CASE NO. 22-11172

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORNELIUS CAMPBELL BURGESS,
Appellee/Cross-Appellant,

v.

JENNIFER WHANG, IN HER OFFICIAL CAPACITY AS AN ADMINISTRATIVE LAW JUDGE; FEDERAL DEPOSIT INSURANCE CORPORATION; 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,
Appellants/Cross-Appellees.

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

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SUPPLEMENTAL BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE/CROSS-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

CASE NO. 22-11172

Burgess. v. Whang et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Brent Skorup	Counsel to *amicus*
Thomas Berry	Counsel to *amicus*
Cato Institute	*Amicus curiae*

Amicus Cato Institute is a Kansas nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

/s/ Thomas A. Berry

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies about legal issues, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs in constitutional law cases. This case interests Cato because adherence to the U.S. Constitution's guarantee of a jury trial in civil proceedings is essential to individual liberty and government accountability. The government here violates Americans' Seventh Amendment right by assigning legal proceedings to jury-less administrative tribunals.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

English and early American history features many examples of "powerful actors attempting to evade jury authority—not by eradicating the institution, but by creating or expanding alternative tribunals."[2] Infamously, one of the primary complaints the Founders listed against the British colonial government was the Crown's increasing practice of shunting Americans into vice-admiralty courts. *See*

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

[2] Richard L. Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. 1187, 1198 (2023).

THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); John Adams, *Instructions of the Town of Braintree to Their Representative*, Oct. 14, 1765, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 40 (2000). This diversion of cases denied jury trials to American subjects and shielded British judges and prosecutors from accountability to juries. Admiralty courts also lacked the impartiality and procedural protections of traditional courts. After the Revolutionary War, then, the Framers expressly protected this fundamental right when they added the Seventh Amendment to the Constitution, which guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

Last term, in *SEC v. Jarkesy*, the Supreme Court recapped the history of, import of, and motivation for the Seventh Amendment. 144 S. Ct. 2117, 2128 (2024). This reminder was needed, unfortunately, because over the past few decades U.S. lawmakers—resembling their British forebears—have passed laws shunting Americans into specialized and jury-less administrative agency "courts," including at the Federal Deposit Insurance Corporation (FDIC).

Here, Cornelius Burgess contests the FDIC's refusal to grant him a jury trial in FDIC proceedings that assessed a $200,000 fine against him, among other penalties. *See Burgess v. FDIC*, 639 F. Supp. 3d 732, 739 (N.D. Tex. 2022). Starting in 2010, staff investigated Mr. Burgess, the president of a small Texas bank, based on a tip alleging that he had been misusing substantial amounts of bank funds for

personal expenses. In 2014, FDIC staff initiated an enforcement proceeding against him before an FDIC Administrative Law Judge (ALJ), an agency employee. Ultimately, an FDIC ALJ recommended to the FDIC that Burgess be removed from his job and assessed a $200,000 civil monetary penalty.

Mr. Burgess was troubled by the legal process he and other FDIC targets are subjected to. The FDIC in-house "court" differs from an Article III court in many respects. For instance, the agency determines its own rules for its "court" proceedings, dubious evidence like hearsay is admissible,[3] and—most notably—juries are absent. Before the FDIC's Board of Directors could impose the ALJ assessment against Mr. Burgess, he challenged the constitutionality of the agency's ALJ process in federal court on the grounds that the FDIC unconstitutionally deprived him of his Seventh Amendment right to a jury trial. *See Burgess*, 639 F. Supp. 3d at 732.

The district court issued a preliminary injunction against the FDIC's use of administrative tribunals. The district court recognized the agency's claims under Section 1818 as akin to common-law breach of fiduciary duty actions, thus entitling Burgess to a jury. The agency appealed to this Court, and while the appeal was pending the Supreme Court decided the landmark Seventh Amendment case *SEC v.*

[3] *See* 12 C.F.R. § 308.36(a)(3) (broadly permitting admission of evidence, including evidence that would be inadmissible under Federal Rules of Evidence, in FDIC proceedings).

Jarkesy, 144 S. Ct. 2117 (2024). In *Jarkesy*, the Court reaffirmed that Congress could not validly assign cases involving *legal* claims and remedies (akin to suits at common law) to jury-less administrative adjudication. *Id*. at 2139. The sole exception—the public rights exception—includes a few categories of cases that "historically could have been determined exclusively by the executive and legislative branches." *Id*. at 2132 (cleaned up). The FDIC argues that its case against Mr. Burgess falls into this narrow public rights exception.

We write to highlight three points. First, the *Jarkesy* decision strengthens Mr. Burgess's argument that his Seventh Amendment rights were violated when the FDIC denied him a jury trial. The Court emphasized the broad nature of the Seventh Amendment's jury trial guarantee—nearly any action by the government to recover civil penalties, unless subject to the public rights exception, requires trial by jury. Second, the public rights exception is narrow, and the FDIC's case against Mr. Burgess falls outside the exception. Finally, the government's argument for a broad conception of the public rights exception would create a massive loophole to the broad jury trial guarantee the Framers ratified in the Seventh Amendment.

Jarkesy's application to this case is clear. The Seventh Amendment requires a jury trial in legal proceedings like Mr. Burgess's. This Court should affirm.

ARGUMENT

I. THE FDIC'S "CIVIL MONETARY PENALTY" IS CLEARLY A PENALTY AND THUS IMPLICATES THE SEVENTH AMENDMENT.

The Supreme Court's decision in *Jarkesy* was a sweeping affirmation of the Seventh Amendment's guarantee of a jury trial in cases involving civil penalties. *See* 144 S. Ct. at 2128. The Court stated that "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *Id*. (citation omitted). In many cases, "the remedy is all but dispositive." *Id*. at 2129. Here, the FDIC is seeking a $200,000 civil monetary penalty from Mr. Burgess. As the name suggests, FDIC civil monetary *penalties* are penalties and not restitution damages. That's a critical distinction here because the Court in *Jarkesy* emphasized that "only courts of law issued monetary penalties to 'punish culpable individuals.'" *Id*. (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)). That the FDIC is imposing a civil penalty "effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims." *Id*. at 2130.

While the nature of the remedy is the most important factor in determining whether a claim is legal, *id*. at 2129, a cause of action that resembles a common-law "ancestor" is also probative. *See id*. at 2130. "[W]hen Congress transplants a common-law term, the old soil comes with it," *United States v. Hansen*, 599 U.S. 762, 778 (2023), and a "close relationship between" a federal civil action and a

common law civil action "confirms that [an] action is 'legal in nature.'" *Jarkesy*, 144 S. Ct. at 2131 (citing *Granfinanciera v. Nordberg*, 492 U.S. 33, 53 (1989)). Mr. Burgess's alleged statutory violation is "breach of [his] fiduciary duty." 12 U.S.C. § 1818(e)(1)(A)(iii). The FDIC also alleges he violated a prohibition on offering favorable loan terms to bank insiders like himself, 12 C.F.R. § 215.4(a)(1)(i), a regulation that prohibits one type of breach of a fiduciary duty. Breaching a fiduciary duty, though prohibited via statute and regulation here, clearly has its roots in the common law. *See*, *e.g.*, Restatement (Second) of Torts § 874 (Am. L. Inst. 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."). That the FDIC's charges against Burgess are, like the SEC's fraud claims in *Jarkesy*, clearly rooted in the common law only confirms the conclusion that the Seventh Amendment extends to the FDIC claims.

As was the case in *Jarkesy*, the imposition of a penalty and the common law analog point in the same direction: This case is legal in nature and thus implicates the Seventh Amendment. *See* 144 S. Ct. at 2129–31. And the Court in *Jarkesy* was clear: "Traditional legal claims must be decided by courts, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Id*. at 2135 (cleaned up) (citing *Granfinanciera*, 492 U.S. at 52).

Tellingly, the FDIC does not dispute the legal nature of its action against Mr. Burgess, nor the implication of the Seventh Amendment. *See* FDIC Supp. Br. 16–17. The FDIC instead spends the bulk of its brief attempting to shoehorn its actions into the narrow public rights exception. *Id*. at 16–31.

II. THE FDIC'S CLAIMS FALL FAR OUTSIDE THE NARROW PUBLIC RIGHTS EXCEPTION.

The FDIC mistakenly suggests that *Jarkesy* was a narrow ruling that recognizes a broad set of public rights exceptions, particularly in highly regulated industries where the government maintains a strong interest. FDIC Supp. Br. 25–27. However, as Justic Gorsuch notes in *Jarkesy*, the Court has constrained the public rights exception to a few legal fields "defined and limited by history." *Jarkesy*, 144 S. Ct. at 2146 (Gorsuch, J., concurring). If it were otherwise, Congress could destroy the Constitution's broad guarantee of a jury trial by simply creating new statutory obligations and then assigning these matters to an administrative process or otherwise compelling the waiver of Seventh Amendment rights for the sake of regulatory convenience. *Id*. at 2128 (majority op.).

The public rights exception only applies in areas that are exclusively the province of the federal government and historically adjudicated solely within the executive or legislative branches, such as immigration, foreign relations, and tax collection. *Id.* at 2133. Congress's desire to embed the federal government's

involvement deeper into private life does not shift historic and private rights into the public domain.

However, the FDIC argues that its enforcement powers fall within the public rights exception, much like immigration and tariff enforcement, because of longstanding federal regulation of the banking industry. FDIC Supp. Br. 25. This analogy fails because banking and the enforcement of fiduciary duties, unlike the areas the Supreme Court lists, are not within the historic and exclusive jurisdiction of the executive or legislative branches.

Although the Court in *Jarkesy* provided a non-exhaustive list of areas of law within the public rights exception, banking and fiduciary duties are readily distinguishable. Indeed, all the examples of the public rights exception that the Court listed in *Jarkesy* are historically exclusive federal government functions: relations with Indian tribes, administration of public lands, public benefit grants, customs enforcement, tax collection, and immigration. 144 S. Ct. at 2132–33. These areas are unlike banking, which has a long history of private regulation and private rights of action, including, conspicuously, breach of a fiduciary duty. *See*, *e.g.*, *Coit Indep. Joint Venture v. Fed. Savs. & Loan Ins. Corp.*, 489 U.S. 561, 578–79 (1989) ("We note, however, that the usury and breach of fiduciary duty claims . . . involve 'private rights' which are at the core of matters normally reserved to Article III courts.") (cleaned up) (citations omitted). Breach of fiduciary duty in banking is a right of

action, in fact, that predates the ratification of the Seventh Amendment. *See* David J. Seipp, *Trust and Fiduciary Duty in The Early Common Law*, 91 B.U. L. REV. 1011, 1034 (2011).

Although the FDIC argues that banks are one of the oldest regulated entities, there is little comparison to a subject like revenue collection and immigration enforcement. For example, in *Oceanic Steam Navigation Co. v. Stranahan*, the Supreme Court upheld the government's ability to enforce a prohibition on certain types of immigrants because "Congress's power over foreign commerce, we explained, was so total that no party had a 'vested right' to import anything into the country." 214 U.S. 320, 335 (1909) (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904)).

Furthermore, in cases involving a mix of public and private rights, such as in *Granfinanciera,* the Court looks to the nature of claim. In *Granfinanciera*, Congress added a private rights action, fraudulent conveyance, to a public rights scheme, the bankruptcy code. 492 U.S. at 35. Nevertheless, the Court ruled that the fraudulent conveyance claim was not transformed into a public right simply because it was embedded in a regulatory framework. Fraudulent conveyance remained a private right—thus implicating the Seventh Amendment—because it was deeply rooted in the common law as a private right. *Id*. at 61. Likewise, that Congress enacted a vast web of banking regulations and charged the FDIC with enforcing them does not

transform private rights like breach of a fiduciary duty or negligence into public ones.

Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), is the exception that proves the rule, and the Supreme Court has shown little interest in expanding on the public right exception since that case. In *Atlas Roofing*, the Court ruled that the Congress could assign workplace safety adjudications to an administrative judge because they were "unknown to the common law." 430 U.S. at 461. Much like the intricacies of the bankruptcy code or the edicts that administer public benefits, the statute in *Atlas Roofing*, the Occupational Safety and Health Act of 1970, created novel claims that have no precedent in common law and are purely inventions of Congress. *Id.* at 445.

Conversely, banking regulation and actions against officers, like the ones the FDIC have brought against Mr. Burgess, have a deep history and tradition outside of the executive and legislative branches.

III. ADMINISTRATIVE CONVENIENCE CARRIES NO WEIGHT IN ASSESSING WHETHER A STATUTORY RIGHT IS PUBLIC OR PRIVATE.

The Court was clear in *Jarkesy* that Congress cannot assign actions involving private rights to agency adjudicators for the sake of a more efficient regulatory scheme. *Jarkesy*, 144 S. Ct. at 2135 (citing *Stern v. Marshall*, 564 U.S. 462 (2011)). Despite this clear standard, the FDIC argues that Congress properly withheld jury

trials from FDIC-regulated banking officials like Mr. Burgess because the interest of the government demands it. FDIC Supp. Br. 27–29 ("[J]ury trials *are* generally incompatible with the overall federal bank-regulatory regime.") (emphasis in original). However, *Jarkesy* cannot be read to legitimize the reassignment of private rights as public rights if jury trials would undermine the intent of Congress. The will of Congress must yield toward the Constitution's guarantees, not the other way around.

The Constitution exists to restrain government and protect individual liberty, not to empower the federal government. Justice Gorsuch in *Jarkesy* criticized the dissent's argument that the Constitution allows expansive congressional authority to waive jury trials: "[W]hy would a Constitution drawn up to protect against arbitrary government action make it easier for the government than for private parties to escape its dictates?" *Jarkesy*, 144. S. Ct. at 2150 (Gorsuch, J., concurring). The majority rejected the dissent's prioritization of government efficiency over adherence to the Seventh Amendment's purposes: "[O]ur precedents foreclose this argument. As *Stern* explained, increasing efficiency and reducing public costs are not enough to trigger the exception." *Id.* at 2139 (citing *Stern* 564 U.S. at 462); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983)).

The FDIC also wrongly suggests that private rights must yield to Congress's regulatory ambition because "'one of the purposes of the banking acts is clearly to

commit the progressive definition and eradication of [unsafe or unsound banking practices] to the expertise of the appropriate regulatory agencies.'" FDIC Supp. Br. at 28 (quoting *Groos Nat'l Bank v. Comptroller of the Currency*, 573 F.2d 889, 897 (5th Cir. 1978)).

Such an argument, if accepted by courts, would effectively relegate private rights to a discretionary status and allow Congress to waive them when it wishes to regulate more of the economy. Furthermore, the Supreme Court expressly rejected the notion that contemporary regulations somehow avoid Seventh Amendment scrutiny simply because they are new: "this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims." *Jarkesy*, 144 S. Ct. at 2124 (citing *Tull*, 481 U.S. at 421–23).

Finally, reading *Jarkesy* to accommodate regulatory demands would enable what the Framers sought to curtail: the assignment of essential private rights to a jury-less administrative tribunal. Justice Gorsuch noted "the British government and its agents engaged in a strikingly similar strategy in colonial America. Colonial administrators routinely steered enforcement actions out of local courts and into vice-admiralty tribunals where they thought they would win more often. These tribunals lacked juries. They lacked truly independent judges." *Id.* at 2142 (Gorsuch, J., concurring).

The government, like the eighteenth-century British Parliament, may believe that "juries [are] not to be trusted," but that sentiment is precisely what the Seventh Amendment was ratified to combat. *Id*. at 2143 (citing David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America*, *1764-1776*, 16 WM. & MARY Q. 459, 468 (1959)).

CONCLUSION

For the forgoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 2,857 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Thomas A. Berry*

January 22, 2025

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Thomas A. Berry*

January 22, 2025