No. 22-11172

In the United States Court of Appeals for the Fifth Circuit

CORNELIUS CAMPBELL BURGESS,
Plaintiff-Appellee/Cross-Appellant,

v.

JENNIFER WHANG, IN HER OFFICIAL CAPACITY AS AN ADMINISTRATIVE LAW JUDGE, FEDERAL DEPOSIT INSURANCE CORP.; MARTIN J. GRUENBERG, IN HIS OFFICIAL CAPACITY AS ACTING CHAIRMAN OF THE FDIC; MICHAEL J. HSU, IN HIS OFFICIAL CAPACITY AS A DIRECTOR OF THE FDIC; ROHIT CHOPRA, IN HIS OFFICIAL CAPACITY AS A DIRECTOR OF THE FDIC,
Defendants-Appellants/Cross-Appellees.

On Appeal from the U.S. District Court for the Northern District of Texas (Wichita Falls Div.), No. 7:22-cv-00100-O, Hon. Reed O'Connor

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici: The New Civil Liberties Alliance—a nonpartisan, nonprofit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

Counsel for Amici: Gregory Dolin and Margaret A. Little are Senior Litigation Counsel for the New Civil Liberties Alliance and represent the Alliance in this matter. Mark Chenoweth is President and General Counsel of NCLA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* the New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ Gregory Dolin
Gregory Dolin

STATEMENT REGARDING CONSENT TO FILE AND FINANCIAL CONTRIBUTIONS

The New Civil Liberties Alliance certifies that it timely sought and received consent from all parties to the filing of this brief.

The New Civil Liberties Alliance states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

/s/ Gregory Dolin
Gregory Dolin

INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: due process of law, the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels, the right to have executive power exercised only by actors directed by the President, and the right to a trial by jury, which is at stake in this appeal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by reasserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional

administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by Congress channeling punitive enforcement actions away from fora controlled by common citizens—courtrooms with civil juries—and into administrative hearings where bureaucrats serve as prosecutor, judge and jury. That usurpation by the select few of powers that rightfully belong to the people, is present here, where the Federal Deposit Insurance Corporation ("FDIC") adjudicates claims of fraud—claims that are traditional common law causes of action—before an administrative tribunal and without a jury. The Seventh Amendment limits Congress's powers to create judicial or quasi-judicial bodies that can hear common law cases without juries. Nor can Congress deny citizens access to Article III courts which could protect them from having to submit to an unconstitutional process before an unconstitutional body while risking their reputation, financial security, and constitutionally protected property interests.

Because Congress cannot vest FDIC with powers that can only be exercised lawfully by citizen-jurors, and because Congress imposed on

Americans a constitutionally defective and *ultra vires* process, the trial court should be affirmed.

STATEMENT OF THE CASE

Congress created the Federal Deposit Insurance Corporation to enforce federal banking laws and regulations and to investigate banks and bankers. The authorizing statute empowers FDIC to investigate violations of law, and, upon a finding of a violation to impose a variety of penalties including monetary penalties, removal and prohibition orders that operate to destroy reputations and livelihoods, even when exercising only purely civil powers.

FDIC conducts hearings in front of an administrative law judge ("ALJ") who issues a written report of findings and recommendations. The final decision on both liability and penalties rests with FDIC's five-member Board of Directors. FDIC does not utilize juries and instead relies on ALJs' findings of fact.

In 2014, FDIC began enforcement proceedings against Cornelius Campbell Burgess ("Burgess" or "Appellee"), which concluded with a finding of liability, and imposition of penalties including a lifetime prohibition on working in the banking industry, as well as a $200,000 civil penalty. Following the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), this Court vacated FDIC's proceeding because the

ALJ who conducted it was not properly appointed. On remand, an ALJ whose appointment was cured consistent with the judgment in *Lucia* entered findings in all relevant respects identical to the prior decision. Burgess petitioned the U.S. District Court for the Northern District of Texas to enjoin FDIC from formally approving the ALJ's recommendations and entering a final order against him.

Appellee challenged FDIC's process as: (a) a violation of the "vesting clause" of Article II because the FDIC Board of Directors members who exercise "executive power" are not removable by the President at will; (b) a further violation of Article II because ALJs employed by FDIC are unconstitutionally shielded from removal; and (c) a violation of the Seventh Amendment's guarantee of a trial by jury. *Amicus* addresses the Seventh Amendment argument.

ARGUMENT

Burgess's arguments that FDIC's allegations must be tried to a jury rather than a government bureaucrat and that Congress is powerless to force a citizen to navigate a Kafkaesque administrative process before vindicating his rights in an Article III court is amply supported by the

historical record and the proper understanding of the nature of Congressional power versus the Constitution.

I. THE SEVENTH AMENDMENT IS NOT MERELY A PERSONAL RIGHT, BUT A DIRECT LIMIT ON CONGRESSIONAL POWER TO SET UP ADMINISTRATIVE TRIBUNALS

Unlike the right to a jury trial in a criminal case, which was codified in the original Constitution, *see* U.S. Const. art. III, § 2, cl. 3, a similar right in civil cases was omitted from the draft submitted to the several states for ratification. This was not accidental—it was done by design. The failure to include this right in civil actions became perhaps the biggest obstacle to the ratification of the Nation's charter. The lack of a right to a civil jury led the first Congress to propose and the several States to quickly ratify the Seventh Amendment.

A. The Sorry Anglo-American History of Non-Jury Tribunals Informed the Thinking of the Founding Generation

As the saying goes, "there is nothing new under the sun." Ecclesiastes 1:9. So too with administrative tribunals. Ever since the Anglo-American insistence upon jury trials and due process has existed, the government has tried to circumvent the protections that juries provide citizens. Often, these shortcuts are undertaken with expressions

of good intentions for a means of "supplying speedy and expert resolutions of the issues involved." *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 461 (1977). *See also* Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570-1640*, 51 Am. J. Legal Hist. 639, 645 (2011) (noting that "The Court of Star Chamber … responded to the limitations of the common law by dispensing the royal grace in a technically arbitrary, but also speedy, manner [in cases which were] unresolvable at common law or [which] involved issues in which the King might have a particular interest."). Though such processes often began with wide public support,[1] they just as often and just as quickly deteriorated into a system that abused individual rights. *See, e.g.*, Edward P. Cheyney, *The Court of Star Chamber*, 18 Am. Hist. Rev. 727, 740-41 (1913).

By the time of the American Revolution the abuses of non-jury-based courts were not only well known but expressly provided cause for

[1] *See, e.g.*, 5 William Holdsworth, A History of English Law 189 (2d ed. 1937) (Court of Star Chamber "commanded popular approval"); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1206 (1986) (noting that "the first federal independent regulatory commission was established with the support of overwhelming majorities in both houses of Congress").

seeking independence from Great Britain. *See* Decl. of Indep. (1776) (listing "depriving [Americans] in many cases, of the benefits of Trial by Jury" as one of the abuses by and grievances against the King); *see also* Decl. of Rights & Grievances (1765) ("Th[e] trial by jury is the inherent and invaluable right of every British subject in these colonies."). These pronouncements were grounded not just in things learned from books, but in long-held reactions to abuses well-known in England and directly experienced in the colonies.

Deprivation of the jury trial right remonstrated against in the Declaration of Independence reflects the Colonies' experience with English vice-admiralty courts—which were ostensibly set up to deal with criminal matters stemming from smuggling and tax avoidance, but whose jurisdiction bled into traditional common-law actions. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 n.47 (1973) (and sources cited therein); *In re U. S. Fin. Sec. Litig.*, 609 F.2d 411, 420 (9th Cir. 1979) ("Colonial administrators had been circumventing the right [to a jury] by trying various cases, both criminal and civil, in the vice-admiralty courts."). Vice-admiralty courts were seen as quite odious, both because they tried

their cases without a jury *and because the government alone could choose where to bring cases*—in traditional common-law provincial courts or in the vice-admiralty court. *See* Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 Am. J. Legal Hist. 35, 79 (2005). Hence, following the American Revolution, *every* new state's constitution guaranteed a right to civil juries. *See* Wolfram, *supra* at 655. "In fact, 'the right to a trial by jury was probably the only one universally secured by the first American state constitutions ….'" *Id*. (quoting Leonard W. Levy, Freedom of Speech and Press in Early American History—Legacy of Suppression 281 (1963)).

So thoroughly did the Founding generation reject jury-less courts, some states even committed "prize" cases (traditionally within admiralty courts' jurisdiction) to juries. *See* Blinka, *supra* at 81; *see also* Act of Cont'l Congress, Nov. 25, 1775 (cited in *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (1792)). In short, both the English experience with the Court of Star Chamber and colonial injustice in vice-admiralty courts led the Founding Fathers to ensure such tribunals would not administer justice over their lives, liberty and property.

B. The Seventh Amendment Was Meant to Deny Congress the Ability to Create Tribunals Similar to the Hated Vice-Admiralty Courts and the Court of Star Chamber

Although experience with jury-less courts caused each state to guarantee jury trials in state courts, when the Constitutional Convention drafted the Constitution to replace the Articles of Confederation, this guarantee was absent. Anti-Federalists forcefully advocated against ratification of a Constitution that failed to guarantee civil jury trials.

The initial reason for the omission appears to have been that "[t]he cases open to a jury, differed in the different states; [making it] impracticable, on that ground, to have made a general rule" concerning civil juries in federal cases. 3 Max Farrand, The Records of the Federal Convention of 1787 at 101 (1911). However, in the ratification debates, the justification for omitting the guarantee of the civil jury changed (or at the very least was supplemented by) Alexander Hamilton's arguments regarding the limitations of the jury system. In Federalist 83, Hamilton wrote of his "deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one," adding his concern that juries "will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public

policy which ought to guide their inquiries." He argued the Constitution *ought* to leave the right to a civil jury unprotected, leaving "the legislature … at liberty either to adopt that institution or to let it alone." *Id.* Had Hamilton won, Congress *could* set up jury-less regulatory adjudication schemes.

However, the Anti-Federalists strongly disagreed. Centinel wrote

> The policy of this right of juries, (says judge Blackstone) to decide upon fact, is founded on this: That if the power of judging were entirely trusted with the magistrates, or any select body of men, named by the executive authority, their decisions, in spite of their own natural integrity, would have a biass [*sic*] towards those of their own rank and dignity; for it is not to be expected, that the few should be attentive to the rights of the many.

2 The Complete Anti-Federalist 149 (H. Storing ed. 1981) (Letters of Centinel (II)); *accord* 3 William Blackstone, Commentaries on the Laws of England 379-80 (R. Bell, Philadelphia ed. 1772). Anti-Federalists understood that juries provided a bulwark against structural biases of government-employed adjudicators to rule in favor of the government—including vice-admiralty courts where the judges' own compensation depended on the number of vessels seized and fines imposed.

The Anti-Federalists carried the day. The First Congress rejected

Hamilton's pitch for flexibility, proposing the Seventh Amendment which was adopted by the young nation. The Amendment, though part of the "Bill of *Rights*," was in reality a structural limitation on Congressional power to create non-jury courts. *See generally* Suja A. Thomas, *A Limitation on Congress: 'In Suits at Common Law*,' 71 Ohio St. L.J. 1071 (2010). The historical record makes clear that *with respect to rights and remedies that existed at the time the Seventh Amendment was adopted*, Congress could not extinguish the right to trial by jury. *See* Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281, 1339 (1978) ("The seventh amendment *was* added to the Constitution to preserve the common law right as fully as possible and to ensure that any future Congresses would" indeed be rendered powerless to assign fact-finding to administrative agencies).

The historical record unquestionably favors Professor Kirst's view. In contrast, (and as explained further *infra*), the Court's decision in *Atlas Roofing* exhibited a "total lack of prior grounding in Seventh Amendment jurisprudence," and as result was "fundamentally incoherent." Martin H. Redish & Daniel J. LaFave, *Seventh Amendment Right to Jury Trial*

in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407, 422 & 429 (1995). The Supreme Court acknowledged this in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

The Amendment was also meant to check the governing class, protecting the public's power to supervise, and if necessary, rein it in:

> [T]rial by jury is … essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. … The few, the well born, etc. … in judicial decisions as well as in legislation, are generally disposed … to favour those of their own description. The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other.

2 The Complete Anti-Federalist 249-50 (Letters of the Federal Farmer

(IV)).

"The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). *See also* Blackstone, *supra* at 379-80. As the District Court for Massachusetts observed,

> [t]he American jury, that most vital expression of direct democracy extant in America today, thus functions as a practical and robust limitation on congressional power. It is as crucial and central a feature of the separation of powers … as is the Supreme Court. Indeed, within her proper fact-finding sphere, an American juror is the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.

Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 80 (D. Mass. 2005) (internal citations omitted). This insight is echoed in the citizens' own perception of their role while serving on a jury even today. *See* Charles Homans, *The Trump Juror Who Got Under America's Skin*, N.Y. Times Mag. 7 (Mar. 19, 2023) ("[T]o get this peek into the world of … politics and … of government and of all these different things, and have the curtain lifted just a little bit and let us peek in as regular people has been amazing.").

However, if Congress were permitted to simply channel rule-making, investigation, adjudication, and imposition of penalties into a single body staffed by career attorneys and other government servants impervious to any sort of democratic control, the supervisory function of the jury would disappear. This alone is reason enough for rejecting the Government's position that Appellee is not entitled to a jury trial.

C. The Concerns that Animated Anti-Federalists and Resulted in the Seventh Amendment's Passage Have All Remanifested in Administrative Tribunals

Given the experience with vice-admiralty courts and the memory of the abuses by the Court of Star Chamber, the Founding generation was particularly concerned with a system where "[t]he few, the well born" would "in spite of their own natural integrity, … have [in their judicial decisions] a biass [*sic*] towards those of their own rank and dignity." A major concern of the proponents of an explicitly inscribed right to a civil jury was that the "experts" would not be receptive to the arguments by common citizens and would be much more likely to side with fellow experts. Time has proven the Anti-Federalists correct.

Examples abound. The Federal Trade Commission has not lost an in-house trial in over 25 years. This stands in sharp contrast with the

Department of Justice's record before Article III courts that sit with juries. *See* Pet. Br. at 9, 47, *Axon v. FTC*, No. 21-86 (U.S. May 9, 2022), https://bit.ly/3nTbyKf. When the Government puts its case in front of a jury (perhaps thinking that public unease over a given issue may make a jury more sympathetic), the panel of citizens is apt to surprise. *See, e.g.*, Bob Van Voris, *Chicken-Industry Executives Found Not Guilty of Price-Fixing*, Bloomberg News (July 7, 2022), https://bloom.bg/3LHPlZr. The above statistics and administrative losses before juries show the truth of the maxim, "to a hammer, everything looks like a nail." Too often, powerful regulatory agencies prosecute every accounting lapse or incomplete audit as "fraud." A disinterested jury is better able to discern and sort mere error from fraud.

Similarly, despite the promises that administrative adjudications will be "speedy" and efficient, *see Atlas Roofing*, 430 U.S. at 461, agency processes often have become interminable.

> The administrative proceedings against [Ray Lucia] began in September 2012. After a hearing before an unconstitutionally appointed SEC ALJ and an appeal to a Commission that is itself insulated from presidential control, Lucia was found to have violated the Advisers Act, directed to pay a penalty, and barred from ever again

> working in the securities business (which he had done, without incident, for more than two decades). In 2018, th[e] [Supreme] Court ruled in his favor on his Appointments Clause claim. But that just led to another administrative proceeding in which the new ALJ unsurprisingly declined to break from a determination that had already been approved by the Commission.

Pet. Br. at 49, *Axon v. FTC*, No. 21-86 (citing *Lucia*, 138 S.Ct. 2044). The costs to citizens of fighting the agency first internally and only later in an Article III circuit court can be staggering—and futile. *See id.* at 47 (pointing out Axon had already incurred $20 million in legal fees to be able to proceed with a transaction worth barely more than half that). Given that Article III appellate review accepts the ALJ's fact-finding as true, no genuine judicial review of biased agency adjudication is possible. This echoes the experience of the founding generation with vice-admiralty courts. *See* Blinka, *supra* at 79 ("[A]dmiralty jurisdiction portended seemingly onerous, unfamiliar legal procedures [and] saddled the claimant with the costs of maintaining the action."). The asymmetries of procedure that systemically favor agencies in modern administrative adjudication are even more onerous.[2]

[2] *See, e.g.*, Br. *Amicus Curiae* Citizens United at 20-29, *SEC v.*

Even before the American Revolution, William Blackstone warned that trial by jury must be protected against "new and arbitrary methods of trial" because "however *convenient* these may appear at first," (noting all arbitrary powers are *convenient*) "yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty …." Blackstone, *supra* at 342-44 (emphasis in original). Given that administrative trials are not even "convenient" except for the Government that hardly ever loses before its hand-picked judges, there is every reason to be as attentive to Blackstone's warning as the Founders were.

II. "PUBLIC RIGHTS" DOCTRINE CANNOT SUPPORT ASSIGNING TRADITIONAL CAUSES OF ACTION TO ADMINISTRATIVE TRIBUNALS

The Seventh Amendment protects a right to a jury trial "not merely [in] suits, which the common law recognized among its old and settled proceedings, but [in] suits in which legal rights were to be ascertained

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Cochran, No. 21-1239 (U.S. July 7, 2022), https://bit.ly/3zE4Eea ("The result is the worst of both worlds for respondents: they are hurried through the administrative hearing process with less time to prepare than if the same proceeding were held in district court, then forced to remain in limbo for more time than if the same action was filed in district court.")

and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830) (opinion by Story, J.)). The Supreme Court squarely rejected the proposition that "the Amendment is inapplicable to new causes of action created by congressional enactment." *Id*. To the contrary, "the applicability of the constitutional right to jury trial in actions enforcing statutory rights [is] a matter too obvious to be doubted." *Id*. (internal quotations omitted). There is, however, one exception to this rule—cases where public (in contradistinction to private) rights are at issue can be adjudicated without juries in non-Article III courts. However, that exception is exceedingly narrow and has no place in the present case.

A. Public Rights Doctrine Extends Only to Matters Connected to "the Performance of the Constitutional Functions of the Executive or Legislative Departments"

The "public rights" doctrine traces its origins to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). There, the Court explained that "[C]ongress can[not] either withdraw from judicial cognizance any matter which, from its nature, is the subject of a

suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." *Id.* at 284. For two centuries, the "public rights" doctrine was anchored in the "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued," as well as "the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982).

In the second half of the twentieth century, the doctrine became unmoored from its doctrinal anchor, sowing significant confusion. *Cf. Stern v. Marshall*, 564 U.S. 462, 488 (2011) (noting that the Court's "discussion of the public rights exception … has not been entirely consistent, and the exception has been the subject of some debate.").

The apex of the "public rights" doctrine was reached in *Atlas Roofing*'s holding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at

common law.'" 430 U.S. at 455. *Atlas Roofing* is in some tension with originalism. As Kirst notes, the Court's historical analysis of "administrative precedents developed in tax, tax penalty, and customs and immigration cases" was erroneous "[b]ecause the Court commenced its historical research in the middle [*i.e.*, in 1856] rather than at the beginning," *i.e.*, in 1791. *Kirst*, *supra* at 1294. Customs, tax, and immigration cases are quintessentially the types of matters connected to "the performance of the constitutional functions of the executive or legislative departments." *N. Pipeline*, 458 U.S. at 67-68. "[T]axes were assessed and collected by an executive or administrative agency without judicial involvement in the colonies and in England before the adoption of the Constitution and the seventh amendment, and by the state and federal governments after 1791." *Kirst*, *supra* at 1294. Similarly, the regulation of immigration was explicitly committed to the legislative branch by the Constitution. U.S. Const. art. I, § 8, cl. 4.

In contrast, imposing penalties for violating statutory commands has always been the province of common law courts. *See Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies

intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."). Despite this clear history, *Atlas Roofing*'s "careless use of precedent permitted the Court to [erroneously] declare that the cases upholding administrative factfinding in certain situations subsumed the general proposition that a jury trial is not required by the seventh amendment in public rights cases." *Kirst*, *supra* at 1294.

Atlas Roofing may also be distinguished on the basis that the Occupational Safety and Health Act had created an entirely new regulatory scheme imposing technical workplace safety standards *precisely because common-law tort remedies had been deemed insufficient* to the task. These included the power for the Department of Labor to inspect and issue citations for regulatory violations unknown to the common law—even where no employee was injured, doing away with the common-law requirement of harm. At law, no one could force a factory to erect barriers, or fail-safe devices to protect workers from dangerous work conditions. But *Atlas Roofing*'s ruling soon metastasized from new enforcement schemes unknown at common law, thereby eroding or

denying Seventh Amendment protections for claims long known at law.

Since *Atlas Roofing*, the Court has retreated from an expansive view of the "public rights" doctrine. In *Northern Pipeline*, the Court explained that the mere fact that the Government is pursuing an action in its sovereign capacity is insufficient to view the issue of one of "public rights." 458 U.S. at 70, n. 23 ("It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'"). Instead, the touchstone of the inquiry is whether "the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern*, 564 U.S. at 490. *See also Jarkesy v. SEC*, 34 F.4th 446, 453 (5th Cir. 2022) ("At the same time, the mere presence of a regulatory scheme does not *ipso facto* make every legal right and obligation created by such a regime a matter of "public right." In order to determine whether public or private rights are involved, this Court applies a two-step analysis. *Id*.

> First, a court must determine whether an action's claims arise "at common law" under the Seventh Amendment. Second, if the action involves common-law claims, a court

> must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. Here, the relevant considerations include: (1) whether Congress created a new cause of action, and remedies therefor, unknown to the common law, because traditional rights and remedies were inadequate to cope with a manifest public problem; and (2) whether jury trials would go far to dismantle the statutory scheme or impede swift resolution of the claims created by statute.

Id. (cleaned up). The application of this framework to the Appellee's case yields a clear result—the civil penalty is not a matter of "public right."

B. FDIC's In-House Adjudication Fails Jarkesy's *Two-Step Analysis*

In *Atlas Roofing* the Court did not even attempt to address (much less resolve) the question whether the right or the remedy in question created by the Occupational Safety and Health Act of 1970 was *analogous* to common law as it existed in 1791. Indeed, *Granfinanciera*, decided a dozen years after *Atlas Roofing*, warned that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency … ." 492 U.S. at 61. The correct approach then is not merely to ask whether the agency is enforcing a "statutory" or

a "common law" right, but whether the statutory right, and more importantly, the *remedy sought* in the enforcement proceeding is analogous to rights and remedies known to common law. *See Tull*, 481 U.S. at 417 (The Seventh Amendment "analysis applies not only to common-law forms of action, but also to causes of action created by congressional enactment. To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought.") (internal citations omitted); *see also Jarkesy*, 34 F.4th at 452 (Seventh Amendment protections apply to "suits brought under a statute" that seek "common-law-like legal remedies.").

Of course, no matter how problematic a Supreme Court precedent may be, this Court must faithfully apply it. *Id.* at 461, n.13. But this Court need not violate its duty to faithfully follow precedent to affirm the judgment below. Just as earlier cases like *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), upheld the NLRB's order for back pay as within the "public rights" framework because neither reinstatement of employment nor a remedy of back pay were known to common law, so too

Atlas Roofing is confined by its terms to OSHA's new regime—as made clear by later decisions of the Court.

As both the Supreme Court and this Court have recognized, when the Government seeks to impose civil penalties, it must do so through a process involving a civil jury. *See Tull*, 481 U.S. at 422 ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."). In the present case, FDIC seeks to impose a $200,000 penalty on Appellee. The Government does not dispute that the exactment is meant to punish and deter rather than restore it to the status quo prior to any alleged fraud.

Jarkesy's step two asks "whether Congress created a new cause of action, and remedies therefor." 34 F.4th at 453 Here the cause of action is fraud, just as in *Jarkesy*. *Compare id.* at 450, *with In re Cornelius Campbell Burgess,* Nos. FDIC-14-0307e, FDIC-14-0308k, 2022 WL 4598597, at *64 (Sept. 16, 2022) (concluding "that Respondent's actions constituted a breach of Respondent's fiduciary duties of loyalty, care, and candor and … that Respondent's misconduct demonstrated personal dishonesty."). The mere fact that such dishonesty is statutorily

prohibited does not make it "a new cause of action" unknown to common law. To the contrary, "[c]ommon-law courts have heard fraud actions for centuries, even actions brought by the government for fines" penalizing common-law fraud. *Jarkesy*, 34 F.4th at 455.

The remaining inquiry is "whether jury trials would go far to dismantle the statutory scheme or impede swift resolution of the claims created by statute." *Id.* at 453. As an initial matter, it should be observed that this case is a poor candidate to illustrate the "swift resolutions" of claims by FDIC. This matter has been pending since 2014, or nearly *nine years*. In contrast, the average pendency of a federal civil case from filing to the entry of judgment is under three years,[3] or *three times faster* than FDIC's supposedly "swift" process. *See also Jarkesy*, 34 F.4th at 456 (noting that when administrative process takes seven years (*i.e.*, two years less than in the case at bar) it is hard to credit any claim "that proceedings with a jury trial would have been less efficient.").

More importantly, there is no reason to believe that involvement of juries and Article III courts in resolving disputes arising under the

[3] Admin. Off. U.S. Courts, National Judicial Caseload Profile tbl. 1 (2022), https://bit.ly/3KHSg3p.

Federal Deposit Insurance Act would be any more likely to "dismantle the statutory scheme" than the involvement of juries and Article III courts in matters arising under the Securities Act, the Securities Exchange Act, and the Advisers Act. Indeed, the very chapter under which FDIC proceeded against the Appellee explicitly authorized either civil or criminal[4] prosecutions for violations of various banking statutes. It is implausible that prosecuting some banking violations in a civil court would preserve the overall "statutory scheme," whereas prosecuting *all* such violations in the civil court would "dismantle" it. *See Jarkesy*, 34 F.4th at 455-56 ("If Congress has not prevented the SEC from bringing claims in Article III courts with juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the years, then it is difficult to see how jury trials could "dismantle the statutory scheme.") (footnote omitted).

[4] The government *routinely* prosecutes banking fraud in criminal courts with jury trials all around the country. A Westlaw search revealed over 100 appellate opinions referencing criminal prosecutions under 18 U.S.C. § 1344 in the last three years alone.

III. CONGRESS CANNOT GET AROUND SEVENTH AMENDMENT CONSTRAINTS BY DIVESTING COURTS OF JURISDICTION

It is well settled that Congress cannot accomplish indirectly what it is constitutionally prohibited from doing directly. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("Constitutional rights would be of little value if they could be ... indirectly denied.") (cleaned up).

There are two substantive limitations on Congressional powers relevant to this case. First, Article III itself vests all judicial power in the courts. *See* U.S. Const. art. III, § 1. This power "extend[s] to all Cases, in Law and Equity, arising under th[e] Constitution [and] the Laws of the United States." *Id.* § 2. Under a well-settled precedent, this means that Congress *must* vest some inferior courts with the power to hear and adjudicate cases arising under federal law. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327-38 (1816) (opinion by Story, J.). And Congress has no constitutional power under Article I (or otherwise) to revest constitutionally allocated judicial power outside Article III courts.

Second, and as discussed in Part I, *supra*, the Seventh Amendment is not merely a confirmation of an individual right, but a structural constraint on Congressional power. So, much like Congress cannot evade its obligation to vest judicial power in federal courts, *see id*. ., neither can it vitiate a right to a civil jury. That right would be a dead letter if Congress could simultaneously: a) permit administrative agencies to impose civil penalties in non-jury administrative proceedings; and b) prohibit citizens from attempting to avoid unlawful exercise of such agencies' jurisdiction. *See U.S. Term Limits*, 514 U.S. at 829

Without a doubt, Congress retains authority to create inferior courts and to confer on them such jurisdiction as it sees fit. *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 331. And though the power "to establish and disestablish inferior courts, expand or trim their jurisdiction, and move jurisdiction from one such court to another," *Enwonwu*, 376 F. Supp. 2d at 80 (footnote omitted), is broad, it is not limitless. The "limit is the American jury." *Id*.

From these principles it follows that much like Congress cannot confer "criminal jurisdiction of the United States …, consistently with the constitution, … [on] state tribunals," and withdraw it from the

cognizance of federal courts, neither can it confer a power to exact civil penalties on tribunals that are permitted to sit without a jury. *See N. Pipeline*, 458 U.S. at 85-87 (concluding that jury trials are one of the "the essential attributes of the judicial power" and can only be exercised by an Article III court).

This Court's decision in *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019) does not grapple with these limitations on Congressional power. The failure to do so was through no fault of the Court as the parties to that litigation never raised the Seventh Amendment claim at issue here. *See Bank of Louisiana v. FDIC*, No. CV 16-13585, 2017 WL 3849340, at *2 (E.D. La. Jan. 13, 2017), *aff'd*, 919 F.3d 916 (5th Cir. 2019) (noting that plaintiffs alleged "age discrimination, retaliation, ridicule, and mockery, and were denied procedural due process rights guaranteed under the United States Constitution," specifically ability to "confer[] with counsel" and "the right to make a proffer of evidence."). On such a limited argument, this Court reached the correct decision in the case because Congress is always free to assign adjudication of pure questions of law to any of the inferior courts it chooses. As Justice Story explained, Congress "might establish one or more inferior courts; [it] might parcel

out the jurisdiction among such courts, from time to time, at [it] own pleasure." *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 331. Thus, to the extent that initial adjudication in an administrative agency is proper, Congress can choose to assign review of that adjudication to Courts of Appeals rather than District Courts. But Congress may not assign *factual* determinations in suits at common law (or their analogues) to anything other than Article III courts. Congress is certainly free not to create a cause of action, or create a particular obligation, but not provide any enforcement mechanism, *see, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2112 (2021) (recounting existence of an obligation to buy health insurance coupled with absence of any enforcement mechanism for such an obligation). However, Congress is not free to assign resolution of common-law cases to administrative agencies when doing so would extinguish Americans' constitutionally protected jury trial rights.

The Government's position, taken to its logical conclusion means that *no* court can *ever* vindicate Appellee's Seventh Amendment right, because even on petition for review of FDIC's final order, which the Government concedes is available, *see* 12 U.S.C. § 1818(h)(2), the Court of Appeals would not be able to issue a declaratory judgment that jury-

less trials before the FDIC are unconstitutional. If the Government is correct that the statutory language providing that "no court shall have jurisdiction to affect by injunction *or otherwise* the issuance *or enforcement*," *id.* § 1818(i)(1), of any of FDIC's orders means that the only avenue to challenge FDIC's orders is under the Administrative Procedure Act, then there will be no avenue to challenge the constitutionality of the provision. But section 1818 cannot and does not trump Appellee's Seventh Amendment right to have his civil liability for penalties decided by a jury. Accordingly, this Court must reject the Government's jurisdictional argument.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,497 words. This brief also complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Gregory Dolin
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