No. 22-11172

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

vs.

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,
Defendants-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

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT AND AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 22-11172

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Plaintiff-Appellee/Cross-Appellant,

vs.

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,
Defendants-Appellants/Cross-Appellees.

Pursuant to Rule 29.2, the undersigned counsel of record certifies that he is unaware of any other person or entity that has an interest in the outcome of this case, other than those listed in the prior party and *amicus curiae* briefs filed in this appeal. As before, the Chamber of Commerce of the United States of America ("Chamber") is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: January 22, 2025

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber filed an *amicus curiae* brief earlier in this appeal, *see* ECF 77, prior to the Court staying the action pending the Supreme Court's decision in *Jarkesy v. SEC*, 603 U.S. 109 (2024). *See* ECF 143. *Jarkesy* confirmed the Chamber's understanding of the Seventh Amendment's reach, and the Chamber continues to have a significant interest in ensuring that administrative proceedings involving other agencies comply with the Constitution's structural guarantees. The Chamber

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

thus submits this supplemental brief to respond to the government's incorrect reading of *Jarkesy*.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Amendment gives Cornelius Campbell Burgess "the right to be tried by a jury of his peers before a neutral adjudicator." *SEC v. Jarkesy*, 603 U.S. 109, 140 (2024). The Federal Deposit Insurance Corporation's ("FDIC") attempt to impose civil penalties against Burgess through a juryless in-house proceeding is an affront to that guarantee. The District Court properly enjoined that unconstitutional proceeding, and this Court should affirm.

The Framers recognized that "structural protections against abuse of power [are] critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Key among those structural protections was the right to trial by jury. At the time of the Founding, that "most excellent method of decision" had long been hailed as "the glory of the English law." 3 William Blackstone, *Commentaries on the Laws of England* 391 (1768). And, as the Supreme Court emphasized this past Term, it was "prized by the American colonists" in both criminal and civil cases alike. *Jarkesy*, 603 U.S. at 121.

[2] In its prior *amicus curiae* brief, the Chamber addressed the threshold jurisdictional question and the ALJ-removal issue, *see* ECF 77 at 5–7, 17–27, which are not affected by the Supreme Court's decision in *Jarkesy*.

Indeed, the Seventh Amendment was a direct response to—and protection against—the juryless tribunals that fueled the fires of revolution. The Seventh Amendment arose out of the English effort to "siphon[]" the adjudication of civil cases that had traditionally been tried before juries to "juryless admiralty, vice admiralty, and chancery courts." *Id.* "[A]s tensions grew between the British Empire and its American Colonies, imperial authorities responded by stripping away th[e] ancient [jury trial] right" on this side of the Atlantic. *Erlinger v. United States*, 602 U.S. 821, 829 (2024). Most notably, the Crown expanded admiralty jurisdiction in the 1760s to enforce unpopular Acts of Parliament without the involvement of juries. *See* ECF 77 at 9–11.

"After securing their independence, the founding generation sought to ensure what happened before would not happen again." *Erlinger*, 602 U.S. at. 829. The people thus quickly ratified the Seventh Amendment to "preserve[]" the civil jury trial right in "Suits at common law." U.S. Const. amend. VII. And they understood this language to "embrace[] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Jarkesy*, 603 U.S. at 122 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)). That includes suits by the government for civil penalties, which historically "could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987). Rerouting such suits through in-house administrative proceedings would, after all,

eradicate the jury's crucial check on bureaucratic overreach while "concentrat[ing] the roles of prosecutor, judge, and jury in the hands of the Executive Branch." *Jarkesy*, 603 U.S. at 140. "That is the very opposite of the separation of powers that the Constitution demands." *Id.*

Yet that is what the FDIC continues to try to do here. The FDIC's pursuit of legal relief against Burgess is "all but dispositive" in finding a violation of his Seventh Amendment right. *Id.* at 123. At the same time, the FDIC cannot justify its constitutional deprivation by proclaiming that it is vindicating "public rights." As *Jarkesy* made clear, the "public rights" exception to the Seventh Amendment is narrow and inapplicable absent a specific showing that "'withdraw[al] from judicial cognizance'" has firm roots in "background legal principles." *Id.* at 131–32 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)). The FDIC cannot identify any historical understanding that would support removing this garden-variety legal claim from the Article III courts—and the jury review that the Constitution requires.

ARGUMENT

I. The Seventh Amendment Prohibits Compelled Adjudication In The FDIC's Juryless Administrative Tribunals.

As the Chamber has previously explained, "[t]he FDIC's pursuit of civil enforcement penalties in a jury-less administrative tribunal resembles the British admiralty courts that sought to deprive colonists of their legal rights." ECF 77 at 15.

The Framers ratified the Seventh Amendment to prevent that sort of abuse from recurring. *See id.* at 9–16. And this Court has faithfully applied that historical understanding to hold that "the jury-trial right applies . . . to penalties action[s]" brought by the SEC. *Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022); *see* ECF 77 at 15–17. The Supreme Court's affirmance in *Jarkesy* underscores that understanding and the narrowness of the "public rights exception." Burgess is entitled to a jury trial.

A. *Jarkesy* Confirmed The Seventh Amendment's Reach.

In *Jarkesy*, the Supreme Court held that "the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." 603 U.S. at 120. Along the way, the Court stressed that "whether [a] claim is statutory is immaterial" to the Seventh Amendment analysis. *Id.* at 122. Rather, "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *Id.* (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). And "[t]o determine whether a suit is legal in nature," the Court "consider[ed] the cause of action and the remedy it provides," while noting that the remedy was the "'more important' consideration." *Id.* at 122–23 (citation omitted). The "civil penalties in [that] case [were] designed to punish and deter, not to compensate," and they were accordingly "'a type of remedy at common law that could only be enforced in courts of law.'" *Id.* at 125 (quoting *Tull*, 481 U.S. at 422).

As a result, the SEC could not pursue them through an in-house adjudication. *See id.* at 122–27.

So too here. As in *Jarkesy*, the "remedy is all but dispositive" of Burgess's Seventh Amendment right to a jury trial. *Id.* at 123. The FDIC "seeks civil penalties, a form of monetary relief." *Id.* And "a monetary remedy is legal if it is designed to punish or deter the wrongdoer." *Id.* That is because "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo," were historically issued only "by courts of law, not courts of equity." *Tull*, 481 U.S. at 422; *see also Jarkesy*, 603 U.S. at 123. In fact, "[a]ctions by the Government to recover civil penalties under statutory provisions" were long "viewed as one type of action in debt requiring trial by jury." *Tull*, 481 U.S. at 418–19.

The FDIC does not dispute that the penalties in this case are designed to deter and punish Burgess. Nor could it. Like the statute in *Jarkesy*, section 1818(i) conditions the amount and availability of civil penalties on several criteria, including the defendant's state of mind, *see* 12 U.S.C. § 1818(i)(2)(A)–(C), his "history of previous violations," *id.* § 1818(i)(2)(G)(iii), the amount of loss to a banking institution and the defendant's pecuniary gain, *see id.* § 1818(i)(2)(B)(ii)(II)–(III), 1818(i)(2)(C)(ii), and "such other matters as justice may require," *id.* § 1818(i)(2)(G)(iv). "Of these, several concern culpability, deterrence, and

recidivism," which are the hallmarks of punishment statutes. *Jarkesy*, 603 U.S. at 123–24. In addition, section 1818 mirrors the statute in *Jarkesy* by providing for three tiers of civil penalties, with "[e]ach successive tier authoriz[ing] a larger monetary sanction." *Id.* at 124; *see* 12 U.S.C. § 1818(i)(2)(A)–(C). And the FDIC "is not obligated to return any money to victims." *Jarkesy*, 603 U.S. at 123. The penalties recovered "shall be deposited into the Treasury." 12 U.S.C. § 1818(i)(2)(J).

All this shows that the "civil penalties in this case are designed to punish and deter." *Jarkesy*, 603 U.S. at 125. That "effectively decides that this suit implicates the Seventh Amendment right" to a jury trial. *Id.*; *see Tull*, 481 U.S. at 422–23.

B. The Public Rights Exception Does Not Apply.

The FDIC does not seriously contest that its pursuit of these civil penalties implicates the Seventh Amendment. It therefore retreats to arguing that the "public rights" exception applies. *See* FDIC Supp. Br. at 15, 21–32. But the FDIC's invocation of the public rights exception is misplaced.

Jarkesy once again removes any doubt. There, the Supreme Court held that the government "cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal.'" *Jarkesy*, 603 U.S. at 135 (alteration in original) (quoting *Granfinanciera*, 492 U.S. at 52). That is true "[e]ven when an action 'originates in a newly fashioned regulatory scheme.'"

Id. at 134 (citation and brackets omitted). What matters instead "is the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Id.* at 135. Indeed, "[i]f 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." *Id.* at 128. The government can rebut that presumption only by pointing to firmly rooted "background legal principles" that justify a departure from the text of Article III and the Seventh Amendment. *Id.* at 131; *see also id.* at 153 (Gorsuch, J., concurring) ("[T]raditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree.").

The FDIC cannot point to any history that would allow it to dispense with the jury trial right. This case does not involve traditionally recognized public rights, such as the collection and disbursement of tax revenues from a customs agent, the granting of land patents, or immigration matters. *See id.* at 128–30 (majority op.); *Murray's Lessee*, 59 U.S. (18 How.) at 281–85. Nor is there any reason for this Court to expand the doctrine to this new context. "The public rights exception is, after all, an *exception*" that "has no textual basis in the Constitution." *Jarkesy*, 603 U.S. at 131. It thus must be applied "with care" and "close attention" to Founding-era history; otherwise, "the exception would swallow the rule." *Id.*

Unable to muster any historical support, the FDIC turns to *Akin v. Office of Thrift Supervision*, 950 F.2d 1180 (5th Cir. 1992). But *Akin* did not concern a suit

for civil penalties under section 1818(i). Rather, it involved a "cease and desist order" under section 1818(b) for "restitution" where the defendant was "unjustly enriched." *Id.* at 1182–83; *see* ECF 77 at 17.[3] That is a classic form of equitable relief, and *Jarkesy* itself makes that distinction clear. At the Founding "courts of equity could order a defendant to return unjustly obtained funds," but "only courts of law issued monetary penalties to 'punish culpable individuals.'" *Jarkesy*, 603 U.S. at 123 (quoting *Tull*, 481 U.S. at 422). *Akin* involved the former remedy, and this case involves the latter. Here, as in *Jarkesy*, the FDIC's suit for civil penalties involves traditional legal claims that must be decided by the courts rather than the Executive. In fact, as Burgess explains, the charges at issue closely resemble traditional claims for negligence and breach of fiduciary duty. *See* Burgess Supp. Br. at 10–13. Such claims plainly "involve 'private rights' which are at the 'core' of 'matters normally reserved to Article III courts'" and the juries that preside there. *Coit Indep. Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 578–79 (1989) (citation omitted) (recognizing as much for "breach of fiduciary duty claim[]"); *see Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (holding that the Seventh Amendment applied to a claim sounding in negligence).

[3] The FDIC suggests that this Court took Akin's "claim at face value" that his case involved "'a collection action on a breach of contract.'" FDIC Supp. Br. at 21 (quoting *Akin*, 950 F.2d at 1182). That is inaccurate. "This characterization" of the claim was specifically "rejected." *Akin*, 950 F.2d at 1182.

The FDIC's attempts to distinguish *Jarkesy* are unavailing. The FDIC notes that unlike the SEC, the FDIC "has never been authorized to bring enforcement claims seeking penalties in federal court." FDIC Supp. Br. at 24, 31. But that legal framework was forged in the late twentieth century, *see* Pub. L. No. 95-630, § 107(e)(1), 92 Stat. 3641, 3660–61 (1978), and so it is irrelevant to the Seventh Amendment inquiry. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (citation omitted). And by "'embedd[ing]' [the jury trial] right in the Constitution," the Framers made sure to "secur[e] it 'against the passing demands of expediency or convenience.'" *Jarkesy*, 603 U.S. at 122 (quoting *Reid v. Covert*, 354 U.S. 1, 10 (1957) (plurality op.)). A legislative decision that long postdated the Founding thus cannot "transmute a private right into a public one" to curtail that fundamental right. *Id.* at 131 n.2.

The FDIC also suggests that a jury trial would be "incompatible with the overall federal bank-regulatory regime" because Congress did not provide for jury trials. FDIC Supp. Br. at 28, 31. But such circular reasoning does not amount to any kind of explanation for why Congress *could not* have assigned these civil-penalties claims to an Article III jury proceeding. And the fact that Congress neglected to provide for a jury trial does not "strip [an enforcement] target of the protections of the Seventh Amendment." *Jarkesy*, 603 U.S. at 140. If that were

enough to overcome the Seventh Amendment, then its safeguards could be nullified by legislative fiat—whenever Congress chose to reroute legal claims through administrative proceedings. The Framers did not ratify such a hollow protection, and Congress cannot defeat it merely by "assign[ing] a matter to an agency for adjudication." *Id.* Again, "what matters is the substance of the action, not where Congress has assigned it." *Id.* at 134 (citation omitted).

Relatedly, the FDIC emphasizes that it "do[es] not have the option to bring enforcement claims seeking a civil money penalty in federal court." FDIC Supp. Br. at 29, 32. Congress funneled those claims through the juryless inner workings of the agency. *See* 12 U.S.C. § 1818(h)(1), (i)(2)(I)(ii). But an unconstitutional law does not become constitutional simply because Congress has declined to provide a constitutional alternative. *See Granfinanciera*, 492 U.S. at 61. If Congress wants to authorize the FDIC to pursue the "potent enforcement tool[]" of civil penalties, then it must do so consistent with the Seventh Amendment. FDIC Supp. Br. at 29 (quoting *Jarkesy*, 603 U.S. at 118). Enforcement targets are "entitled to a jury trial in an Article III court" to decide the agency's quintessential legal claims. *Jarkesy*, 603 U.S. at 140.

Finally, the FDIC argues that "section 1818 enforcement actions directly implicate public funds" and concern a "bank-insurance program created and administered by the federal government." FDIC Supp. Br. at 25, 27, 31. That makes

no difference either. There is nothing extraordinary or unusual about a federal bank-insurance program that would prevent an Article III court and a jury from adjudicating civil-penalty claims like these. After all, "despite its misleading name, the [public rights] exception does not refer to all matters brought by the government against an individual to remedy public harms." *Jarkesy*, 603 U.S. at 152 (Gorsuch, J., concurring) (emphasis omitted). "Instead, public rights are a narrow class defined and limited by history." *Id.*; *see also id.* at 130–32 (majority op.). The FDIC lacks any historical support for invoking that exception here.

For all these reasons, the public rights exception does not apply. The Seventh Amendment does, and the FDIC cannot deprive Burgess of its protections.

II. The Deprivation Of Seventh Amendment Rights Constitutes Irreparable Harm.

Switching gears, the FDIC suggests that "the harm resulting from the denial of a jury trial can be remedied on appeal" and is thus not irreparable. FDIC Br. at 33 (citation omitted). That, too, is mistaken. Burgess challenges his subjection to an unconstitutional adjudication in the first instance. This Court has held that "subjecting [a party] to costly and dubiously authorized administrative adjudications amounts to irreparable harm." *Career Colls. & Sch. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 238 (5th Cir. 2024), *cert. granted on unrelated question*, 2025 WL 65914 (U.S. Jan. 10, 2025). And that is because such an injury "is impossible to

remedy once the proceeding is over, which is when appellate review kicks in." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023).

That is particularly true for Seventh Amendment violations. Indeed, courts have a "responsibility" to grant the drastic remedy of "mandamus where necessary to protect the constitutional right to trial by jury." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962). And, to issue such a writ, "there must be no other adequate means to obtain the relief desired." *In re Jefferson Parish*, 81 F.4th 403, 416 (5th Cir. 2023). In that way, the "mandamus analysis" is "similar to an irreparable-injury analysis." *Id.* This confirms that the deprivation of a jury trial right constitutes irreparable harm. And there is no basis in law or equity to require Burgess to proceed through a juryless administrative tribunal before affording him a chance to vindicate his Seventh Amendment rights. Regardless of the result, a juryless "proceeding that has already happened cannot be undone." *Axon*, 598 U.S. at 191. Nor is there any mechanism to compensate Burgess on the back end for having to endure such an unconstitutional process. An injunction is therefore necessary to provide him meaningful relief.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court affirm the preliminary injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2025, I caused the foregoing *amicus curiae* brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit. The Court's CM/ECF system was used to file the brief, and service will therefore be accomplished by the CM/ECF system on all CM/ECF-registered counsel.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,165 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-pt font.

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