

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.

RESPONDENT LAURIE BEBO'S REPLY
IN SUPPORT OF SUBMISSION OF SUPPLEMENTAL AUTHORITY

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Pursuant to the Commission's July 1, 2022, Order, Respondent Laurie Bebo hereby files the following Reply to the Division of Enforcement's Response to Respondent Laurie Bebo's Submission of Supplemental Authority, filed on July 14, 2022.

INTRODUCTION

In its decision in *Jarkesy v. Securities & Exchange Commission*, the Fifth Circuit panel found an SEC administrative proceeding to be unconstitutional on three separate grounds equally applicable to these proceedings. 34 F.4th 446, 449 (5th Cir. 2022). The *Jarkesy* court's holding and reasoning strongly supports the position, which Bebo has raised throughout her own nearly identical SEC proceeding, and in federal court, that Dodd-Frank section 929P(a) is unconstitutional on its face. It also addresses, and rejects, several of the arguments that the Division has put forth in defense of the SEC's current enforcement regime. In its Response to Bebo's Submission of Supplemental Authority, the Division seeks to downplay the Fifth Circuit panel's *Jarkesy* opinion as either inapposite or wrongly decided. (Div. Resp. 2, 4.) Neither claim is supported by the law or logic, and the Division has offered no legitimate reason to disregard the *Jarkesy* panel's decision. Accordingly, Bebo respectfully asks the Commission to consider this decision to be highly persuasive in its review of Bebo's appeal, for the reasons stated below and in Bebo's Supplemental Submission.

ARGUMENT

I. The *Jarkesy* decision bears directly on the issues in this case.

A. *Jarkesy* represents important persuasive authority.

The Fifth Circuit's decision in *Jarkesy* considered and vacated the Commission's own Order in *In re John Thomas Capital Management Group LLC*, Release No. 89775, 2020 WL 5291417 (Sept. 4. 2020), and reached several conclusions about the scope of the Commission's

power in enforcement actions like the one Bebo now challenges on appeal. Yet the Division suggests in its Response that the Commission may essentially disregard this decision, in part because it "is not binding in these proceedings." (Div. Resp. 2.) This argument ignores the fact that federal appellate court decisions represent vital persuasive authority when considering the constitutional disputes at issue. Indeed, the ALJ relied on numerous federal appellate court decisions from different circuits throughout its Initial Decision in Bebo's case. (*See, e.g.*, Initial Decision 8, 9, 15.) And the Division cites decisions from various federal appellate courts, including the Fifth Circuit, as authority in its Response Brief. (Div. Resp. 5-9.) The Division cannot rely repeatedly on federal appellate court decisions in its own arguments, and then ask the Commission to disregard another whose holding undermines those arguments.

B. All of the Fifth Circuit's conclusions in *Jarkesy* are relevant to Bebo's own constitutional arguments.

In the *Jarkesy* decision, the Fifth Circuit panel considered a securities fraud respondents' challenges to an SEC administrative proceeding, and found the proceeding unconstitutional on three independent grounds. 34 F.4th at 449. To reach this conclusion, the panel considered the same issues underlying Bebo's facial challenges to section 929P(a) of the Dodd-Frank Act: the existence of a jury trial right in securities fraud actions, the SEC's power to arbitrarily choose the forum for its enforcement actions, and the restrictions insulating SEC ALJs from removal.

The petitioners in *Jarkesy* also (like Bebo) raised due process and equal protection challenges. As Bebo explained in her Supplemental Submission, the panel did not address these challenges directly, instead vacating the Commission's decision on the Seventh Amendment, nondelegation, and removal grounds. (Suppl. Submission 3.) In its Response, the Division argues that *Jarkesy* is "largely inapposite" because Bebo did not raise standalone Seventh Amendment

and nondelegation claims.¹ (Div. Resp. 3.) But as Bebo noted in her Supplemental Submission, it is the *implications* and *reasoning* of these holdings, that "necessarily require dismissing these proceedings for the reasons set forth in Bebo's own equal protection and due process claims, and provide an independent sufficient basis to dismiss these proceedings as violative of the United States Constitution." (*Id.* at 3-4.)

1. The Fifth Circuit's Seventh Amendment finding supports Bebo's due process and equal protection challenges.

Bebo's due process and equal protection challenges both stem from the fact that, under Dodd-Frank, the SEC may arbitrarily deny respondents accused of securities law violations their Seventh Amendment right to a jury trial. The existence of a jury trial right in SEC securities fraud actions is therefore foundational to both constitutional arguments.

In this proceeding, Bebo has argued that Dodd-Frank violated equal protection principles by allowing the SEC to pursue some actions for securities law violations in district court (where the respondent would have a right to a jury trial) and others in administrative proceedings (where a similarly situated respondent would not). Bebo's due process argument is similarly premised on the existence of a jury trial right in such cases: Bebo argued that it was a violation of due process to pre-emptively penalize her for the anticipated assertion of her Seventh Amendment right to a

¹ The Division suggests that Bebo's arguments pertaining to the Seventh Amendment and the nondelegation doctrine were waived. But these provisions, as applied to cases like Bebo's, raise fundamental constitutional questions that are still being considered and disputed in the federal courts. Courts have recognized an exception to waiver rules when there has been an intervening change in the law. *See, e.g., Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999). Moreover, a party seeking review of a claim properly raised in the lower court may offer separate arguments in support of that claim. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534-35 (1992). Courts have also recognized that arguments may be addressed for the first time on appeal when they concern issues of "constitutional magnitude which, if meritorious, could substantially affect these, and future, defendants." *U.S. v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990). A finding of waiver is especially inapplicable here, as Bebo has raised these issues throughout this proceeding and in a federal district court suit. Before the Eastern District of Wisconsin in 2015, for example, Bebo argued that section 929P(a) of the Dodd-Frank Act was an improper grant of power, giving the SEC "unfettered discretion" to provide or withhold a citizen's Seventh Amendment jury trial right. *Bebo v. SEC*, No. 15-C-3, 2015 WL905349, at *1 (E.D. Wis. March 3, 2015). It therefore cannot be said that Bebo has waived either her Seventh Amendment or nondelegation arguments.

jury trial. In its Initial Decision, the ALJ refuted this argument in part on the ground that these actions amount to "public rights" under *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977). Citing *Atlas Roofing*, the ALJ concluded that "Congress has authority to assign adjudication of the public right to an administrative agency without the right to a jury trial." (Initial Decision 6.)

The *Jarkesy* case brought precisely the same dispute before the Fifth Circuit panel, which supported Bebo's positions. 34 F.4th at 456-59. In *Jarkesy*, the SEC contended that it had discretion under *Atlas Roofing* to bring securities fraud actions in an agency forum where no jury trial was available. The panel found in response that the fundamental right to a jury trial applied to all securities fraud cases, which have elements of common law actions. *Id.* at 458-59. In other words, the Fifth Circuit rejected the very same conclusion that the ALJ reached in the decision that Bebo now appeals, and affirmed the Seventh Amendment right that Bebo's equal protection and due process claims are grounded in. Contrary to the Division's Response, the *Jarkesy* panel unquestionably reached a "legal conclusion that would support Bebo's contentions" when it held that the challenged proceeding violated the Seventh Amendment. (Div. Resp. 2.)

2. The Fifth Circuit's nondelegation finding supports Bebo's position that Dodd-Frank § 929P(a) is unconstitutional on its face.

As with the equal protection and due process arguments, the Division relies on the fact that Bebo has not "raised a stand-alone nondelegation claim," to foreclose consideration of the Fifth Circuit panel's decision. (Div. Resp. 3.) But in deciding Bebo's nondelegation claim, the Fifth Circuit directly affirmed the core of Bebo's facial challenge to Dodd-Frank. Bebo's position, before the district court, the ALJ, and now in her appeal to the Commission, is that Dodd-Frank improperly granted the SEC the power to choose which forum to bring an action in, with no guidance or limits on how that power might be exercised. The *Jarkesy* decision confirmed the unconstitutionality of such a grant of power. 34 F.4th at 461.

The Division asks the Commission to ignore this significant finding because Bebo's argument was not raised specifically as a nondelegation challenge. But the underlying legal conclusion—that Dodd-Frank improperly granted the SEC unfettered authority to choose its forum—is the same, and should be dispositive in this appeal.

3. The Fifth Circuit's opinion on Article II removal restrictions directly supports Bebo's challenge.

In arguing that "*Jarkesy* did not address most of Bebo's constitutional arguments," the Division glosses over the fact that Bebo *did* expressly raise an Article II removal challenge, with which the *Jarkesy* decision aligns. *Jarkesy*, 34 F.4th at 464-65. The *Jarkesy* panel found, as Bebo has consistently argued, that SEC ALJs are improperly insulated from presidential control by two-layers of "for-cause" removal protections, in violation of the Article II Take Care Clause. *Id.* Notably, in deciding the removal issue, the *Jarkesy* panel rejected the very interpretation of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 498 (2010) that the ALJ relied on in its Initial Decision. (Initial Decision 12-14.)

In claiming that the *Jarkesy* decision is "largely inapposite" from Bebo's case, the Division emphasizes that Bebo did not independently raise two of the Fifth Circuit's three grounds for vacating the SEC's decision. But even if the Fifth Circuit panel's conclusions had no bearing on Bebo's other constitutional arguments at all, it is still significant new authority for the Commission to consider regarding the Article II challenge.

II. The Division has not shown that any of the Fifth Circuit panel's findings were wrongly decided.

In disputing the Fifth Circuit's holdings, the Division's response brief mirrors the arguments raised by the SEC in its July 1, 2022, petition to the Fifth Circuit for a rehearing en banc. *Jarkesy* himself has challenged these arguments in an opposition to the petition filed on July 18, 2022. In his Opposition, *Jarkesy* argues that these challenges to the panel's decision are

simply an attempt by the SEC to "avoid the inevitable consequence of the unconstitutional expansion of its power afforded by Dodd-Frank § 929P(a)." (Jarkesy Opp'n 1.) The same can be said of the arguments in the Division's Response to Bebo's Supplemental Submission, which Bebo disputes as follows.

A. The Seventh Amendment guarantees a jury trial right in securities fraud actions.

The Fifth Circuit panel found, as Bebo has maintained via her equal protection and due process challenges, that respondents in federal securities law actions have a right to a jury trial under the Seventh Amendment. This finding rejected the argument, which the Division has long relied on, that these actions amount to "public rights" under *Atlas Roofing*, and may be assigned to administrative tribunals without violating the Seventh Amendment. In continuing to argue that citizens have no Seventh Amendment right in securities fraud cases unless the Commission decides to grant it to them, the Division cites *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989), for the proposition 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." (Div. Resp. 5.)

The Division's framing of *Granfinanciera* is misleading and obscures the holding of that case. Read in full, the line that the Division quotes from simply acknowledges that in "certain situations"² Congress *may* create causes of action analogous to common law claims that are outside the ambit of the Seventh Amendment. But as the Fifth Circuit panel noted in *Jarkesy*, the Court in *Granfinanciera* "clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns 'traditional legal claims' to an

² The quotation from *Granfinanciera* reads in full: "In certain situations, of course, 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*, 492 U.S. at 52. (emphasis added.)

administrative tribunal." *Jarkesy*, 34 F.4th at 453 (quoting *Granfinanciera*, 492 U.S. at 52). Otherwise, Congress could circumvent the Seventh Amendment any time it wanted by simply finding a public purpose for it and codifying it in federal statutory law. *Jarkesy*, 34 F.4th at 457-59. There is no precedent for such a broad ability to effectively eliminate the Seventh Amendment for all enforcement actions brought by the federal government. *See id.*

This context erodes the Division's argument that the Seventh Amendment need not apply to securities fraud actions generally. Applying *Granfinanciera*, the *Jarkesy* panel found that securities fraud actions (like the one that Bebo challenges here) are "not the sort that may be properly assigned to agency adjudication under the public-rights doctrine." *Id.* at 455. The Commission should recognize that this Seventh Amendment finding both supports Bebo's constitutional challenges, and provides an independent basis for dismissing this proceeding.

B. The nondelegation doctrine does apply to the SEC's power to choose the forum for enforcement actions.

In its *Jarkesy* decision, the Fifth Circuit held that the SEC's unguided power to choose the forum for securities enforcement actions amounted to an improper delegation of a legislative function. As the Fifth Circuit panel noted in *Jarkesy*, the Supreme Court has recognized that assigning disputes to agency adjudication is "peculiarly within the authority of the legislative department," *Jarkesy*, 34 F.4th at 461 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). The Court has also found that the "mode of determining" which cases go to administrative tribunals is "completely within congressional control." *Crowell v. Benson*, 285 U.S. 22, 50 (1932). In *INS v. Chadha*, the Court found that an action is legislative where it "alter[s] the legal rights, duties and relations of persons...outside the legislative branch." 462

U.S. 919, 952 (1983). Applying this precedent³ in *Jarkesy*, the Fifth Circuit panel concluded that Dodd-Frank section 929P(a) improperly delegated a legislative power to the SEC.

The Division argues that its power to arbitrarily grant some citizens a jury trial in district court and provide others a streamlined trial before an administrative law judge is equivalent to that of criminal prosecutors and other executive branch officials exercising discretion over how to enforce their laws. As Jarkesy noted in his Opposition, this parallel "mixes apples and oranges", as criminal prosecutors (unlike the SEC under Dodd-Frank) "do not have executive discretion to nullify Article III jurisdiction and strip a fundamental constitutional right from an accused." (Jarkesy Opp'n. 12.) Jarkesy in his Opposition and the Fifth Circuit panel decision got it right—the SEC's power to assign disputes to agency adjudication, and to choose whether to grant a jury trial right, is fundamentally distinct from the examples of prosecutorial discretion that the Division lists in its Response. The Division has thus offered no cognizable challenge to the *Jarkesy* panel's conclusion that Congress unconstitutionally delegated a legislative function to the SEC.

C. The removal restrictions on the ALJs violate Article II.

Finally, the *Jarkesy* panel concluded, as Bebo has long maintained, that the SEC ALJs' two layers of for-cause removal protections are a violation of the Article II Take Care Clause. This is a straightforward conclusion. There is no question that the ALJs are protected by two layers of removal restrictions. And the Supreme Court has held that such protections violate Article II. *Free Enterprise Fund*, 561 U.S. at 498. Nonetheless, the Division's Response reiterates its argument that *Free Enterprise Fund* should not extend to SEC ALJs, primarily

³ The Division claims in its Response that the *Jarkesy* panel's decision regarding legislative actions was based on "one sentence in *INS v. Chadha*," ignoring entirely the other Supreme Court cases that the Fifth Circuit cited for this conclusion. (Pet. at 6-7.)

because the restrictions at issue in *Free Enterprise Fund* were more stringent, and the ALJ's perform adjudicatory functions. (Div. Resp. 9.)

These nuances do not overcome the Supreme Court's holding in *Free Enterprise Fund*. As the *Jarkesy* panel concluded, "even if the ALJs' functions are more adjudicative than PCAOB members, the fact remains that two layers of insulation impedes the President's power to remove ALJs . . ." *Jarkesy*, 34 F.4th at 465. While the SEC attempted in *Jarkesy*, as the Division does here, to complicate this issue with distinctions between SEC ALJs and PCAOB members, the panel nonetheless reached the natural conclusion under *Free Enterprise Fund*: that SEC ALJs, as inferior officers, are improperly insulated from removal in violation of Article II.⁴

CONCLUSION

The Fifth Circuit panel's decision in *Jarkesy* significantly undermines the Division's opposition to Bebo's constitutional arguments. In vacating an Order from the Commission and finding the SEC proceeding unconstitutional, the Fifth Circuit reached conclusions that directly contradict the arguments the Division has relied on in this appeal, and that the ALJ reached in the Initial Decision that the Division seeks to uphold. While it is perhaps understandable that the Division would wish to set aside this decision under these circumstances, the fact remains that *Jarkesy* is a highly persuasive and directly applicable authority on the crucial questions underlying Bebo's constitutional challenges. Bebo therefore asks that the Commission recognize, in light of the *Jarkesy* decision, that the SEC's administrative proceedings are unconstitutional and must be dismissed.

⁴ The Division argues in its response that if the Fifth Circuit panel were correct that section 929P9(a) violated Article II, the proper remedy would be to "sever the offending portion of the statute." (Div. Resp. 10.) The SEC made the same proposal in its Petition for Rehearing. (Pet. at 16-17.) In his Opposition, *Jarkesy* noted that the SEC's "invitation to reimagine or 'sever' unidentified parts of the statutory scheme is both impracticable and waived by its failure—before the panel and in its Petition—to even suggest how such complex judicial surgery, on multiple statutes, might be accomplished." (*Jarkesy* Opp'n. at 15.) Similarly, here the Division provides no explanation for how these provisions can be severed, and the suggestion is not workable or supported by the law.

Dated: July 29, 2022

Respectfully submitted:

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CERTIFICATE OF SERVICE

Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. certifies that on July 29, 2022, he caused a true and correct copy of Respondent Laurie Bebo's Reply in Support of Submission of Supplemental Authority to be served on the following by e-mail:

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