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Media Inquiries: [Judy Pino](#), 202-869-5218

NCLA Amicus Brief Blasts FDIC for Depriving Ex-CEO of Jury Trial Rights in Enforcement Action

Cornelius Campbell Burgess v. Federal Deposit Insurance Corporation, et al.

Washington, DC (April 10, 2023) - The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus curiae brief](#) in *Burgess v. FDIC, et al.* Friday evening. NCLA urges the U.S. Court of Appeals for the Fifth Circuit to redress the Federal Deposit Insurance Corporation’s (FDIC) unlawful enforcement action against Cornelius Campbell Burgess, which the agency pursued through its in-house administrative court. NCLA argues that FDIC’s allegations must be tried in front of a jury rather than an Administrative Law Judge (ALJ). FDIC’s current ALJ enforcement regime deprives Burgess of his Seventh Amendment right to a jury trial.

In 2014, FDIC began enforcement proceedings against former Herring Bank executive Cornelius Burgess, which concluded with a finding of liability, imposition of penalties including a lifetime prohibition on working in the banking industry, and a \$200,000 civil penalty. Burgess petitioned the district court to prevent FDIC from formally approving the ALJ’s recommendations and entering a final order against him. Burgess challenged FDIC’s process as: (a) a violation of the “Vesting Clause” of Article II because FDIC’s Board of Directors—which exercises “executive power”—is not removable by the President at will; (b) a violation of Article II’s “take Care Clause” because FDIC ALJs are unconstitutionally shielded from removal; and (c) a violation of the Seventh Amendment’s guarantee of a trial by jury. NCLA’s *amicus* brief addresses the Seventh Amendment argument.

In this case, Congress has vested FDIC with powers that can only be exercised by citizen-jurors. Yet, both the Supreme Court, in cases like *Granfinanciera, S.A. v. Nordberg* and *Tull v. United States*, and the Fifth Circuit in *Jarkesy v. SEC*, decided just last year, have held that Congress cannot abrogate the right to a jury trial by merely relabeling a well-known cause of action and inserting it into a complicated regulatory regime. Nor is Congress permitted to get around Seventh Amendment constraints by divesting courts of jurisdiction over the claims raising this issue. The Seventh Amendment is not merely a confirmation of an individual right, but a structural constraint on Congressional power. That right would be a dead letter if Congress could simultaneously permit administrative agencies to impose civil penalties in non-jury administrative proceedings and, at the same time, prohibit citizens from attempting to avoid unlawful exercise of such agencies’ jurisdiction.

The Government’s position, that federal law strips federal courts of jurisdiction in this lawsuit, taken to its logical conclusion would mean that *no* court could *ever* vindicate Burgess’s Seventh Amendment right, because even on petition for review of FDIC’s final order, which the Government concedes is available, the Court of Appeals would not be able to issue a declaratory judgment that jury-less trials before the FDIC are unconstitutional. The Court should thus reject the Government’s jurisdiction argument and hold that the relevant statute cannot and does not trump Burgess’s Seventh Amendment right to have his civil liability for penalties decided by a jury.

NCLA released the following statement:

“The right to a civil jury trial is centuries old and traces its origin to at least as far back as the Magna Carta. The American Revolution was fought over this right, and adoption of the U.S. Constitution was explicitly conditioned

on its protection. Yet, over the last half century, the Administrative State has steadily eroded it. The Fifth Circuit should take this opportunity to shore up the right to a civil jury.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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