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 BRIEF IN SUPPORT OF HER MOTION FOR SUMMARY DISPOSITION FOR CONSTITUTIONAL VIOLATIONS

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INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") creates an unconstitutional enforcement scheme previously unheard of in the administrative state. This scheme allows the government to pursue the same remedies for the same alleged securities law violations in either an administrative action or federal court. However, it provided no guidance or legislative basis for determining which individuals would be subjected to an administrative proceeding as opposed to a federal court action. This parallel enforcement scheme is facially unconstitutional, as it violates the Fifth Amendment's guarantees of equal protection and due process. This proceeding should be dismissed on this basis alone.

This proceeding be dismissed for two additional reasons, however. First, the Commission ALJ's are protected by multiple lawyers of tenure in violation of Article II of the United States Constitution, rendering these proceedings unconstitutional. And second, the proceedings instituted against Bebo must be dismissed because the original OIP was facially invalid.

ARGUMENT

I. Section 929P(a) of Dodd-Frank is facially unconstitutional.

As Bebo demonstrated in her opening brief, the provision of Dodd-Frank that allows the SEC to choose whether to prosecute its enforcement actions in federal district court, where the defendant is entitled to a jury trial and application of the federal rules of evidence, or an administrative proceeding, where she has neither of those things, violates the Fifth Amendment's guarantees of due process and equal protection. Such violation "inheres in the terms of the statute," which is therefore unconstitutional in all of its applications. *Ezell v. City of Chi.*, 651 F.3d 684, 698 (7th Cir. 2011).

This enforcement scheme violates the equal protection and due process guarantees of the Fifth Amendment because, as Congress intended, it allows the Commission to seek coextensive penalties either in an administrative proceeding, where respondents are stripped of their right to a jury trial and discovery, or in federal district court, where respondents' rights are guaranteed:

> *Section 211. Authority to impose civil penalties in cease and desist proceedings*
>
> This section streamlines the SEC's existing enforcement authorities by permitting the SEC to seek civil money penalties in cease-and-desist proceedings under Federal securities laws. The section provides appropriate due process protections by making the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court. As is the case when a Federal district court imposes a civil penalty in a SEC action, administrative civil money penalties would be subject to review by a Federal appeals court.

H. Rep. No. 111-687, at 78 (2010) (Investor Protection Act of 2009) (emphasis added).

As applicable to Bebo's facial challenge to Section 929P(a) of Dodd-Frank on both due process and equal protection grounds, the Division's response concedes, as it must, a number of critical points. *First*, the Division does not dispute that pursuant to this provision of Dodd-Frank the remedies it may seek are equivalent whether they are pursued in federal district court or an administrative proceeding.[1] *Second*, the Division does not dispute Dodd-Frank grants the SEC the sole, arbitrary, and unbridled discretion to choose the forum in which it seeks the same remedy for the same conduct. *Third*, the Division does not dispute that this arbitrary and wholesale transfer of a citizen's jury trial right to the government is unique and unheard of within the administrative state. In light of these concessions, it is not surprising that the Division's

[1] The Division's limited challenge to this proposition is based on legislative history of the 1990 amendments to the civil penalties that could be imposed administratively, not Dodd-Frank. (Opp'n 6 citing S.Rep. 101-337 at 13 (1990).) Indeed, the sections of the Exchange Act cited in the Division's brief—15 U.S.C. § 78u(d)(3) and 78u-2(b)—reflect the current version of the law that each contain the same three-tiered penalty provisions. Similarly, even though the Division claims that an asset freeze requires district court action (*Id.*), it ignores 15 U.S.C. § 78u-3(c)(3) which permits administrative temporary orders to take action to prevent dissipation of assets.

response brief on the merits of Bebo's constitutional claims relies on irrelevant, straw-man arguments.

A. Section 929P(a) is unconstitutional on its face because it violates the Fifth Amendment's guarantee of equal protection.

Despite the Division's attempts to cast Section 929P(a)'s grant of unfettered authority to strip citizens of their right to a jury trial in a constitutional light, Section 929P(a) remains unconstitutional on its face. In passing Section 929P(a), Congress provided SEC prosecutors no guidance in terms of which enforcement targets should be tried in administrative proceedings and which should be tried in federal court. On the Commission's whim, any two enforcement targets could be afforded vastly different procedural protections[2] in their defense against charges for the same securities violations, based on the same conduct, for which they face the same penalties. As the *Baxtrom* and *Humphrey* cases cited in Bebo's opening brief establish, this arbitrary distinction is facially unconstitutional under the Fifth Amendment's equal protection guarantee. (*See* Respondent Laurie Bebo's Mot. for Summary Disposition for Constitutional Violations ("Bebo's Opening Br.") at 11-12.)

In its response, the Division argues Bebo's facial challenge to Section 929P(a) fails because *Baxstrom* and *Humphrey* only apply their equal protection analysis where a statute explicitly identifies a group for different treatment. (The Division of Enforcement's Opposition to Respondent Laurie Bebo's Motion for Summary Disposition (the "Opp'n") at 11-12.) The

[2] The procedural protections available to enforcement targets prosecuted in federal court that are not available in administrative proceedings include, for example, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, discovery, and, of course, the right to a jury. *See In re John A. Carley, et al.,* Release No. 50954, 84 S.E.C. Docket 2165, 2005 WL 17992, at *2 (Jan. 3, 2005) ("[W]e have held repeatedly that our proceedings are not governed by the Federal Rules of Civil Procedure."); *In the Matter of Laurie Jones Canady*, Release No. 477, 59 S.E.C. Docket 1896, 1995 WL 408764, at *1 (July 6, 1995) ("[T]his agency is not bound by the Federal Rules of Evidence."); *In re Narragansett Capital Corp. et al.*, Release No. 264, 52 S.E.C. Docket 417, 1985 WL 151506, at *4 (Oct. 4, 1985) (describing the "significant differences between federal practice, where wholesale discovery is available to the parties under the federal rules of civil procedure, and the Commission's Rules of Practice, where only limited 'discovery', discretionary with the presiding officer, is available").

Division claims there is "no plausible way" to read *Baxstrom* and *Humphrey* to preclude a Congressional grant of discretion to the government to arbitrarily choose whether a citizen is in the group that receives a right to a jury or the group that does not. Far from being implausible, the exact concern identified by the *Baxstrom* and *Humphrey* Courts applies with equal force to Dodd-Frank:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitment.

Baxstrom v. Herold, 383 U.S. 107, 111-12 (1966) (emphasis in original). Thus, the *Baxstrom* Court found it a violation of equal protection where the statute withheld a jury trial from some individuals (those already incarcerated) while permitting a jury trial to everyone else. There is no basis in logic or equal protection jurisprudence for the position that the State could simply grant *to the prosecutor* the same arbitrary authority to grant certain individuals the right to a jury in determining whether they should be civilly committed and arbitrarily withhold from others—in the name of efficiency and expedience as the justification, as the government does here—a jury trial for that same determination. In this way Dodd-Frank is even worse, from a Constitutional perspective, than the statutory scheme invalidated in *Baxstrom*.

The fact that Dodd-Frank itself does not establish whether Bebo falls within the group of individuals that receives a jury trial or the group of individuals that does not, does not matter either. Dodd-Frank indisputably contemplates that each citizen will fall into one or the other groups; it just defers to the government, with no guidance or standards at all, as to which group the citizen will be placed. In this way, Section 929P(a) clearly discriminates against an

identifiable group—respondents who intend to exercise their constitutional right to a jury trial in an SEC enforcement action.

In an effort to show some rational basis for the arbitrary grant to the government of this classification or grouping of individuals, the Division asserts there could be many "plausible policy reason[s]" to support this Congressional decision. (Opp'n at 8.) But none of these *post hoc* policy justifications even relate to, let alone support, the arbitrary distinction the law allows the Commission to make between those who will receive the procedural benefits of a federal court case and those who will not.

The Division's policy justifications are irrelevant under the applicable legal standard. To pass muster under even the lowest level of constitutional scrutiny, the "plausible policy reasons" for the statute must be *relevant to the distinctions the statute makes. Marshall v. United States*, 414 U.S. 417, 422 (1974) ("[T]he concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment does not require that all persons be dealt with identically, but rather that there be some rational basis for the statutory distinctions made . . . .") (citations omitted); *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) (Equal protection requires "that a distinction made have some relevance to the purpose for which the classification is made."); *see also Hill v. Burke*, 422 F.2d 1195, 1196 (7th Cir. 1970) (calling the *Baxtrom* rule "well established"). The policy reasons the SEC posits in its brief have no relation to the authority Section 929P(a) provides to SEC prosecutors arbitrarily to decide which enforcement targets will receive the procedural benefits of a federal court prosecution.

The Division then shifts into arguments relevant only to an as-applied challenge (Opp'n 10, 12 and cases cited therein), which have no applicability to Bebo's *facial* challenge. In particular, the Division argues there are "many reasons why the Commission might bring an

administrative action" and that the Commission enjoys broad discretion over these prosecutorial decisions. (Opp'n 9-10.) Equal protection is not violated, the Division argues, when a prosecutor has the discretion to choose who to charge, to choose between various statutes under which to charge the same conduct, even if one provides a substantially greater sentence than the others, or to choose between prosecuting an individual in state or federal court. *Id.*

These cases and arguments are inapposite. None of the prosecutorial discretion cases involve a situation where the prosecutor has the discretion to innocently or nefariously grant or withhold a fundamental procedural right enshrined in the Constitution's bill of rights. Here, the SEC can choose (without Congressional guidance) to charge the *same conduct* and seek the *same remedy* in either federal district court, where the defendant can exercise her constitutional right to a jury, or in administrative proceedings, where she cannot. The constitutional infirmity in this scheme is that an investigative target is either stripped of or allowed to enjoy certain constitutional and procedural rights (such as the right to a jury trial and the applicability of the Federal Rules of Evidence) on the Commission's whim. This scheme is unprecedented among administrative agencies.

Put simply, the Commission has set forth no legally permissible rational basis for the statutory distinctions made, as required by Fifth Amendment equal protection, because Congress has not provided or implied any. Because the Division cannot point to any rational basis under Section 929P(a) for distinguishing between those who will be subject to administrative proceedings and those who will be pursued, instead, in federal court, Section 929P(a) does not provide equal protection under the law and is unconstitutional on its face.

B. Section 929P(a) further violates the Fifth Amendment's guarantee of due process.

Section 929P(a) establishes a process in every charging decision where there is the potential for the government to retaliate for a citizen's exercise, or anticipated exercise, of her Seventh Amendment right to a jury trial. (Bebo's Opening Br. at 17.) As the government may pursue the same remedies for the same conduct in either forum, Dodd-Frank punishes the exercise of the jury trial right by granting government prosecutors the sole power to withhold the citizen's right to a jury trial when the SEC concludes the citizen would be advantaged by a jury trial or to grant the citizen a jury trial when the SEC concludes a jury would view the citizen unfavorably. This process, which not only discourages but *disallows* a person's assertion of her constitutional right to a jury, violates due process.

In response, the Division first argues Section 929P(a) does not violate Bebo's right to due process because the Commission is allowed to strip a respondent of her right to a jury trial before she ever gets to assert it. (Opp'n 13.) But the Division cites no authority suggesting the preemptive infringement of due process is constitutional. Here, Section 929P(a) is facially unconstitutional because it allows the Commission to preemptively remove a respondent's right to a jury trial and to the procedural safeguards set forth in the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

The Division next wrongly asserts that Section 929P(a) is constitutional because discouraging the assertion of a legal right is not its "only objective." (Opp'n 14.) In making this argument, the Division contorts a single footnote in *Chaffin v. Stynchcombe*, 413 U.S. 17, n. 20 (1973), which states "if the only objective of a state practice is to discourage the assertion of constitutional rights it is patently unconstitutional." (internal quotation marks omitted). Bebo agrees with the quoted language, as a statute or state practice should be deemed patently

unconstitutional if its sole objective is to discourage the assertion of constitutional rights. But the quoted language does not suggest a due process claim is only successful if the *only* objective of the challenged statute or practice is to discourage the assertion of constitutional rights.

Finally, the Division argues Section 929P(a) is constitutional because a facial challenge on due process grounds is appropriate only where "a reasonable likelihood of vindictiveness exists." (Opp'n at 15.) Although facial challenges have been upheld on other grounds, such as when the scheme needlessly chills or deters the exercise of a constitutional right, Bebo has shown a reasonable likelihood of vindictiveness here. Indeed, the likelihood that a person will be punished for the very possession of her jury trial right inheres in the statutory construct. For example, in a 2014 speech, the SEC's enforcement director identified only one factor regarding the Divison and Commission's decision to file a case in district court as opposed to an administrative proceeding – whether it would be advantageous as a litigation tactic to file there. (Bebo's Opening Br. at 9) (citing Andrew Ceresney, Remarks to the American Bar Ass'n Business Law Section Fall Meeting (Nov. 21, 2014).) In other words, the Division and Commission consider whether it would be advantageous to the government to strip a respondent of procedural rights and protections, such as a right to a jury trial, discovery, and application of the Federal Rules of Evidence. This necessarily entails an evaluation of how a citizen would be viewed by a jury and, if she were to be viewed favorably, motivates the government to deprive her of her jury trial right as a litigation tactic.

Because Section 929P(a) affects a wholesale transfer of Bebo's constitutional right to a jury trial *to the government*, it is facially unconstitutional. Accordingly, this Court should grant Bebo's Motion for Summary Disposition.

II. The Multiple Layers Of Tenure Protecting Commission ALJs Are Unconstitutional, And These Proceedings Must Therefore Be Dismissed.

The Supreme Court in *Lucia* left unanswered the question whether, even though Commission ALJ's are inferior officers that held their position in violation of Article II's appointments clause, they also violate Article II, Section 3's "take care" clause in light of their multi-layered for-cause removal protections. *Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018). Bebo demonstrated in her opening brief that the removal protections provided to Commission ALJ's mean they remain unconstitutional under Article II under the Court's decision in *Free Enterprise Fund*. (Mot. 18-23.)

In response, the Division requests this Court adopt the Solicitor General's position in the brief that he filed on behalf of the Commission in *Lucia*. (Opp'n 16-17.) Notably, the Solicitor General conceded, that absent his proposed narrow reading of "good cause," the current ALJ removal restrictions, "*would be unconstitutional*." *Brief for Respondent Supporting Petitioners*, filed in *Lucia v. SEC*, No. 17-130, 2018 WL 1251862, *53 (hereafter cited as "SG Br. __"). However, as set forth in Bebo's opening brief and in further detail below, the Division's and Solicitor General's position would have the courts improperly re-write statutes governing ALJ removal.

In addition, the Division raises a second argument that the Solicitor General did not make in *Lucia*. The Division contends that the role of ALJ's is sufficiently different from the members of the Commission accounting board at issue in *Free Enterprise*. This argument also has no merit.

A. This court lacks the ability to effectuate the statutory reconstruction proposed by the Division, and in any event rewriting the APA would be improper.

The Division first posits that this court should simply *construe* the statute to comport with the Constitution in accordance with the interpretation offered by the Government in *Lucia.* (Opp'n 16-17 citing SG Br. 45 (arguing that the Court should "construe" or "interpret" the APA to permit the Commission to remove an ALJ for "personal misconduct or for failure to follow lawful agency directives or to perform his duties adequately.").) This proposed construction, based on "constitutional avoidance" principles, has both a substantive component and a procedural component. First, the Division would have this Court adopt the Solicitor General's narrow construction of the substantive definition of "good cause." SG Br. 49-52. Second, the Solicitor General would modify the language of 5 U.S.C. § 7521 to effectively eliminate that statutory requirement that such cause be "established and determined by the Merit Systems Protection Board." SG Br. 52-53.

It is this combination of substantive and procedural re-construction of the statutory regime that Justice Breyer found improper. *Lucia*, 138 S. Ct. at 2061. In describing the Solicitor General's position, Justice Breyer wrote:

> And in [the Solicitor General's] view, the administrative law judges' statutory removal protections violate the Constitution (as interpreted in *Free Enterprise Fund*), unless *we construe those protections as giving the Commission substantially greater power to remove administrative law judges than it presently has.*

Id. In particular, Justice Breyer noted the procedural re-construction proposed by the Solicitor General that would relegate the MSPB decision to a review of Commission findings of good cause rather than the statutory requirement (and current practice) whereby the MSPB conducts a hearing to "establish and determine" whether the agency has established "good cause" for

removal.[3] *Id.*; *see also Social Sec. Admin. v. Glover*, 23 M.S.P.R. 57, 64 (1984) (MSPB has "reserve[d] to itself the final decision on [whether] good cause" for discipline exists).

More fundamentally, there is a separation of powers problem imbedded within the Division's request that this Court construe or re-write the statutes governing ALJ removal through the application of constitutional avoidance principals. In essence, the Division suggests that this court should assert the authority to decide the standard for when its own supervising officers may remove it from office. This is a job only the courts can do. Indeed, the Division overlooks that the Government "offered" its proposal to the Supreme Court, not to the very inferior officers whose removal was at issue. While it is axiomatic that "It is emphatically the province and duty of the judicial department to say what the law is[,]" *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the same does not necessarily go for inferior officers of the Executive branch. *See* 5 U.S.C. § 706 ("the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). It is therefore highly doubtful that this Court's adoption of the modifications proposed by the Division could save what is, absent such saving, an unconstitutional statute. Instead, dismissal is appropriate.

Finally, such statutory reconstruction is improper and was rejected by the Court in *Free Enterprise Fund*, where the government proposed a similar statutory re-construction option "if necessary to avoid invalidation." 561 U.S. at 502. The Court rejected the invitation, both

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[3] The Division glosses over this troubling procedural change, which Justice Breyer recognized. In a footnote, it only addresses a related, but less significant issue—whether ALJs could continue to serve in their capacity while the MSPB determines whether the Commission's conclusion of good cause was appropriate (as noted, under an improperly deferential standard unsupported by the text of Section 7521). (Opp'n 17 n.8 (quoting SG Br. 53).) Moreover, the Supreme Court has rejected the idea that bureaucratic maneuvers short of removal could suffice to control inferior officers. As explained in *Free Enterprise Fund*, "Broad power over Board functions is not equivalent to the power to remove Board members." *Id.* at 504. "The Framers did not rest our liberties on such bureaucratic minutiae." *Id.* at 500.

because it would not have fixed the constitutional problem,[4] and because re-writing statutes is improper. *Free Enterprise Fund*, 561 U.S. at 502, 509-10. The Court explained:

> In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be "Officers of the United States." Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—*belongs to the Legislature*, not the Judiciary. Congress of course remains free to pursue any of these options going forward.

Free Enterprise Fund, 561 U.S. at 509–10 (emphasis added). As in that case, " removal restrictions set forth in the statute mean what they say." *Id.* at 502.

B. The sliding scale of tenure proposed by the Division is unworkable and at odds with holding in *Free Enterprise Fund.*

The fact that this court cannot rewrite the Congressional statutes should end this matter. As the Commission recognized in *Lucia*, "If the Court concludes that the interpretation of Section 7521 advocated here cannot be reconciled with the statute, *then the limitations that the provision imposes on removal of the Commission's ALJs would be unconstitutional.*" SG Br. 53 (emphasis added). The Supreme Court declined to adopt the Solicitor General's proposal, and thus there is no basis for this Court in an administrative proceeding to re-write the statutory good cause provisions.

Yet the Division persists, proposing that because ALJs are what it calls "quasijudicial" officers, rather than "executive" ones, they may be afforded the double for-cause protections forbidden by *Free Enterprise Fund.* (Opp'n 17-18). This contention begs the question: if double for-cause protection is constitutionally permissible for "quasijudicial" officers, why did the

[4] As set forth in the next section, the Solicitor General's proposal also would not prevent a finding of unconstitutionality. At its heart, it is the two layers of for-cause removal that results in the constitutional violation. *Free Enterprise Fund*, 561 U.S. at 501 ("two layers are not the same as one"); *see also Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 700 (D.C. Cir. 2008) (now Justice Kavanaugh dissenting and arguing two layers of removal of executive officers is absolutely precluded).

Commission recognize that that the APA's restrictions on removal "*must* be narrowly construed in light of *serious separation-of-powers concerns*"? SG Br. 39 (emphasis added, original in capital letters). The Division does not say.

Moreover, the Division provides no support for its contention, never explaining which offices are "quasijudicial" nor what level of protection is constitutional for those officers as opposed to purely "executive" or "quasilegislative" ones. The only cases cited to support the sliding scale advocated by the Division are *Wiener v. United States*, 357 U.S. 349 (1958), which involved the independent War Claims Commission, and *Morrison v. Olsen*, 487 U.S. 654 (1988), which dealt with an inferior officer under the supervision of a principal officer (the Attorney General) who was subject to at will removal.[5] And the Division's contention that the Commission's ALJs are uniquely subject to double for-cause protection is not persuasive.[6] While the Division's contention that "Congress has the latitude to impose removal restrictions to ensure the structural independence necessary for ALJs to properly perform their quasijudicial functions" might be reasonable for ALJs within a department headed by an officer who is herself subject to the President's control through at will removal, it is not true for the Commission's ALJs. *See Morrison*, 487 U.S. at 663. The Division cites *Free Enterprise Fund* to argue that "the Court has countenanced for-cause limitations on a principal officer's ability to remove inferior officers." (Opp'n 15.) But the Court was discussing *United States v. Perkins*, 116 U.S. 483 (1886) and *Morrison*, both of which involved supervision by principal officers who were either

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[5] *Wiener* is also distinguishable. The War Claims Commission ("WCC") at issue in *Wiener* bears no relation to either the Commission or its ALJs. The WCC was established by Congress to distribute funds that Congress itself had the authority to appropriate directly. *Id.* at 355.

[6] As discussed in Bebo's moving papers at 22, the Division's reliance on footnote 10 of *Free Enterprise Fund* is misplaced. Most important, "Whether administrative law judges are necessarily 'Officers of the United States;" is no longer disputed. *Id.* And while Congress is permitted to insulate the heads of certain "independent" agencies, like the Commission, and certain inferior officers, as in *Morrison*, nothing about those cases, or any others cited by the Division, suggests that "these separate layers of protection may be combined." *Free Enterprise Fund*, 561 U.S. at 483.

subject to "an officer directly responsible to the President and 'through [whom]' the President could act," (*Morrison*), or whose tenured protections were "widely regarded as unconstitutional and void (as it is universally regarded today)." *Free Enterprise Fund*, 561 U.S. at 494-95.

And the Division's argument misses the point: *Free Enterprise Fund* juxtaposed removal for good cause with removal *at will*, not removal under some yet-to-be-determined intermediate standard. *See, e.g., id.* at 502 ("the Government argues that the Commission's removal power . . . could be construed as broader still, if necessary to avoid invalidation. . . . But the Government does not contend that *simple disagreement* with the Board's policies or priorities could constitute 'good cause' for its removal." (citation omitted (emphasis added))). The *Free Enterprise Fund* decision did not turn on the "unusually high standard" for dismissal from the PCAOB contained in Sarbanes-Oxley. *Id.* at 503. To be sure, the Supreme Court noted that that case presented "an even more serious threat to executive control than an "ordinary" dual for-cause standard." *Id.* at 502-03. But its holding applied generally to "two levels of protection from removal for those who nonetheless exercise significant executive power." *Id.* at 514.

III. The OIP in this case was legally invalid, and because it could not toll the statute of limitations, these proceedings must be dismissed with prejudice.

Although the Division argues that the OIP in this case was valid despite assigning it for hearing to an illegal hearing officer, the Division *concedes* that if the OIP is not valid this proceeding must be dismissed because any new OIP would be untimely.[7] But as demonstrated in Bebo's opening brief, the 2014 OIP that commenced these proceedings was facially invalid because it noticed a hearing before an officer who could not lawfully preside, under either the

[7] This is no doubt true. Because any newly issued OIP (or federal district court filing) would be untimely under the applicable statute of limitations, these proceedings must be dismissed with prejudice. *See Periera v. Sessions*, 138 S. Ct. 2105 (2018); *United States v. Virgen-Ponce*, 320 F.Supp. 3d 1164 (E.D. Wash. 2018).

Exchange Act or the Commission's own rules. (Bebo's Opening Br. at 23-26.) None of the Division's arguments to the contrary have merit.

As to the validity of the OIP, the Division first argues that this Court should overlook the requirements of 15 U.S.C. §§ 78u-3 and 78v which, when read together, require the OIP to contain a notice of hearing before a valid Commission officer. The Division posits that these statutory provisions to not impose specific "formal requirements" on the OIP itself. (Opp'n 20.) But the Division's elevation of form over substance proves too much. Under that reading, an OIP could lawfully summon a person to a hearing before *anyone*, including the Commission's mail clerk, as long as it contained the other specific information required under Commission Rule of Practice 201.101(a). Plainly, that cannot be the law. To comply with the Exchange Act's requirement of "notice," an OIP must notice a hearing that is *lawful* under the Exchange Act, and a lawful hearing must take place, at the very least, before an *officer of the Commission.* The OIP in this case failed that fundamental requirement.

Next, the Division nonsensically argues that when the Exchange Act mandates a hearing before "officer of the Commission," it really requires only a hearing before an *employee* of the Commission because the term "officer" in the Exchange Act "is not coterminous" with the term "Officer" as used in Article II of the U.S. Constitution. U.S. Const. art. II, § 2. (Opp'n 20.) However, the Division never explains which of the Commission's employees are "officers of the Commission," or why Congress would permit notice of a hearing before a mere employee who could not, consistent with the Constitution, actually hear the case. This tortured argument defies common sense, the Supreme Court's *Lucia* decision, and the Exchange Act's plain language. Put simply, the statute and the Constitution are referring to the same person at issue—the officer

exercising the authority of the government. There is no principled basis to give the term "officer" two different meanings under these circumstances.

Not surprisingly, the Division's argument is foreclosed by *Lucia* itself. There, the Supreme Court held that the Commission's ALJs are inferior officers by virtue of the very powers they wield under the Exchange Act and rules promulgated thereunder to perform their statutory role. *Lucia*, 138 S. Ct. 2044, 2053. The fact that Congress placed "officer[s] of the Commission" on parity with the head of the department—"the Commission"—makes clear that Congress sought to vest the authority to preside over hearings only in duly appointed constitutional officers.[8]

Nor did the Supreme Court acknowledge the new intermediate class of statutory-but-not-constitutional officers that the Division posits. *Id.* at 2051. Rather, it explained that "[t]he only way to defeat [the petitioner's] position is to show that those ALJs *are not officers at all*, but instead non-officer employees—part of the broad swath of 'lesser functionaries' in the Government's workforce." *Id.*[9] Congress was explicit that constitutional officers must preside over hearings. *Lucia* made clear that Congress meant what it said. This Court should too.

To circumvent the plain language of the Exchange Act and the implications of the *Lucia's* reasoning and holding, the Division's refers the Court instead to the Administrative Procedures

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[8] The legislative history supports the view that the term "officer" in the Exchange Act should be interpreted consistent with the Constitutional implication of that term. *See, e.g.*, H.R. 4314, 73d Cong. § 6 (1933) ("[T]he Commission may revoke the registration of any security by entering an order to that effect . . . . In making such examination the Commission or other officer or officers designated by it shall have access to and may compel the production of all the books and papers of such issuers . . . and may administer oaths to and examine the officers of such issuers . . . .").

[9] The Commission's reliance on *Free Enterprise Fund* is misplaced. Far from distinguishing between "officers" for Constitutional and statutory purposes, the Court specifically noted the critical distinction between "employees" and "officers." *Free Enterprise*, 561 U.S. at 506. The portion of the *Free Enterprise* decision taken out of context by the Division (Opp'n 20), simply stated that even though Congress designated members of the board as *private* as opposed to *government* officials, the parties agreed that they exercised the power of the federal government and therefore could be considered inferior officers under Article II. *Id.* at 485-86.

Act and a law review article discussing it. The Division suggests that, under the APA, each of the terms "officer" or "officer, employee, or agent" may refer to "agency staff members," and thus the Exchange Act provisions which require notice of a hearing before an officer of the Commission should not also mean the actual, inferior officer, who will preside over the hearing. (Opp'n 21 (citing Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 612, 615 & n.l l (1948) (brackets omitted)).) However, even if the Court should look to the APA for guidance, the Division confuses necessity for sufficiency—while all 'officers' and 'officers, employees, or agents' are "agency staff members," *not all staff members are officers*. The APA makes this explicit through the different definitions of "officer" in 5 U.S.C. § 2104 and "employee" in 5 U.S.C. § 2105. The definition of "employee" is much broader than that of an "officer." Thus, while all officers are also employees, not all employees are officers.

The Division also relies on *SEC v. Jones*, 12 F. Supp. 210 (S.D.N.Y. 1935) in an improper attempt to conflated the roles "'employee of the commission,' an 'officer[] of the commission,' and 'one of [the Commission's] attorneys'". (Opp'n 21.) In *Jones*, the court held that the Commission's examiner was not disqualified from presiding over a hearing by virtue of also being "an employee of the commission." *Jones*, 12 F. Supp. at 215. The Court reasoned that Congress authorized the Commission "to *appoint* attorneys, as well as other agents, to assist in the discharge of those duties, *and has definitely authorized officers of the commission to take evidence and conduct hearings* . . ." *Id.* (emphasis added). Therefore, the court found it "manifest that it was within the province of the commission to 'use' one of its attorneys as an examiner to conduct a hearing for the taking of testimony," as long as the attorney was *appointed. Id.*

Thus, the *Jones* court was doing precisely the opposite of what the Division contends; rather than conflating "employees" or "attorneys" with "officers," the court reasoned that because the Commission could "definitely" appoint officers to act as hearing examiners, it could also, in the court's view, "use" its own attorneys to do the same. *Id.* Importantly, the court specifically noted the *Commission's* ability to "appoint" rather than "hire" its "attorneys, as well as other agents," consistent with *Lucia's* holding that ALJs must be appointed by the Commission rather than hired by staff members. *Jones* thus reinforces the distinction between Commission-appointed officers and lower employees and that distinction was understood around the time Congress passed the Exchange Act.

Finally, the Division's attempt to distinguish the defective OIP with the defective notices in *Pereira* and *Virgen-Ponce* that failed to specify the time and date of the hearing because the Commission's OIP "contained all of the information the Commission is required to include under 15 U.S.C. 78u-3(b)" is unavailing. (Opp'n 22.) The fact that the Commission's OIP was deficient because it contained erroneous information—by failing to provide notice of hearing before a valid officer of the Commission—rather than omitting information altogether, is a distinction without a difference. The OIP told Bebo to appear for a hearing before an officer who could not preside over that hearing and failed the statutory requirements of §§ 78u-3 and 78v.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Bebo's opening brief, she respectfully requests that the Court grant her motion for Summary Disposition.

Dated this 2nd day of April, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Laurie Bebo's Reply Brief in Support of her Motion for Summary Disposition for Constitutional Violations contains 5,997 words (as calculated by the Microsoft Word count feature), exclusive of the caption, table of contents, table of authorities, signature block and this certification.

Dated this 2nd day of April, 2019.

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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

Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. certifies that on April 2, 2019, he caused a true and correct copy of Respondent Laurie Bebo's Reply Brief in Support of Her Motion for Summary Disposition for Constitutional Violations to be served on the following by e-mail and first class United States mail:

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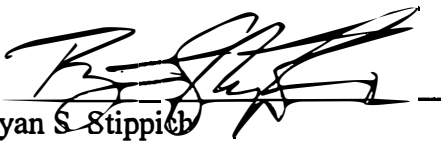
By: 
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