No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN ASSOCIATION OF BANK DIRECTORS, AND BANK POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MANUEL G. BERRELEZ
Counsel of Record
JAMES F. HOPPER
VINSON & ELKINS LLP
Trammell Crow Center
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201
(214) 220-7709
mberrelez@velaw.com

THOMAS PINDER
ANDREW DOERSAM
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Avenue NW
Washington, DC 20036

GREGG L. ROZANSKY
THE BANK POLICY INSTITUTE
1300 Eye Street NW, Suite 1100 West
Washington, DC 20005

DAVID BARIS
AMERICAN ASSOCIATION OF BANK DIRECTORS
14400 Falling Leaf Drive
Darnestown, Maryland 20878

Counsel for Amici Curiae

324515

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INTEREST OF *AMICI CURIAE*[1]

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

Amicus curiae 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 $23.7 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people, safeguard $18.7 trillion in deposits, and extend $12.2 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.

Amicus curiae 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.

Amicus curiae the **Bank Policy Institute** ("BPI") is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic

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

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. Issues of focus include capital and liquidity regulation, anti-money-laundering, payment systems, consumer protection, bank powers, bank examination, and competition in the financial sector.

This case is important to *amici* because it presents critical questions concerning the constitutionality of administrative enforcement proceedings seeking civil monetary penalties. Banks and bankers can face civil monetary penalties via "in-house" enforcement proceedings at a variety of federal agencies, including the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve Board ("FRB"), and the Office of the Comptroller of the Currency ("OCC," and, together with FDIC and FRB, the "Banking Agencies"). The Banking Agencies are *required* to pursue any civil monetary penalties via in-house proceedings; unlike the Securities and Exchange Commission ("SEC"), the Banking Agencies lack statutory authorization to seek such penalties in court.[2]

[2] See 12 U.S.C. § 1818(i) (FDIC and OCC); *id.* §§ 93(b), 504 (OCC). To be clear, the FDIC, acting in its capacity as receiver, retains broad power to seek a variety of other remedies against banks and bankers in state and federal court. See *id.* § 1821(k). If the Fifth Circuit's opinion is affirmed, the Banking Agencies may seek authorization from Congress to pursue civil penalties in court. *Amici* support reasonable regulation of banks and bankers, and believe that the Banking Agencies should have

The government has acknowledged that the "practical consequences" of this case will not be limited to the SEC, and the Court's holding may extend to other agencies that "conduct adjudications seeking civil penalties." Pet. 23–24. *Amici* therefore have a strong interest in ensuring that the Fifth Circuit's opinion is affirmed, which in turn will ensure that *amici*'s members do not face unfair and unlawful enforcement proceedings at the Banking Agencies.

Besides protecting banks and their directors, officers, and employees from regulatory overreach, the maintenance of adequate checks and balances in the enforcement process is mission-critical to ensure that banks are able to recruit and retain qualified personnel, including directors and officers. At present, a variety of risks and problems with the banking regulatory structure, including the absence of adequate safeguards in the Banking Agencies' in-house processes, disincentivize talented professionals from serving as bank directors or employees, to the detriment of bank customers and the public. See AABD, *AABD Survey Results: Measuring Bank Director Fear of Personal Liability*, at 1 (Apr. 2014), https://tinyurl.com/mr3sthhc ("AABD Survey"). Bank directors are typically paid little for their roles and are not professional bankers, especially in community banks. They are the doctors, pharmacists, teachers, and leaders of their respective communities. Therefore, they generally have few resources to litigate against the federal government in

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authority to pursue civil penalties in court, so long as that authority is lawful and reasonably bounded. *Amici* would look forward to working with Congress and their regulators to improve the Banking Agencies' enabling statutes.

protracted enforcement actions, even though enforcement actions expose directors to significant financial liability and reputational risk. See Br. for AABD as Amicus Curiae, at 1-2, *Calcutt* v. *FDIC*, No. 22-714 (Mar. 3, 2023).

In this case, the Fifth Circuit correctly held that an administrative enforcement proceeding at the SEC violated Mr. Jarkesy's rights under Article III and the Seventh Amendment. See Pet. App. 4a–5a. Relying on that holding, another federal court recently recognized that an FDIC enforcement proceeding against a banker was unconstitutional. In that case, as in this one, the court determined that the enforcement target was entitled to a jury trial in court because the agency was seeking civil monetary penalties based on a cause of action that was akin to a common law theory of liability. See *Burgess* v. *FDIC*, 639 F. Supp. 3d 732, 747–749 (N.D. Tex. 2022), *appeal docketed* Dec. 5, 2022 (5th Cir. No. 22-11172). The FDIC's appeal in *Burgess* has been stayed pending disposition of this case.

Amici have a significant interest in ensuring that the Fifth Circuit's opinion is affirmed, and that banks and their directors, officers, and employees are able to enjoy the full protections of the Seventh Amendment and Article III. Only then will bankers be assured that their property and livelihoods will not be stripped away via in-house enforcement proceedings where agency personnel, and not a jury of their peers, hold the ultimate reins of power.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Although this Court has not yet defined the precise contours of the "public rights" doctrine, its prior decisions provide some waypoints that help draw the line between public and private rights. Those waypoints include whether the remedy at issue implicates core private-property interests, whether the cause of action in question is within the traditional bailiwick of American courts, and whether the cause of action or remedy would have been understood by the Framers to fall within the ambit of Article III and the Seventh Amendment. In this case (and in many banking-related administrative enforcement actions), the agency seeks civil monetary penalties based on causes of action that existed at common law or that otherwise closely mirror actions which would have been heard in English courts of law prior to the merger of law and equity. Each of the waypoints discussed above suggests that enforcement proceedings of this type implicate *private* rights, not public rights.

The experience of banks and their directors, officers, and employees confirms the wisdom of the Fifth Circuit's holding that this case does *not* implicate the "public rights" doctrine. The Banking Agencies can and do assess enormous penalties against individual bankers in their personal capacities. The suggestion that these penalties do not implicate those banker's "private" rights strains the ordinary meaning of the words "public" and "private" beyond recognition.

Moreover, the history of financial regulation in the United States confirms that actions to recover money from a banker or other finance professional have

traditionally been understood as species of common law claims sounding in fraud or fiduciary breach, both of which were routinely heard in early American courts as actions at law. The history and practice of banking regulation, from the early Republic to the present, bolsters the Fifth Circuit's holding that cases of the type at issue here belong in courts, not agencies. See Section I, *infra*.

2. The banking industry is an ideal microcosm for understanding why Article III and the Seventh Amendment are such critical safeguards of individual liberty. Those constitutional provisions were designed to protect against the exact problems that have come to characterize some administrative enforcement proceedings at the Banking Agencies—*i.e.*, the absence of checks and balances if banks and their directors, officers, and employees are subject to government overreach, conflicted decisionmakers, and unfair procedures. The experience of bankers confirms the Framers' prescience when crafting Article III and the Seventh Amendment, and it serves as an exemplar of the type of expansive agency power that regulated parties would come to expect if the government's capacious view of the "public rights" doctrine were credited. See Section II, *infra*.

3. This case will transform the American banking industry, impacting not only banks and bankers but also their customers and the public at large. The specter of unfair enforcement proceedings at the Banking Agencies is a disincentive for talented professionals to serve as bank directors or otherwise work in the banking industry. Affirming the Fifth Circuit's decision will guarantee that Americans who make their living

in regulated industries can rest assured that they will receive a fair shake if called to account by their regulators. See Section III, *infra*.

ARGUMENT

I. The Fifth Circuit Correctly Held that Administrative Enforcement Proceedings to Recover Civil Penalties Violate Article III and the Seventh Amendment.

The government does not dispute that, if an action to recover civil penalties were heard in a court, the defendant would be entitled to a jury under the Seventh Amendment. Gov't Br. 28–29. In the government's telling, the key issue in this case is not the scope of the Seventh Amendment, but rather is the question whether actions seeking civil penalties involve "public rights," such that they may be assigned to agency adjudication without violating Article III.

Although the public rights doctrine has not been "definitively explained," this Court's cases have laid out several benchmarks that help draw the line between public and private rights. *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018). As for each of those benchmarks, history and practice suggest that administrative enforcement proceedings seeking civil monetary penalties are *not* within the ambit of the "public rights" doctrine. As explained below, the experience of banks and bankers helps clarify why the Fifth Circuit was correct not to expand that doctrine to capture proceedings of the type at issue here.

1. One obvious demarcation between "public" and "private" rights is inherent in the common meanings

of those words. There is no clearer example of a "core private right" than the right to private property, which—by its nature—vests in "each individual" rather than "the people at large." *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 198–199 (2023) (Thomas, J., concurring); see *id.* at 204 (noting that "the threat of significant monetary fines" or "penalties" necessarily "implicate[s] the core private right to property").

Bankers, perhaps more than any other regulated professionals in American life, understand that the threat of civil penalties is an intensely "private" affair. The Banking Agencies possess authority to take the private property of banks and bankers through crippling civil monetary penalties. Under current law, the Banking Agencies can wield fines of more than *$2.3 million per day* for violations that include "breaches [of] fiduciary duty" and fraud (both of which have traditionally been understood as actions at law).[3] See 12 U.S.C. § 1818(i)(2)(A), (C)–(D); *Notice of Inflation Adjustments for Civil Monetary Penalties*, 88 Fed. Reg. 861, 861–862 (FDIC Jan. 5, 2023).

The Banking Agencies' authority to assess civil penalties has dramatically expanded in recent years: New agencies such as the Consumer Financial Protection Bureau ("CFPB") have been granted authority to issue civil money penalties, and other statutes (such as the Financial Institutions Reform, Recovery, and

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[3] "[A]n action to recover money damages for * * * breach of fiduciary duty"—the type of action the Banking Agencies can pursue "in house" under 12 U.S.C. § 1818(i)(2)(C)(i)(III)—"was the type of action that would have been brought in a court of law in the courts of England prior to the merger of law and equity." *In re Hooper*, 112 B.R. 1009, 1012 (B.A.P. 9th Cir. 1990).

Enforcement Act of 1989) have significantly increased the maximum penalties available by statute. This trend—under which more agencies are assigned ever-expanding penalty powers—shows no signs of abating.

Whatever the bounds of the "public rights" doctrine may be, that doctrine should not be understood as a license for agencies to impose such massive civil monetary penalties on private individuals, without ever affording them a right to a jury or the procedural protections available in court. Since the Founding, "[d]isposition of private rights to * * * property" was understood to fall squarely "within the core of the judicial power." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 711 (2015) (Thomas, J., dissenting); accord Jennifer Mascott, *Constitutionally Conforming Agency Adjudication*, 2 Loy. U. Chi. J. Reg. Compliance 22, 45 (2017) (noting that disputes involving "deprivations" of "property constitute a 'core' of cases that * * * must be resolved by Article III courts—not executive adjudicators 'dressed up as courts'").

The taking of property is of course an intensely "private" affair for banks and bankers. Their livelihoods and life savings can be stripped away as a result of enforcement proceedings superintended by the leaders of the very same government agencies that performed the underlying investigations and examinations of the conduct giving rise to the enforcement proceeding. And, as explained below, the "private" and individualized nature of the Banking Agencies' penalty authority has profound on-the-ground consequences for banks and bankers, many of whom view the threat of personal liability and the unfairness of the Banking Agencies' enforcement proceedings as a

disincentive to work in the banking industry. See Section III, *infra*.

2. A second mode of distinguishing between "public" and "private" rights is to determine whether the type of action or remedy at issue is within the traditional bailiwick of American courts. See *Atlas Roofing Co.* v. *OSHA*, 430 U.S. 442, 458 (1977); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 53 (1989). As the Fifth Circuit correctly explained, actions to recover civil monetary penalties were known at common law and track early American causes of action sounding in fraud, debt, or fiduciary breach—all of which have been adjudicated *in courts* since the Founding. See Pet. App. 9a–10a. The public rights exception applies only when a cause of action and its remedies were "unknown to the common law," which is not the case in claims for civil penalties of the type at issue here and in many administrative enforcement proceedings by the Banking Agencies. Pet. App. 9a–10a; see pp. 7–8 & note 3, *supra*.

The history of banking regulation is instructive. Banks were first incorporated in the early Republic in 1781, and at this time banks were variously either private or were chartered by state legislatures. See Edward L. Symons, Jr., *The United States Banking System*, 19 Brook. J. Int'l L. 1, 4 (1993). For the next 150 years, an action seeking to recover money from a bank or banker due to malfeasance was understood as a species of claim rooted in common law notions of fraud and fiduciary breach, and such claims were routinely heard in American courts. In *Hun* v. *Cary*, for example, a bank receiver sued bank trustees seeking money damages for breach of fiduciary duty based on the

trustees' "improvidence and reckless extravagance." 82 N.Y. 65, 66 (1880). The New York Court of Appeals held that the action "was properly tried as an action at law" because the complaint sought "a money judgment." *Id.* at 79.[4]

The concept of superintendence of banks and bankers via administrative enforcement actions was introduced in New Deal-era statutes, and was then dramatically expanded following the savings-and-loan crisis of the 1980s. See David Min, *Federalizing Bank Governance*, 51 Loy. U. Chi. L.J. 833, 851–852, 857 (2020). But even after these New Deal-era changes, courts have always retained the power to hear cases brought by the FDIC (acting in its capacity as a receiver) against bankers. See 12 U.S.C. § 1821(k).

In short, "[f]ederal courts" have long "handled claims alleging entitlement to civil penalties for breaches of common-law duties." *Burgess*, 639 F. Supp. 3d at 748. Thus, the notion that the regulation of banks and bankers is particularly well-suited to agency adjudication conflicts with both historical facts and modern realities.

3. A final way to distinguish between "public" and "private" rights is to return to the original public meaning of Article III and the Seventh Amendment, in hopes of ascertaining whether the type of action or

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[4] Such cases were often heard in *state* court because "during most of the first century of our Nation's history * * * state-chartered banks were the norm and federally chartered banks an exception"; in this period, the fiduciary duties of banks and bankers were ordinarily understood as matters of state common law. See *Atherton* v. *FDIC*, 519 U.S. 213, 220 (1997).

remedy at issue would have been understood to be captured by those provisions at the Founding. See *Atlas Roofing*, 430 U.S. at 458; *Granfinanciera*, 492 U.S. at 42. As explained below, the Framers viewed the protections afforded by Article III and the Seventh Amendment as critical checks against government overreach, biased decisionmakers, and procedural abuses. It speaks volumes that modern administrative enforcement proceedings (and banking-related proceedings in particular) have come to be defined by the exact problems the Framers sought to avoid when crafting our Constitution.

II. Affirming the Fifth Circuit's Holding Will Promote Fair Enforcement of the Federal Banking Laws Against Banks and their Directors, Officers, and Employees.

The current process for administrative enforcement proceedings at the Banking Agencies is an ideal lens for understanding why Article III and the Seventh Amendment remain such critical bulwarks against infringements on individual liberty.

In the vast majority of cases, banks and bankers will take necessary corrective action during an examination or shortly thereafter, meaning that formal administrative enforcement proceedings are largely outlier cases. But in at least some of those outlier cases, examiners and Banking Agency investigators make errors, exhibit bias, or otherwise engage in regulatory overreach. That examiners and other agency staff often make inherently subjective judgment calls means that the need for a fair and independent administrative enforcement process on the back end is especially critical in the banking industry. Regrettably, the fact

that banks and bankers lack access to juries or an Article III court only reinforces the power of the Banking Agencies and to underscore the unfairness of the administrative enforcement process.

As explained below, modern banking-related enforcement proceedings have come to be defined by the exact set of ills that the Framers sought to prevent when drafting Article III and the Seventh Amendment, including government overreach and an absence of checks and balances, see Section II.A, *infra*; decisionmakers who have a strong incentive to side with their agency employers, see Section II.B, *infra*; and unfair procedures and an absence of due process, see Section II.C, *infra*.

A. The Seventh Amendment and Article III Are Important Checks and Balances Against Government Overreach.

Long before the ratification of the Constitution, Americans viewed the right to a jury trial in a court as an essential check on government overreach. The original 1606 Charter of Virginia recognized the right to trial by jury, and by 1623 that right was also recognized in Plymouth Colony. See Sara Gordon, *All Together Now: Using Principles of Group Dynamics to Train Better Jurors*, 48 Ind. L. Rev. 415, 420 n.38 (2015).

The expansion of non-jury proceedings in the late Colonial era—including Parliament's decision to expand the jurisdiction of jury-less admiralty courts to cover alleged violations of the Stamp Act of 1765—drew fierce resistance from the Colonists, and was a significant factor in the push for independence. See

Philip Hamburger, *Is Administrative Law Unlawful?*, at 150 (2014); see also The Declaration of Independence ¶ 20 (U.S. 1776) (listing among the reasons for separation that the Crown had "depriv[ed] us, in many cases, of the benefits of trial by jury").

That experience in turn formed the backdrop for crafting Article III and the Seventh Amendment a dozen years later. Indeed, a key aim of those provisions was to ensure the availability of jury trials in cases involving interests in property, money, and other legal rights, thus preventing a wayward drift towards tribunals of the kind that helped spark the American Revolution. See Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 Wm. & Mary Bill Rts. J. 811, 818 (2014); Laura Perry, *What's in a Name?*, 46 Am. Crim. L. Rev. 1563, 1567 (2009).

Modern administrative enforcement actions have come to resemble the exact types of proceedings that the Framers sought to prevent. The Banking Agencies, for example, leverage their power to extract enormous financial penalties from banks and bankers, without ever affording them a jury or a right to de novo review by a court. See pp. 2 & note 2, 7–8, *supra* (discussing Banking Agencies' penalty authority).

Remarkably, some federal agencies with banking-related jurisdiction have even elected to use individual adjudications to announce changes to longstanding agency precedent, and then to impose massive new penalties against enforcement targets based on that novel interpretation. In 2014, for example, an administrative law judge ("ALJ") at the CFPB imposed a $6.4 million penalty on an enforcement target. On

review of that Order, the CFPB Director added $103 million in additional penalties—a twentyfold increase. As then-Judge Kavanaugh explained, the "Director discarded the Government's longstanding interpretation of the relevant statute, adopted a new interpretation of that statute, applied that new *interpretation retroactively*, and then imposed massive sanctions * * * for violation of the statute—even though [the] relevant acts occurred *before* the Director changed his interpretation of the statute."[5]

The problem is not just the size of the potential penalties but also the fact that the penalties are largely immune from any meaningful judicial review. Banking Agency orders assessing civil monetary penalties can only be set aside if "arbitrary, capricious [or] an abuse of discretion." *Calcutt* v. *FDIC*, 37 F.4th 293, 310 (6th Cir. 2022) (quoting 5 U.S.C. § 706(2)), rev'd on other grounds, 598 U.S. 623 (2023) (per curiam); see *Scott* v. *FDIC*, 684 F. App'x 391, 397 (5th Cir. 2017) (affirming the FDIC Board's civil monetary penalty award because it "did not constitute an abuse of discretion and was not arbitrary and capricious"); *Michael* v. *FDIC*, 687 F.3d 337, 355–356 (7th Cir. 2012) (similar); see also note 7, *infra*.

Given the expansive nature of their penalty powers and ongoing regulatory supervision, the Banking Agencies can functionally compel enforcement targets into settlement. Much of the Banking Agencies' power is now exercised via the mere *threat* of exposure to

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[5] *PHH Corp.* v. *CFPB*, 881 F.3d 75, 185 n.13 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (emphasis altered), abrogated by *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020).

enforcement proceedings. Recent data from the FDIC suggests that the amount of money extracted from enforcement targets via "voluntary" settlements and restitution payments can vastly exceed the amounts actually imposed via monetary penalties—sometimes by tenfold or more. See FDIC, *Consumer Compliance Supervisory Highlights* 4 (Mar. 2023), https://tinyurl.com/58tumeuu. Banks and their directors, officers, and employers also know that the Banking Agencies will continue exercising their ongoing supervisory duties, such as conducting annual bank examinations, and thus are inclined to settle rather thank risk upsetting regulators.

This power imbalance is made all the worse by the fact that the Banking Agencies' enforcement proceedings often drag on interminably. In recent years, some of those proceedings have lasted a dozen years or more, all before the enforcement target ever has an opportunity to invoke judicial review (which will take years more).[6] Banks and bankers recognize that decade-long enforcement proceedings will be extraordinarily expensive to defend, and that their reputations will remain sullied through those investigations. *Cf. Burgess*, 639 F. Supp. 3d at 749. That the Banking Agencies conduct their enforcement proceedings at a pace that would never be permitted in any court is yet

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[6] The FDIC's *Burgess* investigation was initiated thirteen years ago, with the formal enforcement proceeding (which is still ongoing) having been initiated some nine years ago. See *Burgess*, 639 F. Supp. 3d at 738; see also *Calcutt*, 37 F.4th at 307 (pending FDIC proceeding initiated over ten years ago).

another pressure point the Agencies use to compel settlements.

The absence of checks and balances has only grown more problematic in recent years, as the Banking Agencies continue to develop innovative strategies to shield their enforcement practices from accountability, judicial review, and public exposure.

The case of Patrick Adams is instructive. See No. OCC AA-EC-11-50, 2014 WL 8735096 (Sept. 30, 2014). In that matter, OCC Enforcement Staff charged Mr. Adams with several violations of federal banking laws, but the ALJ issued a decision recommending that the case be dismissed in its entirety. The ALJ's decision was then reviewed by the Comptroller of the Currency, who disagreed with the ALJ's findings and found that the record supposedly "could" support findings of violations and a decision to impose civil penalties. *Id.* at *37. But the Comptroller ultimately dismissed the charges against Mr. Adams, meaning that there was no adverse order for him to appeal. Mr. Adams was therefore left with no remedies, despite having been (1) exposed for years to an abusive and ill-founded investigation that the agency's own ALJ disparaged, and (2) heavily criticized in a 68-page opinion from the Comptroller, which caused Mr. Adams significant reputational damage.[7] The *Adams* matter exemplifies the structural bias inherent in a system where the head of an agency (who often favors the

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[7] And even if there had been a final order to appeal, the availability of deferential judicial review is no substitute for the provision of constitutionally-compliant procedures at the agency itself. See *Axon*, 598 U.S. at 202–204 (Thomas, J., concurring).

findings made by his employees over those of an ALJ) is the ultimate arbiter, subject only to very limited judicial review.

In sum, enforcement proceedings at the Banking Agencies have come to resemble the types of proceedings that the Framers sought to stamp out. Those Agencies' toolkit—which allows them to impose massive penalties and extract massive settlements, while also largely shielding their decisions from subsequent review—is an important warning as to the types of proceedings that all regulated parties can come to expect if the Fifth Circuit's decision is reversed.

B. The Seventh Amendment and Article III Are Important Checks and Balances Against Conflicted Decisionmakers.

At the Founding, deprivations of individual rights in non-jury proceedings were a matter of recent memory. The Framers were well-acquainted with the Court of Star Chamber, an infamous English tribunal where cases in which the Crown had a "particular interest" were resolved without a jury. Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570-1640*, 51 Am. J. Legal Hist. 639, 645 (2011). The "experts" who sat at the bench of Star Chamber after it became a law court under the Tudors commissioned reports and gathered data, and then issued decrees based on the "evidence" they collected. See *id.* at 647–648; Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 Mo. L. Rev. 939, 947 (2016).

Even after the Star Chamber was abolished, abuses by "expert" tribunals continued apace. For

example, some early Americans were haled before English "vice-admiralty" courts in the Colonies, which were another form of jury-less tribunal for common law actions. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 & n.47 (1973).

"[T]he Star Chamber has for centuries symbolized disregard of basic individual rights," *Faretta* v. *California*, 422 U.S. 806, 821 (1975), and the Framers crafted the Constitution's jury provisions in hopes of preventing any like tribunal from ever convening on American soil, see *In re Oliver*, 333 U.S. 257, 270 (1948). See also Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 Stan. L. Rev. 897, 905 n.45 (2016) (discussing Framers' discussion of the Star Chamber during debates over the Bill of Rights). Indeed, a central purpose of the Seventh Amendment was to install juries as a check against "expert" decisionmakers who would otherwise wield authority over the affairs of everyday Americans. See Pet. App. 5a–6a. The jury was selected as the bulwark against biased decision-making in recognition of the fact that, if the "administration of justice" were "entirely entrusted to the magistracy," then decisionmakers would be plagued by "an involuntary bias towards those of their own rank and dignity." William Blackstone, *Commentaries on the Laws of England* 1991 [Book III at 380] (1765).

Regrettably, modern enforcement proceedings at the Banking Agencies have come to be defined by many of the same problems that made the Framers so fearful of the Star Chamber, including conflicted

decisionmakers with significant authority to strip disfavored litigants of their property and liberty.

One telling example is the ongoing *Burgess* proceeding at the FDIC. In that case, the ALJ acknowledged "clearly unprofessional" conduct on behalf of FDIC personnel; among other things, agency staff characterized the FDIC investigation as a "witch hunt" against a bank that regulators spoke of with profanities after the enforcement targets pushed back. *In re Burgess*, Nos. FDIC-14-0307e+, 2022 WL 4598597, at *32–35, *41 (Sept. 16, 2022).

The examiners involved in Mr. Calcutt's case displayed similarly "shocking" examples of bias towards their enforcement target.[8] The FDIC case manager engaged in improper communications with the counterparty to the loan at issue in the underlying enforcement action, including wrongfully sharing confidential information obtained during bank examinations.[9] The language in those communications reveals the extent of the examiner's animosity against Mr. Calcutt; among other things, the examiner told the counterparty that the bank "should have fired" Mr. Calcutt and characterized his updates as "news to brighten your weekend."[10]

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[8] Respondent Harry C. Calcutt's Exceptions to the Admin. L. Judge's Recommended Decision on Remand, at A386, *Calcutt*, No. 20-4303 (6th Cir. Apr. 7, 2021), ECF No. 24 (citing testimony from a FDIC examiner who characterized the inappropriate conduct of his fellow examiners as "shocking").

[9] *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 ("*Calcutt* Br.").

[10] *Calcutt* Br., *supra* note 9, at 44.

Regulator bias extends well beyond the examiners, and can also be found in the ALJs themselves. For example, in the enforcement action the OCC recently prosecuted against bank executives, the enforcement targets moved to disqualify the ALJ after he held *ex parte* meetings with OCC enforcement counsel without explanation, made disparaging remarks about respondents' evidence and arguments, and made many one-sided rulings both pre-trial and during trial.[11] Despite the clear bias exhibited by the ALJ, the Comptroller declined to rule on the targets' motion for disqualification and instead allowed the ALJ to deny the motion himself and continue to preside over the trial.

While the issue of regulator bias is now gaining increased attention, the existence of such bias is hardly news to banks and bankers. For example, in 1991, the FDIC began investigating Missouri banker Glen Garrett in connection with allegedly improper loans and "questionable procedures" in constructing a new bank branch. See 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). During the FDIC's enforcement proceeding, the FDIC asked for help from the OCC because the borrower in question held a bank account in a national bank. The OCC ultimately found exculpatory evidence in favor of Garrett yet failed to share that evidence with the FDIC. See *ibid.* The FDIC also sent letters to two former employees

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[11] Respondent David Julian's Br. in Support of Exceptions at 291– 293, *In re Claudia Russ Anderson* et al., OCC Nos. AA-EC-2019-81+ (Apr. 14, 2023), https://tinyurl.com/yhar87u5 ("*Julian* Br.").

who had been subpoenaed by Garrett, threatening them with criminal prosecution if they testified. FDIC staff went as far as to say that "Mr. Garrett should be castrated." *Ibid.*

C. The Seventh Amendment and Article III Ensure the Provision of Due Process and the Fairness of Procedure.

The Framers understood that an important advantage of proceedings in court—and of jury trials in particular—would be to ensure that litigants were afforded due process and the guarantees of fair and orderly procedures. Since the term "due process" was first used in the fourteenth century, it has been "associated with a series of protections inherent in the trial process." Simona Grossi, *Procedural Due Process*, 13 Seton Hall Circuit Rev. 155, 162 (2017); see Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 Harv. C.R.-C.L.L. Rev. 399, 401 (2011) ("Th[e] right to be heard, the core of due process of law, has been integral to democratic thought and institutions at least since the English Magna Carta.").

Although the Seventh Amendment does not necessarily "require photographic reproduction of historical procedures" used in 1789, it does impose a baseline requirement that the procedures used in jury trials "do not interfere with the performance of that which was the jury's essential function at the time of the amendment's adoption." Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 Wm. & Mary Bill Rts. J. 407, 415 (1995); see *Galloway* v. *United States*, 319 U.S. 372,

390–392 (1943). The Framers understood that the procedural rights inherent in the jury system were among the reasons why juries are such effective guarantors of individual freedom. Indeed, those protections—including "trial of the vicinage," the "cross-examining [of] witnesses * * * before the triers of fact," the prevention of "ex parte" presentation, and the opportunity to present "oral evidence"—were considered by the Framers as reasons why "[t]he trial by jury is very important." Federal Farmer Letters to the Republican IV (1787).

Modern administrative enforcement proceedings are a far cry from the types of tribunals that the Framers would have understood as sufficiently protective of individual freedom. In these enforcement proceedings, the Banking Agencies often strip their targets of due process and other procedural protections that would have been available had the case been heard before a jury in a court.

Amici are aware of cases in which the Banking Agencies have prevented enforcement targets from cross-examining witnesses in an enforcement action,[12] prevented enforcement targets from conferring with counsel or witnesses,[13] blocked enforcement targets

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[12] See, *e.g.*, *Calcutt*, 37 F.4th at 323; *Julian* Br., *supra* note 11, at 214–225.

[13] See*, e.g., Bank of La.* v. *FDIC*, No. 16-cv-13585, 2017 WL 3849340, at *2 (E.D. La. Jan. 13, 2017) (enforcement target prevented from conferring with counsel), aff'd, 919 F.3d 916 (5th Cir. 2019); *Julian* Br., *supra* note 11, at 58–68 (enforcement target prevented from communicating with key percipient witness).

from proffering evidence or calling witnesses,[14] or made various other arbitrary evidentiary rulings (*e.g.*, preventing discovery, blocking discovery of *Brady* material, allowing experts to testify beyond the scope of their expertise, and imposing procedural burdens on enforcement targets that were not imposed on agency enforcement counsel).[15] *Amici* are also aware of cases where the ALJ had improper *ex parte* contact with enforcement counsel,[16] or where an ALJ was not disqualified from a proceeding despite plain evidence of bias.[17]

If the Fifth Circuit's decision is not affirmed, this troubling pattern will no doubt continue, and regulated parties will be forced to endure proceedings that are fundamentally different in kind from those the Framers viewed as fair and adequate.

III. Unfair Enforcement Proceedings Are a Disincentive for Talented Personnel to Work in the Banking Industry.

As explained above, administrative enforcement proceedings at the Banking Agencies are unfair in

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[14] See, *e.g.*, *Bank of La.*, 2017 WL 3849340, at *2; see also *In re Haynes*, Nos. FDIC-11-370e+, 2014 WL 4640797, at *19 (July 15, 2014); *Julian* Br., *supra* note 11, at 277–283.

[15] See *Julian* Br., *supra* note 11, at 73–90, 210–214.

[16] See *id.* at 300–303.

[17] See *id.* at 291–300, 303–306. *Amici* are aware that such bias was on visual display during the hearing on remand in the *Burgess* enforcement action, where the ALJ had an FDIC seal on display at the beginning of proceedings before changing her backdrop to the more "neutral" Office of Financial Institution Adjudication ("OFIA") seal during the hearing.

various ways. Banks and bankers well know that enforcement proceedings will heavily favor the agency and that they will be expensive, lengthy, and damaging to their reputations. Many talented professionals therefore view the specter of the Banking Agencies' enforcement proceedings as a disincentive to work in the banking industry or serve on bank boards at all.

One recent survey by *amicus* AABD found that 24 percent of banks reported that fear of being subjected to personal liability was a reason why a bank director had resigned, refused an offer of a directorship, or declined to serve on a bank's loan committee. See AABD Survey, *supra*, at 1. Many banks reported that the "huge uptick in enforcement actions" against banks and bankers left them "feeling more vulnerable" because they knew that they would be "susceptible to civil money penalties for the slightest infraction." See *id.* at 3. These concerns are heightened by the facts that (1) Banking Agencies often demand director and officer personal net worth statements or recent tax returns, and that (2) many banks and bankers find it difficult to find insurers who are willing to provide coverage against the costs of defending enforcement proceedings or the potential imposition of civil monetary penalties.[18] See *id.* at 3–4. *Amici* are also aware of some instances where the Banking Agencies have demanded access to bankers' cell phones and other

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[18] Even if directors and officers obtain insurance, that coverage and any bank indemnification is limited in enforcement actions as soon as the Banking Agency issues a notice of charges against the target of the proposed formal enforcement action. See 12 U.S.C. § 1828(k); 12 C.F.R. § 359; *id.* § 7.2014.

personal devices, which presents significant privacy concerns and stokes yet more fear.

Many directors, especially in community banks, have other full-time jobs and are paid little for their service to the bank. These community leaders are reluctant to serve as bank directors because they have few resources—in terms of both time and money—to litigate lengthy enforcement actions or challenge the Banking Agencies' personally-invasive exercises of authority.

Banks, their customers, and the public all suffer when talented personnel elect not to work at public-facing financial institutions. The fear of enforcement proceedings may also alter the behavior of those bankers who are brave enough to serve. As *amicus* AABD has explained, fear of unjust enforcement proceedings and civil penalties may in some cases "motivate bank boards to disapprove loans to creditworthy individuals," or "to forego a business opportunity for their banks" despite the fact that the bankers believe the opportunity to be both "prudent and sound." AABD Survey, *supra*, at 2.

CONCLUSION

For the foregoing reasons, and those set forth in the Respondents' brief, the portion of the Fifth Circuit's judgment concerning Article III and the Seventh Amendment should be affirmed.

Respectfully submitted.

Manuel G. Berrelez
Counsel of Record
James F. Hopper
VINSON & ELKINS LLP
Trammell Crow Center
2001 Ross Ave.
Suite 3900
Dallas, TX 75201
(214) 220-7709
mberrelez@velaw.com

Thomas Pinder
Andrew Doersam
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Ave. NW
Washington, D.C. 20036

Gregg L. Rozansky
THE BANK POLICY INSTITUTE
1300 Eye Street NW
Suite 1100 West
Washington, D.C. 20005

David Baris
AMERICAN ASSOCIATION OF BANK DIRECTORS
14400 Falling Leaf Drive
Darnestown, MD 20878

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