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Nos. 08-861

In The

SUPREME COURT OF THE UNITED STATES

FREE ENTERPRISE FUND and BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD and UNITED STATES OF AMERICA,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether petitioners had the right to seek declaratory or injunctive relief in federal district court, for the injuries they were suffering, and would suffer in the future, from the investigations, taxation policy, and other actions of respondent Public Company Accounting Oversight Board?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Cases

Boulahanis v. Bd. of Regents of Illinois State University, 530 U.S. 1284 (2000) 1

Davis v. Passman, 442 U.S. 228 (1979) 3

Fitzgerald v. Barnstable School Committee, 129 S. Ct. 788 (2009) 1

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) 5

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) 7

Johnson v. Robison, 415 U.S. 361 (1974) 9

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 8

Occidental Petroleum Corp. v. Securities and Exchange Comm'n, 873 F.2d 325 (D.C. Cir. 1989) 7

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 9-11

Statutes

15 U.S.C. § 7214(h)(2) 7

15 U.S.C. § 7217(b)(4) 4

15 U.S.C. § 7217(c)(2) 4

15 U.S.C. § 7219(d) 11

15 U.S.C. § 78s 4, 5

15 U.S.C. § 78y 5, 7

15 U.S.C. §§ 7201 *et seq.* 2

28 U.S.C. § 1331 7

30 U.S.C. § 814(a) 10

38 U.S.C. § 211(a) 9

8 U.S.C. § 1160(e) 8

Other

S. Rep. No. 107-205 6

INTEREST OF AMICUS CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated constitutional issues in the federal courts and has a special interest in ensuring that effective remedies be available for violations of the Constitution. As an example, CIR represented parties who asked this Court to consider the Seventh Circuit's conclusion that Congress precluded lawsuits based upon the Constitution against recipients of federal funds when it passed Title IX and Title VI. Petition for Writ of Certiorari in Sup. Ct. No. 99-1691, *Boulahanis v. Bd. of Regents*. *Boulahanis v. Bd. of Regents of Illinois State University*, 530 U.S. 1284 (2000) (denying petition). In *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009), this Court unanimously rejected the "preclusion" rule that CIR had challenged.

Here, respondents have made (and presumably will make again) a related argument: that the constitutional arguments plaintiffs wish to make must be channeled through the administrative procedures designed for

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

challenging the rules and orders of respondent Public Company Accounting Oversight Board ("PCAOB"). Because CIR believes that this argument, if accepted, would have deleterious consequences for effective constitutional challenge in other areas, it submits this amicus brief.

This amicus brief addresses only the issue described above. CIR supports petitioners' arguments on the merits.

SUMMARY OF ARGUMENT

The respondents have contended in the courts below that the statute creating the PCAOB has a "comprehensive review scheme," which divested the district court of jurisdiction to hear petitioners' constitutional arguments. The courts below have rejected this argument, and were correct to do so.

The flaw in the argument is its premise: that Sarbanes-Oxley, 15 U.S.C. §§ 7201 *et seq.*, creates a comprehensive review scheme for all lawsuits having anything to do with the PCAOB. A simple reading of the statute disproves that. There is a review scheme for rules created by the PCAOB and a review scheme for sanctions imposed by the PCAOB, but nothing else. The statute provides for administrative review, but has no special provisions for judicial review. Forcing petitioners to submit their sophisticated constitutional arguments to administrative bodies

wholly unequipped to address them would be a gratuitous exercise in delay.

While this Court has precluded attempts to circumvent comprehensive review schemes through lawsuits that challenge *anticipated* sanctions, nothing like that has happened here. The petitioners here do not complain about a sanction or an anticipated sanction, but rather the burden it must undergo in complying with investigations and assessments by the PCAOB. Nothing in the statute provides for an appeal (administrative or otherwise) for those burdened by such ongoing investigations and assessments, and, accordingly, nothing in the statute precluded the district court from exercising jurisdiction over petitioners' constitutional challenges.

ARGUMENT

In the absence of any statutory preclusion, petitioners' allegations that the Sarbanes-Oxley Act violated the United States Constitution and was being enforced by respondents to their injury, constituted a claim that arose under federal law and for which the district court was competent to provide relief. It is axiomatic that individuals whose constitutional rights are being violated can sue in federal district court for a judgment enjoining those violations. *Cf. Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts.")

The Sarbanes-Oxley Act has two primary provisions relating to the review of actions by the PCAOB. Section 107(b)(4), 15 U.S.C. § 7217(b)(4), states that "[t]he provisions of paragraphs (1) through (3) of section 78s(b) of this title shall govern the proposed rules of the [PCAOB], as fully as if the Board were a 'registered securities association' . . . . " The referenced provisions provide for notice of such rules to the Securities and Exchange Commission ("SEC"), along with procedures for the promulgation, review, and approval of such rules.

Section 107(c)(2), 15 U.S.C. § 7217(c)(2) states that "[t]he provisions of sections 78s(d)(2) and 78s(e)(1) of this title shall govern the review by the [SEC] of final disciplinary sanctions imposed by the Board . . . as fully as if the Board were a self-regulatory organization and the [SEC] were the appropriate regulatory agency for such organization . . . " The referenced provisions in Section 78s provide for review of "final disciplinary sanctions" by the appropriate regulatory agency for a given self-regulatory organization ("SRO"), including review by any person aggrieved by the sanction. They also set forth the standards under which the appropriate agency should affirm, modify, or set aside the sanction.

Each of the foregoing provisions modifies the relevant provisions in Section 78s to make the standards appropriate for the review of rules and sanctions of the PCAOB.

Although the court below asserted in *dicta* that the statute provides for judicial review of any SEC determination with respect to rules or sanctions, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 537 F.3d 667, 671 (D.C. Cir. 2008), the statute itself does not provide for any such review. The court below relied on 15 U.S.C. § 78y for its *dicta*, 537 F.3d at 671, but that statute provides only for judicial review of orders "entered pursuant to *this chapter*" (15 U.S.C. § 78y(a)(1) (emphasis added)) and rules "promulgated pursuant to section . . . 78s of this title" (15 U.S.C. § 78y(b)(1)). (Sections 78s and 78y are in Chapter 2A of Title 15; Sarbanes-Oxley is in Chapter 98).

While, as noted above, Sarbanes-Oxley specifically incorporates the *administrative* procedures for SEC review from Section 78s, with some modifications, it nowhere mentions Section 78y. And although Section 78y provides for judicial review of rules and orders promulgated pursuant to Section 78s and other sections in Chapter 2A, it conspicuously does *not* provide for judicial review of rules and orders promulgated pursuant to other sections or chapters, including those that simply use Section 78s and/or Chapter 2A as a *model* for *administrative* review of those rules and orders. Normal rules of statutory interpretation like *expressio unius* would suggest that where, as here, a statute incorporates certain provisions for administrative review, but conspicuously fails to incorporate similar

provisions for judicial review in the courts of appeals, there is no direct judicial review of rules and orders in the courts of appeals. *A fortiori*, those courts do not have exclusive jurisdiction to review orders and rules.

Moreover, since the absence of any specific provision for judicial review in Sarbanes-Oxley hardly suggests an intention by Congress to eliminate all judicial review, for which this Court requires clear and convincing evidence, the district court had jurisdiction. Indeed, the absence of any specific provision for judicial review militates in favor of the conclusion that even the administrative scheme was not intended to be exclusive or primary as to broad constitutional claims, since it is unlikely that Congress would require administrative agencies to waste substantial time addressing constitutional issues for which they have no particular expertise.

Legislative history, although it confirms that Congress intended the general procedures of administrative oversight of SROs by the SEC to apply to the PCAOB, S. Rep. No. 107-205 at 12, 49, says nothing at all about judicial review of the SEC's determinations. It certainly does not support the proposition that the only judicial review of any PCAOB determination is direct review in the courts of appeals from an administrative appeal to the SEC.

Of course, even if the *dicta* regarding

judicial review from the court below were correct, that would only demonstrate, as the court below recognized, that *rules* and *orders* were subject to administrative proceedings followed by direct judicial review in the courts of appeals. Assuming it provided for that, Sarbanes-Oxley itself certainly provides for no other kind of judicial review, and thus its review scheme could hardly be deemed exclusive for challenges not involving orders or rules.[2] Indeed, with respect to the review of inspection reports by PCAOB, the statute specifically *precludes* judicial review of *any* kind. 15 U.S.C. § 7214(h)(2). Given that one of the two petitioners complains primarily about precisely such a report, and the damage that it has caused (*see* J.A. 66 (¶¶ 76-78)), the statute's failure to provide any form of judicial review would otherwise, absent a lawsuit under Section 1331, preclude any review of the injuries that it alleges it has suffered from the constitutional violations identified in the complaint.

So, too, if the PCAOB decided to impose a particularly onerous investigation on an audit firm

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[2] The securities laws do not make all actions of the SEC subject to review only pursuant to Section 78y. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 690 n.15 (1975) (SEC's rate-setting can be reviewed pursuant to Section 78y or the Administrative Procedure Act); *Occidental Petroleum Corp. v. Securities and Exchange Comm'n*, 873 F.2d 325, 337 (D.C. Cir. 1989) (SEC's determination to disclose documents under FOIA reviewable under Section 706 of the APA in district court).

because its owners were Hispanic (albeit without imposing a formal sanction), the firm would plainly be suffering a constitutional injury. It is hard to believe that, by adopting a review scheme for rules and orders, Congress intended to preclude any judicial remedy for that firm.

Even statutory provisions explicitly precluding judicial review – absent from Sarbanes-Oxley other than the provision precluding judicial review of inspection reports – are interpreted in a way to leave open the kind of broad constitutional challenge being made by petitioners here. For example, in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the plaintiffs, representing undocumented aliens working in agriculture who wished to obtain amnesty and obtain status as lawfully admitted, challenged the procedures established for that purpose as a violation of due process. The relevant review statute provided for administrative and limited judicial review of "a determination respecting an application for adjustment of status." *Id.* at 486 n.6 (*quoting* 8 U.S.C. § 1160(e)). This Court concluded that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.* at 492. Thus, "Congress' choice of statutory language" meant that general challenges to the procedures like the one before the Court were not within the scope of the exclusive administrative and judicial review procedures.

Similarly, in *Johnson v. Robison*, 415 U.S. 361 (1974), this Court considered the scope of 38 U.S.C. § 211(a), which provided in relevant part that the determinations of the administrator of the Veterans Administration "on any question of law or fact under any law administered by the [VA] providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . . " *Id.* at 365 n.5 (*quoting* 38 U.S.C. § 211(a)). This Court ruled that the best reading of that text would be limited to decisions arising "in the administration by the [VA] of a statute providing benefits for veterans." *Id.* at 367. Examining both the text and the legislative history, the Court concluded that neither provided the necessary "clear and convincing evidence" that Congress intended to restrict access to judicial review beyond the specific terms of the statute. *Id.* at 373-74. Since the constitutional challenge there was to the exclusion of conscientious objectors from veterans' educational benefits, the statute did not preclude district court jurisdiction. *Id.*

In the lower courts, respondents relied heavily on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). While *Thunder Basin* involved a statutory review scheme, under the Mine Act, the facts there were substantially different. In *Thunder Basin*, a mine operator intentionally ignored its obligation to post the names of designated miners' representatives, in clear violation of a federal regulation. (It argued that

the regulation conflicted with rights it possessed under the National Labor Relations Act and that the administrative process for challenging those regulations violated Due Process.) *Id.* at 204-05. Rather than wait for a sanction to be imposed, it filed suit in District Court, where it obtained injunctive relief against officials of the Labor Department.

The review scheme provided "a detailed structure for reviewing violations of 'any mandatory health or safety . . . regulation promulgated' under the Act." *Id.* at 207 (*quoting* 30 U.S.C. § 814(a)). Examining the statute's language, this Court concluded that the Act did "not distinguish between preenforcement and postenforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208-09. The Court noted that the mine owner's claims "are 'pre-enforcement' only because the company sued before a citation was issued." *Id.* at 216. This Court concluded that it ought not reward the mine owner for having raced to the courthouse before the Secretary of Labor could issue a citation for its violation. *Id.*

Here, of course, petitioners did not race to the courthouse ahead of an impending order or sanction that could only be appealed through the administrative process. Indeed, no such order or sanction has issued even to this day. Petitioners do not object to any specific order, but rather the process and cost of having to address the Board's

investigation, and pay the Board's assessment under Section 109(d) of Sarbanes-Oxley (15 U.S.C. § 7219(d)), which petitioners assert flow from a constitutionally-defective process. The statute provides no redress for those injuries, and, accordingly, it does not preclude the current action.

Two other aspects of *Thunder Basin* deserve mention and demonstrate its irrelevance here. First, this Court did, in fact, determine one of the mine owner's due process claims on the merits. *Id.* at 216-18 (rejecting mine owner's claim that it would suffer irreparable harm in the absence of the availability of a pre-enforcement suit in the district court). Second, *Thunder Basin* upheld the general rule that district courts have jurisdiction, notwithstanding a comprehensive review procedure, over claims that are "collateral" to a statute's review provisions and outside the agency's expertise. *Id.* at 212. Surely, that describes petitioners' claims here. Those claims, relating to the formation and structure of the PCAOB, are entirely unrelated to any specific order holding that petitioners violated some rule of the PCAOB involving the audits of public companies or that some rule of the PCAOB is beyond its statutory mandate. Moreover, neither the SEC nor the PCAOB has any expertise in the structural constitutional arguments that petitioners make.

Further, there is no ongoing administrative

procedure in which these claims could be made, and there is no prospect for one. Thus, there is no possibility that respondents could decide some factual matter in a fashion that would moot petitioners' complaint and render a constitutional adjudication unnecessary. Petitioners claim that PCAOB's very existence is constitutionally problematic. No administrative proceeding will ever address that problem.

And, for the same reasons, requiring administrative exhaustion would be pointless. It would be odd, indeed, if Congress required a meaningless exercise before administrative bodies, whose expertise is unrelated to broad Constitutional issues, before permitting the precise same Constitutional challenge in the district court that was made here without that meaningless exercise.

CONCLUSION

For the foregoing reasons, the district court had jurisdiction over petitioners' complaint, and this Court should reach the merits of petitioners' constitutional arguments. For the reasons set forth in petitioners' brief, it should reverse the judgment of the court below.

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