No. 24-2860

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

D. ALLEN BLANKENSHIP,

Plaintiff-Appellant,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
No. 2-24-CV-3003

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 24-2860

D. ALLEN BLANKENSHIP

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Amicus Curiae Pacific Legal Foundation makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

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None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
None to the knowledge of Amicus Curiae

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
N/A

Joshua M. Robbins Dated: 12/20/2024
(Signature of Counsel or Party)

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STATEMENT OF IDENTIFICATION

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law, *see, e.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023) (interpreting "waters of the United States" in the Clean Water Act), including in cases challenging the constitutionality of administrative adjudications, *see, e.g.*, *Leachco, Inc. v. CPSC*, 103 F.4th 748 (10th Cir. 2024), *petition for cert. filed* No. 24-156 (Aug. 9, 2024) (removal power, Article III, Due Process of Law, Seventh Amendment); *Manis v. USDA*, No. 24-1367 (4th Cir.) (Appointments Clause and Seventh Amendment); *Black v. SEC*, No. 23-2297 (4th Cir.) (Appointments Clause, Seventh Amendment, Private Non-Delegation).

PLF files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all current parties to the appeal—D. Allen

Blankenship and the Financial Industry Regulatory Authority—have consented to the filing of this brief.

This amicus brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Amicus or its counsel, contributed money to fund this brief's preparation or submission.

SUMMARY OF ARGUMENT

After the Supreme Court's decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), district courts have subject matter jurisdiction to hear collateral challenges to unconstitutionally structured administrative adjudications. Applying a three-part test, *Axon* concluded that an adjudication respondent could not obtain a meaningful remedy—or any remedy—for the injury of being subjected to an unconstitutionally structured non-Article III tribunal after the fact, and that structural constitutional claims are wholly collateral and outside the expertise of the same. Here, the District Court attempted to apply that framework to D. Allen Blankenship's Seventh Amendment claim but failed. It mistook the ultimate question raised by Blankenship's lawsuit—whether the Seventh Amendment applied to his Financial Industry Regulatory Authority ("FINRA") disciplinary proceeding—for the threshold question of whether the District Court has jurisdiction to consider the Seventh Amendment claim at all. And in doing so, it concluded that it had no subject matter jurisdiction to consider the claim. That is wrong.

A Seventh Amendment claim satisfies each of the three *Axon* factors for district court subject matter jurisdiction over a collateral

challenge to a non-Article III adjudication. First, after an adjudication concludes, a Seventh Amendment claimant will not be able to obtain a remedy for the injury of being subjected to a juryless tribunal outside of an Article III court. Like a qualifiedly immune state official, an adjudication respondent has a right not to be tried in a forum that has no power to adjudicate the claims at issue and without a jury that protects the respondent from administrative caprice. And if the adjudication occurs, it cannot be undone. Second, the analysis required by a Seventh Amendment claim is wholly collateral to the determination of liability in an enforcement proceeding. The applicability of the Seventh Amendment is determined by analyzing the nature of the claims against the respondent and whether there is a background, historical basis for adjudicating those claims outside an Article III court. Neither question requires the court to engage in the kind of substantive analysis or application of law to facts that the adjudication of the claim itself would require. Third, and finally, the Supreme Court has observed that agencies and authorities administering statutory enforcement schemes are not well positioned to decide constitutional questions, like the applicability of the Seventh Amendment.

Refusing to permit the collateral review of Seventh Amendment claims under *Axon* will subject numerous respondents in administrative adjudications of common law claims to unconstitutionally structured, juryless processes. *See SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). Because Seventh Amendment claims fall squarely within the *Axon* framework, the District Court's dismissal of Blankenship's case for lack of subject matter jurisdiction should be reversed.

ARGUMENT

The adjudication of common law claims without a jury and outside of Article III courts is a serious breach of the Constitution's separation of powers. *See Jarkesy*, 144 S. Ct. at 2131–32. The practice violates both the Seventh Amendment's guarantee of civil jury trials for common law claims and Article III of the Constitution's commitment of claims "in Law" to adjudication by the judicial branch. *Id.* at 2136. Such adjudications are unconstitutionally structured and deny respondents the protection that the separation of powers provides to individuals. *Stern v. Marshall*, 564 U.S. 462, 483 (2011). Collateral challenges to non-Article III adjudications of common law claims are, and indeed must be, permitted under *Axon* to prevent individuals from suffering the

irreparable harm inflicted by being subjected to "an unconstitutionally structured decisionmaking process." 598 U.S. at 192, 195–96.

Axon applied the three factors developed in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), for determining whether existing statutory review schemes preclude district court jurisdiction: (1) whether "precluding district court jurisdiction 'foreclose[s] all meaningful judicial review;'" (2) whether the claim is "wholly collateral to the statute's review provisions;" and (3) whether the claim is "outside the agency's expertise." *Axon*, 598 U.S. at 186 (cleaned up) (citations omitted). The Court concluded that structural claims challenging an agency's "power to proceed at all" were not the type of claim that should proceed through the normal statutory review scheme. *Id.* at 192. With respect to the three factors, *Axon* explained that (1) being subjected to an unconstitutionally structured adjudication is a harm that could never be remedied after the fact; (2) structural constitutional claims are entirely collateral to the questions of liability in an adjudication; and (3) administrative agencies have no expertise in structural constitutional questions. *Id.* at 190–95.

A Seventh Amendment claim is a structural constitutional claim that falls within *Axon*. Such claims are structural because they challenge

the underlying power of a non-Article III tribunal to adjudicate common law claims itself without a jury. *Jarkesy*, 144 S. Ct. at 2131–32. If the Seventh Amendment applies to a claim assigned outside of an Article III court, that tribunal necessarily cannot adjudicate it because the common law claims must be heard by an Article III court. *Id.*

Seventh Amendment claims satisfy all three *Thunder Basin* factors in the same way as the removal and due process claims in *Axon*. (1) There is no available remedy after the fact for being forced to defend yourself in a juryless, non-Article III adjudication that could not adjudicate your claim. *Axon*, 598 U.S. at 190–92. (2) The Seventh Amendment analysis of the nature of a claim and whether it historically falls outside of Article III courts, *Jarkesy*, 144 S. Ct. at 2127, is wholly collateral to the administrative proceedings themselves, *Axon*, 598 U.S. at 192–94. (3) Because the Seventh Amendment claim is a structural constitutional claim, administrative tribunals have no expertise in resolving them. *Id.* at 194–95. While there may be peculiarities to specific judicial review schemes, in the main, collateral challenges calling into question whether a non-Article III tribunal can adjudicate a claim at all are precisely the

kind of structural constitutional claim that federal district courts have subject matter jurisdiction to review. *See id.* at 190–95.

I. Prohibiting Collateral Seventh Amendment Claims Forecloses Meaningful Judicial Review

A Seventh Amendment claim satisfies the first *Axon* factor. There can be no meaningful judicial review because the "'here-and-now'" injury of being subjected to a juryless adjudication outside an Article III court cannot be remedied after the fact. *Axon*, 598 U.S. at 192. The Supreme Court concluded in *Axon* that the injury of being subjected to an "unconstitutionally structured decisionmaking process" is irreparable once the adjudication has occurred. *Id.* The Seventh Amendment claim alleges just such an injury because the guarantee of a civil jury trial is coextensive with the constitutional requirement to adjudicate that claim in an Article III court. *Jarkesy*, 114 S. Ct. at 2131. A respondent in a non-Article III adjudication of a common law claim to which the Seventh Amendment applies is not injured "from this or that ruling but from subjection to all agency authority." *See Axon*, 508 U.S. at 195. This injury "cannot be undone" once it occurs. *Id.* at 191.

A. Agency Adjudications that Violate the Seventh Amendment Are Unconstitutionally Structured

A Seventh Amendment claim against a non-Article III adjudication alleges that the adjudication is unconstitutionally structured just like the removal and due process claims at issue in *Axon*. *See Jarkesy*, 114 S. Ct. at 2139. Analytically, the question of whether a claim is covered by the Seventh Amendment and whether that claim must be heard by an Article III court is the same, necessarily calling into question a tribunal's ability to adjudicate the claim. *Jarkesy*, 144 S. Ct. at 2127, 2131. So, Seventh Amendment claims fall squarely within *Axon* because the analysis considers whether a non-Article III tribunal has the "power to proceed at all." 598 U.S. at 192.

The text of the Seventh Amendment "preserve[s]" the right to a jury trial "[i]n Suits at common law, where the value in controversy [] exceed[s] twenty dollars." U.S. Const. amend. VII. A suit at common law is not limited to the "'common-law forms of action recognized' when the Seventh Amendment was ratified." *Jarkesy*, 144 S. Ct. at 2128. It "embrace[s] all suits which are not of equity and admiralty jurisdiction," in whatever form they "settle legal rights." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830). Common law actions include a

"statutory claim if the claim is 'legal in nature.'" *Jarkesy*, 144 S. Ct. at 2128.

This broad set of common law claims must not only be tried to a jury, but also tried in an Article III court. *Jarkesy*, 144 S. Ct. at 2127. Article III brings within the "judicial Power" "*all* Cases, in Law." U.S. Const. art. III, § 2, cl. 1 (emphasis added). The cases "in Law" that are committed to Article III courts are the same set of "common law" cases that the Seventh Amendment covers. *Parsons*, 28 U.S. at 447. Thus, "[t]he Constitution prohibits Congress from 'withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.'" *Jarkesy*, 144 S. Ct. at 2131 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1855)) (alterations in original). Under the plain text of the Constitution, Executive Branch agencies cannot adjudicate common law claims.

This would be the end of the Seventh Amendment inquiry, but for the Supreme Court's recognition of the public rights exception to Article III. *Jarkesy*, 144 S. Ct. at 2131–34. The public rights exception recognizes a class of cases that "historically could have been determined exclusively by [the executive and legislative] branches[.]" *Id.* at 2132 (quoting *Stern*

v. Marshall, 564 U.S. 462, 493 (2011)). Because the public rights exception "has no textual basis in the Constitution," it "must therefore derive instead from background legal principles." *Id.* at 2134. Moreover, common law causes of action "presumptively concern[] private rights, and adjudication by an Article III court is *mandatory*." *Id.* at 2132 (emphasis added).

From these lines of cases emerged a two-part test for the applicability of the Seventh Amendment. *Jarkesy*, 144 S. Ct. at 2127. First, courts determine whether the claim is common law in nature. *Id.* at 2128–31. Second, courts determine whether the claim falls within the public rights exception such that it can be adjudicated outside of an Article III court without a jury. *Id*. at 2131–34. If the public rights exception applies, the respondent in the non-Article III adjudication does not have a Seventh Amendment jury trial right. *Id.* at 2127. In other words, to determine the applicability of the Seventh Amendment to a claim in a non-Article III adjudication is to determine whether that agency can adjudicate the claim at all.

Because a Seventh Amendment claim implicates the authority of tribunal to hear the claim, it fits within the *Axon* framework. In *Axon*,

the constitutional claims—removal and due process—called into doubt the structure of the agency's adjudication process. 598 U.S. at 182–83. If the plaintiffs were right, their adjudications could not go forward as organized. *See id.* at 192. The same is true of a Seventh Amendment claim. If an agency brings a common law claim in an in-house adjudication, it is subjecting the respondent "to an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* at 191.

Historically too, the Seventh Amendment guarantee of civil jury trials was adopted as a vital structural check on all three branches of government, functioning as "the surest barrier against arbitrary power." *United States v. ERR, LLC*, 35 F.4th 405, 409 (5th Cir. 2022) (quoting Luther Martin's *Information to the General Assembly of the State of Maryland*, in 2 The Complete Anti-Federalist 27, 70 (Herbert J. Storing ed., Univ. of Chicago Press 1981)). The ratification of the Seventh Amendment resulted from the 1787 Constitutional Convention's omission of a civil jury trial guarantee from the original Constitution. *ERR*, 35 F.4th at 409–10; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 656–57 (1973). This omission was one of the major objections to the Constitution during

the ratification debates. *Jarkesy*, 144 S. Ct. at 2128; *ERR*, 35 F.4th at 410. The Federalists asserted that the right to a jury in civil cases had not been abolished and could be entrusted to Congress to protect. The Federalist No. 83 (Hamilton); *ERR*, 35 F.4th at 410; *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J.); Wolfram, *supra*, at 664–65, 712 n.200; Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law"*, 71 Ohio St. L.J. 1071, 1106 n.227 (2010). But the Anti-Federalists were understandably concerned that this trust in Congress was misplaced. *See* Wolfram, *supra*, at 664–65. This risk was unacceptable because, as Mercy Otis Warren, quoting Judge William Blackstone, wrote, the jury "'has been coeval with the first rudiments of civil government, that property, liberty and life, depend on maintaining in its legal force the constitutional trial by jury.'" *Observations on the New Constitution, and on the Federal and State Conventions. By a Columbian Patriot*, in 4 The Complete Anti-Federalist 276 (Herbert J. Storing, ed., Univ. of Chicago Press 1981).

The Anti-Federalists won the argument, and the Seventh Amendment was ratified. *Jarkesy*, 144 S. Ct. at 2128. Indeed, *Jarkesy* described the objections to the lack of a civil jury trial guarantee as

"perhaps the 'most success[ful]' critique leveled against the proposed Constitution." 144 S. Ct. at 2128. Implicit in the Seventh Amendment's ratification was the rejection of the argument that Congress could determine when jury trials would be available. *See* Thomas, *supra*, at 1106 n.227. From the beginning, the Seventh Amendment was a structural protection against juryless adjudications.

B. Being Subjected to the Administrative Adjudication of a Common Law Claim Cannot Be Remedied After the Fact

"Judicial review" of a Seventh Amendment claim (i.e. a "structural constitutional claim[]") after an administrative adjudication concludes "would come too late to be meaningful." *Axon*, 598 U.S. at 191. If the respondent's claim is adjudicated outside of an Article III court without a jury despite the Seventh Amendment applying, that is a "'here-and-now injury'" suffered by the respondent. *Id.* This injury would occur even if the respondent were to win in the administrative adjudication or have a liability determination overturned through judicial review and it "cannot be undone." *Id.*

The Seventh Amendment claim, "is not about [an] order" from a non-Article III tribunal, but about the constitutionality of the

adjudication itself. *Axon*, 598 U.S. at 191; *see supra* Part I.A. This circumstance is analogous to the right "'not to stand trial' or face other legal processes" that state officers possess in the qualified immunity context. *Id.* at 192. "[T]hose rights are 'effectively lost' if review is deferred until after trial." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). So too here. Successful Seventh Amendment claimants have a right not to undergo a juryless adjudication outside an Article III court and will lose that right entirely without a collateral challenge. *See Jarkesy*, 144 S. Ct. at 2139. Indeed, in the context of the civil jury trial right, the analogy to an immune officer's right not to stand trial is particularly apt.

Here, in finding the judicial review factor favored FINRA, the District Court took the position that a Seventh Amendment claim was unlike the claims in *Axon* because a "Seventh Amendment argument gets purchase only if FINRA is subject to the ruling in *Jarkesy* and the FINRA rules and penalties are sufficiently analogous to common law claims." Appx005. This is not a distinction from *Axon*, it is a summary of the analysis the District Court is being asked to undertake to resolve Blankenship's Seventh Amendment claim. If Blankenship endures a

juryless extrajudicial proceeding to which *Jarkesy* applies, he will have suffered an injury that cannot be later remedied by an appeals court ruling in his favor on review. *See Axon*, 598 U.S. at 191–92.

The District Court also explained that FINRA could potentially "change its mind about how to proceed with Mr. Blankenship's case, or [that] Mr. Blankenship could win." Appx005. But these considerations are irrelevant. If Blankenship is successful on his Seventh Amendment claim, "adjudication by an Article III court [would be] mandatory." *Jarkesy*, 144 S. Ct. at 2132. FINRA could not adjudicate its allegations against him at all.

If courts do not have jurisdiction to hear collateral Seventh Amendment claims, administrative respondents will forever lose their right not to undergo juryless adjudications of their claims outside Article III courts. *Axon*, 598 U.S. at 192. There is no meaningful judicial review without the availability of an *Axon* claim because there will be no possibility of remedying this "'here-and-now'" injury. *Id.*

II. Claims Under the Seventh Amendment Are Wholly Collateral to Administrative Adjudications

A Seventh Amendment claim is, in general, wholly collateral to statutory review provisions—the second *Axon* factor—because it goes to

the underlying power of the agency to adjudicate a given claim. 598 U.S. at 192–94. Constitutional challenges that question an agency's power to adjudicate a claim at all rather than "how that power was wielded" are collateral for purposes of jurisdiction. *Id.* at 193; *see also Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010) (finding jurisdiction where "petitioners object to the [agency's] existence, not to any of its [] standards"). Such claims "do not relate to the subject of the enforcement actions" nor do they "address the sorts of procedural or evidentiary matters an agency often resolves on its way to a merits decision." *Axon*, 598 U.S. at 193.

A Seventh Amendment claim goes directly to the underlying power of a non-Article III tribunal to adjudicate a claim because its applicability is coextensive with a claim requiring an Article III court. *Jarkesy*, 144 S. Ct. at 2131. The two questions a court must resolve when reviewing a Seventh Amendment claim implicate neither the subject of an enforcement action itself nor procedural or evidentiary matters agencies normally resolve. Evaluating the nature of a claim as common law, equitable, or otherwise, does not require the court to look into the substance of the claim itself or its applicability to particular facts. *See*

Tull v. United States, 481 U.S. 412, 417 (1987). And the applicability of the public rights exception is an existential question that does not go to the usual questions non-Article III tribunals resolve. *See Axon*, 598 U.S. at 192–93.

A. Whether a Claim Is Common Law in Nature Is Wholly Collateral to an Enforcement Action

Determining whether a claim brought in an administrative adjudication has a common law analog is "'collateral' to any [] orders or rules from which review might be sought." *Free Enter. Fund*, 561 U.S. at 490. Evaluating the nature of a claim is distinct from analyzing its substantive meaning and the conduct to which it applies. Whether a claim is common law or not "ha[s] nothing to do with the enforcement-related matters [agencies] 'regularly adjudicate[].'" *Axon*, 598 U.S. at 193. The question is simply whether the claim is "'legal in nature.'" *Jarkesy*, 144 S. Ct. at 2128.

The category of cases that are legal in nature is broad: it includes "'all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.'" *Id.* "To determine whether a suit is legal in nature … courts [] consider the cause of action and the remedy it provides." *Id.* at 2129. For example, claims against state

officers for rights violations under 42 U.S.C. § 1983 are common law because they "sounded in tort and sought legal relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711 (1999). Similarly, Clean Water Act suits for civil penalties are common law actions because punitive civil monetary penalties are "a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U.S. at 422. And *Jarkesy* doubled down on this analysis concluding that the authority for punitive civil monetary penalties "effectively decides" that such suits "implicate[] the Seventh Amendment right." 144 S. Ct. at 2130. These analyses are not dependent on an agency's "proceedings and the interpretation of its rules," as the District Court incorrectly asserted. Appx006. As such, evaluating the nature of a claim is collateral to the actual decisions of an agency in the adjudication. *Axon*, 598 U.S. at 193.

B. The Applicability of the Public Rights Exception Is Wholly Collateral to the Enforcement Action

The second piece of the Seventh Amendment analysis—the applicability of the public rights exception—is also collateral to the adjudication itself. Like analyzing the nature of the case, it has "nothing to do with the enforcement-related matters" that an agency is actually adjudicating. *Axon*, 598 U.S. at 193. Because the public rights exception

"has no textual basis in the Constitution," the relevant question is whether there are "background legal principles"—in particular, longstanding historical practice—that support adjudicating a claim outside of an Article III court. *Jarkesy*, 144 S. Ct. at 2134.

As demonstrated in *Jarkesy*, the public rights exception analysis looks entirely outside of the adjudication itself. 144 S. Ct. at 2131–34. The Supreme Court identified six "historic categories of adjudications [that] fall within the exception:" revenue collection, immigration, tariffs, "relations with Indian tribes," "the administration of public lands," and "the granting of public benefits." *Id.* at 2133. These categories likely describe the outer limits of the public rights exception after *Jarkesy*. But even if they do not, the existence of background legal principles and historical practice justifying the litigation of securities enforcement claims—or any other category of claim—outside of Article III courts does not implicate the actual "orders or rules from which review might be sought." *Axon*, 598 U.S. at 193.

The District Court was also wrong in two ways to assert that "FINRA's existence" had to be on the line for the Seventh Amendment claim to be wholly collateral. Appx006. First, tying subject matter

jurisdiction to an existential challenge to an agency overstates the holding of *Axon*. District courts have subject matter jurisdiction to consider collateral constitutional challenges, at least, where the plaintiff is "challenging the [agency's] power to proceed at all" in adjudicating a claim. *Axon*, 598 U.S. at 192. This is a question of the agency's ability to adjudicate a specific claim, not whether the agency can exist. Second, whether a tribunal has the power to proceed over a particular claim is precisely the question raised by the public rights exception. *Jarkesy*, 144 S. Ct. at 2132. If a claim does not fall within the public rights exception, it cannot be litigated outside of an Article III court. *Id.* So, the ability of an agency to litigate a claim at all is at issue whenever a Seventh Amendment claim is brought against an administrative adjudication.

III. Seventh Amendment Claims Are Outside the Expertise of Non-Article III Tribunals

Non-Article III adjudicators do not have expertise in the applicability of the Seventh Amendment, the third *Axon* factor. 598 U.S. at 194–95. The Court reiterated its view in *Axon* that "agency adjudications are generally ill suited to address structural constitutional challenges." *Id.* at 195 (quoting *Carr v. Saul*, 593 U.S. 83, 92 (2021)). For example, removal claims against the Securities and Exchange

Commission ("SEC") and the Federal Trade Commission ("FTC") "raise 'standard questions of administrative' and constitutional law, detached from 'considerations of agency policy.'" *Axon*, 598 U.S. at 182–83, 194 (quoting *Free Enter. Fund*, 561 U.S. at 491). Similarly, a due process challenge to the combined "prosecutorial and adjudicative functions" of the FTC raised separation of powers questions that were outside of the FTC's expertise in competition policy. *Id.* at 183, 194. In Blankenship's case, a private entity like FINRA is certainly much less well-positioned to decide constitutional claims than Article III courts established for that purpose. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2257 (2024). And appeals of FINRA decisions go to the SEC, 15 U.S.C. § 78s(d)–(h), which *Axon* specifically considered to be ill-equipped to adjudicate structural constitutional claims, 598 U.S. at 194–95.

The analysis for a Seventh Amendment claim is much the same. Courts must first evaluate whether the underlying action is a "'suit which [is] not of equity or admiralty jurisdiction'" (i.e. is legal in nature). *Jarkesy*, 144 S. Ct. at 2128. Then they must determine whether the claim otherwise falls within the public rights exception. *Id.* at 2131–33. These are standard constitutional law questions that "do not require 'technical

considerations of [agency] policy.'" *Free Enter. Fund*, 561 U.S. at 491; *Axon*, 598 U.S. at 194. In fact, the argument for the lack of agency expertise is much the same as the argument for why this analysis is collateral to the agency action itself. *See supra* Part II. The District Court took the position that "the interpretation or application of [agency] rules" falls within the agency's expertise. Appx006. But interpreting and applying an agency's rules is *not* the analysis a Seventh Amendment claim requires. *See supra* Part II.

Additionally, the Judiciary has a special role in interpreting Seventh Amendment claims because they are constitutional claims regarding an amendment directed at the judiciary. Alexander Hamilton observed that constitutional "[l]imitations ... can be preserved in practice no other way than through the medium of courts of justice" that must "void" unconstitutional acts. The Federalist No. 78, p. 524 (J. Cooke ed. 1961) (A. Hamilton). And the Supreme Court has asserted this role from the very beginning. Shortly after the Constitution's ratification, the Supreme Court affirmed that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* specifically noted that where

the "language of the constitution is addressed especially to the courts[,]" the court must obey the constitution rather than a legislative act. *Id.* at 179. This imbues courts with a particular expertise to consider the applicability to statutory claims of the Seventh Amendment, which directs courts to convene a jury to try common law claims.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the District Court's dismissal of Blankenship's case.

DATED: December 20, 2024.

Respectfully submitted,

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COMBINED CERTIFICATES

I, Joshua M. Robbins, hereby certify that I am a member of the bar of this Court;

that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)(A) and 32(a)(6) because it has been prepared in 14-point Century Schoolbook font;

that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 4,591 words;

the text of the electronic brief is identical to the text in the paper copies;

that Pacific Legal Foundation's documents are scanned for viruses with Symantec Endpoint Protection v.14.3.11216.9000 and this document contains no known viruses; and

that on December 20, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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

DATED: December 20, 2024.

s/ Joshua M. Robbins
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