

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1148

September Term, 2014

FILED ON: APRIL 24, 2015

GEORGE W. FINCH AND JOHN DENNIS HONEYCUTT,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE,
RESPONDENT

On Petition for Review of an Order of the
United States Department of Agriculture

Before: BROWN, PILLARD and WILKINS, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record compiled before the Secretary of Agriculture and on the briefs of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the petition for review be denied for the reasons stated in this judgment.

George W. Finch and John Dennis Honeycutt petition for review of the Secretary of Agriculture's¹ decision and order concluding they were responsibly connected to Third Coast Produce Company, Ltd. ("Third Coast") during a period of time when Third Coast violated the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s. Pursuant to PACA, those who buy or sell certain quantities of perishable agricultural commodities at wholesale in interstate commerce must possess a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a). Licensees are forbidden from engaging in specified types of unfair conduct. *Id.* § 499b. Of relevance here, licensees may not "fail or refuse truly and correctly to account and make full payment promptly" for perishable agricultural commodities.

¹ The Secretary acted by and through his Judicial Officer, to whom he has delegated authority for final decisionmaking in adjudicatory proceedings. *See* 7 C.F.R. § 2.35.

Id. § 499b(4). The Secretary of Agriculture may impose sanctions not only on a licensee who violates this provision but also on individuals “responsibly connected” with the offending licensee. *Id.* § 499h(a)–(b). Absent permission from the Secretary, no other licensee may employ “any person who is or has been responsibly connected” with a licensee found to have committed “any flagrant or repeated violation of section 499b” for at least one year. *Id.* § 499h(b)(2). Further, those found to be responsibly connected are prohibited from obtaining licenses of their own for two years. *Id.* § 499d(b). Under PACA, officers and directors of an offending licensee are presumed to be responsibly connected. *Id.* § 499a(b)(9). However, the presumption may be rebutted by demonstrating by a preponderance of the evidence both “that the person was not actively involved in the activities resulting in a violation” of PACA and “that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.” *Id.*

“We review final decisions in PACA cases under the deferential standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E).” *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007). Accordingly, “we must uphold the Judicial Officer’s decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence.” *Id.* (internal quotation marks omitted). From February 5, 2010 through July 16, 2010, Third Coast failed to make full and prompt payment for perishable agricultural commodities in violation of PACA. Petitioners were officers or directors of Third Coast during this time. They seek to rebut the presumption that they were responsibly connected to Third Coast by establishing the underlying cause of Third Coast’s PACA violations was the precarious financial situation it found itself in after a trusted associate, Javier Bueno, embezzled funds from the company. Regardless of the cause of Third Coast’s cash shortage, however, Petitioners failed to demonstrate they were not actively involved in the conduct resulting in the PACA violations and that they were only nominal officers or directors of Third Coast.

The Judicial Officer reasonably found Petitioners were actively involved in the activities leading to the violations, because they continued to order produce despite knowing Third Coast would be unable to promptly pay for the orders as required under PACA. *Judicial Officer Decision* at 11-12; *see also Jacobson v. Dep’t of Agric.*, 99 F. App’x. 238, 239–240 (D.C. Cir. 2004) (holding it was not unreasonable to conclude “an individual who places orders for produce, with the knowledge that the buyer is having or will have difficulties paying for the produce” is “actively involved in activities resulting in the subsequent failure to make full payment promptly”). The Judicial Officer’s conclusion that Petitioners were not nominal directors or officers of Third Coast was likewise reasonable, as substantial evidence demonstrates they were in control of and were actively managing the company—including its finances—during the time of the PACA violations.² *Judicial Officer Decision* at 11. While Petitioners argue they should

² Petitioners object to the Judicial Officer’s interpretation of the term “nominal” as a partner, officer, director, or shareholder “in name only.” *Judicial Officer Decision* at 9. In applying this interpretation, the Judicial Officer departed from the “actual, significant nexus” test this Court has previously used. *See Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 614–17 (D.C. Cir. 2011). We need not reach the question of whether the Judicial Officer’s specific interpretation of “nominal” is reasonable, *see Chevron U.S.A, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), as we find that under any reasonable construction of the term Petitioners were not “nominal” officers or

be considered nominal directors or officers *vis-à-vis* Bueno's embezzlement, the relevant inquiry under PACA examines Petitioners' relationship with the offending licensee—in this case Third Coast—and not their relationship to Bueno or his alleged illicit activities. *See* 7 U.S.C. § 499a(b)(9).

Petitioners raise several constitutional challenges to PACA itself, and our review is *de novo*. *See J.J. Cassone Bakery, Inc. v. NLRB.*, 554 F.3d 1041, 1044 (D.C. Cir. 2009). These challenges largely focus on the risk that, based on officer status alone, PACA's sanctions might apply to a person who was not in fact actively involved in conduct that violated PACA. Any such constitutional defect would not affect Petitioners, however, because they were found to be actively involved. In any event, these constitutional challenges are either foreclosed by binding precedent or without merit. Petitioners argue PACA violates the Due Process Clause of the Fifth Amendment. The substantive due process claim fails, as we have already held "literal enforcement of the 'responsibly connected' provision" does not violate an individual's due process rights. *Kleiman & Hochberg*, 497 F.3d at 692 n.9; *see also Siegel v. Lyng*, 851 F.2d 412, 416 n.12 (D.C. Cir. 1988) (rejecting a due process challenge and stating Congress possesses a "rational purpose under the Commerce Clause to regulate the free flow of perishable agricultural commodities through PACA restrictions"). To the extent Petitioners raise a procedural due process claim, they argue for the opportunity to prove they were not involved in the embezzlement that led to Third Coast's financial troubles. However, Third Coast was required under PACA to promptly pay for the produce orders it placed, and this responsibility was not annulled by its financial problems—regardless of their cause. Proof of Bueno's embezzlement therefore does not demonstrate Petitioners were not actively involved in the activities that led to Third Coast's PACA violations. Petitioners fail to identify what additional process was due in regards to the responsibly connected determination under PACA, and we therefore reject their claim. *See Doe v. District of Columbia*, 93 F.3d 861, 870 (D.C. Cir. 1996) ("[A] procedural due process claim requires the plaintiff to identify the process that is due.").

Petitioners next argue PACA is an unconstitutional bill of attainder, but we have previously considered and disposed of this precise argument.³ *Siegel*, 851 F.2d at 416–18 (holding PACA "does not infringe the Bill of Attainder Clause because the statutory presumption both is rebuttable in adjudicatory proceedings and also is nonpunitive in nature"). Petitioners further claim PACA is unconstitutionally overbroad because it penalizes non-culpable conduct. Under the constitutional overbreadth doctrine, "[t]he showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (citation and internal quotation marks omitted). Petitioners' claim fails, because they make no argument the application of PACA has a potential chilling effect on speech or expression protected by the First Amendment. *Cf. Electrolert Corp. v. Barry*, 737 F.2d 110, 114 (D.C. Cir. 1984) ("Appellants' overbreadth challenge must fail because there is simply no doctrine that requires that, when the legislature enacts a statute that does not reach substantial

directors.

³ Petitioners' constitutional arguments are premised in part on the factual assertion that they are being held personally liable for Third Coast's debts. Any personal obligation to Third Coast's creditors, however, was not imposed by PACA or the Order under review and is therefore outside the scope of this petition.

constitutionally protected conduct, it must tailor the statute narrowly to accomplish the goals it intends to reach.”).

Petitioners’ final claim is that PACA violates the civil forfeiture statutes found in Chapter 46 of Title 18 of the United States Code. This claim also fails, as Petitioners did not establish the imposition of licensing and employment restrictions under PACA is a civil forfeiture or that any civil forfeiture statute governs the imposition of PACA sanctions. To the extent Petitioners’ argument is that civil forfeiture law *should* apply to PACA proceedings, this is a policy argument properly directed to Congress and not this Court. In closing, we have acknowledged—and it bears repeating—that “PACA is admittedly and intentionally a tough law.” *Kleiman & Hochberg*, 497 F.3d at 693 (internal quotation marks omitted). Like the Judicial Officer we note Petitioners themselves were victims in this situation and they have “demonstrated themselves to be honest and well-intentioned men.” *Judicial Officer Decision* at 12. Under the facts, however, it was not unreasonable to find they were responsibly connected to Third Coast at the time of its PACA violations. And under the law, their challenges to PACA fail.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See FED. R. APP. P. 41 (b); D.C. CIR. RULE 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk