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COURT URGED TO STRIKE DOWN PCAOB UNDER SEPARATION-OF-POWERS PRINCIPLES

(Free Enterprise Fund v. PCAOB, No. 08-861)

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court to review (and ultimately overturn) an appeals court ruling that upheld the constitutionality of the Public Company Accounting Oversight Board (PCAOB).

In a brief filed in *Free Enterprise Fund v. PCAOB*, WLF argued that the PCAOB was established by Congress in a manner that violates separation-of-powers principles. Members of the PCAOB, a board that has been given extraordinary powers to supervise the audits of public companies, are selected not by the President but by the Securities and Exchange Commission (SEC). Moreover, PCAOB members may be removed from office only by the SEC and only for cause; and the SEC commissioners themselves may be removed from office by the President only for cause. WLF charged that this structure removes the PCAOB from any effective control by the President who, under Article II of the Constitution, is supposed to control the entire Executive Branch of government. WLF argued that this structure violates separation-of-powers principles embodied in the Constitution.

"The result of establishing an oversight body that is insulated from political accountability is entirely predictable: the PCAOB has been riding roughshod over the rights of small businesses and accounting firms," said WLF Chief Counsel Richard Samp after filing WLF's brief. "This group of beancounters has adopted a hostile approach toward corporate management and their auditors," Samp said.

The Enron accounting scandal of 2000-01 led Congress to adopt the Sarbanes-Oxley Act for the purpose of preventing lax oversight of publicly owned corporations. The PCAOB was created as part of Sarbanes-Oxley, for the purpose of creating tougher audit standards and ensuring that audits were conducted in accordance with those standards. The plaintiffs (who include a small accounting firm) filed suit against the PCAOB, claiming that the PCAOB is constitutionally prohibited from continuing to exercise federal powers because its make-up violates separation-of-powers principles. In August 2008, the U.S. Court of Appeals for the D.C. Circuit voted 2-1 to reject the challenge. In January 2009, the plaintiffs filed a petition requesting the U.S. Supreme Court to review that decision.

In its brief urging the Court to grant review, WLF argued that the structure of the PCAOB is unconstitutional because it interferes with the President's power to remove Executive Branch officials. WLF argued that the Constitution requires the President to retain such powers to ensure that he remains politically accountable for all Executive Branch actions. WLF conceded that the Constitution permits Congress to impose some controls on the removal power, by (for example) providing that certain officials in so-called independent agencies may only be removed for cause. But, WLF charged, Congress has gone too far in this case by providing that the only officials who may remove PCAOB officials (SEC Commissioners) are themselves significantly protected from Presidential control -- because they themselves may only be removed by the President for cause. WLF argued that this double layer of protection for officials nominally within the Executive Branch is an unprecedented impingement on the President's removal powers. Similar efforts to restrict the President's removal powers have been universally condemned by the Courts in the past, WLF argued.

WLF also argued that the PCAOB violated the Constitution's Appointments Clause, which provides that all federal officials are to be appointed either by the President or by a department head. WLF argued that the five SEC Commissioners cannot be deemed a collective "department head" for purposes of the Appointments Clause. WLF noted that a number of Court decisions have concluded that the SEC Chairman, not the SEC acting collectively, is the "department head" -- and thus the SEC itself has no constitutional authority to appoint PCAOB officials.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared before federal courts to express its view that separation-of-powers principles embedded in the U.S. Constitution bar any branch of the federal government from exercising powers rightfully belonging to another branch.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.