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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING EN BANC

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 22-11172

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.

Pursuant to 5th Cir. R. 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: October 15, 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.

Businesses, and corporate officers and directors, are frequent respondents in administrative enforcement actions brought by the Federal Deposit Insurance Corporation ("FDIC") and other agencies. The Chamber has a significant interest in ensuring that those proceedings respect the Constitution's structural protections, including the Seventh Amendment. But the Panel's decision thwarts that critical jury right and is inconsistent with precedents of this Court and the Supreme Court. Left unchecked, the decision will inflict irreparable harm on Petitioner and other enforcement targets who will be forced to endure the FDIC's in-house prosecutions

[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 this brief's preparation or submission.

before they can ever vindicate their Seventh Amendment jury trial right. The Chamber urges the Court to grant rehearing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Amendment gives Respondent 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 FDIC's attempt to impose civil penalties against Mr. Burgess through a juryless in-house proceeding is an affront to that guarantee, and the District Court properly enjoined that straightforward constitutional violation. This Court should have affirmed. But the Panel held that the District Court was powerless to afford Mr. Burgess relief.

That decision runs straight into binding precedent. The Panel maintained that Mr. Burgess "can seek meaningful review" of his Seventh Amendment and Article II removal claims *after* the FDIC proceeding runs its course. Dkt. 317-1 ("Op.") at 20. But this ignores the basic principle that—as with other structural constitutional claims—the FDIC's juryless in-house "proceeding *is* the injury." *Space Expl. Techs. Corp. v. NLRB*, 151 F.4th 761, 780 (5th Cir. 2025) ("*SpaceX*"). In other words, Mr. Burgess's claims are "about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). And "once [that] unconstitutional proceeding begins, the damage is done." *SpaceX*, 151 F.4th at 780. "Waiting until the end would be no remedy at all." *Id.*

This case places the issue in stark relief. For more than a dozen years, Mr. Burgess has been trapped in the bureaucratic machinery of the FDIC. The agency began its investigation of Mr. Burgess in 2010 and eventually charged him in 2014. Since then, however, he has yet to receive his day in federal court, let alone the jury determination that the Seventh Amendment guarantees. And the Panel concluded that Congress barred the federal courts from granting effective relief.

That was error. The Supreme Court has demanded "'clear and convincing' evidence of congressional intent" before construing a statute to restrict meaningful judicial review of a constitutional claim. *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (citation omitted). This interpretive canon serves to "avoid the 'serious constitutional question[s]' that would arise" from such a jurisdiction-stripping measure. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citation omitted).

Applying that clear statement rule, this Court has previously recognized that the statute at issue, 12 U.S.C. § 1818(i), does "not preclude review of constitutional claims." *Collins v. Dep't of the Treasury*, 83 F.4th 970, 980 (5th Cir. 2023) (citing *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1130 (5th Cir. 1991)). Yet the Panel here held the opposite. And it refused to heed *Webster*'s command—only because it mistakenly believed that "meaningful review" could come long after the FDIC has run Mr. Burgess through the ringer of an unconstitutional proceeding. Op. at 20.

That back-end review is not meaningful. Most FDIC enforcement targets will never even make it to that point. With a "jury out of the picture," and unconstitutionally insulated administrators at the helm, the "odds [are] stacked" heavily against respondents from the get-go. *Jarkesy*, 603 U.S. at 142-43 (Gorsuch, J., concurring). They must defend themselves before an agency that serves as prosecutor, judge, and jury—without the procedural protections afforded by an Article III court. And as the FDIC draws out its in-house prosecutions, few can withstand the agency's coercive settlement pressures or the ever-mounting costs of defense. For those that can, they too will have "los[t] their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." *Axon*, 598 U.S. at 192. This Court should grant rehearing to make clear that the law does not require that result.

ARGUMENT

I. Mr. Burgess Has a Seventh Amendment Right to a Jury Trial.

Rehearing is necessary to uphold the Seventh Amendment's protections and prevent the agency overreach that juryless proceedings enable. Indeed, "[t]he right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Jarkesy*, 603 U.S. at 121 (citation omitted). 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 it was similarly "prized by the American colonists" in both criminal and civil cases alike as a crucial check on the government's coercive enforcement power. *Jarkesy*, 603 U.S. at 121.

However, "as tensions grew between the British Empire and its American Colonies, imperial authorities responded by stripping away that 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 colonial juries. *See Jarkesy*, 603 U.S. at 121. Just as authorities envisioned, this "tactic proved 'most effective' at securing the verdicts they wished." *Erlinger*, 602 U.S. at 829 (citation omitted).

"After securing their independence, the founding generation sought to ensure what happened before would not happen again." *Id.* 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 (citation omitted).

That includes suits like this one by the government seeking civil penalties. "A civil penalty was a type of remedy at common law that could only be enforced in

courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987). And it could hardly be otherwise. Rerouting such enforcement actions through in-house administrative proceedings would 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. Its pursuit of a concededly legal form of relief against Mr. Burgess is "all but dispositive" in finding a violation of his Seventh Amendment right. *Id.* at 123. And 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 (citation omitted); *see also id.* at 153 (Gorsuch, J. concurring). 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.[2]

[2] *Ortega v. OCC*, ___ F.4th ___, 2025 WL 2588495 (5th Cir. 2025), decided by the *Burgess* panel, is inapposite. Its Seventh Amendment holding was erroneous (and separately worthy of en banc review), and in any event, the panel did not discern any history of removing civil-penalty claims involving insured banks from judicial cognizance.

II. The District Court Had Jurisdiction to Entertain Mr. Burgess's Structural Constitutional Claims.

The Panel nonetheless held that the federal courts must stand by while that Seventh Amendment violation unfolds. *See* Op. at 23. That is incorrect. Congress has vested the district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It has empowered courts to protect individual rights through declaratory judgments. *See id.* § 2201(a). And though Congress may limit federal jurisdiction—at least to a degree—its intent "to preclude judicial review of constitutional" claims "must be clear." *Webster*, 486 U.S. at 603.

A. The Panel Violated *Webster*'s Clear Statement Rule.

The Panel disregarded this principle because it concluded Mr. Burgess "can seek meaningful review" after the FDIC's action. Op. at 20. But there is no "meaningful" review once the constitutional wrong has been completed. Mr. Burgess's Seventh Amendment challenge is not merely to the outcome of his proceedings; it is to his subjection to an unconstitutional juryless adjudication in the first instance. And when the alleged "injury is the proceeding itself, not its result, injunctive relief is the only remedy that matters." *SpaceX*, 151 F.4th at 780 n.114. That is because "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). Such an injury "is

impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Axon*, 598 U.S. at 191.

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.

The same goes for Mr. Burgess's removal claims, which challenge the tenure protections for the FDIC's Board and ALJs. Even if Mr. Burgess had no right to a jury—which he plainly does—he would at least be entitled to "an administrative adjudication untainted by [these] separation-of-powers violations." *Cochran v. SEC*, 20 F.4th 194, 210 n.16 (5th Cir. 2021) (en banc), *aff'd sub nom. Axon*, 598 U.S. 175. And, as this Court recently emphasized, the Panel's decision to instead force Mr. Burgess "to appear before an unconstitutionally structured agency inflicts irreparable harm." *SpaceX*, 151 F.4th at 780.

These types of harms cannot be meaningfully remedied later. As Mr. Burgess can attest, FDIC enforcement actions may take years, cost millions in legal fees,

subject targets to ruinous penalties, and cause grave reputational injury. When faced with such crushing litigation costs, enforcement targets often have no choice but to succumb to intense settlement pressures. As a result, the "price" of having to endure a constitutionally deficient proceeding "is tantamount to a complete denial of judicial review for most." *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991). But parties haled before the FDIC in enforcement proceedings need not "bet the farm" just to wait to argue in federal court that the agency's proceedings are inherently unconstitutional. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (citation omitted). They are entitled, under 28 U.S.C. §§ 1331 and 2201, to seek prospective relief in federal court.

Simply put, absent a clear direction by Congress, there is no reason why Mr. Burgess should have to proceed through a juryless administrative tribunal before asserting his claims. Regardless of the result, a juryless "proceeding that has already happened cannot be undone." *Axon*, 598 U.S. at 191. And there is no mechanism to compensate Mr. Burgess on the back end for having to endure such an unconstitutional process. Thus, his injury can only be remedied by judicial review now. That means *Webster*'s clear statement rule applies.

B. Section 1818(i) Does Not Deprive District Courts of Jurisdiction to Hear Structural Constitutional Claims.

Section 1818(i) does not meet *Webster*'s demanding standard. The provision states that "no court shall have jurisdiction to affect by injunction or otherwise the

issuance or enforcement of any notice or order under [§ 1818]." 12 U.S.C. § 1818(i)(1). This language may bar district courts from second-guessing the merits of an ongoing FDIC proceeding, such as the agency's decision to issue a cease-and-desist order. *See Rhoades v. Casey*, 196 F.3d 592, 597 (5th Cir. 1999). Yet it cannot be read to bar judicial review where, as here, the regulated party raises structural constitutional claims collateral to the merits. *See Bank of Coushatta*, 930 F.2d at 1129-30. After all, judicial review of such claims does not "affect" the "issuance" of any particular "notice or order under [§ 1818]." 12 U.S.C. § 1818(i)(1). It simply ensures that the enforcement target receives a constitutionally structured proceeding. And it "bears emphasis that even if [this] reading were not the best one, the interpretation is at least 'fairly possible'—so the canon of constitutional avoidance would still counsel [this Court] to adopt it." *United States v. Hansen*, 599 U.S. 762, 781 (2023) (citation omitted).

Meanwhile, the Panel's contrary reading—that courts may only review structural claims after the agency has completed all proceedings—has little to speak in its favor. The "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citation omitted). And agencies are particularly "ill suited to address structural constitutional challenges,"

which fall outside their expertise. *Carr v. Saul*, 593 U.S. 83, 92 (2021). Those claims are instead the bread and butter of Article III courts.

It would make little sense for Congress to deny "meaningful judicial review" of these structural challenges "wholly collateral to a statute's review provisions" by channeling them through an agency that cannot effectively adjudicate them. *Free Enter. Fund*, 561 U.S. at 489 (citation omitted). Such claims "have nothing to do with any final order that the [FDIC] might one day issue." *Cochran*, 20 F.4th at 200. The agency can issue the same order against Mr. Burgess, so long as it convinces a jury—rather than itself—that Mr. Burgess violated the law.

* * *

Federal courts exist in large part to prevent constitutional violations from running their course. Congress did not disturb that tradition in 12 U.S.C. § 1818(i)(1)—and it certainly did not do so clearly. Accordingly, the District Court correctly exercised jurisdiction to review Mr. Burgess's structural constitutional claims. The Panel's contrary holding runs afoul of binding precedent and threatens to deprive enforcement targets of their fundamental constitutional rights.

CONCLUSION

The Court should grant rehearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 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(b)(4) because it contains 2,598 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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