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.

Amicus Curiae: 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 Amicus Curiae: Gregory Dolin and Margaret A. Little are Senior Litigation Counsel of the New Civil Liberties Alliance. Mark Chenoweth is President and Chief Legal Officer of NCLA. They represent the Alliance in this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* 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 such as 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's channeling punitive enforcement actions away from fora controlled by neutral judges and common citizens, *i.e.*, courtrooms with civil juries, and into administrative hearings where bureaucrats serve as judges, juries, factfinders and sentencers. That usurpation by the select few of powers that rightfully belong to the people is present here, where the Federal Deposit Insurance Corporation ("FDIC")[2] 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

[2] This brief will refer to Appellants collectively as "FDIC."

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 by citizen-jurors, and because Congress imposes 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 finding a breach, to impose a variety of penalties including monetary penalties, removal orders, 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 the five-member FDIC Board of Directors. FDIC does not have juries and instead relies on the 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*, 585 U.S. 237 (2018), this Court vacated FDIC's proceedings 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 likewise unconstitutionally shielded from removal; and (c) a violation of the Seventh Amendment's guarantee of a trial by jury. On December 1, 2022, the district court entered an order granting a preliminary injunction that barred the FDIC from continuing an ongoing administrative enforcement proceeding "in any way."

FDIC appealed, and this Court stayed the proceedings pending Supreme Court review of this Court's decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). *See* ECF 143-2. Following the Supreme Court's decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024), which affirmed this

Court's judgment, this Court ordered parties to file supplemental briefing addressing the impact of the Supreme Court's *Jarkesy* decision on this litigation. *See* ECF 174-2. In their supplemental brief, Appellants argued, *inter alia*, that: a) *Jarkesy* does not apply to the present case because this case involves public, rather than private rights; and b) because unlike in *Jarkesy*, in this case a federal statute—12 U.S.C. § 1818(i)—explicitly divests district courts of jurisdiction to try this case, with or without a jury. This amicus brief addresses these arguments.

ARGUMENT

The Court should reject FDIC's argument that *Jarkesy* does not apply to the enforcement of banking regulations, because nothing in the Supreme Court's opinion even remotely suggests such a carve-out. Furthermore, the Court should hold that Congress cannot evade Article III's requirements merely by stripping jurisdiction from an Article III court and reassigning it to an administrative agency. Were such a move to receive a judicial blessing, both Article III and the Seventh Amendment would be drained of their functions, and the constitutional rights *guaranteed* by those provisions would be at the mercy of mere acts of Congress—eviscerating the whole idea of a *constitutional* right.

At the outset, it should be emphasized that the Supreme Court's *Jarkesy* opinion did not solely decide the scope of, or the protections afforded by, the Seventh Amendment. Rather (and the Court was explicit on this point), the decision at least equally dealt with the limitations that Article III imposes on Congress's ability to delegate judicial functions to non-Article III tribunals. *See* 603 U.S. at 127-32.

I. CONGRESS CANNOT RELOCATE JUDICIAL POWER FROM FEDERAL COURTS TO AGENCIES

Relocating judicial power, even with explicit Congressional authorization, runs into five obstacles. First, Article III's Vesting Clause requires that judicial power be exercised only by courts created under that Article. Second, because only courts and not Congress possess "judicial power," Congress cannot delegate that power to any other branch. Third, the Executive Branch (of which FDIC is part) is vested only with executive power and cannot exercise the judicial power of the courts. Fourth, even if an administrative tribunal could exercise judicial power (and it cannot), judicial determinations cannot be subject to review by political branches (as they currently are when the political entity—FDIC's Board of Directors—has the power to review and revise the ALJ's

determinations). Fifth and finally, the recent *Jarkesy* decision squarely forecloses FDIC's arguments.

Separately, each one of the above reasons suffices to hold FDIC's administrative exercise of judicial power unconstitutional. Together, these objections leave no room for doubt.

A. All Federal Judicial Power "Shall Be Vested" in Article III Courts and Only Article III Courts

Article III of the Constitution provides: "The judicial power of the United States, shall be vested" in the courts. U.S. Const., art. III, § 1. The principle that the Constitution unambiguously vests judicial power solely in courts resounds over centuries of case law, from *Marbury v. Madison*'s recognition of this demarcation—it is "emphatically the province and duty of the judicial department to say what the law is[,]" 5 U.S. (1 Cranch) 137, 177 (1803)—to cases such as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), where the Court held that § 27A of the Exchange Act of 1934 violated the separation of powers. ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.").

Justice Story provided one of the earliest and most comprehensive explications of the scope of Article III, writing for the Court in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). "[T]he language of" Article III, according to the *Hunter's Lessee* Court, "is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that [C]ongress could not, without a violation of its duty, have refused to carry it into operation." *Id.* at 328. And it is Congress's "duty to vest the *whole judicial power*," *id.* at 330 (emphasis in original) and to do so "in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish," *id.* at 328, *under Article III* of the Constitution. The *Hunter's Lessee* Court was explicit. Much like Congress could *not* "vest [executive power] in any other person," except the President elected under Article II, *id.* at 330, Congress cannot vest *judicial* power in any body other than courts created under Article III. *Id.* at 329-30. "[S]uch a construction … would be utterly inadmissible." *Id.* at 330.

The reasons for this conclusion are straightforward and obvious. As Justice Story's opinion elucidates, the judicial power must be vested in an Article III court, because if it is not so vested then "it would be

impossible to carry into effect some of the express provisions of the constitution," because, for example, it would be impossible for "crimes against the United States [to] be tried and punished." *Id.* at 329. In other words, it was obvious to early-era Courts that, if nothing else, suits for violation of law brought by the Government in its sovereign capacity had to be tried in an Article III court, or they could not be tried *at all*. Article III itself—"shall be vested"—precludes Congress from vesting any entity other than an Article III court with the power to adjudicate such cases.

To be sure, Congress has significant power over the organization or jurisdiction of the courts. Article III allows Congress to designate the location of part of the judicial power— but only in "inferior *courts*," not other bodies. Congress therefore cannot place judicial power in FDIC or any other administrative agency. *See id.* at 331 (Congress "might establish one or more inferior courts; [it] might parcel out the jurisdiction among such courts, from time to time, at [its] own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under [the United States'] authority."); Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1110-12 (2023).

Article I empowers Congress to "constitute Tribunals inferior to the Supreme Court," U.S. Const., art. I, § 8, so it might be thought that with this power, Congress could place the judicial power in "Tribunals" at FDIC, which are not inferior courts. But this notion confuses the courts, which exercise the judicial power of the United States, with the host of tribunals that do not exercise that judicial power. Article I's Tribunal Clause gives Congress the power to constitute a range of tribunals, including the inferior federal Article III courts exercising the judicial power of the United States, but also lesser, non-Article III tribunals, such as territorial and District of Columbia courts, which exercise the judicial power, respectively, of the territories and that district.[3]

It therefore is telling that, according to Article III, the judicial power of the United States "shall be vested" in the *courts*, not other sorts of tribunals. So, even with its separate power to constitute tribunals,

[3] Congress also has the power to establish a non-Article III court such as the Court of Federal Claims, but only because the United States has sovereign immunity, and if it chooses to waive it, it can do so on such terms as it deems fit. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 489 (2011) ("Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.") (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856)).

Congress still cannot locate the judicial power of the United States in bodies that are not inferior courts, such as executive agencies.

Whatever the FDIC is, it is not an inferior *court*. The Constitution does not say that judicial power "shall be vested" in the Supreme Court and such inferior courts *and other tribunals* as Congress may see fit to ordain and establish. Rather, the judicial vesting clause spells out a double limit: the judicial power must be in the courts, and when Congress distributes the judicial power not belonging to the Supreme Court, it cannot place that power in any tribunal other than an inferior court.

The Constitution's restriction of judicial power to the courts is essential. In *Stern v. Marshall*, the Supreme Court stated that "Article III could neither serve its purpose … nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial power' on entities outside Article III." 564 U.S. 462, 484 (2011). Congress simply cannot shift judicial power from one branch to another—especially not to the prosecutor! That danger was expressly articulated at the Founding. "'[T]here 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, Spirit of Laws 181 (Publius)).

Thus, the Constitution mandates that the judicial power "shall be vested" in the courts, and it limits Congress to distributing that power only to inferior courts. This restriction brings into sharp focus why administrative judging cannot pass constitutional muster. The exclusive vesting of powers cannot be undone, even by Congress, because that would allow agencies to function as prosecutors, judges, factfinders and juries—a combination of powers the Constitution emphatically separates.

Nor should this mandatory assignment of powers come as a surprise. The Constitution did not vest its powers in separate branches of government merely as an initial distribution of cards, to be played and transferred as soon as the game began. *See Hunter's Lessee*, 14 U.S. (1 Wheat.) at 329 ("The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments.").

B. Congress Cannot Delegate a Power It Lacks

Although it is often assumed that Congress delegates power to executive agencies, congressional delegation can neither explain nor justify the executive exercise of judicial power, because the Constitution gives Congress only legislative powers. Congress cannot delegate a power it does not have, so it cannot delegate judicial power. Judicial power is exclusively vested in Article III; therefore, the question must be decided in terms of vesting, not "delegation."

The Court's decision in this case should focus on the "vesting" language separately appearing at the start of Articles I, II and III because focusing there avoids the inaccuracy of describing congressionally orchestrated transfers of power as mere "delegations."

Delegation's weak analytical framework disintegrates completely when Congress—endowed with only *legislative* power—seeks to shift *judicial* power from the courts to agencies. Not having that power in the first place, Congress cannot lawfully delegate it. This is not merely an initial argument against FDIC's exercise of judicial power. The poverty of delegation language is a powerful reminder that the Constitution's language is different. The Constitution speaks in terms of what is vested

(permanently). This Court should put aside the illusory inquiry about *delegation* of power and ask instead whether Congress has unconstitutionally *divested* the courts of their judicial power.

Once the analysis focuses on the Constitution's actual language—as it ought to do—it becomes clear that Congress cannot delegate a power it does not have. One cannot intelligibly decide the constitutionality of the shift of judicial power to FDIC in terms of *delegation*, because the Constitution places the judicial power exclusively in Article III. It thus becomes imperative to focus on vesting—and divesting—to decide this case.

C. The Executive Is Vested with Only Executive Power

Article II vests only executive power in the President. So, executive agencies—including those that are quasi-independent, such as FDIC—cannot exercise judicial power.

For a branch of government to exercise a power not constitutionally vested in it is to revive the sin long ago repudiated in *Hayburn's Case*, 2 U.S. 409 (1792). That case—actually a series of judicial protests dating from the earliest days of the Republic—centered on the courts' refusal to exercise non-judicial power. For example, the Circuit Court for the

District of Pennsylvania said that "the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority." *Id.* at 410 (1792) (citing C.C.D. Pa. Letter to President George Washington, April 18, 1792).

This principle in *Hayburn's Case* did not merely concern the courts but applied equally to all branches of government. No branch could exercise a type of power other than that vested in it by the Constitution. As put by the Circuit Court for the District of North Carolina, "the legislative, executive[,] and judicial departments are each formed in a separate and independent manner," and "the ultimate basis of each is the [C]onstitution only, within the limits of which each department can alone justify any act of authority." *Id.* at 410 (citing C.C.D.N.C. Letter to President George Washington, June 8, 1792). Administrative agencies, being lodged in the executive branch, cannot exercise any power that is not executive.

D. Judicial Power Cannot Be Subject to Political Review

Another conclusion of *Hayburn's Case* was that neither the Executive nor Congress could review court decisions. Other cases across the centuries have echoed this essential point—notably *Gordon v. United States*, 117 U.S. 697 (1864) (Supreme Court lacks jurisdiction to hear appeals from the Court of Claims, because a court could not exercise executive power, and its judicial power could not be subject to review by the political branches).[4]

Here, of course, judicial power has been relocated from the courts to the Executive. All the same, the case law holds more broadly that political branches cannot review judicial power. Yet that is exactly what happens at FDIC, because the decisions of FDIC's ALJs are subject to re-examination by FDIC administrators. If judicial power really could be placed in ALJs, then it cannot be reviewable by non-judicial political commissioners.

[4] At the time, judgements from the Court of Claims in favor of the claimant, including ones affirmed by the Supreme Court, would only be paid if the Secretary of the Treasury, in his discretion, requested the necessary funds from Congress, and Congress, in its discretion, appropriated the same. *Gordon*, 117 U.S. at 702.

E. Jarkesy Reaffirms These First Principles

The limits on Congress's ability to reassign judicial functions to non-Article III tribunals are evident from the text of the Constitution itself, the historical background against which the Constitution was adopted, and the early authoritative pronouncements of the Supreme Court, *see Hunter's Lessee*, *ante*. Any lingering doubts about these limits were removed completely by the Court's decision in *Jarkesy*. *Jarkesy* has two separate and distinct holdings. *First*, the Court held that "'the judicial Power of the United States' cannot be shared with the other branches," 603 U.S. at 127 (quoting *Stern*, 564 U.S. at 483), because "'Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III,'" *id.* at 132 (quoting *Stern*, 564 U.S. at 484). And *second*, the Court concluded that "Congress cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be … taken to an administrative tribunal.'" *Id.* at 135 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989)).

The two holdings of *Jarkesy* were explicit. One, "matters concerning private rights may not be removed from Article III courts," *id.* at 127, and "must be tried before a neutral adjudicator," *id.* at 140 (which an agency ALJ cannot possibly be) because "[t]he Constitution prohibits Congress from 'withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law,'" *id.* at 140 (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284). And two, "[o]nce such a suit 'is brought within the bounds of federal jurisdiction,' an Article III court must decide it, with a jury if the Seventh Amendment applies." 603 U.S. at 127 (quoting *Stern*, 564 U.S. at 484). Even the dissenting Justices recognized that the principal issue in the case is the scope of Article III. *See Jarkesy*, 603 U.S. at 171 (Sotomayor, J., dissenting) ("Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers.").

On this point, the dissenters were correct because the Court's second holding necessarily depends on the first. In the federal system only Article III courts, staffed with Article III judges, may hold jury trials. *See In re Clay*, 35 F.3d 190, 193 (5th Cir. 1994) ("The authority to conduct a jury trial is an essential attribute" of "judicial power" which "[a]n

Article III court may not delegate."). Thus, in order to conclude that the Respondent in *Jarkesy* was entitled to a jury trial, the Supreme Court necessarily had to conclude that adjudication of Respondent's case outside of an Article III court was unconstitutional.

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FDIC's exercise of judicial power is therefore inconsistent with the Constitution's text on five separate grounds, including both holdings in *Jarkesy*. Any one of these grounds renders FDIC's judicial power unconstitutional; taken together, they doom FDIC's administrative adjudications.

II. CONGRESS CANNOT AVOID ARTICLE III CONSTRAINTS THROUGH JURISDICTION-STRIPPING PROVISIONS

It is well settled that Congress cannot accomplish indirectly what it is constitutionally prohibited from doing directly. *See Smith v. Turner*, 48 U.S. 283, 509 (1849) (when Congress has no "direct power under the Constitution, [it] cannot assume or exercise it indirectly.").

As explained above, Article III 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. This means that Congress *must* vest some inferior courts with the power to hear and adjudicate cases arising under federal law. *See Hunter's Lessee*, 14 U.S. (1 Wheat.) at 327-38.

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 v. Chertoff*, 376 F. Supp. 2d 42, 80 (D. Mass. 2005) (footnote omitted), is broad, it is not limitless. The "limit is the American jury," *id.*, and Article III itself.

From these principles it follows that much like Congress cannot confer "criminal jurisdiction of the United States …, consistently with the constitution, … [on] state tribunals," *Hunter's Lessee*, 14 U.S. (1 Wheat) at 337, 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 Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85-87 (1982) (concluding that jury trials are one of "the essential attributes of the judicial power" and can only be exercised by an

Article III court). Further, FDIC in-house courts lack neutral adjudicators by design and thus violate the Article III holding of *Jarkesy*.

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 [its] own pleasure," *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 331, but it cannot refuse to confer jurisdiction on Article III courts to adjudicate "crimes against the United States," *id.* at 329. Congress thus faces a choice—either create an offense against the United States that can be tried and punished *only* in an Article III court, or forgo the creation of an offense altogether.[5] But what Congress may not do is impose a legal obligation while committing the criminal or quasi-criminal enforcement of that obligation to an administrative agency's tribunal (which cannot exercise the judicial power of the U.S.).

It is of no moment that the penalty against Burgess is denominated as "civil" rather than "criminal." *See Jarkesy*, 603 U.S. at 123 (noting

[5] Congress may also take a middle road—impose a legal obligation but not provide any enforcement mechanism or penalties for violating the same. *See California v. Texas*, 593 U.S. 659, 664-65 (2021) (recounting existence of an obligation to buy health insurance coupled with absence of any penalty for failure to do so).

that "[w]hat determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer….") (citation omitted); *cf. id.* at 159 (Gorsuch, J., concurring) (arguing that much like the Sixth Amendment that applies only in the criminal context, both Article III and the Seventh Amendment right to a jury trial exist "to 'protect the individual.'") (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). When "civil" penalties exist to punish and deter, little separates them from criminal penalties. *See United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971) ("From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct.").[6] The Government can certainly *divest* Article III courts of jurisdiction to hear certain claims about the violation of banking laws, but it cannot *delegate*

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[6] While criminal and civil proceedings (and imposition of penalties) may be subject to differing standards of proof, *see, e.g.*, *Helvering v. Mitchell*, 303 U.S. 391 (1938), the imposition of a penalty in either context can only be done in an Article III forum. *Jarkesy*, 603 U.S. at 123 ("civil penalties are a type of remedy at common law that could only be enforced in courts of law.") (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)) (alterations omitted).

this jurisdiction to any other entity. Choosing the former option simply means that there must be no forum in which the Government can enforce certain prohibitions. To be sure, this is a stark choice, but it is a choice that is fully within Congress's ability to make, to say nothing of a choice the Constitution commands. If Congress does not like the "no enforcement" alternative, all it has to do is adhere to the Constitution's text and channel criminal and quasi-criminal adjudications to Article III courts staffed with life-tenured impartial judges and capable of empaneling citizen jurors.

The Government must make a choice. Option A: Section 1818(i) validly divests Article III courts of jurisdiction to hear, with a jury, cases arising from alleged violations of that section. Choosing that option means the Government will be unable to enforce (at least through the imposition of monetary penalties) the provisos of § 1818. Or Option B: Section 1818(i) is unconstitutional, in which case the Government is free to enforce the full scope of § 1818, but only in an Article III court. What Congress cannot do is avoid the requirements of Article III by subterfuge.

III. THE "PUBLIC RIGHTS" DOCTRINE OFFERS FDIC NO HELP

FDIC's argument that unlike *Jarkesy* this case involves "public rights" is meritless. As the Supreme Court has explained, time and again, "public rights" make up a small set that includes only "matters [that] 'historically could have been determined exclusively by the executive and legislative branches.'" 603 U.S. at 128 (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011) (cleaned up). But "historically" in this context doesn't mean "starting with the time that a specific agency was created." Rather, it means that there must be "some 'deeply rooted' tradition of nonjudicial adjudication," likely stretching back to the pre-Revolutionary Era laws of England. *Id.* at 154 (Gorsuch, J., concurring). *See also N. Pipeline*, 458 U.S. at 67 (anchoring the "public rights doctrine" in "the traditional principle of sovereign immunity" as well as "the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government.").

Thus, FDIC's reliance on the fact that it "has never been authorized to bring enforcement claims seeking civil penalties in federal court," ECF 191 at 24, is beside the point. The question is not whether Congress in

creating an agency authorized it to bring suit in federal courts, but whether, given historical practice, it *had to* do so. For this Court to conclude that FDIC's enforcement involves "public rights," it would have to conclude that determining whether banking regulations have been complied with, "historically could have been d[one] exclusively by the executive and legislative branches." 603 U.S. at 128 (quoting *Stern*, 564 U.S. at 493). FDIC urges this conclusion upon this Court by pointing out that "[b]anking is one of the longest regulated and most closely supervised of public callings." ECF 191 at 25 (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)). But whether there exists a historic pedigree for *regulating* an industry sheds no light on the question of whether the liability and penalties for non-compliance with such regulations "historically could have been determined exclusively by the executive and legislative branches." *Stern*, 564 U.S. at 490. In any event, the Supreme Court's decision in *Jarkesy* squarely forecloses FDIC's argument that penalties for non-compliance with banking regulations involve the adjudication of "public rights."

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

"A hallmark that [the Court] ha[s] looked to in determining if a suit concerns private rights is whether it 'is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" *Jarkesy*, 603 U.S. at 127-28 (quoting *Stern*, 564 U.S. at 484). In answering that question, "the remedy [being sought] is all but dispositive." *Id.* at 123. Moreover, "whether th[e] claim is statutory is *immaterial* to this analysis." *Id.* at 122. 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 123 (quoting *Tull*, 481 U.S. at 421). And where the remedy authorized by statute is a civil monetary penalty, it is "all but dispositive" of the Seventh Amendment and Article III questions. *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 the 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.*

Juryless proceedings before the FDIC 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 it deems fit. 12 U.S.C. § 1818(i)(2).

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, 492 U.S. at 61.[7] 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 Appellee can only be heard by a jury. But the nature of the action itself also commands the same result.

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

In determining whether a statutory claim is analogous to a suit at common law for Seventh Amendment and Article III 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 public nuisance. *Id.*.

Here, FDIC's claim rests on an action that is analogous to negligence—a traditional common-law cause of action. Furthermore,

[7] The analyses of the public rights doctrine under Article III and under the Seventh Amendment are coextensive. *See Granfinanciera*, 492 U.S. at 53-54.

FDIC's claim that rests on breach of fiduciary duty is not merely analogous to, but is drawn directly from, the common law.

Taking "unsafe or unsound practices" first, it is evident that FDIC'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. § 1818(i)(2)(A)(i).[8]

As any first-year law student knows, in civil context, "a violation of law" is merely negligence *per se* (provided all 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.").[9]

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[8] A higher-tier penalty can be assessed if a violation is committed recklessly, 12 U.S.C. § 1818(i)(2)(B)(i)(II), or knowingly, *id.* § 1818(i)(2)(C)(i) .

[9] To the extent that FDIC 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 torts and is applied in exactly the same manner as an ordinary negligence standard. *See* Restatement (Second) of Torts § 500 (1965) (defining recklessness); *id.* § 501(a). The same is true, *mutatis mutandis*, about acts that are taken "knowingly." *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (2010).

Next, under FDIC'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 Cornelius Campbell Burgess*, FDIC Dkt. No. 14-0307e at 71 (Sept. 16, 2022). This language 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 a negligence tort. *See* Restatement (Second) of 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."). 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 FDIC'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 Walley v. Walley*, 23 Eng. Rep. 609 (Ch. 1687).

Given the type of action brought by the FDIC and the remedy sought, it is beyond peradventure that this cause of action is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Stern*, 564 U.S. at 484. And as these matters were "tried by the courts at Westminster," "historically [they] could [*not*] have been determined exclusively by the executive and legislative branches." *Id.* at 490. It therefore follows ineluctably that claims brought by the FDIC are *not* public rights but are quintessentially private rights and must be tried in an Article III court and to a jury.

CONCLUSION

The grant of preliminary injunction 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 6,342 words. This brief also complies with the typeface and type-style requirements of the Federal Rule 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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I hereby certify that on January 22, 2025, 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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