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.**	**THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT LAURIE BEBO'S MOTION FOR SUMMARY DISPOSITION**

Respondent Laurie Bebo moves for summary disposition on the ground that Section 929P(a) of the Dodd-Frank Act, which authorizes the imposition of civil penalties in this proceeding, violates the equal protection and due process guarantees of the Fifth Amendment. She also argues that the removal provisions governing the Commission's ALJs are unconstitutional. Alternatively, she contends that the OIP in this case is void. Each of these arguments fails, and Bebo's motion should be denied.

Bebo's equal protection and due process claims are contrary to precedent. In arguing that Section 929P(a) violates equal protection, Bebo does not assert that the statute arbitrarily discriminates, either on its face or in its effect, against an identifiable class of which she is a member. Nor does she contend in her motion that the Commission has impermissibly applied Section 929P(a) in her case, under either a "class-of-one" or selective prosecution theory. Instead, Bebo argues that Section 929P(a) violates equal protection because it allows the Commission, in deciding whether to bring an enforcement action in district court or in an administrative proceeding, to choose the forum in which it is more likely to obtain an outcome

that best advances the public interest. That contention lacks any support in equal protection case law, and is a transparent attempt to circumvent her burden to prove purposeful discrimination.

Bebo's argument that Section 929P(a) violates due process by penalizing the exercise of her right to a jury trial is similarly flawed. The cases on which Bebo relies prohibit the government from punishing a person for exercising a protected right. There is no support in law or logic for Bebo's claim that Section 929P(a) is facially unconstitutional simply because it grants the Commission the discretion to choose to enforce the securities laws in an administrative forum (in which a jury trial is neither available nor required) or in district court (where she might be entitled to a jury depending on the type of relief sought). Bebo does not argue that the Commission has improperly exercised its discretion and, for obvious reasons, the theoretical possibility that such an abuse *could* occur is insufficient to render a statute facially unconstitutional.

Bebo's claim that the ALJ's removal protections are unconstitutional fails because the statute governing their removal can be construed in a manner consistent with Article II, and because those protections are constitutional in any event in light of the quasijudicial functions that the Commission's ALJs perform. And Bebo's challenge to the validity of the OIP similarly fails for the simple reason that she identifies no legal flaw in the order itself.

I. PROCEDURAL BACKGROUND

On December 3, 2014, the Commission issued the OIP in this matter. ALJ Elliot wase then designated to preside over these proceedings. ALJ Elliot conducted a multi-week hearing between April 20 and June 19, 2015.

On October 2, 2015, ALJ Elliot issued an Initial Decision finding that Bebo violated and caused violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5,

caused violations of Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) and Rules 13a-1 and 13a-13, and violated Exchange Act Section 13(b)(5) and Rules 13a-14, 13b2-1, and 13b2-2. The Initial Decision imposed a cease-and desist order, an officer-and-director bar,[1] and civil penalties.

The Commission granted Bebo's petition for review. While the matter was pending before the Commission, on November 29, 2017, the Solicitor General submitted a brief in the U.S. Supreme Court in *Lucia v. Securities and Exchange Commission* (No. 17-130) agreeing with the petitioners that the Commission's ALJs are inferior officers under the Appointments Clause. The Solicitor General urged the Court to decide that issue and recommended that it appoint an amicus curiae to defend the contrary judgment of the D.C. Circuit. The following day, the Commission ratified its prior appointment of its ALJs, including ALJ Elliot. *See* Order, Exchange Act Release No. 82178 at 1 (Nov. 30, 2017). The Commission also remanded all pending matters in which an ALJ had issued an initial decision, and instructed that the ALJ reconsider the record and determine whether to ratify or revise all prior actions in the proceeding. *Id.* at 1-2.

ALJ Elliot reconsidered the record and, on February 16, 2018, ratified the Initial Decision. Bebo renewed her petition for review, and the Commission agreed to complete its consideration of the petition.

On June 21, 2018, while Bebo's petition was pending before the Commission, the Supreme Court held that the Commission's ALJs are inferior officers and that ALJ Elliot had not

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[1] Bebo engaged in the fraud and other misconduct at issue in this case in her capacity as CEO of a public company. Bebo does not assert that the Commission's ability to seek an officer-and-director bar via administrative proceedings is unconstitutional. Nor does she argue that the Commission could not have brought cease-and-desist proceedings against her, or obtained an officer-and-director bar administratively, prior to Dodd-Frank.

been appointed in a manner required by the Appointments Clause. *Lucia*, 138 S. Ct. 2044. The Court stressed that "the appropriate remedy" for that violation was "a new hearing before a properly appointed official." *Id.* at 2055 (quotation omitted). It further directed that "another ALJ (or the Commission itself) must hold the new hearing." *Id.* The Court remanded the case to the D.C. Circuit for further proceedings consistent with its opinion. *Id.* at 2056. On remand, the D.C. Circuit granted Lucia's petition for review, set aside the Commission's decision and order,e and remanded the case to the Commission "for a new hearing either before another [ALJ] or before the Commission, in accordance with [the Supreme Court's opinion in] *Lucia*." *Lucia v. SEC*, No. 15-1345 (D.C. Cir. Aug. 15, 2018).

The Commission temporarily stayed this proceeding following the Court's decision in *Lucia*. On August 22, 2018, the Commission reiterated its approval of the appointments of the Commission's ALJs as its own under the Constitution, ended the stay, and, consistent with the Supreme Court's and D.C. Circuit's instructions in *Lucia*, vacated "any prior opinion" it issued in this matter and ordered that Bebo "be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter." *Pending Admin. Proc.*, Securities Act Rel. No. 10536 (Aug. 22, 2018).

This case was then reassigned to this Court. On December 18, 2018, the Court accepted the parties' joint proposal for the conduct of further proceedings on remand. Bebo later filed the present motion for summary disposition.

II. ARGUMENT

A. Section 929P(a) of Dodd-Frank is not facially unconstitutional.

Bebo contends (Br. 1, 8) that Section 929P(a) is "facially unconstitutional" because it allows the Commission to seek "functionally identical" remedies in federal district court, where

there is a right to a jury trial, and in an administrative proceeding, where there is not. She does not dispute, however, that Congress may provide for administrative enforcement of the securities laws (with the availability of review in the courts of appeals) without violating the Seventh Amendment. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977). Nor does she dispute that she only has a right to a jury trial if the Commission brings a district court action seeking legal relief. *See Tull v. United States*, 481 U.S. 412, 423 (1987); *Curtis v. Loether*, 415 U.S 189, 194 (1974). And she acknowledges that for decades, the Commission has had statutory authority to seek civil penalties against *registered persons* either in district court or in an administrative proceeding. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 201, 202, 104 Stat. 931 (1990). Indeed, she praises that enforcement regime for striking a "delicate balance" consistent with Supreme Court case law (Mot. 7-8).

Section 929P(a) is different, Bebo opines (Mot. 7-8), because the remedies available in district court are no longer "more severe and punitive" than those available in an administrative proceeding. But Section 929P(a) did not alter the respective available remedies; it expanded to unregistered persons the enforcement regime that had already applied to registered persons since 1990. Bebo does not explain why *that* policy choice transforms the constitutional analysis. And she fails to muster any authority for the proposition that the constitutionality of a statute permitting an agency to choose to enforce the law administratively or in district court turns on the relative "sever[ity]" of the remedies available in each forum.

Nor would that be a coherent or practicable rule. As Congress has recognized, whether a potential set of remedies is more or less severe than another depends on the circumstances. Congress authorized the Commission to impose civil penalties in administrative proceedings in

part because the remedies to which the Commission had been limited—*e.g.*, revocation or suspension of a firm's registration—were "too severe" in some cases, resulting in "adverse consequences" that civil penalties could avoid. S. Rep. 101-337 at 10, 11 (1990). Moreover, Bebo does not explain how a court is to determine whether two remedial regimes are functionally identical. For example, she ignores what Congress considered a "major difference" (*id.* at 13) between the remedies available in the two forums here: in district court, the Commission may seek civil penalties up to the gross amount of pecuniary gain to the defendant, while in administrative proceedings it is limited to a specified maximum dollar amount. *Compare* 15 U.S.C. 78u(d)(3) *with id.* 78u-2(b). And there are more: an asset freeze or receivership requires a district court action, for example, whereas remedies for "caus[ing]" a securities law violation are available only in the administrative forum. *See* 15 U.S.C. 78u-2(a)(2)(B). Even if the maximum civil penalties were identical in both forums, however, it is unclear how much Congress would have to increase the district court amounts to restore a constitutionally permissible "gradient" (Mot. 7).

Ultimately, however, the Court need not address any of these conceptual flaws, because as discussed further below, Bebo's equal protection and due process claims rest on a fundamental misunderstanding of both doctrines.

1. Bebo's equal protection challenge is meritless.

Bebo does not contend that Section 929P(a), on its face, discriminates against any identifiable group of people. *See Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008) ("Our equal protection jurisprudence has typically been concerned with governmental classifications that affect some groups of citizens differently than others.") (quotation omitted). Nor does she argue that Section 929P(a), although facially neutral, has a disparate impact on any identifiable group. *See Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272-73, 279

(1979) (a facially neutral law violates equal protection if it has a discriminatory effect on a definable class that can be traced to a discriminatory purpose). She also does not allege that she has been arbitrarily singled out and treated differently from similarly situated individuals; indeed, she expressly disclaims (Mot. 11 n.8) basing her motion on a "class-of-one" equal protection claim. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).[2] Nor does she allege selective prosecution. *See Wayte v. United States*, 470 U.S. 598, 608-09 (1985).

Instead, Bebo argues that Section 929P(a) must be struck down because it "*allows*" the Commission to choose its forum arbitrarily. Mot. 12-13; *see also* Mot. 3 (Commission "*may* choose the forum" for allegedly impermissible reasons); Mot. 10 (Section 929P(a) "*allows* . . . unguided authority to choose"), Mot. 14 (Section 929P(a) "*permits* arbitrary classification") (emphases added). Such an equal protection claim falls outside any of the categories that the Supreme Court—or, as far as the Division is aware, any court—has recognized. Because Section 929P(a) does not discriminate against any identifiable group, and Bebo has disavowed a class-of-one theory, "no valid equal protection claim exists in this case." *Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc.*, 682 F.3d 1293, 1297 & n.2 (11th Cir. 2012).[3] Bebo's claim can be disposed of on this basis alone.

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2 Such a claim, which Bebo indicates she plans to pursue (Mot. 1 n.1), would not be cognizable because the Commission's choice of forum "involve[s] discretionary decisionmaking based on a vast array of subjective, individualized assessments," and "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that [the Commission is] entrusted to exercise." *Engquist*, 553 U.S. at 594.

3 Bebo appears to suggest that Section 929P(a) "classif[ies]" citizens based on whether or not they receive a jury trial (Mot. 10), but that is not the kind of "discrete and objectively identifiable class[]" upon which an equal protection claim may be predicated. *Engquist*, 553 U.S. at 601 (quotation omitted); *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (a "class" cannot simply be the group adversely affected by the

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But even if her claim were cognizable, Section 929P(a) must be accorded "a strong presumption of validity" and upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for" it, because it does not involve a suspect or quasi-suspect classification or fundamental right. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). Bebo bears the burden "to negative every conceivable basis which might support" the law. *Id.* at 314.eAs this is a facial challenge, the inquiry does not turn on the *Commission's* motives, ase Bebo incorrectly assumes (Mot. 3, 9-10, 13-14), but whether there is any "plausible policy reason" that supports *Congress's* decision in Section 929P(a) to grant the Commission discretion on a case-by-case basis to pursue civil penalties either in district court or an administrative proceeding. *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (quotation omitted).

In fact, there are many. For example, Section 929P(a) gives the Commission an additional enforcement tool to obtain civil penalties for suspected securities law violations by unregistered persons under more expeditious administrative procedures, thereby strengthening deterrence and protecting investors. *See* 17 C.F.R. 201.300 (establishing timeframes for hearings and initial decisions); *cf.* S. Rep. No. 101-337 at 18 ("[G]iven the extremely congested nature of federal court dockets, . . . the authority to issue an administrative cease-and-desist order will enable the SEC to respond in a more timely fashion to violat[ive] conduct or practices."). Section 929(a) also promotes administrative efficiency by enabling the Commission to seek a cease-and-desist order and civil penalties against an unregistered person without having to bring separate administrative and federal court actions. *See* H. Rep. No. 111-687 at 78 (2010) ("This section streamlines the SEC's existing enforcement authorities by permitting the SEC to seek

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challenged government conduct); *Corey Airport Servs.*, 682 F.3d at 1298 ("[T]he class for a class-based claim for equal protection purposes cannot be defined solely as those persons who suffered at the hands of the supposed discriminator.").

civil money penalties in cease-and-desist proceedings."). And Congress might have also intended to expand the number of enforcement actions in which the Commission can apply its expertise and knowledge of the securities laws and industry practices. Any one of these reasons would easily pass muster under rational basis review. *See Goodpaster v. Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013).

Even if the Commission's own decision-making process were relevant in a facial challenge, Bebo's bare assertion that the choice to proceed administratively must be driven by a desire "to deprive a citizen of her right to a jury trial" (Mot. 3) flies in the face of the "longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Hartman v. Moore*, 547 U.S. 250, 263 (2006); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.") (quotation omitted). As the very sources cited by Bebo confirm, there are many reasons why the Commission might bring an administrative action, including an interest in obtaining a more prompt decision on liability and remedies, having the benefit of specialized factfinders, and conserving resources. *See, e.g.*, Andrew Ceresney, *Remarks to the American Bar Association's Business Law Section Fall Meeting* (Nov. 21, 2014), *available at* https://www.sec.gov/news/speech/2014-spch112114ac. Here, for example, it was "particularly rational" to pursue this enforcement matter in an administrative proceeding because the Division's allegations that Bebo caused various securities law violations may only be brought in that forum. *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *29 (Sept. 17, 2015).[4e]

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[4] While *Timbervest* was vacated in light of *Lucia*, *see Timbervest, LLC v. SEC*, No. 15-1416 (D.C. Cir. Nov. 19, 2018), the Commission's reasoning remains persuasive.

Moreover, the Supreme Court has repeatedly held that prosecutors may, consistent with equal protection, exercise "broad discretion" in deciding whether to prosecute, what charges to file, what statute to prosecute under, and what remedies to pursue. *See Armstrong*, 517 U.S. at 464; *Wayte*, 470 U.S. at 607; *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *see also United States v. Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992) (discretion to select an appropriate forum); *United States v. I.D.P.*, 102 F.3d 507, 511-12 (11th Cir. 1996) (same). It has never suggested that in making those decisions, prosecutors may not pursue "litigation tactics" intended "to give the government its best opportunity to win" (Mot. 13-14).

Bebo nonetheless contends (*see* Mot. 3, 10, 12-13, 14) that Section 929P(a) is *facially* unconstitutional because it does not expressly prohibit the Commission from arbitrarily exercising the discretion it confers. But if that were true, all of the prosecutorial discretion cases cited above would have come out the other way. The Supreme Court instead emphasized that discretion that might appear on the face of a statute to be "unfettered" is actually "subject to constitutional constraints," including equal protection standards. *Wayte*, 470 U.S. at 608; *Batchelder*, 442 U.S. at 125.[5] But to prevail on an equal protection claim in this context, the claimant must present "clear evidence" that "the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465 (quotation omitted); *see also McCleskey v. Kemp*, 481 U.S. 279, 292, 297 (1987)

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[5] These cases likewise refute Bebo's suggestion (Mot. 10 & n.7, 13-14 & n.9) that Congress was required to provide guidance limiting the Commission's exercise of discretion. The prosecution of violations of federal law is a quintessentially executive function, *Morrison v. Olson*, 487 U.S. 654, 690-91 (1988); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), and Bebo cites no authority that Congress must specify criteria for the executive to apply in carrying out that function.

(requiring "exceptionally clear proof" that "the decisionmakers in [*the claimant's*] case acted with discriminatory purpose"); *United States v. Moore*, 543 F.3d 891, 900 (7th Cir. 2008) (holding that "an exercise of prosecutorial discretion cannot be successfully challenged merely on the ground that it is irrational or arbitrary" and that "only invidious discrimination is forbidden"). Bebo has made no such showing. In disputing the relevance of these cases, Bebo misses the point: they reinforce that her attempt to avoid having to prove purposeful discrimination by means of a facial challenge is incompatible with equal protection doctrine.

Bebo's reliance on *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), simply confirms her misunderstanding of relevant principles of the equal protection doctrine. Those cases examined state civil commitment schemes that treated prisoners or persons convicted of crimes differently from the population generally. In *Baxstrom*, the Supreme Court held that a state prisoner "was denied equal protection of the laws by the [State's] statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in" the State. *Baxstrom*, 383 U.S. at 110. The Court found "no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments" for purposes of whether a person should be afforded judicial review before a jury. *Id.* at 111-12. In *Humphrey*, the Court found that serious questions were raised by the application of a state law that appeared to authorize the civil commitment of persons convicted of a crime without the procedures, including a right to jury, that would apply to the population generally. 405 U.S. at 508-11.

In holding that a statutory scheme cannot deny to a specific group, for no rational reason, jury review of a determination that it guarantees to all others, *Baxstrom* and *Humphrey* fall

squarely within equal protection's traditional ambit. *See Anderson v. Romero*, 72 F.3d 518, 526 (7th Cir. 1995) ("[T]he equal protection clause forbids the [S]tate to treat one group, including a group of prison inmates, arbitrarily worse than another."). These decisions are irrelevant to the analysis of Section 929P(a), which does not confer a "statutory right" (Mot. 12) to a jury trial on anyone and makes no distinction among any groups. *See Morgan v. Wainwright*, 676 F.2d 476, 482-83 & n.6 (11th Cir. 1982) (holding that state law under which courts have unfetterede discretion to use a jury in probation revocation hearings does not violate equal protection, that *Baxstrom* is "wholly inapposite" to that question, and that an equal protection claim would require proof "that the court in exercising that discretion has made impermissible, arbitrary, or irrational distinctions").

Nor is there any plausible way to read *Baxstrom* and *Humphrey* as establishing (Mot. 12-13) that an agency may not be given discretion to pursue the same remedies for the same conducte in either a district court or administrative action. Bebo's premise that equal protection requires "all people facing [the same] determination be given the same protections" (Mot. 11) was specifically rejected in *Baxstrom*. 383 U.S. at 111 ("Equal protection does not require that all persons be dealt with identically."). A facial constitutional problem arose in *Baxstrom* because no rational basis supported the statutory scheme's classifications. Section 929P(a) suffers no such flaw. An argument that the Commission's choice of forum in a given case is impermissibly arbitrary would have to be raised in the context of the kind of as-applied claims described above, which are not the basis for Bebo's motion.[6]

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6 Moreover, even if it were true that equal protection categorically prohibits the Commission from ever pursuing the same remedies for the same conduct in different forums, that would not justify facial invalidation of Section 929P(a). Rather, it would simply be one of the "constitutional constraints"—like the bar on discrimination on the

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2.e Bebo's due process challenge is meritless.e

eBebo's due process arguments are equally unpersuasive. She relies on a series of casese considering the constitutional limits on government policies and practices that punish a person for having exercised a right. The Supreme Court has stated that a law or practice violates due process "if [its] only objective . . . is to discourage the assertion of constitutional rights." *Chaffin v. Stynchcombe*, 412 U.S. 17, 33 n.20 (1973). In addition, in rare instances, the Court has founde that due process requires a prophylactic bar on certain types of charging decisions that pose "a realistic likelihood of vindictiveness." *United States v. Goodwin*, 457 U.S. 368, 384 (1982) (quoting *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)). In those cases, "the likelihood of vindictiveness justified a presumption that would free defendants of apprehension" that their exercise of a right will result in prosecutorial retaliation. *Id.* at 376.

Bebo contends (Mot. 18) that Section 929P(a) is facially unconstitutional because it "preemptive[ly] punish[es]" her for asserting her right to a jury trial. That claim fails as a matter of legal doctrine, logic, and basic common sense. The vindictive prosecution case law on which Bebo relies presupposes that "the action detrimental to the defendant has been taken *after* the exercise of a legal right," not before it. *Goodwin*, 475 U.S. at 373 (emphasis added); *see also, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (due process precludes "punish[ing] ae person because he has done what the law plainly allows"); *Blackledge*, 417 U.S. at 28-29 (holding that state could not "respond to" defendant's exercise of statutory right by bringing a more serious charge). Here, the Commission's choice of forum *precedes* Bebo's opportunity to exercise any right. Consequently, the due process concerns animating those decisions—the

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basis of race or gender—that limits the Commission's exercise of the discretion Congress has granted. *Batchelder*, 442 U.S. at 125.

"danger" of government "retaliation," *Bordenkircher*, 434 U.S. at 363, and the prospect that such retaliation will "chill" or "deter" the exercise of a right, *Chaffin*, 412 U.S. at 33—are not o implicated.o

Moreover, Bebo cannot demonstrate that Section 929P(a)'s "only objective" is to discourage the assertion of a legal right. *Chaffin*, 412 U.S. at 33 n.20. Bebo has no right to a jury trial in cases where, as here, the Commission chooses to initiate an administrative proceeding. *Atlas Roofing*, 430 U.S. at 455. Any right she would have to a jury trial is contingent upon the Commission choosing to file a district court action seeking legal relief. *Curtis*, 415 U.S. at 194. Thus, the Commission's decision to bring an administrative proceeding does not "penalize" her for exercising that right. Bebo cites no authority for the proposition that prosecutorial decisions that limit a defendant's future opportunity to invoke a right—prevalent throughout the criminal justice system—violate due process. Similarly, she fails to muster a single authority to support her assertion that due process forbids prosecutors from choosing a forum based on an assessment of where the government is "more likely to be successful" in enforcing the law.[7]

Bebo nonetheless argues that a due process challenge must be sustained if the statute "permit[s] the potential for an improper motive to enter the government's decision-making." Mot. 16 (misstating the reasoning in *Blackledge*). Thus, she contends (Mot. 17), Section 929P(a) is facially unconstitutional because it does not expressly forbid the Commission from voluntarily

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7 In any event, Bebo's assertion (Mot. 17) that the availability of a jury trial is the Commission's "sole consideration" in choosing a forum is baseless. As discussed above, the Commission considers a variety of factors. *Cf. Goodwin*, 457 U.S. at 380 nn.11-12 ("A charging decision does not levy an improper 'penalty' unless it *results* solely from the defendant's exercise of a protected legal right" and "*could not be justified* as a proper exercise of prosecutorial discretion.") (emphases added).

dismissing a district court action after a defendant asserts her right to trial and then seeking administrative enforcement. But that is not the law. The Supreme Court has made clear that the "mere opportunity for vindictiveness is insufficient" to invalidate a practice on due process grounds in the absence of proof of a retaliatory motive. *Goodwin*, 457 U.S. at 373, 384. Such a remedy is appropriate "only in cases in which a reasonable likelihood of vindictiveness exists." *Id.* at 373. Here, there is no evidence that the Commission has done anything to penalize defendants for electing a jury trial in the cases it has brought in district court. The theoretical possibility of an abuse that Bebo does not claim has ever occurred, that she herself admits is "unlikely" (Mot. 17), and that would give rise to a cognizable as-applied claim should it ever occur, does not justify facially invalidating Section 929P(a).

B. The ALJ's removal protections do not violate the Constitution.

Bebo wrongly asserts (Mot. 20) that dismissal of this proceeding is mandated because it is "governed by [a Commission ALJ] in violation of" constitutional removal protections. Article II vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3. Unlike its specific directives governing the power of appointment, "[t]he Constitution is silent with respect to the power of removal from office, where tenure is not fixed." *In re Hennen*, 38 U.S. 230, 258 (1839). The "power of removal" nonetheless has been viewed as "incident to the power of appointment." *Id.* at 259; *see also Myers v. United States*, 272 U.S. 52, 164 (1926) (the Constitution implicitly reserves to the President the "power of removing those for whom he cannot continue to be responsible").

The Supreme Court has long recognized that Congress may impose limited restrictions on the removal power. Congress may, for example, impose a for-cause removal restriction on the

President's power to remove principal officers of certain independent agencies. *See Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 493-94 (2010). And the Court has countenanced for-cause limitations on a principal officer's ability to remove inferior officers. *Id.* at 494.

In *Free Enterprise Fund*, however, the Court held that the "novel" and "rigorous" barrier to removing members of the PCAOB by the Commission, whose members are presumed to enjoy "for cause" removal protection, left the President with insufficient ability to supervise the PCAOB's execution of the laws. 561 U.S. at 496. The Court noted that it had "previously upheld limited restrictions on the President's removal power" but only where "one level of protected tenure separated the President from an officer exercising executive power." *Id.* Two levels of "for cause" removal for an officer exercising "executive power," the Court held, "result[s] i[n] a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.*

For two reasons, *Free Enterprise Fund* does not compel the conclusion that the statute providing that the Commission ALJs may be removed only for "good cause" (5 U.S.C. 7521) violates the separation of powers. First, in his brief in *Lucia* (S. Ct. No. 17-130), the Solicitor General offered an interpretation of ALJs' "good cause" removal protection that comports with constitutional constraints. Drawing from constitutional avoidance principles, the Solicitor General explained (SG Br. 51) that, even where ALJs are embedded "in a structure involving more than one layer of tenure protection," a proper construction of "good cause" may alleviate constitutional concerns. The statutory scheme, the Solicitor General stated (SG Br. 47), must be understood to allow "[a]gency heads [to] be able to remove ALJs who refuse to follow agency policies and procedures, who frustrate the proper administration of adjudicatory proceedings, or who demonstrate deficient job performance." Under that view, Section 7521 should be

"interpreted to permit an agency to remove an ALJ for personal misconduct or for failure to follow lawful agency directives or to perform his duties adequately." *Id.* at 45. At the same time, an ALJ may not be removed "'at the whim or caprice of the agency or for political reasons,'" *id.* at 49 (quoting *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 142-43 (1953)), and "an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law," *id.* at 50.

According to the Solicitor General, that interpretation of Section 7521 avoids the constitutional defects at issue in *Free Enterprise Fund*. There, "the PCAOB's members could be removed only under an 'unusually high standard' that required a 'willful' violation of the law, a 'willful' abuse of their authority, or an 'unreasonable' failure to enforce legal requirements"; here, by contrast, "[t]he intrusion on presidential authority is significantly less." SG Br. 51 (quoting *Free Enterprise Fund*, 561 U.S. at 503). "ALJs could accordingly be held accountable, by the Heads of Departments and the President who appoint them, for failure to execute the laws faithfully." *Id.*[8]

Second, crucial to the Court's decision to invalidate the dual for-cause structure in that case was the fact that PCAOB Board members exercised quintessential "executive" functions—

[8] The Solicitor General also stated that Section 7521(a)—which allows for removal "only for good cause established and determined by the Merit Systems Protection Board [MSPB] on the record after opportunity for hearing before the Board"—should be construed so that "the MSPB's review is limited to determining whether factual evidence exists to support the agency's proffered good faith grounds." SG Br. 39, 52. Such an approach ensures that the Department Head retains primary control in the decision to remove an ALJ. But it is not necessary to address this aspect of the statutory scheme at this juncture; regardless of how the MSPB's role in the removal process is understood, agencies like the Commission "possess the authority to reassign responsibilities away from ALJs while awaiting MSPB review of a removal decision." *Id.* at 53, 55. Consequently, "[t]hat authority avoids the possibility that an ALJ might continue to adjudicate cases beyond the point at which the Department Head has lost confidence in the ALJ's ability to exercise appropriate judgment." *Id.* at 55.

and not solely "quasijudicial" functions. 561 U.S. at 496, 502, 505, 507 n.10. Indeed, the Court refused to extend its holding to ALJs, who "of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers." *Id.* at 507 n.10. Contrary to Bebo's assertion (Mot. 20), the Solicitor General in *Lucia* similarly drew a linee (SG Br. 45, 50) between quasijudicial duties and purely executive functions when he explained that the President, acting through principal officers, cannot remove an ALJ "to influence the outcome in a particular adjudication," and noted the need to "respect[] the independence of ALJs in adjudicating individual cases."

That is reflective of the Supreme Court's longstanding recognition that Congress's ability to enact limited removal protections depends in part on the functions of the particular office. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld statutory removal restrictions of War Claims Commission members because the members performed "quasijudicial" rather than purely executive functions. *Id.* at 353-54. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld good-cause restrictions on the removal of an "independent counsel," who was an executive officer with the power to investigate allegations of crime by high officers, because the restrictions provided structural independence necessary to the proper functioning of the particular office, and the independent counsel had "limited jurisdiction and tenure and lack [of] policymaking or significant administrative authority." *Id.* at 689-91, 695-96.e

Accordingly, Congress has the latitude to impose removal restrictions to ensure the structural independence necessary for ALJs to properly perform their quasijudicial functions—

which is precisely what the Commission explained when rejecting a removal challenge premised on *Free Enterprise Fund*. *See Timbervest*, 2015 WL 5472520, at *27.[9]

C. Bebo's challenge to the validity of the OIP does not withstand scrutiny.

Because the OIP in this case complied with all constitutional, statutory, and regulatory requirements, Bebo's challenge to its validity is meritless. Under the Commission's Rules of Practice, an enforcement proceeding must be "initiated by" an OIP, which is "an order issued by the Commission commencing a proceeding." 17 C.F.R. 201.101(a)(4), (7). The OIP must state "the nature of any hearing" and "the legal authority and jurisdiction under which [it] is to be held," set forth "the factual and legal basis alleged . . . in such detail as will permit a specific response thereto," and state "the nature of any relief or action sought or taken." *Id.* at 201.200(b). The only applicable statutory requirement is that the OIP "fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice" unless a respondent agrees otherwise. 15 U.S.C. 78u-3(b).

Here, consistent with those provisions, the Commission issued an OIP containing the information required by Rule 200(b) and ordering that a public hearing "shall be convened not earlier than 30 days and not later than 60 days from service of this Order" before an ALJ "to be designated by further order." OIP at 12. In a subsequent order, Chief ALJ Murray, pursuant to delegated authority by the Commission, designated ALJ Elliot to preside at the hearing. Order Scheduling Hearing and Designating Presiding Judge, Admin. Proc. Rulings Rel. No. 2086 (Dec. 3, 2014).

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[9] Bebo erroneously argues (Br. 20) that *Timbervest's* rejection of the removal challenge rested on the premise that the Commission's ALJs were not inferior officers. In fact, the Commission specifically held that the removal restrictions are constitutional "even if the Commission's ALJs are considered officers." *Timbervest*, 2015 WL 5472520, at *27.

Bebo erroneously contends (Mot. 23-24) that the OIP is invalid in light of the Supreme Court's holding in *Lucia* that ALJ Elliot was not appointed in the manner required of a constitutional "officer." Bebo identifies no valid basis to conclude that a successful constitutional challenge to a Commission hearing voids the OIP that ordered the hearing. She points to Section 22 of the Exchange Act, which provides that hearings may be held before the Commission, any members of the Commission, or "any officer or officers of the Commission designated by it." 15 U.S.C. 78v. But that provision does not impose any formal requirements on the OIP. The same goes for Rule 110 of the Commission's Rules of Practice. 17 C.F.R. 201.110 (providing that proceedings shall be presided over by the Commission or "if, the Commission so orders, by a hearing officer").

Even if the later order designating ALJ Elliot failed to comply with these provisions, it would not follow that the OIP itself is "legally invalid" or "statutorily defective," as Bebo claims (Mot. 23). To that end, while Bebo's motion claims that the OIP is defective, it appears that her real quarrel lies with the subsequently issued order designating ALJ Elliot as the presiding judge. Indeed, the OIP does not assign the proceedings to any particular ALJ. As such, the *OIP* should not be invalidated, even under Bebo's argument.

Moreover, Bebo's argument that the Commission's designation of ALJ Elliot violated Section 22 or Rule 110 fails because there is no indication that Congress intended "officers of the Commission," 15 U.S.C. 78v, to be synonymous with "Officers of the United States," U.S. Const. art. II, § 2, cl. 2. The Supreme Court has recognized that the category of "Officers of the United States" for Appointments Clause purposes is not coterminous with that of "officers" for statutory purposes. In *Free Enterprise Fund*, the Supreme Court held that the members of the PCAOB were inferior officers under the Appointments Clause, *see* 561 U.S. at 510, even though

the Court acknowledged that Congress had expressly declared that Board members were "not considered Government 'officer[s] or employee[s]' for statutory purposes," *id.* at 484 (quoting 15 U.S.C. 7211(b)).

Moreover, a dictionary in use when the Exchange Act and the Securities Act of 1933 were enacted defined the term "officer" to mean "[o]ne charged with a duty; an agent; a minister" or "[o]ne who holds an office," specifically "[a] person lawfully invested with an office, whether civil, military, or ecclesiastical, and whether under the state or a private corporation or the like." *Webster's New International Dictionary* (2d ed. 1934). Consistent with these broad, functional definitions, a federal court decision involving an early challenge to a Commission proceeding under the Securities Act alternatively referred to the hearing examiner—the precursor of an ALJ—as "an employee of the commission," an "officer[] of the commission," and "one of [the Commission's] attorneys." *SEC v. Jones*, 12 F. Supp. 210, 215 (S.D.N.Y. 1935) (finding it "manifest" that use of an attorney to conduct a hearing was proper given that Congress directed the Commission "to perform a great mass of duties" and gave the Commission broad latitude in using various "agents" "to assist in the discharge of those duties"), *aff'd*, 79 F.2d 617 (2d Cir. 1935), *rev'd on other grounds*, 298 U.S. 1 (1936). Similarly, the Administrative Procedure Act "consistently uses the term 'officer' or the term 'officer, employee, or agent'" to "refer to [agency] staff members." Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 612, 615 & n.11 (1948) (citing Nathaniel L. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368, 390e (1946)). Therefore, it is plain that ALJs have always been "officers of the Commission" within the meaning of the federal securities laws, and that the Commission complied with its obligation under Section 22 even if ALJ Elliot was not properly appointed at the time.

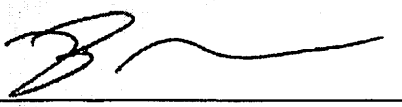
Bebo's reliance on cases in which the government served a notice that omitted information it was specifically obligated by statute to include is misplaced. The notices to appear that were at issue in both *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wash. 2018), cited at Mot. 24, failed to specify the time and date of the hearing, even though the relevant statute required that information. The Court concluded that the notices failed to carry out their "essential function," which is to inform noncitizens when and where to appear for their removal proceeding. *Pereira*, 138 S. Ct. at 2115. There is no comparable flaw on the face of the OIP here. As noted, the OIP contained all of the information the Commission is required to include under 15 U.S.C. 78u-3(b) and Rule 200(b). Nothing in *Pereira* suggests that a constitutional flaw in a removal hearing would invalidate a facially valid notice of appearance, which is essentially what Bebo is arguing here. Because Bebo does not (and cannot) claim that the OIP itself was issued "pursuant to unconstitutional authority" (Mot. 24), *Papasan v. Allain*, 478 U.S. 265 (1986), is simply irrelevant. And *Freytag v. Commissioner*, 501 U.S. 868 (1991), and *United States v. L.A. Tucker Truck Lines, Inc.*, 344e U.S. 33 (1952), stand only for the proposition, confirmed in *Lucia*, that a new hearing before a properly appointed official is the "appropriate remedy" for an Appointments Clause violation. *Lucia*, 138 S. Ct. at 2055 (quotation omitted). Those cases do not suggest that the Appointments Clause violation that occurred also necessitates invalidation of the OIP. For the reasons already discussed, it does not.

* * * *

For the foregoing reasons, Bebo's motion for summary disposition should be denied in its entirety.

Dated: March 21, 2019

Respectfully submitted,



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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.

CERTIFICATE OF SERVICE

Benjamin Hanauer, an attorney, certifies that on March 21, 2019, he caused a true and correct copy of the foregoing The Division of Enforcement's Opposition to Respondent Laurie Bebo's Motion for Summary Disposition to be served upon, via email and overnight delivery:

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