IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REVEREND FATHER EMMANUEL LEMELSON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:24-cv-2415
SECURITIES AND EXCHANGE COMMISSION,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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I. INTRODUCTION

Lemelson's combined brief shows little engagement with many of the arguments and authorities set out in the SEC's motion to dismiss. Where he does respond to specific cases, Lemelson consistently encourages the Court to ignore binding precedent based on his speculation that the Supreme Court may someday rule differently. This approach cannot provide the legal grounding that his claims lack. The Court lacks jurisdiction over Counts Three (Seventh Amendment) and Five (*res judicata*) because Congress has rested exclusive jurisdiction over such challenges in the court of appeals via the Advisers Act's judicial review mechanism. And, as further explained herein, Lemelson cannot state any claim over which the Court does have jurisdiction. The Court should therefore grant the SEC's motion to dismiss in full.

II. ARGUMENT

A. The Court Lacks Subject-Matter Jurisdiction Over Counts Three and Five

The controlling test for whether a statutory review process deprives district courts of jurisdiction requires courts to first examine whether Congress's intent to preclude such jurisdiction is "fairly discernible" in the statutory scheme. If such an intent is discernible, courts must determine whether the particular "claims are of the type Congress intended to be reviewed within this statutory structure." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). That latter inquiry involves application of the so-termed *Thunder Basin* factors: whether "a finding of preclusion could foreclose all meaningful judicial review," whether the claims are "wholly collateral to a statute's review provisions," and whether the claims are "outside the agency's expertise." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 207). The SEC's opening brief set out why the Court lacks

jurisdiction over Lemelson's Seventh Amendment and *res judicata* claims under these principles, and the three primary arguments Lemelson makes in rebuttal are without merit.[1]

First, although he does not squarely rebut the SEC's contention that 15 U.S.C. § 80b-13(a) evinces a fairly discernable congressional intent to preclude district court jurisdiction,[2] Lemelson argues that the statutory review process is for "an order issued by the Commission," 15 U.S.C. § 80b-13(a), and no such order has yet issued, making the statutory mechanism inapplicable to him. *See* Pl.'s Combined Reply in Further Supp. of His App. for a Prelim. Inj. & Opp. to Def.'s Mot. to Dismiss ("Pl.'s Opp.") at 11, ECF No. 17. This theory was considered and rejected in *Thunder Basin* itself. *See* 510 U.S. at 208 (concluding that although the Mine Act "is facially silent with respect to pre-enforcement claims," the existence of the statutory review process clearly "demonstrates that Congress intended to preclude [such] challenges"). To hold otherwise would permit respondents to "evade the statutory-review process" by rushing to court for an injunction before an order is issued, upending the judicial review process Congress carefully devised. *Id.* at 216.

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[1] Lemelson cites a single Justice's concurring opinion in *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023) for the proposition that the *Thunder Basin* factors are "unworkable." Pl.'s Opp. at 8 (citing *Axon*, 598 U.S. at 205–07 (Gorsuch, J., concurring)). But as that concurrence itself indicates, the majority applied the *Thunder Basin* factors, as the Supreme Court has done for decades. *See Axon*, 598 U.S. at 205 (Gorsuch, J., concurring) (stating that, "[a]s the Court sees it," plaintiffs must satisfy the "multi-factor balancing test" from *Thunder Basin*). Lemelson may seek to bring his gripes about that test to the Supreme Court, but it remains the governing legal framework for this Court.

[2] Lemelson argues that 15 U.S.C. § 80b-13(a) "does not reflect any 'fairly discernible' intent to channel structural constitutional challenges" into the statutory review process. Pl.'s Opp. at 9. That contention conflates the question of whether a congressional intent to preclude district court jurisdiction in a general sense is "fairly discernible" from the statute—the threshold question—with whether the particular claims at issue are "of the type Congress intended to be reviewed within this statutory structure," which is evaluated under the *Thunder Basin* factors. *Free Enterprise Fund*, 561 U.S. at 489 (alteration and quotation omitted). Lemelson offers no real argument on the former question, and the SEC addresses the latter below.

Second, Lemelson argues that the Supreme Court's rulings in *Free Enterprise Fund* and *Axon* show that his Seventh Amendment and *res judicata* claims are not "of the type Congress intended to be reviewed within th[e] statutory structure." *Free Enterprise Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212). That is not so, as several courts in this District have recently held. *See Vape Central Grp., LLC v. FDA*, 2025 WL 637416, at *9 (D.D.C. Feb. 27, 2025) (concluding that "the *Thunder Basin* factors weigh against district court jurisdiction for [plaintiff's] Seventh Amendment claims" regarding FDA administrative proceeding); *VHS Acquisition Subsidiary No. 7 v. NLRB*, 2024 WL 4817175, at *4 (D.D.C. Nov. 17, 2024) (similar as to NLRB administrative proceeding). The Court in *Free Enterprise Fund* concluded that the Article II challenges there to the appointment of—and removal protections applicable to—Public Company Accounting Oversight Board members were structural: the plaintiffs "object[ed] to the Board's existence," not to the procedures it used. *Free Enterprise Fund*, 561 U.S. at 489. Those structural claims, the Court held, were collateral to any particular action the agency might take, and were outside the Commission's expertise, making them not the type of claims Congress intended to be reviewed within the statutory scheme. *See id.* at 489–91. The *Axon* Court made a similar determination, concluding that the claims there went "to the structure or very existence of an agency." 598 U.S. at 189; *see also id.* at 180 (describing claims "that the agencies' [ALJs] are insufficiently accountable to the President, in violation of separation-of-powers principles," and challenging the agency's "combination of prosecutorial and adjudicatory functions"). Such claims "do not relate to the subject of the enforcement actions," nor to the "procedures agencies use to make … a decision," making them similar to the claims in *Free Enterprise Fund*. *Id.* at 189, 193.

As set out in the SEC's opening brief, Lemelson's Seventh Amendment and *res judicata* claims *do* relate to the subject of the administrative proceeding: Lemelson's arguments that the

agency's actions are unlawful on those bases depend on the precise relief the agency may impose. *See* Pl.'s Opp. at 15–16 (arguing that a particular "statutory penalty" sought in the proceeding triggers a jury right); *id.* at 24–25 (arguing that the particular "type of industry suspension or order" sought in the proceeding is barred by *res judicata*). And those claims *do* concern the procedures by which the SEC may impose certain remedies against Lemelson. Counts Three and Five are therefore unlike the claims at issue in *Free Enterprise Fund* and *Axon*.[3]

Lemelson unpersuasively argues that a jurisdictional dismissal may deprive him of an opportunity to obtain judicial review of his alleged "'here-and-now injury' of being subjected to 'an illegitimate proceeding.'" Pl.'s Opp. at 9. But the limited "here-and-now injury" recognized in *Axon* again related specifically to "structural constitutional" deficiencies. 598 U.S. at 191, whereas typical "statutory and constitutional claims … can be meaningfully addressed in the Court of Appeals," *Thunder Basin*, 510 U.S. at 215; *see also Waffle House, Inc. v. NLRB*, 2025 WL 602744, at *8 (D.S.C. Feb. 10, 2025) (concluding that an administrative respondent's "alleged Seventh Amendment injury fails to constitute a here-and-now injury" (quotation omitted)).

Third, and finally, Lemelson argues that district courts may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over claims for which Congress has precluded district court jurisdiction via a claims-channeling statute. But he cites no authority for that proposition, and there is no merit to the theory that Congress gave back the same jurisdiction with one hand that it had stripped with the other. The supplemental jurisdiction statute itself disclaims supplemental jurisdiction where "expressly provided otherwise by Federal statute," 28 U.S.C. § 1367(a), and courts have held that claims-channeling statutes "provide[] the exclusive avenue to judicial

[3] Lemelson's contentions that his combination-of-functions due process claim and Article III claim are structural, Pl.'s Opp. at 10, are irrelevant, as the SEC has not argued that the Court lacks jurisdiction over those claims.

review." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012); *see also Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 395 (D.D.C. 2018), *rev'd on other grounds*, 929 F.3d 748 (D.C. Cir. 2019) (although a court normally "has the authority to hear any case that falls within [a] grant of jurisdiction" like "federal question," "diversity," and "supplemental jurisdiction," Congress may still "choose to *withhold* jurisdiction, by channeling certain types of claims through alternative review mechanisms" (quotation omitted)); *Bloom v. Azar*, 2018 WL 11216312, at *4 (D. Vt. May 15, 2018) (statutes need not "explicitly mention § 1367(a) or supplemental jurisdiction in order to 'expressly' provide an exemption to the availability of supplemental jurisdiction"). Section 1367(a) may extend a court's jurisdiction to a claim Congress has not otherwise affirmatively placed within the court's jurisdiction, but it does not override Congress's affirmative choice to withdraw a court's jurisdiction over a claim.

In the event the Court concludes that Section 1367(a) permits it to exercise jurisdiction over Counts Three and Five (which it should not), the Court should nevertheless "decline to exercise supplemental jurisdiction" because "there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4). As discussed, exercising jurisdiction over those claims would subvert "Congress' intent to entirely foreclose judicial review" for claims subject to the Advisers Act's review procedures, *Elgin*, 567 U.S. at 11, opening a gaping loophole in that statutory review scheme. Counts Three and Five should be dismissed for lack of jurisdiction.

B. Lemelson's Complaint Fails to State a Claim on Which Relief May Be Granted

The Court should dismiss any claims over which it concludes it has jurisdiction for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

i. Due Process (Count One)

Lemelson does not even attempt to argue that his due process challenge to the SEC's combination of prosecutorial and adjudicative functions could survive the D.C. Circuit's decision

in *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988), which rejected a due process claim nearly identical to his. He argues only that this Court should discard *Blinder* because it was "mistaken" and would be purportedly overruled "by today's Supreme Court." Pl.'s Opp. at 22. To state that argument is to refute it: this Court must "follow controlling circuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule[s] it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Most of the cases Lemelson cites concern wholly unrelated issues like Article II appointment and removal procedures, the application of a statute of limitations to SEC disgorgement or civil penalty proceedings, and other matters. Pl.'s Opp. at 22. These cases do not implicate *Blinder* at all, much less evince the total "eviscerat[ion]" of that case's reasoning that would be required to qualify as an overruling by implication. *Rai Care Ctrs. of Md. I, LLC v. U.S. Off. of Personnel Mgmt.*, 2024 WL 3694433, at *13 (D.D.C. Aug. 7, 2024) (quotation omitted). The few due process cases Lemelson does cite concern the judiciary, not administrative agencies, and the Supreme Court has "expressly distinguished the situation of administrative agencies from the prototypical situation of a judge performing combined functions." *Blinder*, 837 F.2d at 1105 (citing *Withrow v. Larkin*, 421 U.S. 35, 53 (1975)). The Court should (and indeed must) decline Lemelson's invitation to ignore binding circuit precedent on the basis of speculation about how the Supreme Court might some day view it.

In all events, the Supreme Court's decision in *Withrow* independently defeats Lemelson's claim. *See* 421 U.S. at 58 (concluding that in the context of administrative agencies, "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation"); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174 (D.C. Cir. 1998) (concluding that *Withrow* was "dispositive" in holding that the NLRB's ability "to seek preliminary injunctive relief against an employer in the district court does not deprive the employer

of a neutral decisionmaker in subsequent proceedings before the Board"); *Meta Platforms, Inc. v. FTC*, 2024 WL 1549732, at *1 (D.C. Cir. Mar. 29, 2024) (applying *Withrow*). The mere fact that the Commission previously approved a civil enforcement action against Lemelson in federal court on antifraud grounds does not show that the Commissioners are "psychologically wedded," *Withrow*, 421 U.S. at 57, to any particular position on whether the public interest supports a remedial order against him under 15 U.S.C. § 80b-3(e)(4) & (f), which is a separate question. Lemelson's due process claim should be dismissed.

ii. Seventh Amendment (Count Three)

The Seventh Amendment applies to claims that are "legal in nature," not claims that are "of equity." *SEC v. Jarkesy*, 603 U.S. 109, 123 (2024). Lemelson's theories for why a bar or suspension from the securities industry should be construed as a legal remedy are unpersuasive.[4] *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) ("It is settled law that the Seventh Amendment does not apply" to "suits seeking only injunctive relief."); *Am. Educ. Rsch. Assoc., Inc. v. Public.Resource.Org, Inc.*, 78 F. Supp. 3d 542, 550 (D.D.C. 2015) (similar).

Lemelson initially contends that such a remedial order is a "statutory penalty," not an injunction. Pl.'s Opp. at 16. This contention misses the point: while a bar or suspension under 15 U.S.C. § 80b-3(f) is certainly a remedy permitted by statute, the Supreme Court has made clear that "whether th[e] claim is statutory is immaterial" to the Seventh Amendment analysis. *Jarkesy*, 603 U.S. at 122. To the extent a bar or suspension can be analogized to any court-ordered remedies, they are plainly more analogous to the equitable relief than to legal remedies like

[4] Lemelson does not attempt to show that 15 U.S.C. § 80b-3(e)(4) & (f) is akin to any legal cause of action, and it is not. *See* Def.'s Br. at 20.

damages. Even the Fifth Circuit's decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), on which Lemelson elsewhere relies, *see Pl.'s App. for a Preliminary Inj.* at 18, ECF No. 11, concludes that the SEC's attempt "to ban Jarkesy from participation in securities industry activities" was an "equitable remed[y]," 34 F.4th at 454.[5] Lemelson further contends that such an order is legal in nature because it would be imposed to "punish and deter" him. Pl.'s Opp. at 16. But he fails to address, much less rebut, the SEC's showing that such a contention is both irrelevant and incorrect. *See, e.g.*, *Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010) (stating that an order "debar[ring] investment advisers … is remedial in nature because it is designed to protect the public, and the sanction is not historically viewed as punishment"); *Def.'s Combined Opp. to Pl.'s Mot. for Prelim. Inj. & Mem. of Points & Authorities in Supp. of Def.'s Mot. to Dismiss* (Def.'s Br.) at 19–20, ECF No. 14. Lemelson's Seventh Amendment claim should be dismissed for these reasons.

iii. Article III (Count Two)

Under the "public rights" exception, the Supreme Court has made clear that claims "unknown to the common law" can be assigned to agency adjudicators without offending Article III or the Seventh Amendment. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 461 (1977). And the statute governing the follow-on administrative proceedings here, which permit the Commission to issue a remedial order against an enjoined investment advisor when it is "in the public interest," 15 U.S.C. § 80b-3(f), is not analogous to a common law cause of action. *See* Def.'s Br. at 21–24. Lemelson does not argue otherwise. Instead, he misconstrues *Jarkesy* in three ways.

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[5] Like the Supreme Court on review, the Fifth Circuit only applied the Seventh Amendment to the SEC proceedings in *Jarkesy* because—unlike in this case—the SEC also sought civil monetary penalties. *See* 34 F.4th at 454.

First, Lemelson argues that *Jarkesy* critiqued *Atlas Roofing*. But the Court in *Jarkesy* expressly declined to overrule that case, and further "express[ed] no opinion on the[] various criticisms" of *Atlas Roofing* that it discussed. *See* 603 U.S. at 136, 138 n.4. At most, the Court declined to endorse any "broader rule" than the core proposition *Atlas Roofing* set out: that "Congress could assign … adjudications to an agency" where "the claims were 'unknown to the common law.'" *Jarkesy*, 603 U.S. at 138 (quoting *Atlas Roofing*, 430 U.S. at 461); *see also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 335 (2018). The SEC similarly does not seek any expansion of *Atlas Roofing*, and this Court is bound to apply Supreme Court precedents unless they are overruled. *See Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64, 71 (D.D.C. Mar. 14, 2024) ("To give existing precedent anything less than its full due based on speculation about what the Supreme Court might someday hold would exceed the authority of this Court, would inject grave uncertainty in the legal landscape, and would undermine the rule of law.").

Second, Lemelson argues that *Jarkesy* limited the public rights exception to "cases involving revenue collection, foreign commerce, immigration, tariffs, relations with Indian tribes, and the granting of public benefits." Pl.'s Opp. at 15 (citing *Jarkesy*, 603 U.S. at 128–30). But *Jarkesy* never claimed that it was exhaustively cataloguing all types of public rights matters when it referenced some in its analysis. Indeed, *Jarkesy* expressly disclaimed that it was doing so. 603 U.S. at 131 ("The Court has not definitively explained the distinction between public and private rights, and we do not claim to do so today." (quotation omitted)). Consistent with this disclaimer, *Jarkesy* cited the discussion of historical revenue collection practices in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) only as one "example" of a justification for the application of the public rights exception. *Id.*

Third, and finally, Lemelson argues that if a bar or suspension from the securities industry is construed as more analogous to an equitable remedy for Seventh Amendment purposes, that necessarily means it is a case in "Law and Equity" under Article III, and therefore cannot be assigned to an agency for adjudication. Pl.'s Opp. at 14–15. *Jarkesy* does not support—and in fact rebuts—such an assertion. As *Jarkesy* reiterated, matters that cannot be removed from Article III courts are those that are "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." 603 U.S. at 127 (citation omitted). Lemelson has not meaningfully responded to the SEC's showing that the at-issue provisions permitting the Commission to determine whether and how it serves the public interest to issue a remedial order are not "borrow[ed]" from the common law. *Jarkesy*, 603 U.S. at 136–37; *see* Def.'s Br. at 21–23. That a bar or suspension from the securities industry issued under these novel provisions is more analogous to an equitable remedy than a legal one does not alter this result. As the Supreme Court has long held, even when public rights "may be presented in such form that the judicial power is capable of acting on them," Congress still "may or may not bring [them] within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee*, 59 U.S. at 284.

Jarkesy does not militate against the application of the public rights exception here, and that doctrine defeats Lemelson's Article III and Seventh Amendment claims.

iv. Article II (Count Four)

As set out in the SEC's Notice of Change in Position, ECF No. 16, the Department of Justice will no longer defend the constitutionality of 5 U.S.C. § 7521 against challenges predicated on multiple layers of removal protections. *See* Letter from Sarah M. Harris to Mike Johnson, *Multilayer Restrictions on the Removal of Administrative Law Judges* (Feb. 20, 2025),

https://www.justice.gov/oip/media/1390336/dl?inline. But as set out in the SEC's opening brief, Lemelson's Article II claim fails regardless of the constitutionality of section 7521. *See* Def.'s Br. at 32–35. That is because Lemelson has failed "to meet the harm requirement set forth in the Supreme Court's recent decision in *Collins* [*v. Yellen*, 594 U.S. 220 (2021)]." *Cortes v. NLRB*, 2024 WL 1555877, at *4 (D.D.C. Apr. 10, 2024). If anything, the Department of Justice's conclusion that the removal restrictions at issue are unenforceable only underscores that the President will not treat them as obstacles to his exercise of control over the Executive Branch, making it impossible for Lemelson to demonstrate prejudice. *See Collins*, 594 U.S. at 259–60 (explaining that a showing of compensable harm involves demonstrating either that the President attempted to remove an official "but was prevented from doing so by a lower court decision" or had publicly asserted that he would remove the official "if the statute did not stand in the way"). Lemelson cites no authority for his bare assertion that he "has no burden to prove that the ALJ's tenure protection has inflicted or will inflict 'compensable harm'" on him, Pl.'s Opp. at 18, and his assertion is belied by the unrebutted authorities set out in the SEC's opening brief and herein. *See, e.g.*, *Leachco, Inc. v. Consumer Product Safety Commission*, 103 F.4th 748, 765 (10th Cir. 2024); *K&R Contractors v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *Calcutt v. FDIC*, 37 F.4th 293, 317–20 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023).

v. Res Judicata (Count Five)

Lemelson cites no case in the Advisers Act's 85-year history for the contention that *res judicata* bars the SEC from issuing any particular remedial order in a follow-on proceeding based on a prior civil enforcement action in federal court, nor does he cite any *res judicata* case at all. Instead, he seeks to rebut the proposition that the "SEC could not have asked the Massachusetts district court to impose" an industry suspension or bar against him as "equitable relief." Pl.'s Opp.

at 24. But the SEC has argued nothing of the kind. The SEC's argument, in relevant part, is that the federal court could not have issued a remedial order under 15 U.S.C. § 80b-3(e)(4) & (f), which only authorizes orders by the Commission, and which requires the existence of a prior court order. Because such a proceeding "could not have been brought" in the civil enforcement action, it "is not barred by res judicata." *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989). In all events, Congress overrode any otherwise-applicable common law *res judicata* principles in establishing follow-on proceedings under the Advisers Act, which are expressly predicated on the existence of prior litigation. *See* 15 U.S.C. § 80b-3(e)(4). For this and the other reasons set out in the SEC's opening brief, Lemelson's *res judicata* claim should be dismissed. *See* Def.'s Br. at 35–37.

III. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court grant its motion to dismiss.

Dated: March 18, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2025, a copy of the foregoing document was filed electronically with the Clerk of this Court. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Christian S. Daniel
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