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 CORPORATION; MARTIN J. GRUENBERG, in his official capacity as 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, No. 7:22-CV-100, Hon. Reed O'Connor

# BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN ASSOCIATION OF BANK DIRECTORS, AND THE BANK POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

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# CERTIFICATE OF INTERESTED PERSONS

No. 22-11172, *Burgess v. Federal Deposit Insurance Corporation*

The undersigned counsel for *amici curiae* certifies that, in addition to the persons and entities listed in the Certificates of Interested Persons filed by the parties and all *amici* up to this point, the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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 |
|---|---|
| American Bankers Association | *Amicus curiae* |
| Bank Policy Institute | *Amicus curiae* |
| American Association of Bank Directors | *Amicus curiae* |
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Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 26.1.1, the undersigned counsel states that *amici curiae* the American Bankers Association, Bank Policy Institute, and American Association of Bank Directors have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

DATED: January 22, 2025

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## INTERESTS OF AMICI CURIAE[1]

*Amici curiae* are organizations that represent the interests of banks, bankers, and their customers.

The **American Bankers Association** ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $23.9 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people, safeguard $18.8 trillion in deposits, and extend $12.5 trillion in loans. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types.

The **American Association of Bank Directors** ("AABD") is a non-profit organization that represents the interests of bank directors throughout the United States. Founded in 1989, AABD is the only trade group in the United States devoted solely to bank directors and their information, education, and advocacy needs.

The **Bank Policy Institute** ("BPI") is a nonpartisan public policy, research and advocacy group that represents universal banks, regional

[1] All parties have consented to the filing of this brief. No counsel for any of the parties authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

This case is important to *amici* because it implicates structural constitutional questions that define the rights of banks and bankers in regulatory enforcement proceedings. The Supreme Court's recent decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), established a framework for courts considering Seventh Amendment and Article III challenges to administrative adjudication. *Amici* submit this brief to assist the Court in determining how that framework applies to the in-house enforcement tribunals used by the federal banking agencies, including the FDIC.

This brief also describes the practical realities of proceedings before these tribunals, and how such proceedings result in the effective exclusion of the judicial branch from hearing cases involving the application of federal regulations to the nation's approximately 4,500 banking institutions. With membership that includes a majority of these banks and their directors, *amici* represent a consortium of individuals and entities whose constitutional rights are squarely implicated by this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The FDIC asserts a breathtaking carveout to the jury trial right guaranteed by the Seventh Amendment of the United States Constitution. According to the FDIC, the entire field of banking enforcement satisfies the "public rights" exception and thus operates in a Seventh Amendment-free zone. But the FDIC's understanding of the "public rights" exception is unduly capacious and cannot be reconciled with the Supreme Court's opinion in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

Under *Jarkesy*, the relief sought here by the FDIC—a $200,000 civil money penalty—weighs heavily in favor of concluding that the FDIC's cause of action is legal in nature, thus triggering the constitutional right to a jury trial. The FDIC's breach of fiduciary duty claim's close relationship to the common law further confirms the Seventh Amendment's applicability. Many other claims typically brought by the FDIC and other federal banking agencies also are grounded in the common law.

The FDIC cannot rely on the "public rights" exception to avoid application of the Seventh Amendment. *Jarkesy* directs that this exception be applied carefully, with "close attention to the basis for each asserted application." *Id.* at 2133-34. Yet the FDIC asks this court to apply the exception sweepingly to *all* actions under its principal enforcement statute

(12 U.S.C. § 1818). The FDIC ignores that bank regulation is not analogous to the areas involving public rights identified in *Jarkesy* and that, in practice, banking enforcement actions typically do not concern public rights. The FDIC's reliance on the public rights exception is thus misplaced.

Juries and Article III courts form the bedrock foundation of the U.S. legal system, endowing the legal process with democratic legitimacy and serving as a critical check on state power and the executive branch. The experience of the banking industry before agency administrative law judges ("ALJs") demonstrates the need for these protections. Banking agency administrative tribunals are structurally biased and seldom rule against the government. Proceedings can last for years, during which time regulators may attack the reputations of respondent banks and bankers, but banks and bankers face regulatory limitations on responding.

Unsurprisingly, banks and bankers can rarely afford to roll the loaded dice and contest an enforcement action before an ALJ. In the ten years leading up to *Jarkesy*, the FDIC issued over 150 civil money penalty orders against regulated institutions. Yet only one institution contested its penalties. While individual bankers are somewhat more likely to contest enforcement actions, the banking agencies' administrative enforcement proceedings effectively preclude courts from reviewing how the agencies

apply their governing statutes and regulations to the many thousands of banks nationwide.

The district court also had jurisdiction to hear this challenge. Section 1818(i)(1) does not block Article III courts from considering structural constitutional claims that are collateral to the merits. An alternative interpretation would require banks and bankers to suffer precisely the injury the Constitution protects against.

## ARGUMENT

### I. The District Court Correctly Held that Burgess Is Entitled to a Jury in an Article III Court.

The FDIC does not appear to dispute that its action for civil money penalties implicates the Seventh Amendment.[2] Nor could it. The Seventh Amendment guarantees a jury trial right in "[s]uits at common law." U.S. Const. amend. VII. In *Jarkesy*, the Supreme Court explained that "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" 144 S. Ct. at 2128 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). In determining whether a suit is "legal in nature," courts must "consider the cause of action and the remedy it provides." *Id.* at 2129. Because "some causes of action sound in both law

[2] *See* Supplemental Principal Brief of the FDIC, No. 191, at 25-26 [hereinafter FDIC Suppl. Brief].

and equity, . . . the remedy [is] the 'more important' consideration." *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)).

Here, both the remedy and the cause of action confirm that the FDIC's claims are legal in nature. In *Jarkesy*, the majority explained that civil money penalties are a "prototypical common law remedy" insofar as they are "designed to punish or deter the wrongdoer," not to "restore the status quo." *Id.* In this case, the fact that the FDIC seeks a civil money penalty of $200,000 "effectively decides that this suit implicates the Seventh Amendment right." *Id.* at 2130.

The "close relationship" between the FDIC's breach of fiduciary duty claim and analogous common law claims "confirms that conclusion." *Id.* Like actions for securities fraud, actions for breach of fiduciary duty have long been adjudicated as common-law claims. *See FDIC v. Wheat*, 970 F.2d 124, 129 (5th Cir. 1992) (quoting *Seale v. Baker*, 97 S.W. 742, 744 (Tex. 1888), as indicating "the common law existence of the director's duty to the bank"); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56, 262 (1993) (recognizing that breach of fiduciary duty claims were well-known at common law).

Because the Seventh Amendment is squarely implicated, the government attempts to rely on the "public rights" exception to foreclose a

jury trial right in this case. But the "public rights" exception only applies where a claim "historically could have been determined exclusively by the executive and legislative branches." *Jarkesy*, 144 S. Ct. at 2132 (cleaned up). The Court has upheld the "public rights" exception only within "distinctive areas involving governmental prerogatives," *id.* at 2127, including the collection of revenue and tariffs, regulation of immigration, relations with Indian tribes, administration of public lands, and granting public benefits such as patent rights. *See id.* at 2132-33 (collecting cases).

*Jarkesy* makes clear that the "public rights" exception is narrow, requiring "close attention to the basis for each asserted application." *Id.* at 2133-34. The mere fact that a claim relates to an extensive field of government regulation does not suffice to establish a public right. "'Traditional legal claims' must be decided by courts," not regulatory agencies, even when "they originate in a newly fashioned regulatory scheme." *Id.* at 2135 ("what matters is the substance of the action, not where Congress has assigned it") (quoting *Granfinanciera*, 492 U.S. at 52).

Thus, *Jarkesy* held that even though the SEC's securities fraud claim derived from statute, it resembled a common-law fraud claim, such that the defendant had a right to a jury trial in an Article III court. *Id.* at 2138. Similarly, here, the FDIC's breach of fiduciary duty claim mirrors claims

known to the common law and cannot be compared to the "narrow class" of historical "public rights" cases. *Id.* at 2146 (Gorsuch, J., concurring).

## II. Banking Agencies' Civil Penalty Enforcement Actions Are Not Wholesale Exempt Under the Public Rights Exception.

Despite *Jarkesy*'s directive that the "public rights" exception be used sparingly, the FDIC argues for a broad extension of the doctrine to *all* banking enforcement actions. It asserts that banking regulation relates to the "protection of public funds" and thus is comparable to other areas in which the Court has found public rights. *See* FDIC Suppl. Brief at 34-35. But that analogy fails. Many banking enforcement proceedings—even beyond the fiduciary duty claim at issue here—are analogous to actions at common law. The FDIC's position also depends on a claimed tie between its enforcement actions and protection of the Federal Deposit Insurance Fund—an asserted link that is tenuous and, in any event, cannot overcome the presumption in favor of Article III courts.

### A. *The History of Banking Regulation Distinguishes It from the Limited Categories of "Public Rights" Cases.*

Banking enforcement is not an area that "historically could have been determined exclusively by [the executive and legislative] branches" of the federal government. *Jarkesy*, 144 S. Ct. at 2132 (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)). Nor is it an area where "from the beginning[,] Congress has exercised a plenary power." *Id.* at 2151 (Gorsuch, J.,

concurring) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 334, 339 (1909)).

In the early Republic, states (not the federal government) were the primary regulators of banks. When banks were first incorporated, they were, with rare exception, either private or chartered by state legislatures. *See* Edward L. Symons, Jr., *The United States Banking System*, 19 Brook. J. Int'l L. 1, 4 (1993); *Atherton v. FDIC*, 519 U.S. 213, 220 (1997) ("during most of the first century of our Nation's history . . . state-chartered banks were the norm"). The FDIC has offered no showing that, during this early period, cases at law involving misconduct by banks and their principals were heard without juries.

Although the government experimented for a time with the idea of a national bank, federal regulation of private banks did not emerge until Congress passed the National Bank Acts of 1863 and 1864. *See Atherton*, 519 U.S. at 221-23. Even then, there was no apparent exception to the jury trial right when money damages were sought for misconduct by banks and bankers. *See, e.g.*, *Hun v. Cary*, 82 N.Y. 65, 79 (N.Y. 1880) (action by receiver against bank trustees for alleged misconduct "was properly tried as an action at law"). Accordingly, banking actions are distinct from the narrow "public rights" actions identified in *Jarkesy*.

### B. *Banking Agency Claims Resemble Claims Recognized at Common Law.*

As illustrated by the breach of fiduciary duty claim here, the FDIC routinely brings civil penalty enforcement actions that mirror claims recognized at common law—as do the other two banking agencies with enforcement authority under 12 U.S.C. § 1818, the Office of the Comptroller of the Currency ("OCC") and the Federal Reserve Board. In fact, the statute authorizes the banking agencies to bring civil money penalty actions against a bank or affiliated party when it "violates *any* law or regulation." *See, e.g.*, 12 U.S.C. § 1818(i)(2)(A)(i) (emphasis added). This is capacious language, and the agencies exercise their authority broadly to seek penalties for a range of claims with common-law analogues.

For example, like the SEC in *Jarkesy*, the banking agencies routinely bring actions alleging fraud.[3] As in *Jarkesy*, such fraud-based claims sound in common law and do not vindicate a "public right" historically within the exclusive province of the federal government. *Jarkesy*, 144 S. Ct. at 2136; *see also Granfinanciera*, 492 U.S. at 56 (holding that bankruptcy actions for fraudulent conveyances "appear matters of private rather than public right").

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[3] *See* Scott S. Patterson & Zachary S. Nienus, *Enforcement Actions Against Individuals in Fraud-Related Cases: An Overview*, FDIC Supervisory Insights (2005), https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum05/sisummer05-article2.pdf.

The banking agencies also routinely bring actions for violations of the unfair and deceptive acts and practices ("UDAP") prohibition in Section 5 of the Federal Trade Commission ("FTC") Act.[4] This is a prohibition that has roots in common-law fraud and tort law[5] and thus does not fall within the public rights exception. Notably, the FTC itself does not use in-house tribunals to assess civil penalties for UDAP violations.[6]

In addition to claims for violations of "any law or regulation," the banking agencies use section 1818 to bring enforcement actions for "unsafe or unsound" practices. *See* 12 U.S.C. § 1818(i)(2)(B). One *amicus* characterizes such actions as "novel claims" that are "without any common law roots." Amicus Brief of Administrative Law Scholars, *supra*, at 28-29, 34-35. This argument misstates the historical record.

Congress did not create the "unsafe or unsound" practice claim from whole cloth when it established the deposit insurance fund. Instead, it

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[4] *See Unfair or Deceptive Acts or Practices by State-Chartered Banks* (FIL-26-2004) (Mar. 11, 2004), https://www.fdic.gov/news/financial-institution-letters/2004/fil2604.html.

[5] *See* Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat A Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1078 (2010); Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 Chap. L. Rev. 155, 155-56 (2004).

[6] *See generally* Eric N. Holmes, *Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act*, Cong. Rsch. Serv., IF12244 (Nov. 4, 2022), https://sgp.fas.org/crs/misc/IF12244.pdf (FTC may seek equitable remedies via in-house tribunals; when seeking civil penalties for violations of its orders, it must do so in federal district court).

adopted the "unsafe or unsound" standard from longstanding state banking laws, dating back to the early 1800s.[7] Only in 1966—more than three decades after the establishment of federal deposit insurance—did Congress give the FDIC authority to bring enforcement actions penalizing such "unsafe or unsound" practices. *See* FDIC, *FDIC: The First Fifty Years* 125 (1984) ("Cease-and-desist orders were authorized by Congress in 1966."); *see also* Pub. L. No. 101-73, 101 Stat. 183 (1989) (authorizing FDIC civil money penalties). At the time, a senior banking regulator explained to Congress that "the words 'unsafe' or 'unsound' . . . [already] appear[ed] in the banking or savings and loan laws of 38 States." *Hearings on S. 3158 Before the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966).

The substantive claims underlying "unsafe or unsound" actions have readily apparent common-law analogues. For example, "unsafe or unsound" actions alleging deficiencies in a bank's management or controls are analogous to common-law negligence claims. In both, a defendant's conduct is alleged to fall below a prescribed standard of care and pose an unreasonable risk of harm. *Compare* Restatement (Second) of Torts § 282 (1964) ("[N]egligence is conduct which falls below the standard established

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[7] *See, e.g.*, Act of Dec. 4, 1847, ch. 419, § 3, 1847 N.Y. Laws 519; An Act Concerning Banks, § 14, *in* Public Statute Laws of the State of Connecticut 94 (1839); Act of July 4, 1837, ch. 140, § 27, *in* Revised Statutes of the State of New Hampshire 266 (1843).

by law for the protection of others against unreasonable risk of harm."), *with* FDIC, *Risk Management Manual of Examination Policies, Formal Administrative Actions*, § 15.1 at 15.1-4–15.1-5 ("[A]n unsafe or unsound practice encompasses any action, or lack of action, by an institution or an IAP which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would result in abnormal risk of loss or damage . . . ."); *see also* Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin*, 63 Geo. Wash. L. Rev. 175, 211-13 (1995) (connecting the safety-and-soundness doctrine to negligence principles).

Similarly, regulators contend that misrepresentations can constitute "unsafe or unsound" banking practices. *See, e.g.*, *Dodge v. OCC*, 744 F.3d 148, 151, 156-57 (D.C. Cir. 2014) (misrepresenting bank's financial condition to regulators); *De La Fuente v. FDIC*, 332 F.3d 1208, 1224 (9th Cir. 2003) (failing to disclose relevant information to regulators). These types of actions mirror claims for fraud and misrepresentation at common law. They "target the same basic behavior: misrepresenting or concealing material facts." *Jarkesy*, 144 S. Ct. at 2125.

### C. *The Deposit Insurance Fund Does Not Convert the FDIC's Enforcement Actions Into Claims Covered by the Public Rights Exception.*

In urging this Court to accept that banking enforcement actions categorically vindicate public rights outside the reach of the Seventh Amendment, the FDIC ties the purpose of its section 1818 actions to the protection of the deposit insurance fund. *See* FDIC Suppl. Brief at 34-35. Yet this asserted purpose does not justify sacrificing the jury trial right and access to the federal courts.

When administering and protecting its insurance fund, the FDIC is operating much like a traditional private insurer. The deposit insurance fund is financed privately, "mainly through quarterly assessments on insured banks,"[8] which are analogous to commercial premium assessments. For decades, the FDIC's primary tool to respond to banks perceived to present risk to the fund was to terminate insurance, just as a private insurer would terminate insurance or deny coverage for a breach of coverage conditions. *See* FDIC, *FDIC: The First Fifty Years* 125 (1984); *supra* at 12. Even today, the actions that most directly secure the insurance fund—including actions to recover underpaid insurance assessments and to recover losses from

[8] *See* FDIC, *Deposit Insurance Fund* (2024), https://www.fdic.gov/resources/deposit-insurance/deposit-insurance-fund.

executives of a failed bank—are heard in an Article III court. *See* 12 U.S.C. § 1817(g); 12 U.S.C. § 1821(k). Plainly, adjudication of claims related to the protection of the deposit insurance fund is not an area uniquely assigned—by the Constitution, or even Congress—to the political branches rather than the courts.

There is also no factual support for the FDIC's claimed nexus between its enforcement actions and the deposit insurance fund. The FDIC and the other banking agencies routinely bring enforcement actions without identifying any link—and where there is no conceivable risk—to the fund. Binding precedent in this circuit (and others) does require that where the banking agencies seek a penalty for an unsafe or unsound practice, they establish that the practice has had "a reasonable direct effect on [the relevant] bank's financial stability." *See First Nat'l Bank of Bellaire v. OCC*, 697 F.2d 674, 681 (5th Cir. 1983); *Gulf Fed. Sav. & Loan Ass'n of Jefferson Par. v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981). But, insulated by their in-house tribunals, the banking agencies expressly ignore this precedent—in fact, the FDIC did so at an earlier stage of this very case. *See In re Burgess*, FDIC-14-0307e+, Decision and Order, 2017 WL 4641701, at *12 (Aug. 7, 2017) ("the Board is not bound by [the Fifth Circuit's decision in] *Gulf Federal*, and it declines to apply the *Gulf Federal* standard here").

At least one other banking agency has done the same. *See In re Adams*, OCC AA-EC-11-50, Final Decision, 2014 WL 8735096, at *3-*5 (Sept. 30, 2014).

Even before this court, the FDIC claims boundless discretion to undertake "the progressive definition . . . of [unsafe or unsound] practices" through a process of regulation by enforcement. FDIC Suppl. Brief at 37 (quoting *Groos Nat'l Bank v. OCC*, 573 F.2d 889, 897 (5th Cir. 1978)). Plainly put, the FDIC asserts that it need never bind itself to a fixed definition of the term.

That position is wrong. It ignores the case law cited above. It ignores that "safety and soundness" has been defined in state law since at least 1837. *See supra* at 12. And it violates basic principles of administrative law. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 404 (2024) (requiring courts to "police the outer statutory boundaries of . . . delegations"). It also, however, makes clear that the FDIC's enforcement program has roving boundaries and is frequently not related to the narrow objective of protecting its insurance fund.

In fact, the FDIC's enforcement policies contain no explicit requirement that the agency evaluate whether a violation or practice poses risk to the fund. The threat of loss to a bank—which might conceivably, in unusual cases, lead to loss to the fund—is just one of thirteen factors the

FDIC considers in evaluating whether to pursue a civil money penalty. FDIC, *Formal and Informal Enforcement Actions Manual, Restitution and Civil Money Penalties*, § 9.5-9.6 (June 2022). Over the last six months, the FDIC has issued seven civil money penalty orders against banks, all relating to minor deficiencies that posed no asserted threat to the deposit insurance fund.[9] Thus, even if the FDIC were correct that actions to preserve the fund implicate public rights—rather than the same private rights any insurer may have in its insurance reserves—there would be no factual basis to justify the FDIC's attempt to categorically extinguish the Seventh Amendment rights of banks and bankers.

## III. In-House Banking Enforcement Actions Raise Serious Constitutional Concerns that Necessitate the Protections Guaranteed by the Seventh Amendment and Article III.

The combination of the jury with the Article III court was an important structural choice by the Framers. The Seventh Amendment's jury trial right endows the justice system with democratic legitimacy, "ensuring that few

[9] Two actions related to credit card reward programs. *In re Comenity Bank*, FDIC-24-0051k, Order to Pay (Aug. 22, 2024); *In re Comenity Capital Bank*, FDIC-24-0050k, Order to Pay (Aug. 22, 2024). Four related to the relevant banks' failures to require small numbers of borrowers to obtain flood insurance. *In re Citizens State Bank*, FDIC-24-0091k, Order to Pay Civil Money Penalty (Nov. 26, 2024); *In re Rockland Tr. Co.*, FDIC-24-0113k, Order to Pay Civil Money Penalty (Nov. 20, 2024); *In re First & Peoples Bank & Tr. Co.*, FDIC-24-0090k, Order to Pay Civil Money Penalty (Oct. 28, 2024); *In re The Stockgrowers State Bank*, FDIC-24-0036k, Order to Pay Civil Money Penalty (Oct. 9, 2024). And one related to errors in reporting fair lending data to the government. *In re Spring Valley Bank*, FDIC-23-0085k, Order to Pay Civil Money Penalty (Nov. 20, 2024).

acts of government affecting core private rights can be brought to bear without passing through a body of local laypeople." Richard L. Jolly *et al.*, *Democratic Renewal and the Civil Jury*, 57 Ga. L. Rev. 79, 84 (2022). The jury trial right and access to Article III courts work in tandem to protect citizens from the excesses of overzealous government enforcement.

Banking agency enforcement proceedings exemplify the type of government abuses that the Seventh Amendment and Article III courts were intended to prevent. These proceedings occur in structurally biased forums that systematically advantage the agency, place undue pressure on defendants to settle, and deprive defendants of meaningful judicial review.

### *A. The Enforcement Schemes of Banking Agencies Restrict the Potential for Judicial Review.*

Using the administrative enforcement process insulates agency decision-making from adequate judicial review. FDIC orders can typically only be set aside if "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2). This standard is "highly deferential to the agency's determination." *Aviva Life & Annuity Co. v. FDIC*, 654 F.3d 1129, 1131 (10th Cir. 2011) (internal quotation marks and citation omitted); *see also Metro Cnty. Title, Inc. v. FDIC*, 13 F.3d 883, 886 (5th Cir. 1994).

Article III review of factfinding in agency proceedings is particularly circumscribed, concentrating substantial power in ALJs. Courts review the

FDIC's factual findings under the deferential "substantial evidence" standard. *See Cal. Pac. Bank v. FDIC*, 885 F.3d 560, 570 (9th Cir. 2018); *see also R&W Tech. Servs. Ltd. v. Commodity Futures Trading Comm'n*, 205 F.3d 165, 176 (5th Cir. 2000) (procedural determinations and evidentiary rulings reviewed for abuse of discretion). This deference raises constitutional concerns in cases involving private rights. See Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 30 (2018). In essence, the in-house adjudicative process provides executive branch employees—*i.e.*, the ALJs—with broad discretion over the factual record that is eventually presented to a court for limited-scope review. In practice, as set out below, this discretion is regularly exercised to benefit the government.

### *B. The Enforcement Schemes of Banking Agencies Lack Appropriate Checks and Balances against Conflicted Decisionmakers.*

Deprived of the checks and balances guaranteed by the Seventh Amendment and Article III, banking agency adjudication has become notoriously slanted in the government's favor. Over the last ten years, the FDIC has won approximately 85% of its contested in-house proceedings.[10]

[10] This figure is based on a review of FDIC adjudicated decisions. The decisions can be found here: https://orders.fdic.gov/s/searchform.

In *Jarkesy*, the Supreme Court confronted a similar scheme of administrative adjudication, in which the agency "won about 90% of its contested in-house proceedings compared to 69% of its cases in court." *Jarkesy*, 144 S. Ct. at 2141 (Gorsuch, J., concurring).

These disparate outcomes stem partly from structural biases inherent in banking agency proceedings. The ALJs who hear banking agency enforcement actions are part of the Office of Financial Institution Adjudication ("OFIA"), which currently employs two ALJs appointed by the agencies themselves. The agencies can overrule the decisions recommended by the ALJs, *see* 12 C.F.R. § 308.182, and the ALJs can be removed under proceedings instituted by the agencies. *See Burgess v. FDIC*, 639 F. Supp. 3d 732, 738 (N.D. Tex. 2022). That structure effectively makes the agencies the prosecutor and judge in their own cases, inevitably resulting in bias.

Past decisions show that OFIA ALJs, who lack prior experience in bank regulation and banking,[11] systematically defer to the staff of the prosecuting banking agency. For decades, OFIA ALJs have followed an established practice that expressly accords "great deference" to the "opinions,"

[11] The biographies of OFIA judges are available at https://www.ofia.gov/who-we-are/our-judges.html.

"conclusions," and "predictive judgments" of bank examiners.[12] The examiners benefitting from this deference are the same agency employees who first found fault with the enforcement target and recommended that the agency pursue an enforcement action. The result is that *no one* independently evaluates the conclusions of the initial views of the staff: the ALJs defer to them, the agencies routinely adopt the ALJs' decisions, and courts then must review the agencies' decisions on a deferential basis.

While bank examiners are often dedicated and experienced professionals, a culture of unreviewable discretion inevitably leads to abuse. In this very case, FDIC staff sent emails demonstrating bias, e.g., stating that Mr. Burgess's bank should "F themselves"; that the bank was "a pain in the ass"; and that the FDIC should "gear up for war." *In re Burgess*, FDIC-14-0307e+, 2022 WL 4598597, at *33-34 (Sept. 16, 2022). Other FDIC staff questioned whether the FDIC was engaged in a "witch hunt"; suggested that the relevant FDIC office "take a break from attacking" Mr. Burgess's bank;

[12] *See, e.g.*, *In re Marine Bank & Tr. Co.*, FDIC-10-825b, 2013 WL 2456822, at *10 (Mar. 19, 2013) ("[T]he findings, conclusions and predictive judgments of the FDIC's examiners are entitled to considerable deference in determining whether the practices at issue were unsafe and unsound"); *In re First Bank of Jacksonville*, FDIC-96-155b, 1998 WL 363852, at *11 (May 26, 1998) (same), *aff'd mem.*, *First Bank of Jacksonville v. FDIC*, 180 F.3d 269 (11th Cir. 1999); *In re Bank 1st, Albuquerque*, FDIC-09-025b, 2010 WL 1936984, at *3 (Mar. 16, 2010) (same); *In re Nat'l Bank & Tr. Co.*, OCC-84-08, 1985 WL 203015, at *21 (Aug. 14, 1985) (same).

and expressed concerns to an FDIC supervisor that "yall's staff are a little too obsessed with this bank." *Id.* at *35.

In another recent banking enforcement matter, an FDIC case manager engaged in improper communications with a third party; wrongfully shared confidential information with that third party; and demonstrated what another employee characterized as "shocking" animosity toward the enforcement target.[13] A Sixth Circuit decision upholding the FDIC's enforcement determination in that case was summarily reversed and remanded by the Supreme Court because, "[d]espite identifying . . . legal errors in the Board's analysis, the Sixth Circuit nevertheless affirmed the Board's decision" after applying the deferential "substantial evidence" standard. *Calcutt v. FDIC*, 598 U.S. 623, 628 (2023).

The "shocking" agency conduct in these recent cases is not new.[14] It also cannot be dismissed as isolated at an agency that, according to a review commissioned by a Special Committee of its own Board, maintains "a hierarchic structure that [does] not welcome criticism" and where "pushback

[13] Respondent Harry C. Calcutt's Exceptions to the Admin. L. Judge's Recommended Decision on Remand, at A386, *Calcutt v. FDIC*, No. 20-4303 (6th Cir. Apr. 7, 2021), ECF No. 24 (citing testimony from a FDIC examiner); *Calcutt*, 37 F.4th at 324; *see also* Pet'r Brief at 44, *Calcutt*, No. 20-4303 (6th Cir. Apr. 7, 2021), ECF No. 26.

[14] *See, e.g.*, Phyllis Mason, *Are Banking Regulation and Enforcement Proceedings Out of Control? In the Matter of Glen Garrett*, 3 No. 23 Andrews' Bank & Lender Liab. Litig. Rep. 1 (1998) (In a case in the 1990s, FDIC threatened defense witnesses with criminal prosecution if they testified).

would come 'at a personal cost.'" *See* Cleary Gottlieb Steen & Hamilton, LLP, *Report for the Special Review Committee of the Board of Directors of the FDIC* 106-07 (April 2024) ("As one FDIC employee summarized, 'culture here is don't have an opinion, don't speak up.'")

The FDIC's formal procedural rules and practices compound the inequity. Banking agency ALJs have emphasized that they are held to a lesser standard of impartiality than federal judges. *See* Order Regarding Respondents' Motion for Disqualification, *In re Carrie Tolstedt et al.*, OCC AA-EC-2019-82+ (Nov. 3, 2021). On this basis, they have determined that they may engage in extended *ex parte* communications with agency counsel without recusing. *Id.* And they apply structurally biased rules, including, for example, rules *requiring* ALJs to defer to agency counsel's "discretion" on whether a document is confidential, while providing no opportunity for banks to make similar designations. 12 C.F.R. § 308.33.

Given that the FDIC asserts broad regulatory prohibitions on disseminating or describing any bank examiner record,[15] the threat is clear: a bank that chooses to contest an FDIC enforcement proceeding risks a biased decisionmaker who is not just empowered, but potentially required,

[15] *See* FDIC, *Guidelines Regarding the Copying and Removal of Confidential Financial Institution Information* (FIL-14-2012) (2012) ("regulations expressly prohibit the disclosure of examination reports and other supervisory correspondence").

to allow the FDIC to publicize its allegations, while ordering that exculpatory material be held confidential.

Absent checks and balances, the banking agencies' ALJs regularly make evidentiary and procedural rulings inconsistent with the equality-of-arms afforded in an Article III court. In a recent notable case, an OFIA ALJ quashed subpoenas to bank examiners who had worked on a relevant agency ombudsman review, blocked discovery of exculpatory material, and prevented discovery into documents relied on by bank examiner witnesses. *See In re David Julian et. al*, OCC AA-EC-2019-71+, Comptroller's Decision (Jan. 14, 2025). Litigants have also reported restrictions on cross-examination, conferring with counsel, and proffering evidence.[16] Adopting the FDIC's position will permit these one-sided rulings to continue unchecked, depriving banks and bankers of the constitutional protections that would be available before juries and in Article III courts.

### C. *The Unfairness of Banking Agency ALJ Proceedings Places Coercive Settlement Pressure on Banks and Almost Entirely Excludes Article III Adjudication of Banking Supervision and Enforcement Cases.*

Faced with a stacked deck, banks virtually always settle with the government rather than pursuing biased administrative proceedings. As a

[16] *See, e.g.*, *Bank of La. v. FDIC*, No. 16-CV-13585, 2017 WL 3849340, at *2 (E.D. La. Jan. 13, 2017), *aff'd*, 919 F.3d 916 (5th Cir. 2019); *Calcutt v. FDIC*, 37 F.4th 293, 323-24 (6th Cir. 2022), *cert. granted, opinion rev'd*, 598 U.S. 623 (2023).

result, federal courts play essentially no practical role in evaluating the supervisory and enforcement-related decision-making of the federal banking agencies. This coercive settlement pressure makes the constitutional right to a jury trial in an Article III court for these claims even more critical.

Banks and bankers correctly perceive that any challenge to FDIC enforcement demands will fail. *See supra* at 19-20. Compounding this problem is the reality that ALJ adjudications take years to resolve and banks cannot freely defend their public reputation while the proceedings progress. *See supra* at 23-24. In regulated industries like banking and financial services, the publicity associated with government allegations can be "more damaging . . . than any sanction that might be imposed in a contested proceeding." Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 Fordham J. Corp. & Fin. L. 627, 664 (2007) (discussing SEC proceedings); *see* Sharon Yadin, *Regulatory Shaming*, 49 Env't L. 407, 441-42 (2019) (regulatory shaming "may cause firms to become bankrupt or financially unstable"). The harm is particularly pronounced for banks, which operate in an industry in which reputation is paramount.

Thus, banks virtually never contest administrative enforcement actions. In the ten years leading up to *Jarkesy*, the FDIC issued about 150 civil money penalties against banks by consent; only three such penalties

were issued after a contested proceeding, and each one was against the same institution (Bank of Louisiana).[17] Put differently, over that decade, only one bank targeted by the FDIC was willing to risk contesting the appropriateness of a civil money penalty. Predictably, that single bank's challenges were uniformly rejected.[18] As these statistics show, although courts may hear rulemaking challenges to banking regulations, the unbalanced ALJ process means they almost never have the opportunity to opine on how those regulations are applied.

This vacuum in judicial review has broad effects. It allows regulators to act out of bias—or simple mistake—knowing they are not likely to be challenged. *See supra* at 21-23; *see also* FDIC, Guidelines for Appeals of Material Supervisory Determinations, 86 Fed. Reg. 6881 (Jan. 25, 2021) ("fear of retaliation by FDIC examiners . . . was cited as a basis for causing bankers to be reluctant to fully engage with the FDIC on material areas of disagreement"). It disincentivizes participation in the industry. *See* AABD, *AABD Survey Results: Measuring Bank Director Fear of Personal Liability* 1 (Apr. 2014), https://tinyurl.com/mr3sthhc (almost 25% of a sample of

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[17] These figures are based on searches of the FDIC's enforcement action database, *see supra* n.10. The period searched was June 27, 2014 through June 27, 2024 (i.e., the date of publication of *Jarkesy*), inclusive.

[18] *See In re Bank of Louisiana*, FDIC 12-489b+, Decision and Order (Nov. 15, 2016); *In re Bank of Louisiana*, FDIC-17-0086k, Decision and Order (May 28, 2019); *In re Bank of Louisiana*, FDIC-12-489b+, Decision and Order (Apr. 21, 2020).

banks lost directors candidates due to fear of liability). And it places bank regulation in a category of its own—one that is increasingly incongruent with modern administrative law. *Cf.* Michelle W. Bowman, Fed. Rsrv. Gov., *Reflections on 2024: Monetary Policy, Economic Performance, and Lessons for Banking Regulation* (Jan. 9, 2025), https://tinyurl.com/ycm4d2de ("regulators must also acknowledge . . . [that] administrative law increasingly demands greater transparency and accountability"). Meaningful access to independent judicial review is vital to ensuring lawful and constitutional regulation of not just those very few banks and bankers who brave the odds, but of the industry as a whole.

## IV. The District Court Had Jurisdiction Under Section 1818(i)(1) to Consider this Collateral, Structural Constitutional Challenge.

The district court correctly concluded that 12 U.S.C. § 1818(i)(1) does not divest courts of jurisdiction to hear the Seventh Amendment claims at issue here. *See Burgess*, 639 F. Supp. 3d at 740-45. Although Section 1818(i)(1) may bar federal courts from second-guessing the merits of an ongoing FDIC proceeding, it does not bar jurisdiction over structural constitutional claims that are wholly collateral to the merits. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 190-96 (2023) (holding that separation-of-powers claim was not precluded where it presented a challenge that was

collateral to the agency's enforcement proceeding); *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) (recognizing that agencies are particularly "ill suited to address structural constitutional challenges," which fall outside their expertise).

"Where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). As the district court explained, unlike other statutes, section 1818(i)(1) does not expressly withdraw judicial review for particular types of claims or otherwise state that it is stripping the federal courts of review of collateral constitutional challenges. *Burgess*, 639 F. Supp. 3d at 742. This Court's precedent is fully in accord. *See Collins v. Dep't of the Treasury*, 83 F.4th 970, 980 (5th Cir. 2023) (1818(i)(1) "did not preclude review of constitutional claims").

To adopt the FDIC's contrary view would effectively "foreclose all meaningful judicial review" over structural constitutional claims against the banking agencies. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489 (2010). Regulated parties would be forced to litigate their cases in full before in-house tribunals in proceedings stacked against them. In doing so, parties would incur constitutional injuries that "unquestionably" cannot be remedied after the fact. *See Burgess*, 639 F. Supp. 3d at 749 (quoting *Elrod*

*v. Burns*, 427 U.S. 347, 373 (1976)). They would also incur significant reputational harm, which is damaging in any industry and particularly so in financial services. *See supra* at 25.

It is untenable to suggest that banks must wait to raise their constitutional challenges until the end of a multi-year ALJ proceeding that will almost inevitably result in a loss when virtually none has been willing to do so. Thus, FDIC's interpretation of Section 1818(i)(1) would enable banking regulators to continue to foreclose constitutional review of their enforcement determinations. The district court's reading of section 1818(i)(1), in contrast, ensures that banks and bankers have meaningful redress for a patently unconstitutional enforcement regime.

## CONCLUSION

For the foregoing reasons, and those set forth in appellee's brief, this Court should affirm the district court's judgment.

DATED: January 22, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Fifth Circuit Rule 29 because it contains 6,449 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) and Fifth Circuit Rule 32 because it has been prepared in a proportionally-spaced typeface using Microsoft Word for Microsoft 365 MSO Version 2402 in Georgia and 14-point font.

DATED: January 22, 2025

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## CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing *amicus curiae* brief was filed electronically with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 22, 2025.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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