UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of **LAURIE BEBO, and JOHN BUONO, CPA,** **Respondents.**	**DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENT LAURIE BEBO'S SUBMISSION OF SUPPLEMENTAL AUTHORITY**

Respondent Laurie Bebo incorrectly argues that the decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), supports the constitutional challenges that she has raised in this proceeding. *Jarkesy* is not controlling here and remains subject to further review. Moreover, *Jarkesy* largely addressed issues that Bebo has not raised and, in any event, is incorrect on the merits.

BACKGROUND

The ALJ's Initial Decision rejected Bebo's arguments that these proceedings violated equal-protection and due-process principles. Initial Decision Rel. 1401 (Aug. 13, 2020) ("I.D.") at 4–16. Bebo petitioned the Commission for review, asserting these same constitutional claims. After briefing before the Commission was complete, the court issued its decision in *Jarkesy*. Over a dissent, the panel majority held that: (1) the administrative proceeding violated the petitioners' Seventh Amendment rights to a jury trial; (2) Congress unconstitutionally delegated legislative power when it gave the Commission the unfettered authority to choose to institute administrative enforcement proceedings rather than file enforcement actions in district courts; and (3) "the statutory removal restrictions for SEC ALJs are unconstitutional." 34 F.4th at 451–65. The Commission has filed a petition for en banc review.

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ARGUMENT

I. *Jarkesy* is not binding in these proceedings.

Jarkesy does not control here. To begin with, a petition for en banc review of the split panel decision has been filed, and the Fifth Circuit has ordered a response. Moreover, Bebo, a resident of Wisconsin, has previously sought review in the Seventh Circuit. *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *see also* 15 U.S.C. § 78y(a)(1) (providing for review "in the United States Court of Appeals for the circuit in which [s]he resides or has [her] principal place of business, or for the District of Columbia Circuit"). To the extent Bebo seeks further review in the Seventh Circuit (or in the D.C. Circuit), the law in those courts does not accord with the incorrect holdings in *Jarkesy*, which depart from Supreme Court precedent.

II. *Jarkesy* did not address most of Bebo's constitutional arguments.

Jarkesy is largely inapposite because, with the exception of the Article II removal question, that opinion addressed constitutional arguments different from the ones Bebo raises. Bebo asserts that Section 929P of the Dodd-Frank Act is facially invalid on equal-protection grounds because it grants the Commission the authority to "choose its forum," Bebo Appeal Br. at 59–60, and that Section 929P violates the Due Process Clause because it purportedly allows the Commission "to punish" Bebo for the "prospective exercise" of a jury-trial right "by subjecting her to an administrative proceeding," *id*. at 61–62. But the panel majority in *Jarkesy* did not address either of these constitutional claims, let alone reach a legal conclusion that would support Bebo's contentions.[1] For instance, nothing in *Jarkesy* is inconsistent with the ALJ's correct ruling that

[1] Illustrating the disconnect between *Jarkesy* and Bebo's claims, Bebo has relied on *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), to support her equal-protection claim, and *Blackledge v. Perry*, 417 U.S. 21 (1974), and *United States v. Jackson*, 390 U.S. 570 (1968), to support her due-process claim. Neither the petitioners in *Jarkesy* nor the Fifth Circuit cited, let alone relied upon, any of these cases.

Bebo's due-process claim has no traction because she has not shown actual retaliation for invocation of a constitutional right. I.D. at 6–7.

In contrast to the claims asserted by Bebo, the arguments at issue in *Jarkesy* concerned the applicability of the Seventh Amendment in the context of the public-rights doctrine and principles of nondelegation. But Bebo has never argued that the Seventh Amendment, by itself, requires the SEC to bring cases like hers in district court. Rather, she appears to have waived such an argument by accepting the principle that Congress may assign the adjudication of public-rights cases to administrative proceedings.[2] Nor has Bebo ever raised a stand-alone nondelegation claim. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006); 17 C.F.R. § 201.411(d) (stating that the Commission may deem waived any argument not made in an opening brief).

While there is at least some overlap between the "class of one" equal-protection theory asserted by Jarkesy, *see* Jarkesy Br., 2021 WL 1081281, at *41–47 (5th Cir. filed Mar. 10, 2021), and the equal-protection claim asserted by Bebo, the majority in *Jarkesy* "decline[d] to reach these issues." 34 F.4th at 466 n.21. Bebo's claim is also different from Jarkesy's. She brings a facial attack against § 929P of the Dodd-Frank Act. *See* Bebo Appeal Br. (Mar. 11, 2021) at 60. But as the ALJ explained, § 929P "does not create any objectively identifiable classes of people to be treated differently." I.D. at 5 (citing *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008)). Nor would a class-of-one claim be any stronger. *See Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 905 (7th Cir. 2012) (en banc) (Easterbrook, C.J., concurring) ("[T]here is no class-of-one doctrine in federal administrative law, any more than in criminal law.").

[2] *See* Bebo Mot. for Summ. Disposition (Feb. 28, 2019) at 7–8 (favorably citing *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'm*, 430 U.S. 442 (1977)); Bebo Appeal Reply Br. at 32 (disclaiming argument "that public rights can never be adjudicated through an administrative proceeding").

III. *Jarkesy* is wrongly decided and contravenes Supreme Court precedent.

Even if the Commission were to consider the panel majority's opinion in *Jarkesy*, its holdings are incorrect for the following reasons.

A. The Seventh Amendment does not forbid Congress from permitting administrative agencies to impose civil penalties.

Jarkesy's Seventh Amendment holding cannot be reconciled with Supreme Court precedent. The Seventh Amendment provides that "the right of trial by jury shall be preserved" in "[s]uits at common law" involving more than twenty dollars. U.S. Const. amend. VII. Congress may nonetheless create "public rights" and assign adjudication of those rights—and the imposition of money penalties for their violation—to an administrative tribunal. *See Helvering v. Mitchell*, 303 U.S. 391, 402–03 (1938); *accord Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1373–74 (2018) (explaining that patents are "public rights" that "did not exist at common law" but are rather "creature[s] of statute law").

The Supreme Court has explained that these penalty schemes are constitutional because "Congress is free to provide an administrative enforcement scheme without the intervention of a jury." *Atlas Roofing*, 430 U.S. at 448. *Atlas Roofing* affirmed an administratively imposed money penalty for maintaining an "unsafe working condition" in violation of the Occupational Safety and Health Act of 1970. *Id.* at 445. The Court explained that the Act created "public rights" because it was designed to supplement existing "common-law actions for negligence and wrongful death." *Id.* In contrast to those common-law torts, the Act imposed liability even if no "employee [was] actually injured or killed as a result of" the unsafe workplace. *Id.* Whereas common-law and "[w]holly private tort, contract, and property cases" would necessitate a jury trial, the Seventh Amendment did not apply to a "valid statute creating enforceable public rights." *Id.* at 458.

Jarkesy held that a jury trial was required for violations of the federal securities laws if

those violations involve fraud and have elements similar to common-law fraud. 34 F.4th at 453–57. But that holding is incompatible with the Supreme Court's recognition that "Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989). The Court has made clear that "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.* at 53.

Consistent with *Granfinanciera*, this proceeding involves the adjudication of violations of "public laws" and was initiated to remedy wrongs "against the United States rather than an aggrieved individual." *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017). *See also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 749 (D.C. Cir. 1995) (noting that existing doctrine "allows Congress freely to extinguish [Seventh Amendment] rights by assigning their adjudication to a non-judicial body"); *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 323–24 (7th Cir. 1987) ("In a non-Article III forum the Seventh Amendment simply does not apply."); *United States v. One 1976 Mercedes Benz 280S,* 618 F.2d 453, 458 (7th Cir. 1980) ("Congress is free to fashion new types of remedy, such as … an administrative tribunal, where jury trial may validly be withheld.").

In addition, *Jarkesy*'s conclusion that "the securities statutes at play in [that] case created causes of action that reflect common-law fraud actions," 34 F.4th at 455, cannot be squared with governing precedent. Contrary to the panel majority's view, the federal securities laws "do[] not incorporate common-law fraud." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 162 (2008). Under the common law, a plaintiff must prove that a misrepresentation was "relied upon by the other party, and that the misrepresentation "caus[ed] injury." *Flaherty & Crumrine*

Preferred Income Fund, Inc. v. TXU Corp., 565 F.3d 200, 212 (5th Cir. 2009). By contrast, "[a]n action brought by the Commission … need not include proof of harm." *Schellenbach v. SEC*, 989 F.2d 907, 913 (7th Cir. 1993); *accord Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000). Likewise, Congress enacted the federal securities laws as a "prophylaxis" to prohibit not just common-law fraud, but also "conduct that tempts" fraud. *SEC v. Cap. Gains Res. Bureau, Inc.*, 375 U.S. 180, 200 (1963). Accordingly, the securities laws do not require "proof of intent to injure and actual injury," *id.* at 195, just as the workplace safety scheme in *Atlas Roofing* did not require injury to an employee (as required for a common-law tort action).

Jarkesy's historical reasoning is even less persuasive on the facts presented here. The ALJ found Bebo liable for violating the Exchange Act's antifraud provisions, as well as for violating the Act's auditing, internal-controls, certification, and books-and-records provisions. *See* I.D. at 2, 66–80, 107–11. Even if one were to accept *Jarkesy*'s reasoning as to the fraud claims, these other provisions fall sufficiently outside any analogy to common-law practice so as to constitute public rights to which the Seventh Amendment does not apply.

B. The nondelegation doctrine does not apply to the Commission's choice to institute administrative proceedings rather than filing district-court actions.

Under the nondelegation doctrine, Congress may not delegate "powers which are strictly and exclusively legislative." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). By contrast, the federal government's decision to enforce the laws is a matter over which "Executive Branch has exclusive authority and absolute discretion." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *accord Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

Jarkesy held that the Commission's decision to enforce the laws through an administrative proceeding was legislative action in violation of the nondelegation doctrine. The majority relied on one sentence in *INS v. Chadha*, 462 U.S. 919 (1983), which held that the House of

Representatives' veto of the Attorney General's decision in an immigration matter violated the Constitution's bicameralism and presentment requirements. *Chadha* held that the House's veto was a legislative act because it "alter[ed] the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." *Id.* at 952. Based on that sentence, the majority concluded that the Commission exercised legislative authority because its decision to bring an administrative (rather than Article III) proceeding altered the rights Jarkesy would have had if sued in district court. 34 F.4th at 461–63.

The crucial point in *Chadha* was that action by Congress was "legislative." The Court did not suggest that enforcement of the laws by the Executive Branch raises similar concerns. And it has always been understood that in enforcing the laws, Executive Branch officials not only decide whether to institute proceedings, but also what violations to assert, what penalties to seek, and in what forum to proceed. *Cf. United States v. Batchelder*, 442 U.S. 114, 125–26 (1979) (prosecutor's choice to charge one criminal violation but not another does not "impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties"). While those charging decisions may affect whether a party "receive[s] certain legal processes," *Jarkesy*, 34 F.4th at 462, they are executive, not legislative, actions. Indeed, "[t]he Supreme Court has long allowed discretionary decisions by police, prosecutors, and regulators as part and parcel of the exercise of executive power." *Kincaid v. Gov't of D.C.*, 854 F.3d 721, 730 (D.C. Cir. 2017) (collecting cases).

For instance, the United States may choose to charge a defendant with a petty misdemeanor rather than a felony. That decision would deprive the defendant of a right to a jury trial, *Baldwin v. New York*, 399 U.S. 66, 69–70 (1970), and the requirement for a grand jury, *United States v. Linares*, 921 F.2d 841, 844 (9th Cir. 1990). The United States may also choose to pursue certain

claims in district court or in "any administrative proceeding to determine a civil money penalty." 31 U.S.C. § 3730(c)(5). Such enforcement decisions are quintessentially executive actions—not "delegations of legislative power." *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 443 (5th Cir. 2020). *Cf. Kincaid*, 854 F.3d at 729 ("Supreme Court precedent teaches that the presence of enforcement discretion alone does not render a statutory scheme unconstitutionally vague."); *U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 886 (D.C. Cir. 2010) (where two overlapping statutes provide alternative regimes under which the government can sue, that "choice does not create a conflict, let alone an 'irreconcilable conflict'"); *Burris v. Farley*, 51 F.3d 655, 660 (7th Cir. 1995) ("[L]egislatures often enact different penalties for the same acts, leaving the choice to prosecutorial discretion."); *United States v. Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992) (noting executive-branch discretion to select an appropriate forum for a criminal case).[3]

C. The statutes governing the removability of ALJs are constitutional.

Jarkesy incorrectly invalidated a nearly 80-year-old provision of the Administrative Procedure Act, Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946).[4] The majority's analysis rested entirely on *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), but there the

[3] There is also an intelligible principle here. The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quotation omitted). Moreover, Congress provided that a civil penalty may be imposed in administrative proceedings only where "such penalty is in the public interest," 15 U.S.C. § 78u-2(a)(1), and the Supreme Court has "found an 'intelligible principle' in various statutes authorizing regulation in the 'public interest,'" *Whitman*, 531 U.S. at 474 (collecting cases).

[4] *Jarkesy* is in tension with decisions of at least two other circuits. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021) (upholding the same statutory removal restrictions for ALJs in the Department of Labor); *see also Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) ("doubt[ing]" that petitioner "could establish a constitutional violation from the ALJ removal restrictions"). The D.C. Circuit recently requested supplemental briefing and appointed an amicus in considering the constitutionality of dual for-cause removal statutes, but declined to reach the issue. *See Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1097 (D.C. Cir. 2021).

Supreme Court stated that "[n]othing in our opinion … should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies," including the restrictions on ALJs. *Id.* at 507 & n.10. Responding to the dissent, the majority explained that "the employees referenced by the dissent [do not] enjoy the same significant and unusual protections from Presidential oversight" as the *Free Enterprise* officers. *Id.* at 506. Rather, the removal restrictions in *Free Enterprise* were "novel" and "rigorous," *id.* at 496, and the officers could only be removed for "willful violations of" specified statutes and regulations; "willful abuse of authority; or unreasonable failure to enforce compliance," *id.* at 503.

By contrast, the "good cause" standard in 5 U.S.C. § 7521 allows for ALJs to be removed for misconduct, poor performance, or insubordination. *See* Black's Law Dictionary 822 (4th ed. 1951) (defining "good cause" to include "any ground which is put forward by authorities in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the duties with which such authorities are charged"); *Morrison v. Olson*, 487 U.S. 564 724 n.4 (1988) (Scalia, J., dissenting) ("for cause … would include, of course, the failure to accept supervision"). And as then-Judge Kavanaugh recognized, the separation-of-powers issues presented by ALJs are different than those in *Free Enterprise* because federal agencies have a "choice whether to use ALJs," ALJ decisions "are subject to review by agency officials," and ALJs perform only limited "adjudicatory functions." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

Any concerns regarding the Merit Systems Protection Board's ("MSPB") involvement in the removal process should be addressed by construing the MSPB's role in "establish[ing] and determin[ing]" the existence of "good cause" as authority to adjudicate whether evidence supports the agency's proffered, good-faith grounds for cause—not as authority to second-guess the

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agency's determination that removal, rather than a lesser sanction, was necessary. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (a court's "plain duty is to adopt" a saving construction of a statute to "avoid a serious [constitutional] doubt"). Construing 5 U.S.C. § 7521 this way would address the separation-of-powers concerns, since it is well established that a court may review an executive officer's removal, *United States v. Perkins*, 116 U.S. 483, 483–85 (1886), even though Article III judges enjoy far greater protection from removal than MSPB Members.

Even if the majority's holding were correct, in cases involving a separation-of-powers violation the usual course is to sever the offending portion of the statute. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2208–09 (2020). The Fifth Circuit did not do so. It is thus unclear whether the majority found a violation based on the removal restriction for ALJs, the "establish and determine" function of the MSPB, the SEC Commissioners' assumed for-cause removal restrictions, the MSPB members' removal restrictions, or some combination of factors. And as the ALJ correctly held here, given that severance (rather than *vacatur*) is the normal remedy, Bebo prevailing on these grounds would not necessarily invalidate a finding of liability against her. *See* I.D. at 13–14.

CONCLUSION

Notwithstanding *Jarkesy*, the Commission should find Bebo liable for the charges alleged against her and impose substantial sanctions against her in the public interest.

Respectfully submitted:

Dated: July 14, 2022

_/s/ Benjamin J. Hanauer_____
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CERTIFICATE OF SERVICE

Benjamin J. Hanauer, an attorney, certifies that on July 14, 2022, he caused a true and correct copy of the Division of Enforcement's Response to Respondent Laurie Bebo's Submission of Supplemental Authority to be served on the following by email:

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Dated July 14, 2022

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