UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN C. PONTE Plaintiff, vs. FEDERAL DEPOSIT INSURANCE CORPORATION, *et al*. Defendants.	Case No.: 1:24-cv-02379

PLAINTIFF'S REPLY MEMORANDUM TO DEFENDANTS' OPPOSITION TO HIS MOTION FOR A TEMPORARY RESTRAINING ORDER[1]

[1] This brief is a Reply to the Opposition to Plaintiff's Motion for a TRO. The Response in Opposition to the Defendants' Motion to Dismiss will be filed at the appropriate time.

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Apparently determined to deny Plaintiff John C. Ponte's ("Ponte") right to a jury trial, Defendant Federal Deposit Insurance Corporation ("FDIC"): 1) claims two prior cases dismissed "without prejudice" and prior to *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), have preclusive effect; 2) claims *Jarkesy* does not bind the FDIC as it does the Securities and Exchange Commission ("SEC") because of a slight but non-dispositive wording difference in statutes; 3) relies on the "public rights" doctrine to continue to subject a non-banker to a banking regulator's jurisdiction; and 4) accuses undersinged counsel of "gamesmanship" for filing this case immediately after the FDIC's own motion for a stay to consider *Jarkesy* was denied by the ALJ. For good measure, for the first time in its pleadings the reveals claims against Ponte it never made in the adminisrative process. The FDIC's legal analysis is wrong on all these issues, it errs in recounting the facts, and its opposition to the requested TRO lacks merit.

I. There Is No Collateral Estoppel

The Government wrongly argues that Ponte is barred from bringing this suit because two pre-*Jarkesy* decisions, identified by Plaintiff in his moving papers, Pl.'s Mem. in Support of Mot. for Temporary Restraining Order at 7, 8 ("TRO Mem."), found no subject matter jurisdiction. The first case did not address any of the issues presented here and the outcome in both cases has been overcome by recent monumental Supreme Court decisions.

In Ponte's first case, he did not raise a constitutional claim. *Ponte v. FDIC*, 673 F. Supp.3d 145, 151 (D.R.I. 2023) ("*Ponte I*"), ("At best, this case is distinguishable because the plaintiffs here have not raised such constitutional claims and instead have only has [*sic*] raised the statutory argument that Ponte is not an IAP of the Bank."). On that basis the court explicitly rejected the *Burgess* decision which allowed federal court review during the ongoing administrative proceeding, *Burgess v. FDIC*, 639 F. Supp.3d 732 (N.D. Tex. 2022). Hence, there can be no collateral estoppel or issue preclusion here for an issue the court explicitly said was not before it and then said was dismissed "without prejudice" as to the 12(b)(1) claims. *Ponte I*, 673 F. Supp.3d at 152 ("The dismissal of the remainder of the complaint, being on jurisdictional grounds pursuant to Rule 12(b)(1), is denied without prejudice."). Moreover, Ponte's first case was pre-*Axon/Cochran*, *Axon Enter. Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175 (2023) ("*Axon/Cochran*"), and pre-*Jarkesy* and mentions neither case.

Unsurprisingly the next court to consider a challenge did not find collateral estoppel or issue preclusion barred a second filing. *Ponte v. FDIC*, No. 1:23-cv-00165, 2023 WL 6441976 (D.R.I. Oct. 3, 2023) ("*Ponte II*"). Instead, it looked at the new claim with the new precedent. *Id.* at *1-2. That court reviewed the *Axon/Cochran* decision and determined that it applied only to "implied" divestment of jurisdiction and so did not change the previous outcome: dismissal without prejudice. *See id.* In the second case, the court did not consider *Jarkesy* because that landmark, binding Supreme Court case did not yet exist.

In *this* case, Plaintiff moves for a TRO because 12 U.S.C. § 1818(i)(1) does not divest this Court of jurisdiction over Plaintiff's assertion of his jury right. However, if the Court found Section 1818(i)(l) did purport to prevent immediate protection of Plaintiff's jury right, then the statute would violate the Seventh Amendment and thus be unconstitutional. The claim asserted in this case was stated nowhere in the prior cases. In fact, only factual and legal changes of vast importance in the intervening time period made Plaintiff's current claim pellucidly clear. First, *SEC v. Jarkesy*, 144 S.Ct. 2244, was issued on June 27, 2024. Less than two weeks later, on July 8, 2024, Ponte moved before ALJ Jennifer Whang to insist on a jury trial. Verified Complaint, Exh. 2 ("VC"). The Government moved for a week extension to respond to Ponte's motion and for 60 days to consider *Jarkesy*. The week extension was granted, but 60 days was denied by the ALJ on July 19, 2024. VC, Exh. 3. On July 24, 2024, the FDIC forwent civil monetary penalties but proceeded on all other claims against Ponte. VC, Exh. 4. On August 8, 2024 (unsealed on August 16, 2024), the ALJ denied in part and granted in part the FDIC's motion for summary disposition; however, in so doing the ALJ "sidestepped", once again, any determination as to whether Ponte is an institution-affiliated party ("IAP") of a regulated financial institution. Order No. 41. Ponte filed this action less than a week later and moved for a TRO within days of it being filed.[2] The Board of the FDIC, by Order of August 15, 2024, denied Ponte's appeal and determined that many important factual findings in its case against Ponte will now be made without a jury. Decision and Order of the Board On Interlocutory Review dated August 15, 2024 ("FDIC Decision") attached as Exhibit 1 hereto. It determined that issues of fact remained, including scienter, that will be found without a jury.

Ponte brought this suit and moved for a TRO only after a landmark Supreme Court decision was presented to an administrative body and rejected. That body ruled that facts would be found by an ALJ when the Supreme Court requires them to be found by a jury. Had the ALJ or the Board determined no proceeding could go forward no TRO would have needed to be filed. No case cited by the Government exhibits this fact pattern and the cases are distinguishable for this and other reasons.

The standard for issue preclusion is that: 1) the same issue raised in the second case must have been raised, contested and submitted for determination in the prior case; 2) the issue must have been necessarily determined by a court with jurisdiction in that prior case; and 3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. DOJ*, 488 F.3d 446, 454 (D.C. Cir. 2007) (citation omitted) (quoted in *Campaign Legal Center v. FEC*, No. 22-cv-3319, 2023 WL 6276634 at *7 (D.D.C. Sept. 26, 2023) ("*CLC*")). And

[2] This also refutes any claims of "gamesmanship" by counsel. Ponte attempted to get relief from unconstitutional processes before the ALJ. He was refused and sued promptly.

while it is true that Rule 12(b)(1) rulings can sometimes be preclusive, that is not the case here. *See Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 306 (D.C. Cir. 2015) (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 219 (D.C. Cir. 2004) (emphasis added) ("*issue preclusion is inappropriate if there has been an intervening 'change in controlling legal principles.'*") *and* (courts "have recognized that issue preclusion would be unfair 'if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial.'" *Id.* (quoting *Otherson v. DOJ*, 711 F.2d 267, 273 (D.C. Cir. 1983)); *see also CLC*, 2023 WL 6276634 at *7 (the "curable defect" exception to a preclusive effect "permits an action to proceed if the jurisdictional ground for dismissal of the original suit has been remedied by occurrences *arising after the dismissal of the first action.*") (quoting *Newdow v. Bush*, 355 F. Supp.2d 265, 274-75 (D.D.C. 2005)) (emphasis added) (internal quotation marks omitted).

Critically to this case, "[i]n considering the fairness prong, courts are reluctant to apply issue preclusion 'when there has been [1] an intervening change in controlling legal principles, [2] when a party to be bound lacked incentive to litigate in the first trial, especially in comparison to the stakes of the second trial, and [3] when the prior proceedings were seriously defective." *Id.* at *8 (quoting *UMC Dev., LLC v. District of Columbia*, 401 F. Supp.3d 140, 157 (D.D.C. 2019)). The D.C. Circuit has singled out changes in constitutional law as a key reason not to apply estoppel. It stated:

> Apotex also argues that *res judicata* does not apply here, because Judge Roberts' decision in *Paroxetine* effected a significant change in circumstances after *TorPharm* had issued. *Res judicata* does not bar parties from bringing claims based on material facts that were not in existence when they brought the original suit. *Drake,* 291 F.3d at 66. And, in a small set of cases, a change in controlling legal principles may allow a party to relitigate a claim that would otherwise be barred by *res judicata. See Hardison v. Alexander,* 655 F.2d 1281, 1288–89 (D.C. Cir. 1981) (stating that in general *res judicata* applies even if there has been a subsequent change in the law of the circuit, ***but noting that there are exceptions for reasons of compelling public policy, such as cases involving important questions of***

constitutional law).

Apotex, 393 F.3d at 218 (emphasis added). The *Jarkesy* decision is such a major change.

In *CLC*, while the issue of whether there was informational harm to one party was precluded, the issues of associational standing and the statute of limitations were still open. There, the intervening event was not a Supreme Court case, and, in any event, the controlling decision came out when plaintiff could still have appealed it. In that case, decided less than a year ago, the Court noted that the issue of whether there was an intervening change of the law was "murky." 2023 WL 6276634 at *9. Here, it is not murky. The Supreme Court has described the necessary shift as "a judicial declaration intervening between the two proceedings [that] so change[s] the legal *atmosphere* as to render the rule of collateral estoppel inapplicable." *Id.* (quoting *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 600 (1948)) (emphasis in *CLC*). *Jarkesy* changed the atmosphere on the propriety of ALJ fact finding when large sums were being extracted from a defendant. The Supreme Court has also said the intervening shift should be a change in "applicable legal *context*" or a "significant change … in controlling … legal *principles.*" *CLC*, 2023 WL 6276634 at *9 (cleaned up) (*comparing Herrera v. Wyoming*, 587 U.S. 329, 343 (2019) *with Montana v. United States*, 440 U.S. 147, 157 (1979)). *Herrera* cited *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 363 (1984), which refused to find a party bound by "an early decision based upon a now repudiated legal doctrine[.]" 587 U.S. at 343. Here Ponte cannot be bound by prior doctrine repudiated by *Jarkesy*.

Jarkesy is at least as big a departure from prior law (*Atlas Roofing v. OSHA*, 430 U.S. 442 (1977)) as *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), was from *Ward v. Race Horse*, 163 U.S. 504 (1896). There, the Court ruled *Ward* did not warrant issue preclusion in *Herrera*. 587 U.S. at 342. While Chief Justice Roberts noted in *Jarkesy* that the majority was not overruling *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977),[3] it had been the habit, blessed by courts for decades, for administrative agencies to try common law claims before themselves without juries. A sea change was effected, whether the *Jarkesy* Court explicitly states so or not. The dissent sure thought so. "Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right." 144 S.Ct. at 2155 (Sotomayor, J., dissenting). The dissent went on to say that the key holding of *Jarkesy* was that "the nature of the remedy is … virtually dispositive" of whether a jury had to be convened. *Id.* "The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not 'advance the equitable administration of the law.'" *Herrera*, 587 U.S. at 343 (quoting *Bobby v. Bies*, 556 U.S. 825, 836-37 (2009)). It would not advance the "equitable administration of law" to do so here. Indeed, it would be unjust to preclude Ponte from bringing this case when the legal landscape has changed so markedly after his time to appeal his previous cases had run.

The legal landscape has changed in another way. *Jarkesy* is a direct repudiation of

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[3] This is in keeping with the Chief's penchant, often noticed by academia, of substantially weakening or overruling cases without explicitly saying so. *See* John. O. McGinnis & Mike Rappaport, *Emancipating the Constitution from Non-Originalist Precedent,* Law & Liberty (July 11, 2024), https://lawliberty.org/emancipating-the-constitution-from-non-originalist-precedent/ (discussing how Justice Roberts cut back on non-originalist precedent in *Jarkesy*); *see* Russell A. Miller, *The Purpose and Practice of Precedent: What the Decade Long Debate Over Stare Decisis Teaches Us About the New Roberts Court*, 51 Hastings Const. L.Q. 231, 264 (2024) ("Roberts [has] continued to pursue this 'stealth reversal' or 'overruling by erosion' approach to *stare decisis* in the years leading up to the *Dobbs* decision"); *see* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum. L. Rev. 1861, 1863-64 (2014) ("Prominent commentators have lambasted the Roberts Court for its frequent willingness to narrow apparently applicable precedents"); *see* Michael Showalter, *Jarkesy and Gravitational Pull: The Supreme Court's Approach to Precedent and Its Implications,* 2024 Harv. J.L. & Pub. Pol'y Per Curiam 30, *7-9 (2024) (discussing that *Atlas Roofing* will gradually be weakened or overruled as it cannot be reconciled with original meaning).

Congress's ability *under the Constitution* to deny constitutional rights by jurisdictional prestidigitation. The Court boldly stated that unless a public right is at issue, "Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal." 144 S.Ct. at 2133. This case, unlike any previous case, claims that after *Jarkesy*, Section 1818(i)(1) does not preclude the Court from enforcing the constitutional requirement of a jury trial. And if Section 1818(i)(1) does purport to do that, such action is itself unconstitutional as Congress was divested of that power by the Seventh Amendment. It would be patently unjust to preclude Ponte from making these claims after a sea change in the governing law. (A tide that the FDIC vainly struggles against in its public right argument addressed below).

A. Changes In Facts And Law Since The Previous Cases

The facts have also changed in substantial ways as the Government itself said in its opposition. In contrast to when Ponte elected not to pursue appeals of prior decisions to the First Circuit, the FDIC says it now seeks vastly greater penalties and punishments than it did when it filed its original Notice of Charges on or about February 10, 2023. *Compare* TRO Exh. A (notice of intent) *with* Opp. p. 1 & n. 1. The FDIC also argues that Ponte somehow "defrauded" the United States Small Business Administration ("SBA"), over which it has no jurisdiction and makes no similar claim in its charging document.[4] *See* TRO Exh. 1 at ¶¶ 84-88. These enhancements to the FDIC's claims provide Ponte greater incentives to pursue his rights than existed in his prior cases.

[4] Admittedly, the Notice of Charges alleges that Ponte violated the SBA Standard Operating Procedures ("SOP"), which is guidance and neither regulation nor statute. (It is axiomatic that it is up to the SBA's PLP Lender to interpret the SOP. Neither Ponte nor his company had the ability to do so.) In so doing, the FDIC asserts that it is the regulated financial institution, *to wit*, Independence Bank, that was purportedly harmed by Ponte's alleged conduct, and not the SBA. *See, e.g.,* TRO Exh. 1 at ¶¶ 112-23. The FDIC's late asserted position is a marked departure from its prior position.

This Court and the D.C. Circuit have recognized exceptions to estoppel in cases with less changes in facts and law then here where whether Congress intended to remove the jury right from individuals and whether it is constitutional for them to do so is a pure question of law. *See e.g. Alabama v. U.S. Army Corps of Eng'rs*, 704 F. Supp.3d 20, 69 (D.D.C. 2023) (water law). In this case there is not only intervening law[5] but the ALJ has now ruled that that intervening law from the Supreme Court does not apply to her. The FDIC has ruled that issues of fact, including scienter in what amounts to a common law fraud case, will be found by the ALJ sitting without jury. Exh. 1 hereto, FDIC Decision. The FDIC has purported to drop civil monetary penalties but reinstated them, in greater amounts, by another name. The facts and law have dramatically changed and so there ought to be no preclusion.

The D.C. Circuit has been loath to extend estoppel principles to "different issues" no matter how similar. *See Jackson v. Off. of the Mayor of D.C.*, 911 F.3d 1167, 1171 (D.C. Cir. 2018) (similar claims in state and federal court are not the same). *National Association of Home Builders v. EPA*, 786 F.3d 34, 43 (D.C. Cir. 2015), relied upon by the Government, is not to the contrary. There, the court indicated that had the plaintiff "alleged that events after the original dismissal" cured the jurisdictional defect found by the previous court, it would not apply estoppel. *Id.* But here that is precisely what Ponte alleges. There have been two intervening Supreme Court cases and rulings by the FDIC that one, *Jarkesy*, will not be followed. *Jarkesy* stands for the proposition that Congress *cannot strip jury rights from an individual for the equivalent of common law claims*. *Loper Bright* held that this Court is not to defer to the FDIC. The combination of *Axon/Cochran* and *Jarkesy* set up a brand-new question of jurisdiction: the question is not only what did Congress

[5] It should be noted that *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024) also rejects deference to an administrative agency's view of the law and to the extent such reflexive deference to the FDIC's view of its jurisdiction infected the prior proceedings, they are not to be relied upon for preclusion.

do in Section 1818(i)(1) but also *whether it was constitutional to strip jury rights from Ponte even if that is what Congress intended.*

This Court must address the merits because this claim and issue have never been before a court with the current binding precedent of the United States Supreme Court.

II. Section 1818(i)(1) Does Not Prevent Subject Matter Jurisdiction In This Court.

It is instructive what the Government could not deny and did not address from Ponte's moving brief. First, the statute does not *require* restitution to injured persons for any of the claims made against Mr. Ponte. This places the matter on all fours with *Jarkesy* and the voluntary asserted actions of the FDIC do nothing to change it. The Government did not address the fact that the FDIC, in "waiving" its civil money penalties ("CMPs"), maintains the legal basis seek them later. *See* VC Exh. 4. It also does not deny that there is no identified *res* the FDIC is trying to obtain from Ponte. It is moving on overcharges on contracts and on material misstatements, by commission or omission, which all sound in fraud. While the Government attempts to claim that promising to give any recovery to somebody beside itself changes the nature of the claim, the facts of the matter are not denied. Finally, Ponte argued that Congress's power to strip courts of jurisdiction is not plenary. TRO Mem. at 22. The Government does not directly cross this argument.

Where the Government does engage with the arguments in Ponte's TRO motion, its legal analysis is flawed. For example, the Government states that *Burgess v. FDIC*, 639 F. Supp.3d 732, 742-50 (N.D. Tex. 2022), *appeal docketed*, No. 22-11172 (5th Cir. Dec. 5, 2022), was wrongly decided. However, the cases the Government cite as rejecting *Burgess* are all pre-*Jarkesy* and some are from courts with binding precedent on the matter. *See Bonan v. FDIC*, No. 4:23-cv-8, 2023 WL 156852 at *4 (E.D. Mo. Jan. 11, 2023) (rejecting *Burgess*' reliance on the Fifth Circuit's now affirmed ruling in *Jarkesy* as non-binding). *Bonan* (like *Ponte I*), is clearly wrong as it rejects 5th Circuit reasoning on jury trials that has now been upheld by the Supreme Court and thus is binding here.

The Government also chiefly relies on *McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52 (D.C. Cir. 2001), *affirming in part and vacating in part*, 83 F. Supp.2d 135 (D.D.C. 1999), and yet that case, if anything, stands for the proposition that individual rights like the right to a jury are cognizable in the district courts despite Congressional attempts to bypass jurisdiction. In that case, the district court explicitly ruled that the denial by the statute and by the defendant of his First Amendment rights through prior restraint was unconstitutional and ruled for the plaintiff. 83 F. Supp.2d at 178. The Government did not appeal that ruling. The D.C. Circuit, accordingly, left this ruling completely undisturbed despite claims of congressional stripping of jurisdiction. 264 F.3d at 68. The Seventh Amendment right to jury trial, like the First Amendment right to speech, is an individual exogenous right that the district court decided it had jurisdiction over and that ruling from this district is precedent. And it is precedent that favors Ponte's claims on his jury rights. The Government also used *McBryde* for another proposition critical to Ponte here: importantly, if "'[j]udicial review of [his] structural constitutional claims [comes] too late to be meaningful[,]'" *i.e.*, after the administrative proceeding has been completed, then the case is moot. *Jolley v. United States*, No. 21-5181, 2024 WL 1521633 at *3 (D.C. Cir. Apr. 9, 2024) (quoting *McBryde*, 264 F.3d at 55) (alteration in original). It is therefore critical that the administrative proceeding here be stayed, pending a determination of the constitutional questions. It would be unconscionable if Ponte's rights to a jury trial and basic due process already laid out by the Supreme Court were mooted by a failure of stay. What happened to the plaintiff in *Jolley* ought not to be a goal but a warning.

Board of Governors of Federal Reserve System v. MCorp Financial Incorporated, 502 U.S. 32 (1991), relied upon by Defendants, is nearly irrelevant to the case here. There was no constitutional claim in that case at all. It was a pure question of whether the automatic stay provisions of the bankruptcy code reached the administrative hearings by the FDIC of a regulated and FDIC-insured bank. *Id.* at 37 (case concerned an "interpretation of the relationship between the provisions governing judicial review of Board proceeding and those governing bankruptcy proceedings."). Whether Congress intended to remove any constitutional rights, never mind jury rights, from an individual under Section 1818(i)(1) was completely unaddressed. It is also long before the revolution in jurisdiction and constitutional rights wrought by cases such as *Axon/Cochran* and *Jarkesy*. Even in *MCorp*, however, the Court left open the possibility that claims that could not be vindicated post-appeal might be stayed in the proper case. That case turned on the fact that the MCorp had a perfectly fine remedy in the appellate courts for its challenge to the "source of strength regulation" it challenged. *Id.* at 43-44. But what Ponte is being denied is completely irremediable. Just as *MCorp* did not determine whether Congress intended to strip individuals of jury rights, but only whether it intended to strip statutory rights from the district courts, the other D.C. cases the FDIC relies upon have the same problem. In *Riddler v. Office of Thrift Supervision*, 146 F.3d 1035, 1041 (D.C. Cir. 1982), the Court explicitly held that there was no constitutional violation because there was no taking.[6] It also noted the type of cases that fall under *Leedom v. Kyne*, 358 U.S. 184 (1958), jurisdiction in the district courts. *Id.* at 1040 ("Under *Kyne,* they argue, district courts may review agency action, even when Congress intended otherwise, if a plaintiff makes a 'strong and clear' showing that the agency has acted

[6] Ironically there, the plaintiff *wanted* to be an IAP. Here, Ponte, unlike every entity in the cases cited by the FDIC, was not a bank, the employee or the affiliate of a bank. He took no affirmative action to become a regulated party. And yet, he has been deemed a regulated party by the FDIC simply because he did business with a bank.

contrary to its statutory authority or deprived the plaintiff of constitutional rights") (citing *McCulloch v. Libbey–Owens–Ford Glass Co.,* 403 F.2d 916, 917 (D.C. Cir. 1968)). Only because there was not a showing of a clear constitutional violation was no jurisdiction found. Here Ponte's jury rights and due process rights are being willfully ignored as all the orders of the ALJ and the FDIC demonstrate. *First National Bank of Scotia v. United States*, 530 F. Supp. 162, 169 (D.D.C. 1982), is of the same nature. There were no constitutional rights at issue, and its statements about the availability of appellate review of agency action being sufficient to divest a district court of jurisdiction are clearly contrary to *Axon/Cochran*.

A. *Axon/Cochran* Applies Here and Not Only To "Implicit" Jurisdictional Bars

The FDIC makes two claims concerning *Axon/Cochran* and its application to this case, neither of which is correct. First, it steals a base by asserting that Section 1818(i)(1) is an "explicit" bar to district court jurisdiction under 28 U.S.C. § 1331. Second, it claims that *Axon/Cochran* only applies to questions of "implicit" jurisdiction stripping. Both assertions are wrong.

First, the analysis in *Burgess* on whether Section 1818(i)(1) *is* an explicit bar to the claims here is a matter of first impression in this Circuit.[7] *Burgess* was relying for its analysis on the Fifth Circuit's decision in *Cochran* which has now *been* affirmed by the Supreme Court. *Burgess*' holding is that when a jurisdictional bar does not reference other jurisdictional statutes, the question is whether it did bar constitutional rights explicitly from a district court and weighs against such "explicit" bar. 639 F. Supp.3d at 742 (citing *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000), which addressed a jurisdictional bar explicitly excluding Section 1331). Here we have a key constitutional right, and as *Burgess* noted, citing *Webster v. Doe*, 486

[7] Justice Gorsuch's concurring opinion in *Axon/Cochran* is dealt with below, but the Court's opinion was written by Justice Kagan, and she did not cite Section 1818(i)(1) in the majority opinion.

U.S. 592, 603 (1988), when Congress intends to remove jurisdiction from the district courts in those circumstances it must be clear. *Id.* The FDIC tries to distinguish *Webster* to only apply to complete denials of judicial review. Opp. at 21. But that is unavailing. Not only does *Webster* not state that in its ruling, but in this case the trial of Ponte without a jury and the ALJ finding facts without such a jury are completely unreviewable after they happen. *Burgess* is absolutely right that Congress did not make its intent clear as *Shalala* demonstrates it could have, so the Court must engage in further statutory interpretation to discern Congress' meaning.

But even on its own terms, *Axon/Cochran* is not limited to "implicit" jurisdiction stripping. While the question presented in that case was as to "implicit" jurisdiction stripping, the case heavily relied on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208, 212 (1994), which found that even when a statutory scheme clearly stripped jurisdiction in some instances, the Court's duty was to determine whether the claims asserted were the "type Congress intended to be reviewed within this statutory structure" *Axon/Cochran*, 598 U.S. at 186 (citing *Thunder Basin*, 510 U.S. at 208, 212). In such cases the Court examines whether there is meaningful review. Here there is not. If Ponte is denied a jury trial on the claims against him all sounding in contract and fraud, he will have suffered a constitutional injury as well as likely reputational injury that cannot be fixed on appeal. If the ALJ finds for him and the FDIC affirms, he will not be able to appeal to a Circuit Court. He will have been subject to an unconstitutional proceeding, denied his constitutional rights and yet have no remedy or meaningful review. Like in *Axon/Cochran*, if the ALJ proceeds, Ponte's claim "is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker [fact-finder]. And as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone. Judicial review of [Ponte's] structural constitutional claims would come too late to be meaningful." 598 U.S. at 191.

The FDIC leans heavily on Justice Gorsuch's concurrence in *Axon/Cochran* to claim the jurisdiction stripping here was "explicit" even to a jury right. That's far too much weight to put on a concurring opinion that uses a "*See e.g.* cite" and does not grapple with the question of constitutional rights. *Axon/Cochran*, 598 U.S. at 207 (Gorsuch, J., concurring). The concurring opinion, in which Justice Gorsuch vents his well-known penchant for eschewing multi-factor tests, is not a reasoned determination on the meaning of a statute that was used as an example. More useful to this Court in determining a TRO is that concurrence's dire, well-reasoned and well-supported explanation of what happens when district courts do not assert proper jurisdiction early enough to prevent unconstitutional proceedings. *Id.* at 215-16 (dire injury and lack of remedy for petitioners from failure to exercise jurisdiction in the first instance). The concurrence that is more meaningful to this Court's substantive analysis is that of Justice Thomas, which presaged *Jarkesy*. *Id.* at 196-204 (Thomas, J., concurring) (Adjudication of "private rights" requires Article III courts as a constitutional matter).

Bohon v. FERC, 92 F.4th 1121 (2024), again does not change the analysis. In that case the plaintiffs had a full and fair opportunity to challenge the granting of a permit, did not do so, and then attempted to do so in district court after the Circuit Court already had jurisdiction. Further, there was no constitutional challenge mentioned in that case or suggestion that the statute did not provide meaningful review of any constitutional claim. Thus, *Bohon* completely fails to address the questions here: whether there is meaningful review and whether, even if Congress was clear enough in its intent to deprive Ponte of his right to a jury trial, it had the constitutional power to do so.

The TRO sought here is aimed at the denial of Ponte's jury rights under *Jarkesy*. *Axon/Cochran* provides jurisdictional precedent, but Plaintiff has not moved for a TRO on Counts

I, II and IV of the Complaint.[8] It is true that Ponte is not an IAP. It is also true that this suit challenges the structure of the agency. These lend context to the instant motion but the question here is not about the structure of the FDIC except as it denies Ponte his jury rights. As such the cases cited at pages 20-21 of the Opposition and relating to those counts are inapposite.[9]

B. If Congress Intended to Subject Ponte to A Fact Finding Without Jury On The Fraud-Based Claims, Section 1818(i)(1) is Unconstitutional.

The FDIC does not address the argument made in the moving brief that if Section 1818(i)(1) does deny Ponte his jury rights, it is unconstitutional and beyond Congress's power under Article II. Instead, the Government asserts that Congress has the power as long as, in the sweet by and by, a Circuit Court can reverse the FDIC and….do what? Ponte will have been—in direct contradiction of the Seventh Amendment and of *Jarkesy*—deprived of a jury trial for all facts at issue. If he loses, he will have that fact finding against him and the ordeal of "trial" that can not be undone. If he somehow prevails in FDIC's own tribunal, he still has been deprived of his jury trial and due process rights and has no right to appeal. The Government says that 12 U.S.C. § 1818(h)(2) cures all constitutional problems by making a Circuit Court available, after all the constitutional violations without remedy are inflicted. Opp. at 22, Section II, A, 2 (c) (citing 12 U.S.C. § 1818). All of the cases the Government cites, however, raise issues that can be remedied later. It cites cases that are inapposite to what is happening here. For example, in *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997), the court noted that the alien in that case had habeas review to address any constitutional problem *before he was removed*. In this case the

[8] As noted, Ponte will Oppose the Motion to Dismiss those counts at the time allowed by the local rules.

[9] This is particularly so as to Anti-Injunction Act, 26 U.S.C. § 4721, cases. The Anti-Injunction Act and statutes like it are aimed at delaying taxation and only divest jurisdiction from the Court if the taxpayer fails to pay the tax before bringing suit. *See CIC Srvs., LLC v. IRS*, 593 U.S. 209, 211 (2021).

irreparable harm will be done before any court can correct or repair the agency's unconstitutional action. And the FDIC's citation of *Blitz v. Donovan*, 740 F.2d 1241, 1248 (D.C. Cir. 1984), comports with Ponte's argument that Section 1818(i)(1) should be interpreted so as not to raise a constitutional question. Moreover, *Blitz* is a simple exhaustion of administrative remedies case having nothing to do with constitutional claims.

In perhaps a veiled response to whether Congress has plenary power to strip Article III courts of jurisdiction, the FDIC cites *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943), for the proposition that Congress can make district courts and so can deny them any jurisdiction it likes. This is wrong on several fronts. First, *Lockerty* is about price controls in war time. Second, the litigants there did not take advantage of any remedies allowed them under the statute. *Id.* at 186. Third, Congress created a Court in equity to deal with claims. The entire case is about equity jurisdiction. *Id.*at 187-88. Here, these are all actions at law and require an Article III court and a jury under the Constitution. Neither the *Lockerty* court nor any subsequent court has said that Article II gives the Congress power to prevent protection of individuals from Congressional violations of core individual rights by denying them access to courts. In short, Section 1818(i)(1) does not divest this Court of jurisdiction over the claims here but if it did it would be beyond Congress's power to do so.

III. Ponte is Entitled to a Jury Trial for the Vast Civil Damages the FDIC Seeks.

The FDIC claims that it can transform clear legal actions into either "equity claims" or "public rights" by pronouncement. *Jarkesy*, however, stands for the proposition that Congress itself cannot make claims "equitable" or a "public right" merely by calling them such. *Jarkesy*, 144 S.Ct. at 2136 ("if the action resembles a traditional legal claim, its statutory origins are not dispositive.”).[10]

The FDIC’s arguments are practically nonsensical after *Jarkesy* and its own Notice of what it is charging. TRO Exh. A (“Notice”). *See* Opp. at 24-29. In his motion, Ponte laid out the actual allegations in the Notice and their names: Fraud and overcharging on contracts. *See* TRO Mem. at 12. The Court can look at the charges itself: they are not a mystery. First, the Notice begins by noting Ponte’s company entered contracts with the Bank for referrals. Notice ¶¶ 12, 13, and 14. If those contracts were not followed or were otherwise unlawful, that is a contract action. Next, Ponte is accused of entering more contracts, called “bridge loans,” through another company. *Id*. ¶¶ 37-39. This allegation also seems to include allegations of usury, *id.* ¶ 40, and material omissions, *id.* ¶ 42.[11] The FDIC calls the transfer of risk “fraudulent.” *Id*. ¶ 61. It also claims they are violations of regulations, but the FDIC cannot magically claim a fraud is not a fraud by making a regulation about it. That is the teaching of *Jarkesy*: Congress cannot transform common law claims into statutory ones. 144 S.Ct. at 2136. (citing *Granfinanciera*, *S.A. v. Nordberg*, 492 U.S. 33, 56 (1989) and *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). The Notice at paragraphs 70-74 sounds in guaranty actions. Further, it claims a “[F]raud on the SBA.” Notice ¶¶ 84-110. The Notice proceeds with more alleged fraudulent activity regarding altering documents and the “Genesis of the *Fraudulent* Bridge Loan Scheme.” *Id*. ¶¶ 112-338 (emphasis added). Specific loans and actions regarding them are identified. Ponte did not choose any of this language or the

[10] Congress does not have equitable powers. It cannot provide the agencies with powers neither it nor the executive have. The power to adjudicate equitable remedies are powers of a court. Whether in law or equity, an Article III court must adjudicate them. So, though a court may try equitable matters without a jury, an agency should not.

[11] The FDIC says deceiving the SBA is not a common law claim; but if a contract was made or an omission made, it is either a contract or a fraud with the SBA as an interested party. And here, the FDIC is claiming the people injured were the people in contract with Ponte’s companies (not Ponte). They are beneficiaries of contract, and any “restitution” is through contract otherwise they have no relationship with Ponte.

allegations. The FDIC did. If his companies charged too much in interest, that is a contract or usury claim.

The Court should also look at the FDIC's behavior and its actions before and after *Jarkesy* to assess the proper state of the allegations. The Notice lays out a scheme and asks for penalties that it reduces to $74,000 for Ponte. *Id.* at 46. As he opposes them, they constantly up the number. Then, *Jarkesy* is issued, and the FDIC claims this is all not punishment, but "equity." As noted, the FDIC has no equitable powers. It is not an Article III court and under *Jarkesy* can't have such powers. Thus, cases like *Crude Co. v. FERC*, 923 F. Supp. 222 (D.D.C. 1996), are inapplicable. That case had a trial in an Article III court. *Id.*at 227. But as to the jury right, the FDIC is doing exactly what the Supreme Court prevented Congress from doing: characterizing a normal common law allegation as a violation of statute or "equity" to deny the accused his rights. *See* VC Exh. 1 at 1-2 ("restitution is an equitable claim.")

The FDIC says it does not allege that "Ponte's improper fees overcharged or otherwise breached any contract." Opp. at 28 n.20. But every contract is presumed to have the background of applicable law. *See generally Cheek v. United States*, 498 U.S. 192, 199 (1991) ("common law presumed that every person knew the law.") Here, the claim is that Ponte's charges were unlawful under the law (as enforced by the FDIC), and that is why those in contracts with Ponte are supposedly to be reimbursed. Of course, the statement that there would be reimbursement to alleged victims was only extracted from the FDIC in the wake of *Jarkesy*, which is another reason to discount the assertion that these are all regulatory violations or "equitable" remedies. The Supreme Court has also held agencies—even in Article III Court proceedings—to adhere to all elements of the equitable power asserted. *See generally*, *Liu v. SEC*, 591 U.S. 71, 91-92 (2020) (holding even when Congress grants statutory equitable remedies they must adhere to traditional equitable principles). *Grupo Mexicano de Desarollo S.A., v. Alliance Bond Fund*, 527 U.S. 308, 319 (1999) (traditional procedural rule required "that remedies at law had to be exhausted before equitable remedies could be pursued.").

The FDIC's arguments are foreclosed by *Kokesh v. SEC*, 581 U.S. 455, 466-67 (2017). The statute does not require the "restitution" go to the injured individuals. There is no provision for deducting expenses as was the case there. Further, the FDIC's whole argument that simply ceasing the proceeding will injure faith in the banking system demonstrates the remedies sought are for the purpose of punishment and deterrence. Just as in *Kokesh*, an agency can't call something "equity" if it has an element of punishment and here it does. The FDIC's withdrawal of CMPs provides powerful evidence that, in the FDIC's view, restitution serves the same purpose as penalties.

The FDIC waived its remedies at-law to avoid a jury, and equity should not step in. The FDIC also obscures the matter by bringing the SBA into the allegations.[12] The SBA's losses do not seem ascribable to Ponte in any event. Is the "restitution" for overcharging on contracts? If so, what has the SBA got to do with restitution? The FDIC attempts to escape *Great-West Life & Annuity Insurance Company v. Knudsen*, 534 U.S. 204, 210 (2002), but it cannot: overpayments on a contract are contract damage. If the party to the contract receives the overpayment in law, it does not lie in equity. *See District Title v. Warren*, No. 14-1808, 2015 WL 7180200 at *6-7 (D.D.C. Nov. 13, 2015) (recovering on breach of contract means a party cannot obtain unjust enrichment from the contracting party). Here, the FDIC purports to stand in the shoes of contractors who it has waived remedies at law for and cannot then deem the same thing "equitable

[12] The whole exercise is difficult to square with equitable principles as the Bank was responsible for providing all this information to regulators, not Ponte. But in any event, the theory gets murkier as the FDIC weaves to walk away from its original pleading of garden variety fraud.

recovery."

A. No Public Right Is Implicated

According to the Notice, Ponte's businesses contracted with those it referred to the bank before they ever had an SBA loan. Notice ¶¶ 37-43. According to the allegations, Ponte's companies made contracts with individuals or companies and provided Bridge Loans *whether or not* the SBA later funded them. This was all private market contracting by Ponte's companies. Despite this, the FDIC cites public rights cases having nothing to do with contracts with loan seekers or banks. For example, tariffs are a government function it alone conducts. *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1856) ("*Murray's Lessee*"). The same is true of immigration enforcement, patent rights, public lands issues, and tribal relations. *See* Opp. at 31 (collected cases).[13] Banking is not such an activity nor do the cases cited by the Government declare it to be. There are private banks and they are regulated. That does not mean that the contracts of everyone who then contracts with a bank becomes a public right. Otherwise the lessons of both *Murray's Lessee* and *Stern v. Marshall*, 564 U.S. 462, 488-489 (2011) that private rights cannot be removed from Article III courts because they touch on something the Government is doing would be lost.

In *Stern v. Marshall* it was bankruptcy courts. In *Murray's Lessee*, the Government was concerned with arguably its own property. That is not the case here. When the Government enters into and affects the private market, it does not create a "public right" that eliminates private rights. It is this distinction that the Supreme Court has had to maintain against arguments like that presented here for more than a century and half. As Justice Thomas explained, public rights and privileges belong to the "people at large." *Axon/Cochran*, 598 U.S. at 199 (Thomas, J., concurring)

[13] In fact the FDIC's entire argument on "public rights" reads like the dissent in *Jarkesy*. *Id.* at 1-22. Obviously, as it is a dissent it is not law and should be rejected here as it was there.

(quoting *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 344 n.2 (2015) (Thomas, J., concurring)) (internal quotation marks omitted). Neither of the contracts Ponte's corporations entered into, nor the contracts they had with the Bank created public rights; rather, they were individual rights of the parties involved. These are not going to the treasury, like tariffs, which again belies any assertion of a "public right." This case is nothing like the cases identified in *Axon/Cochran* by both the majority, the dissent, and the Thomas concurrence. To the extent *Atlas Roofing* maintains viability, it has no application here because the FDIC is accusing Ponte of overcharging on contracts (in violation of its regulations) and making material misrepresentations to others (in violation of regulations). But those regulations "[carry the] [common law] soil:" indeed the very language of the common law with them and no public right is implicated. *Jarkesy*, 144 S.Ct. at 2130 (quoting *United States v. Hansen*, 599 U.S. 762, 779 (2023)) (internal quotation marks omitted).

The arguments the FDIC is making on public rights were completely rejected in *Jarkesy.* But the FDIC also claims that banks have been federally regulated for a long time, and this somehow makes banking cases a public right. The securities laws are of a piece. Congress created the Securities and Exchange Commission in 1934 through the Securities Exchange Act (a year after the FDIC was established). 15 U.S.C. § 78d(a) (1934). Securities trading has been regulated at the state level since 1792, when New York passed its first significant securities legislation. Stuart Banner, *What Causes New Securities Regulation? 300 Years of Evidence*, 75 Wash. U. L.Q. 849, 849–50 n.6 (1997) (citing N.Y. Laws, 15th Sess., ch. 62 (1792)). None of that makes contracts with banks "public rights."

Finally, if it is true that the FDIC cannot move in federal court that does not make its claims "public rights." The whole teachings of *Tull v. United States*, 481 U.S. 412 (1987)*, Axon*, and

Granfinanciera are that the Government cannot change private rights to public ones by fiat. This is equally true of failing to provide the FDIC with the right to go into district court. That does not convert FDIC's claims to public rights.

IV. All Other Factors Regarding Entry of a TRO Favor Plaintiff Ponte and the Court Should Grant the TRO

As explained in the opening brief, the additional TRO factors are completely on Ponte's side. He is being denied a constitutional right in a way that creates an irreparable harm *that cannot be remedied after the fact*. The Government simply fails to address this issue except to say after the unconstitutional proceeding he may get the futile review Justice Gorsuch outlined in *Axon/Cochran*. In contrast, a TRO would impose virtually no harm to the Government. If this Court and any appellate review finds Ponte is not entitled to a jury trial, the FDIC will still have everything it has now. It can put him before its in-house ALJ, obtain "restitution," and do all the things to Ponte it is doing now. It will simply have to wait a bit to do so. The Government of the United States and the FDIC is far less vulnerable than Ponte. A delay in this process, when the offending Bank and other individuals are no longer at issue, will hurt no one.

Recognizing this, the FDIC still seeks a "substantial bond" when it has shown no injury from delay. This should be seen for what it is, a quest for more punishment for Ponte for asserting constitutional rights.

V. No Security is Required Under FRCP 65(c)

The government insists that Fed. R. Civ. P. 65(c)[14] "requires the posting of security by an applicant for an injunction or a TRO to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Opp. at 44 (citing *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp.2d 30, 52 (D.D.C. 2013)). This assertion is misguided. Precedent

[14] The government says 65(b) in its brief.

makes clear that this Court may exercise significant discretion in the matter of security for a TRO. *See DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999); *Nat. Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971), *aff'd on other grounds* 458 F.2d 827 (D.C. Cir. 1972). This includes determining the appropriate amount of the security or even whether to require a security at all. *See Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980) (a district court has "power not only to set the amount of security but to dispense with any security requirement whatsoever.").

The Court should not require the posting of a security for the TRO Plaintiff seeks—especially a "substantial" one as the government requests—because this action seeks to vindicate important public interests. *See TikTok, Inc. v. Trump,* 490 F. Supp.3d 73, 85 n.4 (D.D.C. 2020) (requiring no security); *see Armstrong v. Bush*, 807 F. Supp. 816, 823 (D.D.C. 1992) (requiring only a nominal security of $100 in FOIA case against the government because "the public interest favor[ed] granting" the TRO). Plaintiff seeks a TRO in this case to prevent the violation of his constitutional right to a trial by jury in civil actions, a "safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). There would be great harm if Plaintiff is hindered from challenging the deprivation of his rights by the imposition of a substantial TRO security. *See Morton,* 337 F. Supp. at 168 ("Courts have held that security is not necessary where requiring security would have the effect of denying the plaintiffs their right to judicial review of administrative action.") (collecting cases).

Here the Government has no injury. Ponte will be as available after adjudication of his claims here as he is now.

The Government only cites *Fox Television Stations, Inc. v. FilmOn X LLC*, a case between private parties which involved a group of plaintiffs who, unlike the defendant (a television streaming service), had "considerable assets to respond in damages if the injunction is overturned." 966 F. Supp.2d 30, 52 (D.D.C. 2013). The opposite is true here. FDIC has considerably more financial resources than does Mr. Ponte, and Mr. Ponte would suffer more pecuniary harm from the imposition of a security than would FDIC. *See TikTok, Inc.,* 490 F. Supp.3d at 85 n.4. And "it would be a mistake to treat a revenue loss to the Government the same as pecuniary damage to a private party." *Morton*, 337 F. Supp. at 169. Thus, the imposition of a TRO security is not appropriate here.

Dated: August 30, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing document complies with the page limitation limit under LCvR 7(e) as well as other pertinent requirements set forth in LCvR 5.1, LCvR 7, and the Federal Rules of Civil Procedure.

/s/ John J. Vecchione

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that foregoing document was filed on August 30, 2024 via this Court's electronic filing system. Undersigned counsel further certifies that the foregoing was served on all counsel of record via the notification of docket activity generated by this filing.

/s/ John J. Vecchione