IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN DOE, *Plaintiff*, v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, et al., *Defendants*.	Case No. 3:24-cv-254 Chief Judge Campbell Magistrate Judge Frensley

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

Russell G. Ryan (*pro hac vice*)
Casey Norman (*pro hac vice*)
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr., Suite 300
Arlington, VA 22203
(202) 869-5210
russ.ryan@ncla.legal

Thomas K. Potter, III (TN Bar No. 024857)
BURR & FORMAN LLP
222 Second Avenue South
Suite 2000
Nashville, TN 37201
(615) 724-3231
tpotter@burr.com

Counsel for Plaintiff John Doe

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INTRODUCTION

Plaintiff John Doe, a Tennessee accountant, seeks through this action declaratory and injunctive relief to stop an unconstitutional enforcement prosecution being pursued against him by Defendants Public Company Accounting Oversight Board (the "Board"), the Board's SEC-appointed Chair, and the Board's four other SEC-appointed Board Members (all collectively referred to as "Defendants"). In moving to dismiss Plaintiff's First Amended Complaint (cited herein as "FAC at __"), Defendants assert that (i) the Court lacks personal jurisdiction over them; (ii) venue is improper or should be transferred to Washington, DC; (iii) the Court lacks subject-matter jurisdiction over two of Plaintiff's seven claims; (iv) another claim fails to state a claim; (v) various reasons centered on the purported adequacy of, and failure to exhaust, administrative remedies require dismissal; and (vi) the individual Defendants are impermissibly named in their official capacities. Defendants are wrong in all respects, and their motion should be denied.

Regarding personal jurisdiction and venue, the Board purposefully and regularly conducts its regulatory business in Tennessee—particularly in the Middle District—including years of investigative and enforcement activity that directly led to this lawsuit and was purposefully directed at Plaintiff and his former employer and colleagues, most of whom were located and doing business in this district. Defendants more generally exercise ongoing regulatory jurisdiction and surveillance over more than a dozen other Tennessee accounting firms and countless accountants employed by them in Tennessee. Finally, because the individual Defendants are sued in their official capacities as officers of the United States, personal jurisdiction exists and venue is proper because Plaintiff resides in this district. There is also no legitimate reason to transfer this case away from Plaintiff's preferred and most logical venue. Defendants' preferred venue, the District of Columbia, is not more convenient, and the Board fails to meet its heavy burden in seeking to force Plaintiff to litigate in that distant venue, with which Plaintiff has no meaningful connection.

In addition, the Court indisputably has subject matter jurisdiction over this *case*, and that includes his jury trial and due process claims. The Supreme Court has repeatedly made clear that district courts have subject matter jurisdiction to adjudicate lawsuits like this one that challenge the structural constitutionality of the Board or federal agencies. Nor does Plaintiff need to exhaust, or otherwise trust his fate to, purported administrative remedies that are entirely contingent and speculative.

RELEVANT FACTS[1]

Plaintiff John Doe is a citizen and resident of Tennessee. FAC ¶ 1. He is licensed to practice as a certified public accountant in Tennessee and his principal place of business is in this district. *Id*. Until the Board commenced its disciplinary prosecution against him in September 2023, Plaintiff was a partner of a firm that is registered with the 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)], based in that firm's office in this district. *Id*. Until the Board commenced its disciplinary prosecution against him, Plaintiff had never been the subject of disciplinary charges in his otherwise unblemished, 30+ year career as an accountant. *Id*. Yet as a result of the Board's commencement of its disciplinary prosecution against him, Plaintiff lost his job in this district and continues to have his professional opportunities limited. *Id*. ¶ 67.

Defendant Board is a private, nonprofit corporation created by SOX [15 U.S.C. § 7211], and organized under the laws of the District of Columbia. FAC ¶ 2. It is headquartered in the District of Columbia and has over 800 employees scattered among at least a dozen offices nationwide. *Id*. The Board asserts regulatory jurisdiction over more than 1,500 registered public

[1] The facts described are based on 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 should be accepted as true in deciding a motion to dismiss at this preliminary stage of the litigation.

accounting firms worldwide, including 17 headquartered in Tennessee, along with innumerable accountants associated with those firms in Tennessee and elsewhere. *Id.* The individual Defendants, sued in their official capacities, are the Board's current SEC-appointed Board Chair and four other SEC-appointed Board Members. *Id.* ¶¶ 3–7.

The Board's extensive, ongoing regulatory activities from which this lawsuit directly arose include the following:

- The Board disciplinary prosecution challenged by this lawsuit centers on audits of the financial statements of a publicly traded company headquartered in this district.
- A substantial portion of the relevant audit work was performed in this district.
- A substantial portion of the documents gathered by the Board, and upon which its disciplinary prosecution is based, were created in, maintained in, and produced to the Board from locations in this district pursuant to Board requests and demands purposefully directed at persons and entities located here.
- During the investigation that led to the disciplinary prosecution, Board staff took four days of testimony from Plaintiff while Plaintiff was physically present in this district.
- Board staff also separately took multiple days of testimony from other witnesses while those witnesses were physically present in this district.
- If the Board's disciplinary prosecution results in a final disciplinary sanction against Plaintiff, the Board will be statutorily required to report that sanction to the Tennessee State Board of Accountancy, thereby putting Plaintiff at further risk harm in this district.

FAC ¶ 9.

The Board also avails itself more generally of the ongoing privileges of operating in Tennessee. For example, it funds its operations (including its prosecution against Plaintiff) through "accounting support fees" it imposes on publicly traded companies and broker-dealers, many of which are headquartered in Tennessee and employ innumerable Tennesseans. FAC ¶ 10(i).

Moreover, the Board asserts ongoing regulatory jurisdiction over not only the 17 Board-registered accounting firms headquartered in Tennessee, but also the Tennessee-based personnel

and offices of Board-registered firms headquartered elsewhere. FAC ¶ 10(ii). The Board has registered these firms, regularly inspects them, and presumably investigates them and their Tennessee personnel from time to time, although detailed information is not publicly available. These firms and their personnel must comply with Board demands directed at them in Tennessee or face civil penalties, loss of livelihood, and potential incarceration. *Id*. In addition, Board-imposed monetary penalties, including any the Board might impose against Plaintiff, fund the Board's "PCAOB Scholars Program," which awards scholarships to college accounting students, including dozens attending universities in Tennessee, and in the Middle District in particular, such as Belmont University, Lipscomb University, Middle Tennessee State University, Tennessee Technological University, and Vanderbilt. *Id*. ¶ 10(iii).[2]

Plaintiff's First Amended Complaint seeks relief from Defendants' continued pursuit of him through a secret and unconstitutional disciplinary prosecution that flowed directly from the Board's investigative activities in Tennessee. More specifically, Plaintiff seeks declaratory and injunctive relief to prevent Defendants from continuing with and ultimately adjudicating their pending disciplinary prosecution, asserting among other things that the Board's prosecution (i) usurps and relocates judicial power in violation of Article III; (ii) is being prosecuted and adjudicated by private citizens with no meaningful governmental direction or supervision in

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[2] As previously noted, Defendants do not dispute Plaintiff's well-pled factual allegations regarding their general and specific contacts with Tennessee and this district. They dispute only the relevance of those facts to the analysis of personal jurisdiction and venue.

There is no question these contacts with Tennessee and this district *are* relevant, and dispositive. They are plainly the facts that gave rise to this lawsuit. Without them, Plaintiff would have had neither reason or motive to file this lawsuit, and arguably would have lacked standing or ripeness. He had neither reason nor motive to sue the Board when Congress created it in 2002, nor when the Board shortly thereafter adopted its rules that built the structurally unconstitutional enforcement and disciplinary machinery it is now wielding against Plaintiff *in Tennessee*. Make no mistake: But for the Board's regulatory presence and pursuit of Plaintiff *in Tennessee* through its unconstitutional enforcement and disciplinary process, this lawsuit would never have been filed.

violation of Article II; (iii) is being superintended and adjudicated by a hearing officer who is unconstitutionally appointed and tenure-protected in violation of Article II; (iv) deprives Plaintiff of his right to a jury trial in violation of the Sixth and Seventh Amendments; (v) deprives Plaintiff of his Fifth Amendment right to due process and his statutory right to "fair procedures:" and (vi) is being funded in violation of Article I.

Defendants have moved to dismiss or transfer the case, arguing lack of personal jurisdiction and improper venue. They have also moved to dismiss some—but not all—of Plaintiff's claims for lack of subject matter jurisdiction, failure to state a claim, failure to exhaust administrative remedies, and other reasons. The Board's motion is meritless in all respects.

ARGUMENT

I. THIS COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANTS

Where, as here, defendants have neither disputed the jurisdictional facts alleged in the complaint nor requested an evidentiary hearing, a plaintiff must make only a prima facia showing of personal jurisdiction, a "less-demanding" burden than even a preponderance of evidence. *Schneider v. Hardesty*, 669 F.3d 693, 697 (6th Cir. 2012). On a preliminary motion to dismiss, moreover, this assessment is made not just accepting a plaintiff's well-pled allegations as true, but by construing the facts in the light most favorable to the plaintiff. *See Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 892-93 (6th Cir. 2002). Here, Plaintiff's well-pled allegations easily satisfy his minimal burden of demonstrating a prima facie case for both "specific" and "general" personal jurisdiction over Defendants.

As to specific jurisdiction, Plaintiff has presented a detailed recitation of the Board's *repeated* and *purposeful* activities directed specifically at Plaintiff and other Tennesseans that have already inflicted substantial harm on Plaintiff in Tennessee and threaten further harm if not stopped. Among other things, over approximately four years, the Board repeatedly directed

compulsory demands for documents and testimony into Tennessee (defiance of which would have been punishable by fine, debarment, and potential incarceration); it repeatedly required Plaintiff and other Tennesseans to search for, collect, and produce documents located in Tennessee as compelled by those demands; it demanded and took multiple days of compelled testimony from Tennessee-based witnesses while most or all of those witnesses were physically located in Tennessee; it took regulatory action that caused Plaintiff to lose his job in Tennessee; and it is currently threatening fines and other sanctions that would cause Plaintiff further reputational and professional harm in Tennessee. Courts in the Sixth Circuit have repeatedly found personal jurisdiction based on far less extensive and purposeful conduct directed into the relevant forum state. *See, e.g.*, *Johnson v. Griffin*, 85 F.4th 429, 431-33 (6th Cir. 2023) (small number of out-of-state tweets with knowledge they would cause harm and job loss to Tennessean); *Schneider*, 669 F.3d at 702−03 ("[P]urposeful availment may exist when a defendant makes telephone calls and sends [faxes] into the forum state and such communications 'form the bases for the action.'") (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 616 (6th Cir. 2005)).

The Board is also subject to general personal jurisdiction in Tennessee based on its ongoing regulatory activities here and its assertion of continuous regulatory jurisdiction over more than a dozen Board-registered accounting firms in this State, along with innumerable accountants who work at those firms and in Tennessee offices of Board-registered firms headquartered elsewhere. It inspects each of the Tennessee firms at least triennially, *see* 15 U.S.C. § 7214(b), and presumably investigates some of them from time to time. In either context, obedience to Board demands is mandatory. The Board cannot plausibly maintain that it can require these Tennessee firms to register with it and submit to its ongoing regulatory jurisdiction, roam the state with inspection and investigative demands, threaten fines and debarment for noncompliance, and impose punitive

career-ending sanctions, all without being subject to personal jurisdiction here. *Neogen*, 282 F.3d at 891–93 (out-of-state company's estimated 14 website sales per year to Michigan residents, contacting those customers through "the mail and the wires," "constitutes the doing of business there, rather than simply the exchange of information").

Apart from defying logic and fairness, Defendants' position is expressly foreclosed by statute, at least with respect to the individual Defendants. The federal venue statute specifically provides that officers of the United States may be sued in their official capacities not only in any district where "a substantial part of the events or omissions giving rise to the claim occurred," but also in any district where the plaintiff resides. 28 U.S.C. §1391(e)(1). Because the individual Defendants are officers of the United States, FAC ¶¶ 3-7, 12 (citing 15 U.S.C. § 7211 and *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484-87 (2010)), they may be sued in this district, which is not only where Defendants purposefully avail themselves but where Plaintiff resides.

II. VENUE IS PROPER IN THIS DISTRICT AND TRANSFER WOULD BE INAPPROPRIATE

For similar reasons, venue is proper in this district. Indeed, the federal venue statute permits venue against a corporate defendant in any district where it is subject to personal jurisdiction, because the corporation "resides" in all such districts for venue purposes. 28 U.S.C. § 1391(b)(1), (c)(2) . Venue is also proper because, as previously discussed and as detailed in the First Amended Complaint, the vast majority of the events giving rise to this case occurred here. *Id*. § 1391(b)(2). Finally, venue is proper against the individual Defendants because they are sued in their official capacities and Plaintiff resides here. *Id*. § 1391(e)(1).

There is no reason to transfer the case to Defendants' preferred venue in the seat of the federal government, thereby dislodging a Tennessee plaintiff from his chosen local venue and forcing him to litigate more than 500 miles away. Established Sixth Circuit precedent affords "substantial weight" to a plaintiff's choice to litigate in his local district of residence, and it

imposes a heavy burden on defendants seeking to override that choice, especially where, as here, no forum-selection clause conflicts with plaintiff's choice and there is no hint of forum shopping. *See, e.g.*, *Maples v. United States*, No. 3:17-cv-00912, 2018 WL 943213, at *2 (M.D. Tenn. Feb. 16, 2018) (citing *Reese v. CNH Am. LLC*, 574 F.3d 315, 320 (6th Cir. 2009), *Nollner v. S. Baptist Convention, Inc.*, No. 3:14-cv-01065, 2014 WL 3749522, at *7 (M.D. Tenn. July 30, 2014), and *Smith v. Kyphon, Inc.*, 578 F. Supp. 2d 954, 962 (M.D. Tenn. 2008)). "When a domestic plaintiff initiates a suit in his home forum, that choice is normally entitled great deference because it is presumptively convenient for the plaintiff." *Hefferan v. Ethicon Endo-Surgery, Inc.*, 828 F. 3d 488, 493 (6th Cir. 2016) (citing *Zions First Nat'l Bank v. Moto Diesel Mexicana, S.A. de C.V.*, 629 F.3d 520, 523-24 (6th Cir. 2010)). Moreover, "'the onus of showing that a plaintiff's choice of forum is unnecessarily burdensome falls on the defendant,' and it is a substantial one." *Sacklow v. Saks Inc.*, 377 F. Supp. 3d 870, 876 (M.D. Tenn. 2019) (citing *Heffernan*, 828 F.3d at 498 and *Smith*, 578 F. Supp. 2d at 958). "Unless the balance is strongly in favor of the defendant, a plaintiff's choice of forum should rarely be disturbed." *Id.* at 877 (citing *Reese,* 574 F.3d at 320 and *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 612 (6th Cir. 1984)). A defendant must therefore make a "clear and convincing showing" that the balance of convenience "strongly favors an alternate forum." *Id.* (citing *Doe v. United States*, No. 3:16-cv-0856, 2017 WL 4864850, at *2 (M.D. Tenn. Oct. 26, 2017)); *accord Maples*, 2018 WL 943213, at *3 (transfer inappropriate unless convenience factors "weigh strongly in favor of transfer").

Here, Defendants come nowhere close to meeting their heavy burden. They concede that most of the so-called private-interest factors typically considered in transfer decisions "are not relevant here," Def. Br. at 10—meaning they do nothing to help satisfy their heavy burden of overturning Plaintiff's choice of forum and the heavy presumption against transfer. Moreover, the

parties agree that they anticipate no need for a trial on the merits or witness testimony, much less deposition or trial testimony from third-party witnesses. *See* Proposed Initial Case Management Order at 1, 3-4, 6, and 7 (Dkt. No. 22) (filed July 11, 2024). Instead, "the parties anticipate that this case will ultimately be decided on the merits through one or more dispositive pretrial motions, based largely on undisputed and/or stipulated facts, such that no trial on the merits will be necessary." *Id*. at 7; *accord* Initial Case Management Order at 6-7 (Dkt. No. 35) (filed Aug. 14, 2024) (adopting identical language). Given these stipulated expectations, no convenience to any party or witness would be gained by a transfer.[3]

Faced with this reality, Defendants contrive two purported justifications for transferring the case to the nation's capital. First, they claim that efficiency might be gained from transfer because two other cases challenging the Board's constitutionality—both unrelated to this one, with all three plaintiffs being complete strangers to one another—are currently pending there. Def. Br. at 10-11, 12-13.[4] Second, they cite judicial caseload statistics that purportedly suggest this case might proceed more expeditiously in D.C. than in this district. Def. Br. at 12. Neither of these contrived propositions withstands scrutiny.

Regarding the two unrelated cases now pending in D.C., virtually no meaningful efficiency would be gained transferring this case there because those other two cases are not only unrelated to this one but also unrelated to each other, and thus they are proceeding on separate tracks before two different district judges in that district. That those judges happen to work in the same building is hardly a reason to expect noticeable gains in efficiency from transferring this case to a third

[3] For similar reasons, the mere fact that the Board is headquartered in Washington, DC is entirely irrelevant to the question of relative convenience between this district and any other district.

[4] The two DC cases Defendants reference are *John Doe v. PCAOB* (No. 24-cv-00254-ACR) and *John Doe Corp. v. PCAOB* (No. 24-cv-02443-JEB).

judge in that building, as opposed to keeping it here in Nashville. In any event, one of the two pending D.C. cases was transferred there prematurely, and entirely through administrative mistake, leading the transferor district court in Texas to request its return after the Fifth Circuit directed it to do so through a writ of mandamus. *See* Mandamus Order, *In re John Doe Corp.*, No. 24-20407, Dkt. No. 40-2 (5th Cir. Oct. 3, 2024). The D.C. court has not yet responded to the request, but as one judge in that district recently noted when honoring a similar request, "[w]hen cases are transferred prematurely, federal district courts routinely—and without further analysis—return them upon request." Transfer Order, *Clarke v. CFTC*, No. 24-cv-00167, Dkt. No. 78, at 4 (D.D.C. May 22, 2024) (citing numerous examples); *accord Def. Distributed v. Platkin*, 48 F.4th 607, 607-08 (5th Cir. 2022) (Ho, J., concurring) (citing numerous examples of this "inter-circuit courtesy" and extolling this "longstanding tradition of comity, both within and across the circuits, as repeatedly demonstrated by district courts nationwide"). Thus, one of the two D.C. cases may not remain there much longer.[5]

In any event, the unrelated Doe cases in D.C. are no further advanced than this case, so any suggestion that the presiding judges already have deep familiarity with the novel substantive issues is misleading at best. Very little substantive litigation has occurred in the D.C. cases since they were transferred, beyond a decision in one of them denying the plaintiff's motion to proceed pseudonymously (currently stayed and on interlocutory appeal to the D.C. Circuit) and the Board's recent filing of a motion to dismiss the other. The judge in the former case has not yet even set a

[5] Moreover, that case is hardly identical to this one. Among other distinctions, the plaintiff is a corporation rather than an individual; the underlying Board proceeding is still in its investigative stage as opposed to a formal disciplinary proceeding as here; and two key issues in that case are the absence of any judicial preapproval or review of the Board's investigative demands and the absence of any intelligible principle to guide the Board's rulemaking, neither of which is raised in this case.

briefing schedule for the Board's anticipated motion to dismiss. In short, there is no reason to speculate, much less assume, that either of those other cases will proceed more expeditiously than this one.

Defendants' citation to judicial caseload statistics adds nothing to bolster their speculation. Those statistics reveal that *over a quarter* of civil cases in the D.C. court have been pending for more than three years, whereas only five percent have languished that long in this district. *See* U.S. Dist. Cts.–National Judicial Caseload Profile, at 2 and 45 (2023). They also suggest that, *on average*, the time from filing to disposition of civil cases in D.C. is several weeks faster than in this district, but so what? The instant case is anything but average, and in any event Defendants' statistics don't explain the many hidden reasons why it might *appear*, however improbably, that D.C. judges move their average case more efficiently than Tennessee judges yet somehow end up with nearly five times as many that are more than three years old.

One potential explanation might be that D.C. is the default venue for settled enforcement and other cases brought by federal agencies. Many such cases are opened and closed with final judgments within days—sometimes hours—after the complaint is filed. Even a handful of such open-and-shut cases could easily skew a court's *average* disposition time materially downward; excluding them from the average could easily expose an otherwise *slower* docket in D.C. We don't know. Perhaps that's why the Fifth Circuit recently held, on writ of mandamus, that transferring a case "essentially because of court congestion" was "a clear abuse of discretion," because statistics on court congestion are "speculative" and "carry little weight" on transfer motions. *In re Clarke*, 94 F.4th, 502, 510, 515-16 (5th Cir. 2024).

In any event, Defendants' baseline logic is upside-down. Good jurisprudence *welcomes* having important and novel issues affecting constitutional liberties and national public policy

decided by *multiple* courts in the first instance—not funneled to a single district and circuit for uniform outcomes before they can properly percolate among diverse courts with diverse perspectives, thereby maximizing the likelihood of getting the right answers, or generating a healthy circuit split that ultimately invites uniformity from the Supreme Court. Such multi-circuit percolation is entirely commonplace and prudent in the federal court system. When Congress wishes to create an exception and funnel similar classes of cases to a single court, it knows exactly how to do so and it does so explicitly, either by creating specialized courts (such as the Tax Court, the Court of Claims, and the Federal Circuit) or by otherwise limiting venue by statute. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (establishing exclusive venue in the D.C. Circuit for challenges to Clean Air Act rules having "nationwide scope or effect"). Congress has done neither of those things here.

Defendants' approach, taken to its logical conclusion, would allow the Board to funnel virtually every constitutional challenge against it into the District of Columbia as a supposedly "similar" case, no matter what particular issues were raised and no matter where the plaintiffs worked or lived. No other district or circuit court would ever weigh in on any of the important constitutional issues raised, and every American who deigned to challenge the Board would be forced to litigate in D.C., even if they preferred to litigate in their own local courts.

This case fits a recent pattern whereby D.C.-based regulators routinely attempt to deprive Americans of their chosen local venue. *See, e.g., Clarke*, 94 F.4th at 508 (CFTC); *In re Chamber of Com. of U.S.A*, 105 F.4th 297, 300-02 (5th Cir. 2024) (CFPB); *Humane Soc'y of U.S. v. Perdue*, No. 20-cv-01395, 2024 WL 736729, at *1 (N.D. Cal. Feb. 22, 2024) (Department of Agriculture); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 345 n.7 (5th Cir. 2022) (Department of Defense).

Courts appear to be catching on and rejecting regulators' efforts to secure their perceived more favorable forum.[6]

The events that gave rise to this lawsuit occurred overwhelmingly in this district, where Plaintiff lives and works and where the Board maintains an ongoing regulatory presence over Plaintiff and many other local accountants and accounting firms. There is no forum-selection clause in play, and there is no hint of forum shopping in Plaintiff's eminently logical choice to litigate here. Litigating in this district is unquestionably more convenient and less costly for Plaintiff than being forced to litigate 500 miles away in the nation's capital. Defendants might prefer to inflict that inconvenience and cost on Plaintiff, but they have failed to sustain their heavy burden of overriding Plaintiff's choice of venue.

III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE, INCLUDING PLAINTIFF'S JURY TRIAL AND DUE PROCESS CLAIMS (CLAIMS 5 AND 6).

Despite their objections concerning personal jurisdiction and venue, Defendants do 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.").

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[6] *See, e.g.*, *Chamber of Com.*,105 F.4th at 300 (transfer to DC "a clear abuse of discretion"); *id*. at 307 ("If Congress wants to enshrine D.D.C. as a venue for APA challenges or cases where a federal agency or other D.C.-based government actor is the defendant, it can easily do so. But it hasn't."); *accord In re Fort Worth Chamber of Commerce*, 100 F.4th 528, 540 (5th Cir. 2024) (Oldham, J., concurring) (routine transfers of cases against federal regulators to D.C. "would concentrate federal judicial power in D.C. and undermine our federalist system").

Defendants nevertheless argue that the Court lacks subject matter jurisdiction to adjudicate two of Plaintiff's seven claims for relief—the jury trial challenge he asserts in his fifth claim and the systemic bias and other due process and fairness challenges he asserts in his sixth. Def. Br. at 13–18. Defendants essentially argue that the Court should sever and dismiss those two claims from the case for want of jurisdiction, even as the Court exercises jurisdiction over all of Plaintiff's other claims. According to Defendants, Section 25(a) of the Securities Exchange Act of 1934 ("Exchange Act") reflects a "fairly discernible" intent to "channel" such claims through a years-long statutory review scheme that provides for initial adjudication by the Defendants themselves, then SEC review of any final sanctions order issued by the Defendants, followed by subsequent deferential judicial review of any final SEC order by a federal appeals court. *See* Def. Br. at 13–14 (citing 15 U.S.C. §§ 78y(a) and 7217(c)). Defendants are wrong for two independent reasons.

First and foremost, Defendants' 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 Defendants' 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*, there is no final SEC order from which Plaintiff could seek review under Section 25(a), and there may *never* be one. Indeed, there is not yet even an antecedent final sanctions order by the Board, and there likewise may never be one of those either. 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 Exchange Act Section 25(a) just last year 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 Defendants make here concerning proper application of the so-called *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. *Free Enter. Fund*, 561 U.S. at 489 (citation omitted) (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 as 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 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 the conclusion of the challenged proceeding. *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 the Board's proceedings, the Defendants may decline to issue a final sanctions order or, if they do issue one, the SEC might subsequently set it aside. In either event, Section 25(a) review would never occur, and indeed would be categorically unavailable to Plaintiff, thus depriving him of *any* opportunity for even after-the fact judicial review, much less the "meaningful" judicial review required by *Thunder Basin*.

To the extent Defendants attempt to distinguish *Free Enterprise Fund* and *Axon/Cochran* by arguing those cases alleged structural separation of powers violations whereas Plaintiff's fifth and sixth claims allege structural jury trial and due process 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 enforcement and disciplinary apparatus. It taints every case 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 nearly identical 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 194 ("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 enforcement and disciplinary structure systematically, and by design, deprives *all* litigants of their constitutional right to defend themselves in an Article III forum, before an unbiased tribunal, with fair procedures and a trial by jury. That is the crux of Plaintiff's fifth and sixth claims, and the defects are no less structural than the combination-of-functions claim in *Axon* or the removal-protection claims in *Free Enterprise Fund*, *Axon,* and *Cochran*. Defendants can do nothing in their pending proceeding against Plaintiff to fix or avoid the structural due process and jury trial defects that are inherent in the Board's enforcement and disciplinary system. And even if there were a workaround, it would be totally unrealistic—and almost certainly futile—to ask the Defendants to rule that the system the Board itself created and has operated for more than two decades is structurally unconstitutional.[7]

Defendants' alternative suggestion that Plaintiff's rights to a jury trial and an unbiased adjudication arise only if and when the Defendants choose to impose a monetary penalty at the conclusion of their case against Plaintiff is as nonsensical as it is erroneous. *See* Def. Br. at 16–17. Defendants, acting as "part of the government," *Free Enter. Fund*, 561 U.S. at 486, are prosecuting Plaintiff under a statutory scheme that threatens potential penalties exceeding $1 million. That, by itself, unquestionably entitles Plaintiff to a trial by jury under the Seventh Amendment; the Supreme Court held so unequivocally in *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127–

[7] Indeed, both the Board and SEC are already on record having blessed the Board's procedures as fully compliant with constitutional due process requirements, with SEC reducing those requirements to nothing more a mere "guarantee of fair procedures—typically notice and an opportunity to be heard." *In re Farhang*, SEC Rel. No. 34-83494, at 9 (June 21, 2018).

39 (2024).[8] Defendants coyly suggest that because they might decide, at the conclusion of all proceedings, not to impose any penalty, they might thereby cleanse any jury trial deprivation *nunc pro tunc*. Def. Br. at 16-18. But Defendants have not disavowed their presumptive intention to at least consider imposing a harsh penalty, and any suggestion that Plaintiff's right to a jury trial should turn entirely on what sanctions Defendants actually impose after the fact is absurd.[9]

Finally, even if Plaintiff's structural jury trial and due process claims—in a vacuum—were beyond the Court's subject matter jurisdiction, the Court would still have "supplemental" jurisdiction to adjudicate them 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 proceeding being prosecuted and adjudicated against Plaintiff in an unconstitutional manner by unconstitutional actors. *See generally* 28 U.S.C. § 1367 ("district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the

[8] For present purposes, the Court need not decide whether potential penalties exceeding $1 million render the prosecution a *criminal* case for Sixth Amendment purposes notwithstanding their incongruous "civil penalty" label.

[9] Equally absurd is Defendants' 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 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, § 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 Defendants cite, "[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).

action within such original jurisdiction that they form part of the same case or controversy").[10] 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 a hypothetical, years-long statutory review process that might never materialize.

IV. PLAINTIFF STATES A VALID TAXING-CLAUSE VIOLATION CLAIM (CLAIM 7)[11]

Defendants insist that the annual "accounting support fees" they assess upon and collect from publicly traded corporations and broker-dealers are not taxes, but rather "classic" regulatory fees. Def. Br. at 22. Respected commentators and at least two SEC commissioners have disagreed. *See* SEC Commissioner Michael Piwowar, *Statement at Open Meeting on 2016 PCAOB Budget,* SEC (Mar. 14, 2016) ("The accounting support fee is a tax" requiring companies and broker-dealers "to pay money to the Board for the privilege of merely existing."); SEC Commissioner Hester M. Peirce, *Statement on PCAOB's Ballooning Budget*, SEC (Dec. 23, 2022) (characterizing Board assessments as "a tax that now tops $300 million"); Hans Bader and John Berlau, *The Public Company Accounting Oversight Board: An Unconstitutional Assault on Government Accountability*, Competitive Enterprise Institute Issue Analysis (Oct. 4, 2005), at p.3 (Board "supports itself with a tax, the accounting support fee that it levies on all public companies in the United States"); Peter J. Wallison, *Rein in the Public Company Accounting Oversight Board*,

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[10] 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."

[11] In light of the Supreme Court's recent decision in *CFPB v. Community Financial Services Ass'n*, 601 U.S. 416 (2024), Plaintiff no longer intends to pursue the part of his Claim 7 that challenged the Board's funding mechanism as violating the Appropriations Clause.

American Enterprise Institute Financial Services Outlook (Feb. 2005), at p.2 (accounting support fee is "essentially the power to tax the entire economy in support of [the Board's] regulatory activities").

More importantly, Sixth Circuit precedent confirms that these assessments are taxes rather than fees. The controlling distinction is whether an assessment is for "a personal service voluntarily engaged" (thus a fee) or for "revenue raising for the public's benefit" (thus a tax). *Wright v. McClain*, 835 F.2d 143, 145 (6th Cir. 1987) (citing *Spiers v. Ohio Dep't of Nat. Res (In re Jenny Lynn Mining Co.)*, 780 F.2d 585, 588 (6th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986)) (alternatively framing the question as "whether the assessment in question is for revenue raising purposes or merely a regulatory or punitive levy in the nature of a privilege fee"); *United States v. River Coal Co., Inc.*, 748 F.2d 1103, 1106 (6th Cir. 1984) ("the chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer").

Defendants' assessments are taxes under this test. First, they generate the bulk of the Board's annual revenue. *See* SEC Press Rel. 23-248, "SEC Approves 2024 PCAOB Budget and Accounting Support Fee," SEC (Dec. 13, 2023) (accounting support fees represent $358.8 million of the Board's total 2024 budget of $384.7 million). Second, they are broadly imposed on essentially all publicly traded companies which, being pass-through vehicles, inevitably pass the taxes through to the estimated 150 million Americans (and additional foreigners) who directly or indirectly invest in those companies and/or their customers. Third, the assessments are mandatory and wholly *in*voluntary; failure to pay "is a violation of Section 13(b)(2) of the Securities Exchange Act of 1934 … and could, like any other Exchange Act violation, result in administrative, civil, or criminal sanctions." PCAOB Rulemaking: *Notice of Filing of Proposed Rule on Funding*, SEC Release No. 34-48075 (June 23, 2003). Finally, assuming Defendants are executing their claimed

mission "to protect investors and further the public interest," PCAOB 2023 Annual Report at p. 5, the taxes they impose are spent for *public* benefit rather than a private benefit to the accounting firms the Defendants register and regulate. In no meaningful sense are these taxes voluntary payments by public companies and investors in exchange for a private regulatory license or permission slip from the Board.[12]

V. 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, it should decline to exercise it because Plaintiff has not exhausted his 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 v. PCAOB*, 537 F.3d 667, 670–71 (D.C. Cir. 2008); *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

[12] Plaintiff understands that the Board *also* imposes certain registration and licensing fees on the accounting firms it regulates, and those would likely satisfy the criteria for fees rather than taxes, but those fees represent a relative minor percentage of the Board's overall budget.

are unconstitutional and an injunction preventing the official from exercising his powers). Given that none of the plaintiffs in *Free Enterprise Fund*, *Axon*, or *Cochran* were required to exhaust their administrative remedies, Defendants' suggestion that Plaintiff needs to do so here should be rejected.

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 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 has already been mired in the Board's secret administrative enforcement machinery for more than five years, with any hypothetical SEC review still years away, and any hypothetical judicial review even further beyond (if ever). He 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).

Defendants cite 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, and thus it 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").[13]

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. 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 smartest and most respected jurists in the country, none of whom suggested that either case should have been dismissed, as Defendants argue here, for lack of a statutory private right of action. American citizens enduring ongoing deprivations 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 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 Defendants rely on the administrative review schemes that allow aggrieved parties to challenge agency final orders in federal appeals courts that reliance is again squarely

[13] Defendants suggest comparison to FINRA and other self-regulators, Def. Br. at 23, 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.

foreclosed by *Free Enterprise Fund* and *Axon/Cochran*, where the Supreme Court held that these review schemes are no barrier to claims like Plaintiff's that precede, and are unrelated to the merits of, any hypothetical future Board or agency final order. Defendants' apparent reliance on pre-*Axon/Cochran* cases involving "forum shopping" is also misplaced. 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 by a district court, and that the injury becomes irremediable if the claim must await the conclusion of the tainted proceeding. *Axon/Cochran*, 598 U.S. at 191 (quoting *Seila Law*, 591 U.S. at 212).

C. The Individual Defendants Are Properly Sued in Their Official Capacities

Lastly, Defendants argue for dismissal of the individual Defendants, suggesting that naming those individual officers of the United States in their official capacities was somehow improper or impermissible. Def. Br. at 25. But official-capacity lawsuits are not only permissible; they are commonplace, and neither of the Supreme Court cases cited by Defendants suggests otherwise. Indeed, both *Axon* and *Cochran* included defendants sued only in their official capacities, yet again not a single judge or justice who heard the case ever hinted at any impropriety in that regard, much less that those defendants should have been dismissed from the start. So too with *Free Enterprise Fund*, where individual Board members were sued in their individual capacities without objection and remained parties at least through appeal to the D.C. Circuit or until they left office. Moreover, as previously noted, the federal venue statute expressly contemplates suits that name officers of the United States as additional defendants in their individual capacities. *See* 28 U.S.C. § 1391(e)(1).

Suing the individual Defendants is especially appropriate here. Unlike the heads of conventional government agencies, the SEC-appointed Board Chair and other Board members are the only SEC-appointed and SEC-removable officers among the Board's staff of more than 800

employees. Their status as government-appointed officers is among the primary reasons why the Board is considered "part of the Government." They are also the five individuals who currently hold the fate of Plaintiff's constitutional liberties in their hands, and it is appropriate that any injunction the Court might issue apply directly to them as well as to the inanimate Board. Moreover, contrary to Defendants' assertion, the First Amended Complaint *does* specify actions taken by them as individuals that have deprived Plaintiff of due process in this Board proceeding, including public "findings" and statements about factual matters directly relevant to the pending Board proceeding against Plaintiff and their intent to impose draconian penalties in proceedings like it. *See* FAC ¶¶ 46-52. There is no legal basis to dismiss them as defendants, particularly at this preliminary stage.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied in all respects.

Dated: November 1, 2024

Respectfully submitted,

s/*Thomas K. Potter, III*_____
Thomas K. Potter, III (TN Bar No. 024857)
BURR & FORMAN LLP
222 Second Avenue South
Suite 2000
Nashville, TN 37201
(615) 724-3231
tpotter@burr.com

Russell G. Ryan (*pro hac vice*)
Casey Norman (*pro hac vice*)
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Dr.
Suite 300
Arlington, VA 22203
(202) 869-5210
russ.ryan@ncla.legal

Counsel for Plaintiff John Doe

CERTIFICATE OF SERVICE

I certify that on November 1, 2024, a true and correct copy of the foregoing document was served on all counsel of record through the Court's ECF system.

/s/ Russell G. Ryan
Russell G. Ryan *(pro hac vice)*