UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21214

In the Matter of

JOSHUA ABRAHAMS, CPA,

Respondent.

DIVISION OF ENFORCEMENT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

December 16, 2022

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OS Received 12/16/2022

TABLE OF CONTENTS

OS Received 12/16/2022

TABLE OF AUTHORITIES

Cases

OS Received 12/16/2022

OS Received 12/16/2022

Statutes

Other Authorities

Rules

Constitutional Provisions

On October 21, 2022, the Securities and Exchange Commission issued an Order Instituting Proceedings (the "OIP") against Respondent Joshua Abrahams, a certified public accountant, to determine whether he "engaged in improper professional conduct," and if so, what remedial action is necessary and appropriate. OIP at 2. On November 17, 2022, Abrahams filed an Answer to the OIP, and five days later Abrahams moved to dismiss the proceedings, alleging that they violate his Seventh Amendment right to a jury trial, deny him due process, and are the product of an unconstitutional delegation of legislative power to the Commission. Mot. at 2–12. In the alternative, he asks the Commission to stay this proceeding so that he can seek an injunction in an Article III court. Mot. at 12. The Commission should deny the motion.

BACKGROUND

The Commission initiated these proceedings against Abrahams pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice, 17 C.F.R. 201.102(e)(1)(ii), and Section 4C of the Securities Exchange Act of 1934, 15 U.S.C. 78d-3. OIP at 1. The Division of Enforcement and the Office of the Chief Accountant allege that Abrahams "engaged in repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards." OIP ¶ 67.

Rule 102(e)(1)(ii) provides that "[t]he Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter . . . [t]o be lacking in character or integrity or to have engaged in unethical or improper professional conduct." The Commission promulgated Rule 102(e)'s predecessor in 1935. *See Altman v. SEC*, 666 F.3d 1322, 1327 n.3 (D.C. Cir. 2011). In the Sarbanes-Oxley Act of 2002,

OS Received 12/16/2022

Pub. L. 107-204, § 602, Congress codified Rule 102(e) as Section 4C of the Exchange Act. *See Altman*, 666 F.3d at 1327; S. Rep. No. 107-205, at 56 (2002).

"Rule 102(e) . . . provides the Commission with a means to ensure that the professionals on whom it relies perform their tasks diligently and with a reasonable degree of competence. It is directed at protecting the integrity of the Commission's own processes, as well as the confidence of the investing public in the integrity of the financial reporting process." *Marrie v. SEC*, 374 F.3d 1196, 1200 (D.C. Cir. 2004) (cleaned up); *Touche Ross v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979) ("If incompetent or unethical accountants should be permitted to certify financial statements, the reliability of the disclosure process would be impaired."); *see also id.* at 578 (summarizing early cases). "Rule 102(e) does not establish professional standards. Rather, the rule enables the Commission to discipline professionals who have engaged in improper professional conduct by failing to satisfy the rules, regulations or standards to which they are already subject." *Implementation of Standards of Professional Conduct for Attorneys*, 67 Fed. Reg. 71670, 71671 n.13 (Dec. 2, 2002).

ARGUMENT

Abrahams incorrectly argues that these proceedings are unconstitutional because they (1) violate his Seventh Amendment right to a jury trial; (2) violate the nondelegation doctrine; and (3) violate his due process rights. *See* Mot. These arguments are legally insupportable and provide no basis for dismissing these proceedings. Furthermore, Abrahams's request in the alternative for a stay is without merit.

I. The Fifth Circuit's decision in *Jarkesy* contravenes Supreme Court precedent and is inapplicable to these proceedings.

In making his claims regarding the Seventh Amendment and nondelegation, Abrahams relies on the Fifth Circuit's decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir.), *pet. for rehr'g en*

banc denied, 51 F.4th 644 (5th Cir. 2022). *See* Mot. at 1–5, 10–11. There, a panel majority of the Fifth Circuit held, over a dissent, that a jury trial was required for certain violations of the federal securities laws with elements the court concluded were similar to common-law fraud. 34 F.4th at 453–57.[1] The majority also concluded, in the alternative and over a dissent, that the Commission's choice under the governing statutes to bring antifraud claims in an administrative proceeding rather than in a district court action violated the nondelegation doctrine because Congress "fail[ed] to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of 'all' legislative power in Congress." *Id.* at 449.

Jarkesy reflects the views of a panel majority in the Fifth Circuit. Abrahams is a resident of North Carolina (Answer ¶ 5), and to the extent he were to seek further review in the Fourth Circuit or in the D.C. Circuit (*see* 15 U.S.C. 78y(a)(1)), *Jarkesy* would not bind those courts. Moreover, *Jarkesy* is not controlling because it departs from Supreme Court precedent and the law in those circuits.[2] Both *Jarkesy*'s Seventh Amendment holding and its nondelegation analysis are thus incorrect and inapplicable to these proceedings.

A. The Seventh Amendment

1. *Jarkesy*'s Seventh Amendment holding is incorrect.

The Seventh Amendment does not apply to public rights, a doctrinal category that the *Jarkesy* majority misconstrued. The Seventh Amendment provides that "the right of trial by jury shall be preserved" in "[s]uits at common law" involving more than twenty dollars. U.S. Const.

[1] The claims in *Jarkesy* arose under Section 17(a)(2) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b 5(b) thereunder, and Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder. *See In re George R. Jarkesy, Jr.*, Release No. 5572, 2020 WL 5291417, at *2 (Sept. 4, 2020).

[2] The time to seek certiorari in *Jarkesy* has not yet run. *See* Sup. Ct. R. 13.

amend. VII. The phrase "[s]uits at common law" has "been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not." *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 449 (1977). Congress may create "public rights" and assign adjudication of those rights—and the imposition of money penalties and other remedies for their violation—to an administrative tribunal. *See Helvering v. Mitchell*, 303 U.S. 391, 402–03 (1938); *accord Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1373–74 (2018) (explaining that patents are "public rights" that "did not exist at common law" but are rather "creature[s] of statute law").

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

Jarkesy departed from this precedent when it held that the jury-trial right attached to violations of the federal securities laws if those violations involve fraud and have elements

OS Received 12/16/2022

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

2. *Jarkesy*'s Seventh Amendment holding does not apply to the right to appear before the Commission.

Abrahams seeks to extend *Jarkesy* by arguing that, in addition to fraud-type claims, an action under Section 4C or Rule 102(e)(1)(ii) requires a jury trial. That argument fails. Even if one were to accept *Jarkesy*'s incorrect reasoning as to government actions alleging securities fraud, the claims at issue here fall so far outside any analogy to common-law fraud claims that they plainly constitute public rights to which the Seventh Amendment does not apply.

To start with, Abrahams faces an insurmountable hurdle because of the relief sought in this proceeding. Unlike common-law suits for damages, "actions seeking only equitable relief [are] unaffected" by the Seventh Amendment. *Curtis v. Loether*, 415 U.S. 189, 198 (1974). As even *Jarkesy* recognized, "ban[ning] [someone] from participation in securities industry activities" altogether is equitable, not legal, in nature. 34 F.4th at 454. Abrahams responds to this language in *Jarkesy* by citing another portion of the opinion (Mot. at 4 n.1), which reasoned that when a case involves both legal and equitable claims, "the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too." *Jarkesy*,

34 F.4th at 454 (citing *Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970)). But there is no legal claim inherent in a Rule 102(e) proceeding at all and there is no legal issue to try separately.[3]

Even setting aside the type of relief sought, the only "right" at issue in these proceedings is the right to practice before the Commission itself. *Granfinanciera*, 492 U.S. at 51 (the category of "public rights" includes situations "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights"), quoting *Atlas Roofing*, 430 U.S. at 458. Rule 102(e)(1)(ii) provides, in pertinent part, that "[t]he Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it ... to any person who is found ... to have engaged in unethical or improper professional conduct." Under Rule 102(f), "practice before the Commission" includes, but is not limited to, (1) transacting any business before the Commission, and (2) preparing statements, opinions, or other papers that are filed with the Commission, with the professional's consent. 17 C.F.R. 201.102(f). As Abrahams acknowledges (Mot. at 2), a "public right" outside the scope of the Seventh Amendment may exist where a statute is "closely intertwined with a federal regulatory program," *Granfinanciera*, 492 U.S. at 54, and Rule 102(e)(1)(ii) "provides the Commission with the means to ensure that those professionals, on whom the Commission relies heavily in the performance of its statutory duties, perform their tasks diligently and with a reasonable degree of competence," *Touche Ross*, 609 F.2d at 582. It is difficult to imagine a power more "closely integrated" with the operation of the Commission than the Commission's ability to regulate practitioners who appear before it.

[3] Abrahams relatedly asserts that, to comply with the Seventh Amendment, the Commission "should have brought a claim against [him] in federal court under Section 4C of the Exchange Act," after which it "could then consider imposing discipline in a Follow-on AP after a jury decided the negligence issue." Mot. at 6–7. But Section 4C does not create an independent cause of action in federal court. *See infra* at 10–12.

Moreover, because Congress created the Commission in the 1930s, the right to practice before it did not exist at common law when the Seventh Amendment was adopted. The Seventh Amendment "took the existing legal order as it found it," *Atlas Roofing*, 430 U.S. 442 at 460, and neither "the cause of action" nor "the relief sought here" is "analogous" to a common-law predecessor, *Curtis*, 415 U.S. at 196. Abrahams's erroneous assertion that proceedings under Rule 102(e) and Section 4C are akin "to suits under common law for negligence," Mot. at 3, misses the point. The rule is focused not exclusively on negligence, but rather on the broader goal of "protecting the integrity of the Commission's own processes, as well as the confidence of the investing public in the integrity of the financial reporting process." *Marrie*, 374 F.3d at 1200; *accord Touche Ross*, 609 F.2d at 582. "[I]mproper professional conduct" thus includes both "[i]ntentional or knowing conduct" as well as "negligent conduct." Rule 102(e)(1)(iv)(A), (B). And the Commission can deny privileges if an individual does not "possess the requisite qualifications to represent others" or is "lacking in character or integrity." 15 U.S.C. 78d-3(a)(1)–(2).

Even within the narrower category of professional-misconduct cases involving negligence, the causes of action are not the same. Abrahams focuses on the fact that "[t]he OIP itself" uses the words "negligent conduct," Mot. at 3 (quoting OIP ¶ 66), but as the D.C. Circuit has explained, "a distinction must be made between the *fact* of negligence, which may be relevant to a variety of actions, both legal and equitable, and 'negligence' as a legal cause of action in tort." *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 732 (D.C. Cir. 1972) (holding that a claim does not necessarily require a jury trial even if its adjudication touches on negligence-related issues). "Negligence law grew out of the old common law action on the Case and carried over its requirement that the plaintiff cannot recover without showing actual harm

resulting from the defendant's conduct." Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 125 (2d ed. updated through July 2022). By contrast, to prove a violation of Rule 102(e), "[t]he Commission does not need to show that the accountant's behavior actually caused harm; an accountant can demonstrate a lack of competence even if his conduct did not result in the filing of a false or misleading document." *Amendment to Rule 102(e) of the Commission's Rules of Practice*, 63 Fed. Reg. 57164, 57168 (Oct. 19, 1998); *see also Marrie*, 374 F.3d at 1204 (Rule 102(e)'s scope "reflect[s] choices that the Commission was authorized to make in promulgating its Rule").

Abrahams's contention that this proceeding "implicates his property rights to engage in a chosen profession," Mot. at 4, is similarly flawed. Under the public-rights doctrine, administrative proceedings—even those that involve professional licensing—are not analogous to common-law claims. *See Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d 1275, 1282 (10th Cir. 1989) ("Administrative proceedings regarding suspension of a pilot certificate involve the special expertise of the FAA and are not suits at common law for which a jury trial is required."). Moreover, as the D.C. Circuit observed when considering Rule 102(e)'s application to an attorney, "[t]he sanction imposed [under the rule] is limited to appearances before the Commission and has no effect either on his ability to practice law . . . and to appear before any court . . . ." *Altman*, 666 F.3d at 1327. Even so, the Supreme Court has long "held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citing *Ex parte Burr*, 9 Wheat. 529, 531 (1824)). And attorney-discipline proceedings do not require a jury trial. *Cf. Matter of Jacobs*, 44 F.3d 84, 89 (2d Cir. 1994) (rejecting an attorney's claim that the Seventh Amendment required a jury trial in state disciplinary proceedings, both because the Seventh Amendment does

not apply to state actions and because a disciplinary hearing is not "a suit at common law, in which he is entitled to a jury trial").

B. Nondelegation

1. *Jarkesy*'s nondelegation analysis is incorrect.

Jarkesy's conclusion that Congress impermissibly delegated to the Commission the choice to bring fraud claims in an administrative proceeding rather than in a district court action also contravenes Supreme Court precedent. While the Court has held that Congress may not delegate "powers which are strictly and exclusively legislative," *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality), enforcement decisions are matters over which the "Executive Branch has exclusive authority and absolute discretion." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *accord Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

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

2. *Jarkesy*'s nondelegation analysis is inapposite here.

Even if *Jarkesy*'s conception of nondelegation were not flawed, it is of no help to Abrahams. Unlike in *Jarkesy*, the Commission had no choice of venue when it instituted this

proceeding. Congress vested the Commission with the gatekeeping authority to control who appears before it and provided that the exclusive forum for adjudicating whether a professional should be denied that privilege is an administrative proceeding before the Commission. *Jarkesy*, by contrast, arose from a securities fraud enforcement matter that the Commission decided, consistent with statute, to bring as an administrative proceeding rather than as a federal district court action. 34 F.4th at 450, 455, 462. While the Fifth Circuit panel majority believed that Congress violated the majority's understanding of nondelegation by giving the Commission "unfettered authority to choose" to institute administrative enforcement proceedings rather than file actions in Article III courts, those judges rested their analysis on the fact that Congress delegated to the Commission an actual "decision—to assign certain actions to agency adjudication." *Id.* at 462.

Here, however, there is no district court option. Congress did not grant—and, consequently, the Commission did not exercise—"the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not" in connection with this matter. *Jarkesy*, 34 F.4th at 462. Section 4C of the Exchange Act provides that (1) only "the Commission" may censure a person or deny a person the privilege of appearing before the Commission and (2) that such matters must be determined in administrative proceedings "before the Commission." 15 U.S.C. 78d-3(a); *see also Lawson v. FMR LLC*, 571 U.S. 429, 475 (2014) (finding that Section 4C "grants the SEC the power" to impose the specified penalties); *United States v. Melvin*, 918 F.3d 1296, 1300 (11th Cir. 2017) (same); *Altman*, 666 F.3d at 1326 (same). The Fifth Circuit's nondelegation concerns in *Jarkesy* are thus not present here because *all* Section 4C proceedings are brought in the same venue: before the Commission. *See, e.g.*, *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 764

(2d Cir. 1998) (concluding that "there was no delegation at all" when "[t]he decision [at issue] was manifestly made by Congress itself rather than by the [Executive Branch]").

Jarkesy is also irrelevant here for the independent reason that, unlike this case, the Fifth Circuit's decision rests on a determination that Congress did not provide the Commission with an intelligible principle for deciding between adjudicatory venues. "[A] statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. U.S.*, 139 S. Ct. 2116, 2123 (plurality op.) (brackets and internal quotation marks omitted). Here, Congress's statutory mandate is that *all* Section 4C proceedings be brought before the Commission. 15 U.S.C. 78d-3(a).

Moreover, Abraham's assertion that Section 27(a) of the Exchange Act, 15 U.S.C. 78aa(a), nonetheless permits the Commission to bring a Section 4C "claim" in district court (Mot. at 10–11) is incorrect. While Section 27(a) grants district courts "exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder," it has long been understood that this general jurisdictional grant does not displace Congress's express statutory mandates for administrative proceedings. *See, e.g.*, *Wright v. SEC*, 112 F.2d 89, 95 (2d Cir. 1940) (concluding that Section 27(a) was "not intended to repeal" statutory provisions mandating administrative proceedings); *see also In the Matter of Walston & Co.*, 5 S.E.C. 112 (1939) (rejecting an interpretation of Section 27(a)

similar to Abrahams's as "completely disregard[ing] . . . statutory provisions [mandating administrative proceedings]").[4]

Abrahams also overlooks the content and context of Section 4C. Section 4C authorizes the Commission to deny the privilege of appearance, a power that has never rested with federal courts in the first instance. And Section 4C is a codification of Rule 102(e)(1), which applies in administrative proceedings, not federal court. *See* 17 C.F.R. 201.100(a) ("[T]hese Rules of Practice govern proceedings before the Commission under the statutes that it administers.").

II. These proceedings comport with constitutional principles of due process.

Abrahams argues that his due process rights will be violated by the alleged "shortcomings of the SEC administrative hearing procedures." Mot. at 7. His arguments, however, are without merit and have been soundly rejected by federal courts.

Abrahams first contends that "[the] administrative proceeding suffers from profound structural biases" because the Commission, its staff, and its administrative law judges serve investigative, adversarial, and adjudicative functions. Mot. at 7–8. But the Supreme Court has held that the combining of such functions in an agency, without more, does not "necessarily create[] an unconstitutional risk of bias in administrative adjudication." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see Marshall v. Cuomo*, 192 F.3d 473, 484 (4th Cir. 1999) ("It is well established that due process rights are not violated simply by the combination of the investigative, prosecutorial, and adjudicative functions in one agency." (citing *Withrow*, 421 U.S. at 46–53)).

[4] If Abrahams' Section 27(a) argument were correct (and it is not), it would prove too much. If Section 27(a)'s "exclusive jurisdiction" provision applied to Section 4C, the Commission would have no choice of adjudicatory venue and thus there would be no exercise of purportedly legislative power. Indeed, the same would have been true in *Jarksey*.

Abrahams next argues that the Commission's Rules of Practice deny him discovery and curtail his right to fairly present evidence because they differ from the rules governing federal court proceedings. Mot. at 8–9. But due process does not require application of those federal court rules. Rather, it requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (cleaned up); *see, e.g. Chaudhry v. Gonzales*, 142 F. App'x 770, 771 (4th Cir. 2005) ("Administrative agencies are not bound by the Federal Rules of Evidence, but are governed by a general due process standard."); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 299 (5th Cir. 2004) ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure."). Indeed, it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544 (1978); *see, e.g.*, *Rapoport v. SEC*, 682 F.3d 98, 104 (D.C. Cir. 2012) ("Agencies need not observe all the rules . . . applicable to courtroom proceedings.") (cleaned up).

To be sure, agency procedures must satisfy due process requirements. *See Withrow*, 421 U.S. at 35; *see, e.g.*, *McClelland v. Andrus,* 606 F.2d 1278, 1286 (D.C. Cir. 1979) ("[D]iscovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process."). But the Rules of Practice afford Abrahams ample process, and he identifies no prejudice that will result from their application, "let alone prejudice to a significant degree so as to result in a denial of due process." *Mister Disc. Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985); *see, e.g.*, 17 C.F.R. 201.232(a) (permitting a party to request "the issuance of subpoenas requiring the . . . testimony of witnesses . . . and subpoenas requiring the production of documentary or other tangible evidence"); 17 C.F.R. 201.321

(addressing parties' "[o]bjections to the admission or exclusion of evidence"); 17 C.F.R. 201.452 (permitting a party to "file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission").

Finally, Abrahams argues that his due process rights will be violated should a reviewing court defer to Commission factual findings. Mot. at 9–10; *see* 15 U.S.C. 78y(a)(4) ("The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive."). This argument quarrels not with the process afforded Abrahams in an administrative proceeding but rather the standard of review in a subsequent judicial action. *See Bennett v. SEC*, 844 F.3d 174, 177 (4th Cir. 2016) ("For judicial review of final Commission orders, the Exchange Act specifies . . . the standard of review.") (citing 15 U.S.C. 78y(a)(4)). And, in any event, "imposing this limitation upon judicial review [constitutes] no violation of constitutional limits." *Wright*, 112 F.2d at 94.

III. A stay of these proceedings pending the Supreme Court's decision in *Cochran* is unnecessary.

Abrahams devotes the end of his motion to a request for a stay of these proceedings should the Court deny his motion to dismiss so that he might seek injunctive relief in federal district court. Mot. at 12. He also cites *Cochran v. SEC*, 20 F.4th 194, 198 (5th Cir. 2021) (en banc), *cert. granted*, 142 S. Ct. 2707 (2022), which was argued before the Supreme Court on November 7, 2022, contending that "it would be premature to allow this proceeding to go forward only to potentially be forced to stay it following the Court's ruling." Mot. at 12 n.4.[5]

[5] The question presented in *Cochran* is "[w]hether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding." *See* https://www.supremecourt.gov/qp/21-01239qp.pdf.

Abrahams's request for hypothetical relief should be rejected. Abrahams does not actually move for a stay; rather, he previews that such a motion might be forthcoming if his dismissal motion is unsuccessful. The Commission typically considers requests to stay administrative hearings in favor of proceedings in other courts as requests for adjournment or postponement under Rule 161 rather than as requests for stays of Commission proceedings under Rule 400. *See, e.g.*, *In re Carl E. Dilley*, Release No. 96079, 2022 WL 9194055, at *1 (Oct. 14, 2022); *In re Gregory Lemelson*, Release No. 6091, 2022 WL 3500129, at *1 & n.3 (Aug. 17, 2022). Under Rule 161(b)(1), the Commission has adopted "a policy of strongly disfavoring such requests" except in circumstances "where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case." 17 C.F.R. 201.161(b)(1). Abrahams has made no such showing.

CONCLUSION

Abrahams's motion to dismiss the proceedings should be denied.

DIVISION OF ENFORCEMENT
By its Attorneys:

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In the Matter of JOSHUA ABRAHAMS, CPA

Administrative Proceeding File No. 3-21214

SERVICE LIST

Pursuant to Commission Rule of Practice 151 (17 C.F.R. 201.151), I certify that the attached:

DIVISION OF ENFORCEMENT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

was served on **December 16, 2022**, upon the following parties as follows:

NOT YET ASSIGNED (By electronic email only)
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Dated: December 16, 2022

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