeal reaches an Article III appeals court, the recipient will be saddled with the heavy burden of proving that the sanctions imposed were not supported by "substantial evidence," among the heaviest burdens of proof known to the law. In short, the recipient of a Board staff demand—known as an "accounting board demand" or "ABD"—is almost entirely powerless, and is for all practical purposes at the whim of the Board's wholly unaccountable non-governmental staff employees.

Contrary to the Board's suggestion, this is wholly different from bearing the ordinary "costs and inconvenience of participating in litigation." Def. Br. at 10 (citing *Coinbase, Inc. v.*

Bielski, 599 U.S. 736, 749 (2023)). Board staff investigations are *not* litigation, much less litigation in federal court before an independent, presidentially appointed and Senate-confirmed Article III judge. They are secret inquisitions conducted by private citizens endowed with massive statutory powers and leverage subject to *zero* day-to-day oversight by the President, any presidentially appointed government officer, or even the five SEC-appointed Board leaders. None of the cases or statutes cited by the Board even remotely blesses what then-Judge Kavanaugh aptly called "this uniquely extra-constitutional stew." *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 713 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd*, 561 U.S. 477 (2010).

Nor is the absence of any avenue for pre-enforcement judicial review of Board staff demands anything close to ordinary. Even relatively accountable *governmental* agencies typically need to enlist an Article III court before they can penalize noncompliance with an administrative subpoena. For example, recipients of SEC administrative subpoenas are free to ignore them unless and until SEC enlists a federal judge to enforce the subpoena with a court order. *See* 15 U.S.C. § 78u(c). Ditto for the Federal Trade Commission (15 U.S.C. § 49), the Commodity Futures Trading Commission (7 U.S.C. §9(8)), the Federal Energy Regulatory Commission (16 U.S.C. § 825f(c)), the Consumer Financial Protection Bureau (12 U.S.C. § 5562(b)(2)), and virtually every other federal agency empowered to conduct investigations and issue subpoenas. *Cf. City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) ("The Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) ("although our cases make it clear that the Secretary of Labor may issue an administrative subpoena without a warrant, they nonetheless provide protection for a subpoenaed employer by allowing him to question the

reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court" (citations omitted)). Unlike Board staff demands, at least those agency subpoenas are issued by actual government employees subject to numerous statutory guardrails that keep them in check, starting with the requirement to take an oath to "support and defend the Constitution of the United States" and to "bear true faith and allegiance to the same." 5 U.S.C. § 3331.

Regarding Plaintiff's claim that the Board's investigative and disciplinary system also deprives it of the "fair procedures" required by Sarbanes-Oxley, 15 U.S.C. § 7215(a), the Board concedes that, at a minimum, fair procedures must provide due process of law. As previously discussed, the Board's investigative and disciplinary system does not provide due process, and thus it necessarily fails the test for fair procedures. The Board's reliance on cases upholding the investigative and disciplinary system of Financial Industry Regulatory Authority (FINRA) and its predecessors is likewise unavailing because, unlike the Board, and among many other distinctions, those regulatory entities were not created by statute, do not have leaders appointed by the government, and are not considered "part of the government" for constitutional purposes. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 485 (2010).

B. Plaintiff Asserts a Valid Nondelegation Claim.

The Board patches together various strained readings of nondelegation caselaw in arguing that this Court should dismiss Plaintiff's nondelegation claim, which asserts that the vague statutory mandate for the Board to establish "fair procedures" for its investigations and disciplinary proceeding lacks any intelligible principle to guide the Board. For one, the Board argues that "Congress's delegation must be assessed against the backdrop of agencies' well-established discretion to fashion rules of procedure to govern their own proceedings." Def. Br. at 19. But this argument suffers from a fatal flaw: it assumes the Board is a true executive agency.

Unlike the agencies the Board cites, *e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 99 (2015) (Department of Labor); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978) (Atomic Energy Commission); *F.C.C. v. Schreiber*, 381 U.S. 279, 289 (1965) (Federal Communications Commission), the Board is not a federal government agency. The parties in *Free Enterprise Fund* agreed, and the Board concedes here, that "the Board is 'part of the government' for constitutional purposes." 561 U.S. at 486 (citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)). But that is a far cry from equating the Board with federal agencies that are led by presidentially-appointed and Senate-confirmed government officials and that are subject to a multitude of statutory checks on their power, secrecy, compensation, and other constraints and limitations.

In any event, the cases the Board cites are inapposite. *Perez* and *Vermont Yankee*, for example, concerned notice-and-comment procedures for agency rulemaking, not delegation. *Vt. Yankee*, 435 U.S. at 524; *Perez*, 575 U.S. at 102. By contrast, Plaintiff here is not challenging *how* the Board arrived at its rules, unlike the parties in *Perez* or *Vermont Yankee*. Plaintiff's nondelegation gripe precisely is about the unchecked subjective and abusive application of functionally secret rules under the grossly misleading guise of an objective investigative process. And, the Board steps outside any permissible legislative delegation from Sarbanes-Oxley in exercising its remaining executive and pseudo-judicial power. Ironically, the Board's attempt to shoehorn caselaw about notice-and-comment procedures into a challenge to its investigatory and disciplinary system proves just how unintelligible the concept of "fair procedures" truly is in the Board's nonpublic investigative process.

The Board next argues that Section 105(a) supplies an intelligible principle, turning to "the Supreme Court's repeated characterization of even broader statutory directives as sufficiently

intelligible" in support. Def. Br. at 19-20. Plaintiff acknowledges that "[o]nly twice" has the Supreme Court found that a federal statute failed the intelligible principle test. *Gundy v. United States*, 588 U.S. 128, 146 (2019) (plurality op.). Still, a delegation of legislative power is impermissible unless Congress, at a bare minimum, "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928) (internal quotation marks omitted)). Even if challenged delegations typically fail under this standard, history alone should not be dispositive. Whatever the historical score shows, Plaintiff raises nondelegation challenges sufficient to survive a Rule 12(b)(6) motion to dismiss under current nondelegation principles.

To start, the legislative delegations in many of the Board's cited cases were different. *See, e.g.*, *NBC v. United States*, 319 U.S. 190, 216 (1943); *Yakus v. United States*, 321 U.S. 414, 420 (1944); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). In *NBC*, for example, the petitioners challenged as unintelligible "the standard of 'public interest' governing the exercise" of licensing powers delegated to the Federal Communications Commission. 319 U.S. at 225. The Supreme Court noted the meaning of "public interest" could be easily discerned from the Act itself, "its context, by the nature of radio transmission and reception, [and] by the scope, character, and quality of services." *Id.* at 216 (quoting 47 U.S.C. § 303(g) as providing the public interest to be served by the Communications Act, *i.e.*, "the interest of the listening public in 'the larger and more effective use of radio.'"). Here, by contrast, Plaintiff does not challenge any underlying public interest. Plaintiff challenges the Board's vast rulemaking authority and ability to set "fair procedures for the investigation and disciplining of registered public accounting firms and associated persons of such firms." 15 U.S.C. § 7215(a). And, unlike the respondents in *NBC*, the

Board cannot explain away this delegation with some other language elsewhere in Sarbanes-Oxley informing the meaning of "fair procedures." *See generally* 15 U.S.C. §§ 7211-15.

Indeed, any ambiguity in the challenged delegations in the Board's cited cases could be explained by the clearly-stated "primary aim of the legislation." *Fed. Power Comm'n v. Hope Nat. Gas Co*., 320 U.S. 591, 610 (1944). For example, in *Hope Natural Gas Co*., Congress's apparent policy decision "to protect the consumer interests against exploitation at the hands of private natural gas companies" could fill in any grey surrounding a delegation to set "just and reasonable" gas rates. 320 U.S. at 602, 612 ("These provisions were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies."). Here, the policy choices present in Sarbanes-Oxley inform the subject of the Board's rules (auditing and ethics standards) but not how the Board can administer those rules fairly, particularly in its Star Chamber enforcement context. *Contra Yakus*, 321 U.S. at 423 (finding no unconstitutional delegation because "[t]he boundaries of the field of the Administrator's permissible action are marked by the statute").

That Congress purported to bestow upon the Board vast regulatory power over such a broad subject matter makes the delegation even more dubious. The Supreme Court has recognized that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001). Thus, "[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy." *Id.* A vague directive to establish "fair procedures" over the entire public auditing industry lacks the necessary "substantial guidance." *Id.* In fact, it more resembles the unconstitutional statute that "conferred authority to regulate the entire economy on

the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

Nondelegation cases at the motion to dismiss stage drive home this point. For example, in *Big Time Vapes, Inc. v. Food & Drug Administration*, 963 F.3d 436, 445 (5th Cir. 2020), the Fifth Circuit rejected a nondelegation challenge to the Family Smoking Prevention and Tobacco Control Act. The appellants argued that the Act, in delegating to the Secretary of Health and Human Services the power to determine which tobacco products were subject to the Act, was unconstitutional because it "didn't provide any parameters or guidance whatsoever to guide the Secretary's exercise of that discretion." *Big Time Vapes,* 963 F.3d at 443 (internal quotation marks omitted). In part, the Fifth Circuit pointed to two limitations on the delegation: (1) Congress defined "tobacco product" and (2) "Congress ma[de] many of the key regulatory decisions itself." *Id.* at 445. And, those regulatory decisions—requiring tobacco manufacturers to submit data on their products' ingredients, to file annual registrations listing ingredients, and barring new products without prior approval—went hand-in-hand with the Secretary's determination of what constituted a tobacco product. *See id.* at 445-46. Congress simply delegated the "finishing touches." *Id.*

That is not the case here, given that Sarbanes-Oxley lacks similar limitations on the Board's determination of what constitutes "fair procedures." The statute arguably circumscribes the auditing and ethics standards the Board can adopt and enforce. *See, e.g.,* 15 U.S.C. 7213. It also references Congress's underlying purpose and enumerates specific standards to guide that rulemaking. But the Act offers no comparable information to cabin what makes a procedure "fair" in this context. Thus, there is little indication of "whether the will of Congress has been obeyed,"

Yakus, 321 U.S. at 425, or "the boundaries of this delegated authority," *Mistretta*, 488 U.S. at 372-73 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

C. Plaintiff Asserts a Valid Claim That the Board's Private Staff Employees are Unconstitutionally Exercising Unsupervised Executive Power.

The Board does not dispute that when its non-governmental staff employees conduct their investigations and disciplinary proceedings, they exercise a "quintessentially executive function," *see Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974), which is "typically carried out" by governmental officials. *Free Enter. Fund*, 561 U.S. at 504-05; *see* FAC ¶¶ 29-39. Nor does the Board dispute that as these private-citizen staff employees perform this executive function, the presidentially appointed and Senate-confirmed SEC Commissioners—the only principal executive officers in the vicinity—exercise no direction, control, or supervision over them. FAC ¶¶ 29-34. The SEC Commissioners play no role in deciding, for example, whom the Board will investigate; who is authorized to conduct the investigation; what will be investigated; what documentary evidence and testimony will be demanded; from whom documents and testimony will be demanded; how voluminous and burdensome those demands will be; and whether to seek information through voluntary means or by the threat-centered compulsory demands such as those made upon Plaintiff. FAC ¶ 30. All these discretionary exercises of executive power are performed by the Board's non-governmental staff employees "with zero real-time direction, oversight, supervision, or framework for prompt review" by the SEC Commissioners. FAC ¶ 29. The SEC Commissioners' only hypothetical role comes long after the Board's staff employees have completed their discretionary exercises of executive power, and even that belated appellate review occurs in only a tiny fraction of the Board's numerous investigations and disciplinary proceedings, because the vast majority

are concluded through either settlements or defaults, or they are otherwise never appealed to SEC. FAC ¶¶ 33-34.

This is profoundly unconstitutional. "A cardinal constitutional principle is that federal power can be wielded only by the federal government. Private entities may do so only if they are subordinate to an agency." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939); and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). "If it were otherwise—if people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." *Id*. at 880 (quoting THE FEDERALIST No. 51).

> As Justice Alito explained in a case involving Amtrak:
>
> > One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] not to be agencies or establishments of the United States Government."
> >
> > . . . .
> >
> > When it comes to private entities . . . there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, § 1. Nor are they vested with the "executive Power," Art. II, § 1, cl. 1, which belongs to the President . . . . By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form."

Dept. of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 57, 62 (2015) (Alito, J., concurring) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 390 (1995) and *Carter Coal*, 298 U.S. at 311. *Accord Texas v. Comm'r of Internal Revenue*, 596 U.S. __, 142 S. Ct. 1308, 1308 (2022) (Alito,

J., joined by Thomas, J. and Gorsuch, J.) ("To ensure the Government remains accountable to the public, it cannot delegate regulatory authority to a private entity" (internal citations omitted)).

The Board's investigative and disciplinary functions—performed autonomously by private-citizen staff employees under color of federal law with no real-time direction, supervision, or surveillance by any government agency—embody a similarly "obnoxious form" of unconstitutional assignment of government power to private, unaccountable actors.

III. PLAINTIFF HAS STANDING TO ASSERT ITS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

The Board spills much ink arguing that Plaintiff's Seventh Amendment claim is not "certainly impending," as required to establish Article III standing. Def. Br. at 14-16. The Board maintains that any injury Plaintiff might suffer from a non-jury adjudication is necessarily "contingent" and "hypothetical" simply because Plaintiff has not taken the Board's bait and shirked compliance with an ABD. *Id.* These arguments miss the point of Plaintiff's Seventh Amendment claim.

The Supreme Court recently held that SEC non-jury enforcement proceedings seeking monetary penalties violate a respondent's Seventh Amendment right. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2129 (2024). Here, the Board staff's demand for civil monetary penalties in connection with a clearly articulated and explicit threat of an imminent enforcement action in which a jury trial would not be an option constitutes a sufficiently imminent threat to trigger Plaintiff's standing to assert its right to a jury trial. *See id.* at 2129 ("[T]he Securities Exchange Act and the Investment Advisers Act condition the availability of civil penalties on six statutory factors[.]"). Whether for the SEC in *Jarkesy* or the Board here, civil monetary penalties are one of the "most potent enforcement tools" and threats in the enforcement arsenal. *Id.* at 2126. Therefore, this threat and

use of potential civil monetary penalties to effectuate its administrative goals is "all but dispositive" on the Seventh Amendment issue. *See id.* at 2129.

Consider all of this alongside general standing requirements. At bottom, standing is designed to ensure that courts decide actual "cases and controversies." U.S. Const. art. 3, § 1; *Simon v. E. Kentucky Welfare Rts. Org.,* 426 U.S. 26, 37 (1976). One of the threshold standing requirements is that a plaintiff be at risk of "actual or imminent" harm. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149 (2010). "Actual" refers to an injury that has already occurred, whereas "imminent" refers to an injury "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The Board staff's express intent to bring an enforcement action, extant here, presents "certainly impending" existence-ending and career-ending injuries.

The Board's fusillade of ABDs is not just "certainly impending;" it has already happened. In fact, it has already happened six times. These ABDs forced Plaintiff to comply with broad demands for private information or else face penalties like those issued by a court of law, but entirely without any Article III involvement or the jury trial right embedded in the concept of due process of law. *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 182 (2023) (explaining that forcing someone to "be subjected to such an illegitimate proceeding causes legal injury (independent of any rulings the ALJ might make)"). As previously discussed, Plaintiff has had no practical option other than complying with ABDs or incurring harsh punitive sanctions in the Board's non-jury disciplinary machinery, which is no less an injury simply because Plaintiff has not taken the Board's bait to incur the penalties. *Cf. Laird v. Tatum*, 408 U.S. 1, 11 (1972) (explaining that constitutional violations have arisen when the "challenged exercise of government

power was regulatory, prospective, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations").

The Board's reliance on a passage from *Clapper v. Amnesty International USA* that the injury must be "certainly impending" does not move the needle. 568 U.S. at 410. There, the Supreme Court narrowed fear-based standing, rejecting the argument that the plaintiffs had standing to challenge the constitutionality of FISA amendments authorizing surveillance of foreign contacts when the plaintiffs had not actually been subject to the FISA amendments. *Id.* at 414. Here, however, Plaintiff actually has been subjected to repeated ABDs, including five previous times in the same investigation. Plaintiff also alleges that Board staff, to ensure that Plaintiff would comply with the ABDs, actually threatened Plaintiff with penalties. FAC ¶¶ 30, 35, 77. Moreover, the written disclosures accompanying each Board staff ABD reiterate the threat of severe consequences for noncompliance with ABDs. Plaintiff therefore stands in stark contrast to the plaintiffs in *Clapper*, who had no proof they were subject to the allegedly unconstitutional FISA amendments at all. Here, by contrast, Plaintiff already has been subjected to the PCAOB's unconstitutional actions. *See Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 141 (1951) ("It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted against what the respondents actually did.").

The Rule 12(b)(6) lens should remedy any doubt. All Plaintiff need do at this early juncture is "establish the predicates for standing 'with the manner and degree of evidence required at'" the motion-to-dismiss stage. *Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 104 (D.D.C. 2020), *aff'd sub nom. Ctr. for Biological Diversity v. Haaland,* 849 F. App'x 2 (D.C. Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). That means Plaintiff must

simply provide "general factual allegations of injury resulting from the defendant's conduct . . . , for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 104-05; *see also Riegle v. Fed. Open Mkt. Comm*., 656 F.2d 873, 877 (D.C. Cir. 1981), *overruled in part on other grounds by Melcher v. Fed. Open Mkt. Comm*., 836 F.2d 561 (D.C. Cir. 1987) ("When ruling on a motion to dismiss for want of standing, 'both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 501, (1975)).

Take, as an example, *Saline Parents v. Garland*, 88 F.4th 298, 304 (D.C. Cir. 2023), one of the cases the Board cites. Def. Br. at 14. There, the Attorney General issued a Memorandum to various units in the DOJ indicating that, "[w]hile spirited debate about policy matters is protected under our Constitution, that protection does not extend to threats of violence or efforts to intimidate individuals based on their views." *Id.* at 300. The Memorandum further "instructed DOJ staff to investigate the problem and discuss strategies for addressing the issue." *Id.* The FBI sent a subsequent email "advising its agents that it had created an internal mechanism to track investigations and threat assessments relating to the issues raised in the Memorandum." *Id.* The appellant parents claimed that those actions were unconstitutional because they were "intended to silence" them in their opposition to alleged leftist agendas. *Id.* at 300-01. At the same time, the appellants conceded they were "peaceful, law-abiding citizens" and made no allegation that they had been "hampered" by state actors in their First Amendment activities. *Id*. at 301-02. Thus, unlike Plaintiff here, the appellants in *Saling Parents* "at most indicate[d] a fear that the Government, armed with the fruits of their data gathering, may take action against them in the

future." *Id.* Far more harm already has been inflicted on Plaintiff here, with more harm having been explicitly threatened for the imminent future.

Plaintiff's allegations are not about a generalized investigation into cryptocurrency activities across the country; its allegations are about how the Board has already subjected Plaintiff and its employees to an interminable and meandering investigation of Plaintiff's audits of discrete cryptocurrency activities. FAC ¶¶ 54-65 (discussing a timeline of informal requests, an Order of Formal Investigation, and "six compulsory ABDs" over the course of more than four years). Nor is Plaintiff alleging a hypothetical "fear that the [Board], armed with the fruits of their data gathering, may take action against them in the future." *Saline Parents*, 88 F.4th at 304. In multiple and separate iterations, the Board already has taken such action against Plaintiff by virtue of the Board's Staff's compulsory investigative demands and threats of disciplinary action and punishment. *See* FAC ¶¶ 54-65.

IV. THE BOARD'S OTHER NON-JURISDICTIONAL ARGUMENTS LACK MERIT.

A. Plaintiff Need Not "Exhaust" the Board's Internal Processes.

The Board asserts that even if this Court has subject matter jurisdiction, then the Court should decline to exercise it because Plaintiff has not exhausted its administrative remedies. Def. Br. at 23-24. But the Supreme Court has repeatedly held that when federal courts have subject-matter jurisdiction over a dispute, they have a "virtually unflagging obligation" to exercise it. *See, e.g.*, *Mata v. Lynch*, 576 U.S. 143, 150 (2015) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *accord Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021), *aff'd, Axon/Cochran,* 598 U.S. 175. Tellingly, in neither *Free Enterprise Fund* nor *Axon/Cochran* did the Supreme Court even hint at an exhaustion requirement in cases like this one, and there is no logical or jurisprudential reason for this Court to take the unprecedented step of inventing one here. Indeed, the D.C. Circuit squarely rejected the Board's similar exhaustion argument in *Free*

Enterprise Fund, a holding not disturbed on appeal. *Free Enter. Fund*, 537 F.3d at 670-71; *accord Free Enter. Fund*, 561 U.S. at 544 (Breyer, J., dissenting) (acknowledging that, after *Free Enterprise Fund*, "a plaintiff need not even first exhaust his administrative remedies" before seeking a declaratory judgment that a regulatory official's actions are unconstitutional and an injunction preventing the official from exercising his powers). Given that none of the plaintiffs in *Free Enterprise Fund*, *Axon*, and *Cochran* were required to exhaust their administrative remedies, this Court should reject the Board's suggestion that Plaintiff needs to do so here.

As *Free Enterprise Fund* and *Axon/Cochran* also make clear, regulatory agencies lack competence to decide constitutional issues like those presented by this case—and presumably private corporations like the Defendant Board are endowed with no greater competence than true agencies. *See Free Enter. Fund*, 561 U.S. at 491; *Axon/Cochran*, 598 U.S. at 189, 193-95. It therefore makes no sense to force respondents like Plaintiff to litigate those issues for years before the Board and SEC. Moreover, Plaintiff already has been mired in the Board's secret administrative enforcement machinery for more than four years, with any hypothetical SEC review still years away, and any hypothetical judicial review even further beyond (if ever). Plaintiff has no more obligation to endure that entire administrative gauntlet before seeking judicial relief than did the plaintiffs in *Free Enterprise Fund* or *Axon/Cochran*. *Cf. Axon/Cochran*, 598 U.S. at 213-16 (Gorsuch, J., concurring in judgment) (detailing years-long administrative gauntlet and devastating personal consequences before litigants can seek judicial relief from a final SEC order).

The Board cites no statutory provision or case directing courts not to entertain structural constitutional challenges to Board processes because of a failure to exhaust administrative remedies, because none exists. And even if an exhaustion requirement could somehow be conjured up in the interstices of the statutes relevant here, the Supreme Court has made clear in other

contexts that exhaustion of remedies is an affirmative defense to be pleaded and proved *by defendants*, not a pleading obligation on the plaintiff's part. Thus, this is rarely a proper basis to grant a motion to dismiss. *See Jones v. Bock*, 549 U.S. 199, 203 (2007) ("crafting and imposing" exhaustion rules not required by statute "exceeds the proper limits on the judicial role").[7]

Free Enterprise Fund, Axon, and *Cochran* are the controlling precedents here. The Court has subject matter jurisdiction over this case and thus has a "virtually unflagging obligation" to adjudicate it. *Mata*, 576 U.S. at 150.

B. Plaintiff Does Not Lack a Cause of Action.

Equally meritless is the Board's argument that Plaintiff "lacks a cause of action." Def. Br. at 24-25. Again, Plaintiff's cause of action is materially indistinguishable from the declaratory and injunctive claims asserted in *Free Enterprise Fund*, *Axon*, and *Cochran*. In each case, plaintiffs brought claims to prevent structural constitutional violations by regulators, and no party or Justice even suggested they lacked a cause of action. *Axon* and *Cochran* were collectively heard and considered by more than three dozen of the most learned and respected jurists in the country, none of whom suggested that the cases should have been dismissed, as the Board argues here, for lack of a statutory private right of action. American citizens enduring ongoing deprivation of their constitutional liberties by an arm of the federal government need not patiently "grin and bear it" until they convince Congress and the president to enact a statutory permission slip to seek judicial relief. The plaintiffs in *Axon* and *Cochran* were just the latest in a long tradition of courageous

[7] The Board suggests comparison to FINRA and other self-regulators, Def. Br. at 23-24, but the cases they cite all pre-dated *Axon/Cochran* and most pre-dated even *Free Enterprise Fund*. In any event, despite superficial similarities, FINRA and the Board have vastly distinct origins, structures, and powers that the page limit prevents Plaintiff from cataloguing here.

litigants who have sought immediate refuge in the courts to stop ongoing unconstitutional government action—with or without a bespoke statutory permission slip.

To the extent the Board relies on administrative review schemes that allow aggrieved parties to challenge agency final orders in federal appeals courts, Def. Br. at 25, that reliance is again squarely foreclosed by *Free Enterprise Fund* and *Axon/Cochran*, where the Supreme Court held that these review schemes have no relevance to claims like Plaintiff's that precede, and are unrelated to the merits of, any hypothetical future Board or agency final order. The Board's apparent reliance on pre-*Axon/Cochran* cases involving "forum shopping" is also misplaced. *Id*. The Court made clear in *Axon/Cochran* that complaints seeking judicial relief to prevent "an illegitimate proceeding, led by an illegitimate decisionmaker" present a "here-and-now injury" that may be heard and enjoined by a district court, because that injury would become irremediable if the plaintiff were forced to await the conclusion of the tainted proceeding. *Axon/Cochran*, 598 U.S. at 191 (quoting *Seila Law*, 591 U.S. at 212).

CONCLUSION

The Board's Motion to Dismiss loses sight of where this case stands procedurally. Consistent with *Free Enterprise Fund*, the Board concedes that it is part of the government for at least some purposes, including constitutional claims. Moreover, the Board's ABDs and nonpublic investigative process provide no avenue for pre-enforcement judicial review, and the Board cannot establish otherwise. This case is about the Board's massive and largely unchecked nonpublic investigative, prosecutorial, and pseudo-judicial adjudicative powers, which its non-government employees wield subjectively and unconstitutionally through its secretive Star-Chamber process. For the foregoing reasons, this Court should deny the Board's motion to dismiss in all respects and permit this case to move forward to require the Board to answer the First Amended Complaint and permit discovery to proceed.

Dated: November 12, 2024

Respectfully submitted,

By: */s/Seth B. Waxman*

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CERTIFICATE OF SERVICE

I certify that on November 12, 2024, a true and correct copy of the foregoing document was served on all counsel of record through the Court's ECF system.

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