No. 24-40259

In the United States Court of Appeals for the Fifth Circuit

JEFFREY MOATS,
Plaintiff-Appellant,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD, TODD M. HARPER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, KYLE S. HAUPTMAN, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, RODNEY E. HOOD, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, AND JENNIFER WHANG, IN HER OFFICIAL CAPACITY AS AN ADMINISTRATIVE LAW JUDGE,
Defendants-Appellees.

On Appeal from the U.S. District Court for the Southern District of Texas (Galveston Div.), No. 3:23-cv-00147, Hon. Jeffrey V. Brown

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PLAINTIFF-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 Appellant's 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 is Senior Litigation Counsel for the New Civil Liberties Alliance and represents the Alliance in this matter. Mark Chenoweth is President and Chief Legal Officer 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

The New Civil Liberties Alliance certifies that it timely sought and received consent from all parties to the filing 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.[1] 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

[1] NCLA 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.

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, jury and sentencing judge. That usurpation by the select few of powers that rightfully belong to the people, is present here, where the National Credit Union Administration ("NCUA") 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 even Congress cannot vest NCUA with powers that can only be exercised lawfully by citizen-jurors and Article III courts, and because Congress imposed on Americans a constitutionally defective and *ultra vires* process, the trial court should be reversed.

STATEMENT OF THE CASE

Congress created the National Credit Union Administration to enforce federal banking laws and regulations as they apply to a particular form of banking—cooperative credit unions. The authorizing statute empowers NCUA 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.

NCUA 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 NCUA's three-member Board of Directors. NCUA does not utilize juries and instead relies on ALJs' findings of fact.

Jeffrey Moats led the Edinburg Teachers Credit Union ("ETCU" or the "Credit Union"), a small credit union in south Texas, as its CEO for over 25 years. In 2021, the Texas Credit Union Department issued an order placing the Credit Union in conservatorship. The Department immediately appointed the NCUA Board as the Credit Union's conservator. Moats was immediately terminated as the CEO and

escorted out of the building. On April 20, 2023, the NCUA served a "Notice of Charges" under 12 U.S.C. § 1786 asserting that Moats breached fiduciary duties to the Credit Union, unjustly enriching himself. NCUA sought $4,000,000 in restitution, at least $1,000,000 in "civil penalties," as well as an order permanently barring Moats from serving as a director, officer, or otherwise participating in the conduct of the affairs of any insured depository institution. The matter was assigned to Administrative Law Judge Jennifer Whang for adjudication.

In response to the impending proceedings, Appellant filed suit in the Southern District of Texas, seeking declaratory judgment that proceedings employed by NCUA violate Appellant's Seventh Amendment Jury Trial rights, Fifth Amendment Due Process Rights, as well as several other constitutional provisions.

The District Court dismissed Appellant's suit, holding that Section 1786(k)(1) of Title 12 which provided that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section or section 1790d of this title or to review, modify, suspend, terminate, or set aside any such

notice or order," expressly strips federal courts of jurisdiction to adjudicate Appellant's constitutional claims.

ARGUMENT

Moats's arguments that NCUA'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,[2]

[2] *See, e.g.*, 5 William Holdsworth, A History of English Law 189 (2d ed. 1937) (Court of Star Chamber "commanded popular approval"); Robert L.

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 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."); *SEC v. Jarkesy*, 144 S. Ct. 2117, 2143 (2024) (Gorsuch, J., concurring) ("The abuses of these courts featured prominently in the calls for revolution. In the First Continental Congress, the assembled delegates condemned how Parliament "extend[ed] the jurisdiction of Courts of Admiralty," complained how colonial judges were "dependent on the Crown," and demanded the right to the "common law of England" and the "great and

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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").

inestimable privilege" of a jury trial."). 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 Colonists' 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); *Jarkesy*, 144 S. Ct. at 2142-43 (Gorsuch, J., concurring); *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 enquiries." The Federalist No. 83, at 568 (Alexander Hamilton) (Cooke ed. 1961). 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.* at 559. Had Hamilton won, Congress *could* set up jury-less regulatory

adjudication schemes.

However, the Anti-Federalists strongly disagreed with Hamilton and the decision of the original Constitution's Framers. 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' views on jury trials in civil matters 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 Erlinger v. United States*, 144 S. Ct. 1840, 1850 (2024) ("These principles represent not 'procedural formalities' but 'fundamental reservations of power' to the American people.") (quoting *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (alterations omitted)); *see also* 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, and the Supreme Court confirmed as much just a few months ago in *Jarkesy*.

II. THE SEVENTH AMENDMENT APPLIES TO NCUA'S ATTEMPT TO IMPOSE CIVIL PENALTIES

A. The Nature of the Penalty Sought Is 'All but Dispositive'

As the Supreme Court explained just last Term, "the Framers used the term 'common law' in the Amendment 'in contradistinction to equity, and admiralty, and maritime jurisprudence.' The Amendment therefore 'embraces all suits which are not of equity or admiralty jurisdiction, *whatever may be the peculiar form which they may assume*.'" 144 S. Ct. at 2128 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830) (opinion by Story, J.)) (alterations omitted). The Court further emphasized that "whether th[e] claim is statutory is *immaterial* to this analysis." *Id.* Rather, what matters is the nature of "the cause of action and the remedy it provides," with "the remedy [being] the 'more important' consideration." *Id*. at 2129 (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)). And where the remedy authorized by statute is a civil monetary penalty, it is "all but dispositive" of the Seventh Amendment question. *Id.* Because "money damages are the prototypical common law remedy," it can "'only be enforced in courts of law.'" *Id.* (quoting *Tull*, 481 U.S. at 422).

This understanding long predates the Constitution. Since Magna

Carta, monetary penalties had to be "fixed, not arbitrarily by the Crown," but rather by "honest men of the neighbourhood" (*i.e.*, a jury) following judicial proceedings. William S. McKechnie, *Magna Carta: A Commentary on The Great Charter of King John*, 287–88 (2d ed. 1914). "Prior to the enactment of the Seventh Amendment, English courts had held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull*, 481 U.S. at 418. "After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial." *Id.*

The juryless proceedings before the NCUA violate this centuries-old understanding. Under the statute, the Executive (rather than "honest men of the neighbourhood") is permitted to fix the monetary penalty rather arbitrarily, by deciding a) which "tier" of penalty the alleged offense qualifies for, b) how long the alleged offense lasted, and c) fixing any penalty (up to the statutory maximum) that he deems fit. Thus, under the statute, the Executive decides guilt, the level of culpability, and the appropriate punishment—all decisions traditionally committed to a jury's judgment.

Furthermore, it is well established 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 or a specialized court of equity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). Thus, the only question before this Court is whether § 1818 is sufficiently analogous to an action at common law both as to the basis for the claim and the remedy provided. As to the latter, as already stated, the very nature of a monetary civil penalty leads to the conclusion that the action against Appellant can only be heard by a jury. But the nature of the action itself also strongly counsels in favor of that same result.

B. NCUA's Cause of Action Is Drawn Directly from Common Law or Is Analogous to Common Law Negligence

In determining whether a statutory claim is analogous to a suit at common law for Seventh Amendment purposes, there need not be a precise, element-by-element, eighteenth-century common law analogue to the statutory cause of action. *Tull*, 481 U.S. at 421. For example, the *Tull* Court held that a civil-penalty action for violating the Clean Water Act was sufficiently analogous to a common law action in debt and a

public nuisance action. *Id.* at 422.

Here, NCUA's claim rests on an action that is analogous to negligence—a traditional common law cause of action. Furthermore, OCC's claim that rests on breach of fiduciary duty is not merely analogous to, but is drawn directly from, common law.

Taking "unsafe or unsound practices" first, it is evident that NCUA's claim is analogous to negligence. Under the statute, a cause of action is made out, *inter alia*, where "any institution-affiliated party" "violates any law or regulation." 12 U.S.C. § 1786(k)(2)(A).[3]

As any first-year law student knows, in civil context, "a violation of law" is merely negligence *per se* (provided all of the other negligence elements are met). *See, e.g.*, *Faber v. Ciox Health, LLC*, 944 F.3d 593, 599 (6th Cir. 2019) ("That aptly named doctrine permits a court to treat a statutory violation as a per se breach of the standard of care.").[4]

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[3] A higher-tier penalty can be assessed if a violation is committed recklessly, 12 U.S.C. § 1786(k)(2)(B)(i)(II), or knowingly, *id.* § 1786(k)(2)(C)(i).

[4] To the extent that NCUA is seeking to prove "recklessness," it does not change the analysis. "Recklessness," though a standard higher than mere negligence, *see, e.g.*, *Kim v. Off. of Thrift Supervision*, 40 F.3d 1050, 1054 (9th Cir. 1994), is still a well-known standard in the common law of

Next, under NCUA's own definition, an "unsafe or unsound practice" includes "any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders or the agencies administering the insurance funds." *In re Ray A. Worthy*, NCUA Dkt. No. 98-1201-Ill at 13 (1998). This essentially parrots the classic definition of negligence. *See, e.g.*, *Filkins v. McAllister Bros.*, 695 F. Supp. 845, 848 (E.D. Va. 1988) ("The question [in any negligence case] is what does a reasonably prudent person acting prudently do or fail to do, and what is the accepted standard of the industry.").

The "result" requirement, by definition, incorporates an injury requirement, and thus parallels the common law's requirement of injury or harm as an element of negligent tort. *See* Restatement (Second) of

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torts and is applied in exact same manner as an ordinary negligence standard. *See* Restatement (Second) of Torts § 500 (1965) (defining recklessness); *id.* § 501(a) ("[T]he rules which determine the actor's liability to another for reckless disregard of the other's safety are the same as those which determine his liability for negligent misconduct."). The same is true, *mutatis mutandis*, about acts that are taken "knowingly." *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (2010).

Torts § 7 (1965) ("The word "harm" is used throughout the Restatement of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause."); *Greco v. Jones*, 38 F. Supp. 3d 790, 801 (N.D. Tex. 2014) ("In Texas, a cause of action for negligence requires three elements: a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by that breach.") (citing *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002)). Thus, the statutory cause of action for "unsafe or unsound" banking practices is fully analogous to a common law negligence action.

And when it comes to NCUA's cause of action for breach of fiduciary duties, analogies do not even need to be drawn, because breach of fiduciary duty *is* a common law tort. *See* Restatement (Second) of Torts § 874 (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."). English courts have dealt with these principles at least as early as 1687. *See That Walley v. Walley*, 23 Eng. Rep. 609 (Ch. 1687).

Given the type of action brought by the NCUA and the remedy sought, it is beyond peradventure that this cause of action must (absent a waiver) be tried to a jury.

III. NCUA'S IN-HOUSE ADJUDICATION VIOLATES ARTICLE III OF THE CONSTITUTION

In addition to violating the Seventh Amendment, NCUA's use of executive officers—an ALJ and the Board Members—to adjudicate the claims against Appellant also violates Article III of the Constitution, which establishes an independent judiciary as a "guardian of individual liberty and separation of powers." *Stern v. Marshall*, 564 U.S. 462, 495 (2011). "The judicial Power of the United States" is "vested" in the federal courts, and it secures tenure and salary protection for the judges of those courts, among other protections. U.S. Const. art. III § 1. These protections ensure the independence of the federal courts from the political branches, for "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78, at 523 (Alexander Hamilton) (Cooke ed. 1961) (quoting 1 Montesquieu, *The Spirit of the Laws* 181).

The Supreme Court clarified over 200 years ago that "Congress couldn't imbue executive officers with judicial authority." *Ruiz v. U.S. Att'y Gen.*, 73 F.4th 852, 864 (11th Cir. 2023) (Newsom, J., concurring) (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792)). More recently,

it explained that "[u]nder 'the basic concept of separation of powers … that flow[s] from the scheme of a tripartite government adopted in the Constitution, the judicial Power of the United States' cannot be shared with the other branches." *Jarkesy*, 144 S. Ct. at 2131 (quoting *Stern*, 564 U.S. at 483) (internal quotation marks omitted). The Court thus reaffirmed that "matters concerning private rights may not be removed from Article III courts." *Id.* at 2132.

Here, the ALJ and the Board Members whom the statute purportedly authorized to issue civil penalty orders are Executive Branch officers who may not exercise "the essential attributes of judicial power [that] are reserved to Article III courts." *Stern*, 564 U.S. at 501 (quoting *CFTC v. Schor*, 478 U.S. 833, 851 (2011)) (alteration in original) (internal quotation marks omitted); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 62 (1982). "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*, 144 S. Ct. at 2132 (citing *Stern*, 564 U.S. at 484). This analysis proceeds in the same manner as the Seventh Amendment issue. *See ante.*

As explained above, NCUA essentially brought two common law claims against Appellant—a negligence claim that alleges that Appellant was engaged in "unsafe or unsound" practices, *i.e.*, practices that are "contrary to generally accepted standards of prudent operation," and a breach of fiduciary duty claim. *See* 12 U.S.C. § 1786(k)(2). Because these claims "target the same basic conduct as common law [causes of action], employ the same terms of art, and operate pursuant to similar legal principles," 144 S. Ct. at 2136, it squarely falls within traditional suits at common law brought in English courts of law and impacts Appellant's private rights.

More importantly, § 1786(k)(2) "provide[s] civil penalties, a punitive remedy that [courts] have recognized 'could only be enforced in courts of law.'" *Id.* (quoting *Tull*, 481 U.S. at 422). A statutory action by the government to recover monetary penalties deprives a person of vested property rights and thus requires a *judicial* determination. The 1789 Judiciary Act, for instance, provided that the Article III courts would have "exclusive original cognizance … of all suits for penalties and forfeitures incurred, under the laws of the United States." Judiciary Act of 1789, 1 Stat. 73, 77 § 9. The civil penalty claim NCUA brought

against Appellant is therefore "inherently … judicial." *N. Pipeline*, 458 U.S. at 68–70 (citing *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Determining liability—and the civil penalty amount—requires exercise of judicial power to adjudicate private property rights. Such power is forbidden to executive officers such as the ALJ and the Board Members. So, NCUA's civil penalty claim must be brought in an Article III court.

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. 304, 327–38 (1816) (opinion by Story, J.). And Congress has no constitutional power under Article I (or otherwise) to reallocate judicial power that the Constitution vested in Article III courts to other tribunals.

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.

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. 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 v. Chertoff*, 376 F.

Supp. 2d 42, 80 (D. Mass. 2005) (footnote omitted), is broad, it is not limitless. One "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 Louisiana 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 by* 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 the ability

to "confer[] with counsel" and "the right to make a proffer of evidence."). On such a limited argument, this Court arguably reached the correct decision in that case because Congress is always free to assign adjudication of pure questions of law to any of the inferior courts (District, Circuit, or any other one) 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. 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 would mean that *no* court can *ever* vindicate Appellant's Seventh Amendment right, because even on petition for review of NCUA's final order, which the Government does not dispute is available, *see* 12 U.S.C. § 1786(j)(2), the Court of Appeals would not be able to issue a declaratory judgment that jury-less trials before the NCUA 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.* § 1786(k)(1), of any of NCUA's orders means that the only avenue to challenge NCUA's orders is under the Administrative Procedure Act, then there will be no avenue to challenge the constitutionality of the provision. But section 1786 cannot and does not trump Appellant'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 reversed.

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 5,310 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.

/s/ Gregory Dolin
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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2024, 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
Gregory Dolin