No. 25-3373

In the United States Court of Appeals for the Sixth Circuit

Millennia Housing Management, LTD.; Cherry Estates LP; Cherry Estates Investment, LLC; Flushing Elmcrest Limited Dividend Housing Association Limited Partnership; Elmcrest Investment, LLC; Covenant Apartments LP; Covenant Apartments Investment, LLC; Covenant Project, LLC; Bethel Tower Limited Dividend Housing Association Limited Partnership; Bethel Tower Investment, LLC; Trail West, Ltd.; Trail West Investment, LLC; Trail West Housing Partners, Inc.; Robinson Heights Apartments I, LP; Robinson Heights Apartments Investment I, LLC; Hickory Creek Estates, Ltd.; Hickory Creek Estates Investment, LLC; Sherman Thompson Oh, TC, LP; Sherman Thompson Towers Investment, LLC; Highland Place Associates, Ltd.; Highland Place Investment I, LLC; Petosky Riverview Limited Dividend Housing Association Limited Partnership; Petoskey Riverview Investment, LLC; Oakdale Estates, Ltd.; Oakdale Estates II Investment, LLC; Oakdale Estates Investment Gp, LLC; Oakdale Estates Investment LLC; Morning Star Tower, Ltd.; Morning Star Tower Investment, LLC; International Towers I Ohio, Ltd.; International Tower Investment I, LLC; YMHA Housing Preservation, LLC; Kingsbury Tower I, Ltd.; Kingsbury Tower Investment I, LLC; Hunter's Run Investment, LLC; Halton HR Investors, LLC; HWFB HR Investment, LLC; Halton Springs Investments, LLC; Frank Sinito,

Petitioners-Appellants,

v.

U.S. Department of Housing and Urban Development; Scott Turner, in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; Julia Gordon, in her official capacity as Assistant Secretary for Housing Federal Housing Commissioner, U.S. Department of Housing and Urban Development; Scott Knittle, in his official capacity as Principal Deputy General Counsel, U.S. Department of Housing and Urban Development; Alexander Fernandez-Pons, in his official capacity as Administrative Law Judge, U.S. Department of Housing and Urban Development,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of Ohio, No. 24-cv-02084

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 25-3373 Case Name: Millennia Housing Management v. HUD

Name of counsel: Brianne J. Gorod

Pursuant to 6th Cir. R. 26.1, Brianne J. Gorod
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 18, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Brianne J. Gorod

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to the progressive promise of the Constitution's text and history. CAC has studied the development and scope of the public rights doctrine and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

After the Great Depression resulted in the default of half of the nation's real estate mortgages and mass unemployment in the building industry, *see Validity of Certain Provisions of the Nat'l Hous. Act*, 38 U.S. Op. Att'y Gen. 258, 264 (1935), Congress gave federal housing agencies the authority to provide mortgage insurance for single-family and multi-family properties, National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246. Since then, the Federal Housing Administration (FHA), now a component of the Department of Housing and Urban Development (HUD), has provided insurance for mortgages for the development and construction of multi-family housing—a category of housing loans that lenders have often perceived as especially risky. *See, e.g.*, Samuel D. Young et al., *The Countercyclical Nature of the Federal Housing Administration in Multifamily Finance*, 23 Cityscape 319, 321 (2021). This public assistance has led to more

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief.

"attractive" mortgage terms for developers and has come to play an important role in the credit market, particularly during recessionary periods when lending is more limited. *Id.* at 323.

In exchange for these benefits, mortgagors participating in this program enter into Regulatory Agreements with HUD, under which the mortgagor agrees to comply with certain specified requirements. *See, e.g.*, 24 C.F.R. Part 5 (2025). One such requirement is that mortgagors limit their distribution of profits from the mortgaged property, so that a sufficient amount of the rental income the property generates will be available to pay its liabilities and insurance premiums. *See Millennia, et al.*, HUD OHA Case No. 24-JM-0150-CM-005, HUD SJ Mem., Ex. A to Appellants Br. 4. If a mortgagor "knowingly and materially" violates this requirement, HUD can assess civil monetary penalties to ensure compliance. 12 U.S.C. § 1735f-15(c)(1)(B)(ii).

Appellant Frank Sinito has an ownership interest in over two hundred HUD-insured or HUD-assisted multifamily properties across the country, and Appellant Millennia Housing Management manages these properties. HUD SJ Mem., *supra*, at 22. HUD estimates that "Millennia and its affiliates have earned more than $160 million in each of the past four years" from HUD's project-based rental assistance program alone. *Id*. at 42.

In 2023, HUD found that Appellants made 115 unauthorized distributions of funds—at least 75 of which transferred funds "from a Project's operating account to Frank Sinito's personal bank account." *Id.* at 18 (emphasis omitted). According to HUD, these unauthorized transfers weakened the financial condition of the properties, putting "the FHA insurance fund at risk for a substantial loss." *Id.* at 25. They also created the danger that Appellants would delay needed maintenance projects, thereby harming tenants. *Id.* at 26. Ultimately, HUD expelled Millennia Housing Management and Sinito from the insurance program, Appellees Br. 8, and, seeking to "protect its interests in the property and the interests of residents for which HUD provides assistance," sought civil monetary penalties, HUD SJ Mem., *supra*, at 27.

In November 2024, Appellants filed an action in federal court alleging, among other things, that their Seventh Amendment right to a jury trial would be violated if HUD's administrative proceedings were allowed to continue. Order, R. 23, PageID # 971. The court below refused to enjoin the proceedings and dismissed the claim, holding that it did not have jurisdiction over the claim and that, even if it did, the claim would fail on the merits because HUD's penalty action was not "legal in nature," and was a "matter involving public rights" to which the Seventh Amendment does not apply. *Id.* The court below was right to reject Appellants' Seventh Amendment claim.

In *SEC v. Jarkesy*, the Supreme Court held that the Seventh Amendment entitles defendants to a jury trial when the Securities Exchange Commission (SEC) seeks civil penalties for securities fraud. *SEC v. Jarkesy*, 603 U.S. 109 (2024). But the Court also confirmed that the government may in "some contexts" seek traditional legal remedies and "extract civil penalties" in administrative tribunals. *Id.* at 131 n.2. This is such a context.

As relevant here, the *Jarkesy* Court held that administrative adjudication is constitutional if the agency's action falls within an area of unique and exclusive government power. *Id.* at 128. These are areas where the political branches can prohibit action in the field entirely, meaning that "no party ha[s] a 'vested right'" to act in that area without approval. *Id.* at 129. As Congress acknowledged when creating the program, the FHA insurance scheme distributes valuable government benefits to private industry to encourage home construction, *see infra* Part II, and the federal government has complete authority to determine who receives the benefit of participating in the FHA mortgage insurance program. Administering the benefits of this program involves a "governmental prerogative[]"—protecting the government-backed assets in the FHA insurance fund—that was completely absent in *Jarkesy*, a case about using agencies to "regulate transactions between private individuals interacting in a pre-existing market," 603 U.S. at 121, 135; *cf.* Appellees Br. 4 (noting HUD's financial responsibility of "$134,929,149,471.86 in

amortized unpaid principal balances in the event of default"). Thus, this is an area of unique and exclusive government power "where vested rights do not attach." *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958).

When agencies act in such an area, *Jarkesy* explained, Congress can empower them to pursue civil penalties in administrative settings. 603 U.S. at 129. Perhaps that is why HUD—unlike the SEC in *Jarkesy*—has never used federal courts to seek civil penalties for the sorts of violations at issue here. *See* Order, R. 23, PageID # 983; *cf. Jarkesy*, 603 U.S. at 117-18 (emphasizing that until 2010, Congress permitted the SEC to bring securities fraud claims *only* in federal court). Indeed, HUD sought the civil penalty authority as an alternative to more drastic penalties, such as declaring mortgages in default and prohibiting borrowers from participating in future projects, that often had "a more adverse effect on the Department and the tenants than on the mortgagor." HUD Reform: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin. & Urb. Affs., 101st Cong. 261 (1989).

Furthermore, the FHA mortgage insurance program resembles the type of voluntary scheme to which the Supreme Court has applied the public rights doctrine in the past. As the Court has explained, where participation in a program is voluntary, there is no "purely 'private' right" at issue, and "Article III adjudication" is unnecessary. *See Thomas v. Union Carbide Agric. Prods. Co.*,

473 U.S. 568, 589 (1985) (holding that a law requiring pesticide manufacturers to settle valuable claims outside of an Article III court was constitutional because the program was voluntary, so no "purely 'private' right" was involved). In conferring the public right to participate in the mortgage program, Congress directed the executive to "administer[] a complex regulatory scheme to allocate costs and benefits among voluntary participants." *Id.* In this context, it can permit the assessment of penalties without "providing an Article III adjudication." *Id.*

To be sure, courts must analyze each invocation of the public rights doctrine with "close attention" to ensure that the exception does not "swallow the rule." *Jarkesy*, 603 U.S. at 131. But that is not an issue here. The exception has always included decisions involving "public benefits," *id.* at 130, and other areas within the government's exclusive control, *id.*, and it has always applied when businesses voluntarily submit to a regulatory scheme. Thus, the FHA insurance program at issue here is a paradigmatic example of the type of program to which the public rights doctrine should apply, and the court below was right to apply it.

ARGUMENT

I. Congress Can Assign Adjudication of Claims to Agencies in Areas of Exclusive Government Control.

As the Supreme Court long ago explained, while "private right[s]" must be adjudicated in "the common law, . . . equity, or admiralty" courts, Congress can provide for "matters . . . involving public rights" to be resolved in other forums.

Den ex dem. Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855). As the Court recently reiterated in *Jarkesy*, the public rights doctrine applies in several specific contexts, including when Congress's power over an area is so exclusive that no vested rights are involved. 603 U.S. at 127-28 (citing *Murray's Lessee*, 59 U.S. at 284).

In *Jarkesy*, the Supreme Court considered a Seventh Amendment challenge to a provision permitting the SEC to seek civil penalties before administrative law judges. *Id*. at 120-21. The Court first asked whether the SEC's action "implicate[d] the Seventh Amendment," or, in other words, if the SEC's claim was "'legal in nature.'" *Id.* at 121-26. Answering this question required consideration of "the cause of action and the remedy it provides," with the remedy the more important factor. *Id.* at 123. Although the Court recognized that "monetary relief can be legal or equitable," it concluded that the SEC's penalty was "designed to punish or deter the wrongdoer" rather than "restore the status quo" and thus was the "type of remedy at common law" to which the Seventh Amendment applied. *Id.* at 123-24 (internal citation omitted). The "close relationship" between the SEC's claims and common-law fraud supported this conclusion. *Id.* at 125.

The Court then considered whether the SEC action fell within "a class of cases concerning what we have called 'public rights,'" a category the Court "first recognized" in 1856. *Id.* at 128. Public rights concern matters that "historically

could have been determined exclusively by the executive and legislative branches," *id.* (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011) (brackets omitted)), even when they are "presented in such form that the judicial power [i]s capable of acting on them," *id.* (quoting *Murray's Lessee*, 59 U.S. at 284). Such matters can be adjudicated by administrative agencies. *Id.* at 130 (discussing cases involving immigration, foreign commerce, relations with Indian tribes, and the administration of public lands, in which the government sought legal remedies, including monetary penalties, in administrative settings).

As the Court explained, the public rights doctrine applies when the political branches have "traditionally held exclusive power over [a] field," such that they could prohibit action in the field entirely. *See id.* at 130 (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). In *Bakelite Corp.*, for instance, the Court upheld a law that authorized the president to impose tariffs on goods imported by "unfair methods of competition." 279 U.S. at 446 (internal citation omitted). As the Court emphasized in *Jarkesy*, the political branches' power over imports was so total that "the law even authorized [the president] to 'exclude[] foreign goods entirely'" if the unfairness was extreme. 603 U.S. at 130 (quoting *Bakelite*, 279 U.S. at 446). The breadth of that authority illustrated that the "political branches had traditionally held exclusive power over [the] field and had exercised it," so the public rights doctrine applied. *Id.*; *see generally Crowell v. Benson*, 285 U.S. 22,

50 (1932) (explaining that matters completely within "congressional control" do not "require judicial determination").

Put another way, the public rights doctrine applies when Congress's power in an area has been "so total that no party had a 'vested right'" to act in that area without Congress's approval. 603 U.S. at 129 (quoting *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 335 (1909)). In *Oceanic Steam*, for example, the Supreme Court upheld a statute permitting administrative officials to impose monetary penalties for violations of a prohibition against bringing certain noncitizens into the United States. 214 U.S. at 332. Cautioning against "the interference of the courts with the performance of the ordinary duties of the executive departments," *id*. at 338 (quoting *Bartlett v. Kane*, 57 U.S. 263, 272 (1853)), the Court held that Congress could, "when legislating as to matters exclusively within its control," authorize executive officers to exact "reasonable money penalties . . . without the necessity of invoking the judicial power," *id*. at 339. As *Jarkesy* recounted, the Court's holding in *Oceanic Steam* rested on the fact that Congress's power over immigration "was so total that no party had a 'vested right' to import anything into the country," making clear that administrative penalties in that area could be assessed without a jury. 603 U.S. at 129.

Relatedly, the Supreme Court has upheld Congress's "power to condition issuance of registrations or licenses" on voluntary participation in a scheme in which rights are adjudicated outside of Article III. *Union Carbide*, 473 U.S. at 589. In *Union Carbide*, the Court held that a law requiring pesticide manufacturers to settle valuable claims outside of an Article III court was constitutional because it involved not a "purely 'private' right," but instead a regulatory program in which manufacturers voluntarily participated. *Id.* There, the Court considered a statute that required manufacturers to submit research data to the Environmental Protection Agency concerning a pesticide's environmental effects before receiving a license to sell the pesticide. *Id.* at 571. The Act allowed subsequent registrants to rely on scientific data submitted by previous registrants after compensating those registrants for the use of their data. *Id.* at 573. If the companies were unable to agree on compensation, the dispute would be arbitrated with limited judicial review. *Id.* at 574.

As the Supreme Court later explained, the producers in *Union Carbide* received a "valuable Government benefit"—a "license to sell dangerous chemicals"—in exchange for participation in the arbitration program. *Horne v. Dep't of Agric.*, 576 U.S. 350, 366 (2015) (internal quotation marks omitted); *see id.* (distinguishing the regulation of licenses to sell pesticides, a "special governmental benefit," from the regulation of the sale of raisins). Because

Congress used registrants' data to administer a public program in which manufacturers voluntarily participated, the registrants' right to compensation for the data was not a "purely 'private' right." *Union Carbide*, 473 U.S. at 589; *see generally* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 607, 580 (2007) (explaining that the right to compensation in *Union Carbide* was, "in nineteenth-century terms," a "mere privilege," and that privileges do not generate "vested rights"); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 Ga. L. Rev. 143, 198 (2019) (positing that the distribution of privileges or licenses puts the government "in the position of an owner, with a right to exclude and a power to give permission"). The fact that the scheme involved voluntary participants, rather than "unwilling defendant[s]," meant that private rights were not involved and reduced the danger of encroachment on the Article III judicial powers to "a minimum." *Union Carbide*, 473 U.S. at 591.

* * *

In sum, in *Jarkesy*, the Supreme Court confirmed what it had long recognized: Congress can allow executive adjudication when there is a history of such adjudication or when the government's power over an area is so exclusive that no vested rights are involved, such as when it distributes privileges in exchange for government benefits. Congress produced just such a program when it created the mortgage insurance system, as the next Section explains.

II. The Supervision of Federally Insured Mortgages Is an Area Where There Is a Long History of Administrative Adjudication and Government Control Is So Total that There Is No Vested Right to Participate.

HUD's multifamily insurance programs stem from the National Housing Act of 1934, which was passed to "encourage improvement in housing standards and conditions, to facilitate sound home financing on reasonable terms, and to exert a stabilizing influence on the mortgage market," as well as to alleviate Depression-related unemployment, which was particularly high in the construction industry. Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 203 (2010) (internal quotation marks omitted). That Act created the FHA, which is now a component of HUD, and empowered it to administer insurance programs to encourage the construction of affordable multifamily housing. *See* Order, R. 23, PageID # 966-67; NHA of 1934, Pub. L. 73-479, § 207, 48 Stat. 1246, 1252 (allowing the Administrator to "insure first mortgages . . . covering property held by [various corporations or government actors] . . . formed for the purpose of providing housing for persons of low income"); *see also* National Housing Act Amendments of 1938, Pub. L. No. 75-424, § 207, 52 Stat. 8, 16 (permitting participation by "private corporations, associations, cooperative societies which are legal agents of owner-occupants, or trusts formed or created for the purpose of rehabilitating slum or blighted areas, or providing housing for rental or sale").

The NHA's insurance program used private industry to meet these goals, responding to President Roosevelt's request that Congress "take the initiative immediately to cooperate with private capital and industry in . . . real-property conservation." 78 Cong. Rec. 8739 (1934) ("Message to Congress Recommending Legislation on Assistance for Home Repair and Construction"); S. Rep. No. 75-1300, at 4 (1937) (describing programs "undertaken through the cooperative efforts of government and business"); Jackson, *supra*, at 203 (noting the legislation responded to Roosevelt's "desire for at least one program that could stimulate building without government spending and that would rely instead on private enterprise"). Lawmakers aimed for "maximum reliance upon private business" by providing "the necessary stimulus and machinery for attracting a large volume of private capital into the field of residential construction"—resulting in the creation of a "mass market" for multifamily housing. S. Rep. No. 75-1300, at 4.

The benefits of the mortgage insurance plan would accrue to borrowers who used FHA-insured mortgages. For borrowers, the NHA would "loosen up" private capital for "those . . . who, under present conditions, cannot borrow the money," 73 Cong. Rec. 11199 (1934) (Rep. Williams), providing a boon to the flagging building and construction industries, *see id*. at 11189 (Rep. Hollister) ("the main purpose of this bill is to pump money out, as soon as possible, into the building industry"); *id*. at 11194 (Sen. Reilly) ("The pending bill is intended to help revive

the building industry in this country"). As Mariner Eccles, one of the plan's creators, explained, the program would "induce" lenders to "extend credit" to builders "who are in need of that credit." National Housing Act: Hearings Before H. Comm. Banking & Currency, 73rd Cong. 7 (1934) [hereinafter "NHA – House Hearing"]. The insurance provisions regarding multi-family properties, specifically, would allow the creators of housing projects to "mortgage money in volume at much lower rates than they can otherwise get." National Housing Act: Hearings Before S. Comm. Banking & Currency, 73rd Cong. 55 (1934) [hereinafter "NHA – Senate Hearing"]; S. Rep. No. 75-1300, at 4 (expansions to multifamily housing insurance would "create[] the necessary stimulus and machinery for attracting a large volume of private capital into the field of residential construction," making "large-scale building operations" possible); Amendments to National Housing Act: Hearings Before H. Comm. Banking & Currency, 75th Cong. 140 (1937) [hereinafter "Amendments to NHA"] (Sen. Wolcott) (describing "inducement . . . in th[e] bill for private capital to invest").

When enacting the NHA, lawmakers were very aware that mortgage insurance was an important government benefit. In fact, some questioned whether the government should be in the business of conferring this benefit at all. As Senator Luce asked, "[w]hy should we go into the field of public investment which is judged universally throughout the country to be a dangerous field?"

Amendments to NHA, *supra*, at 136; *see also id*. (adding "[h]ow are we to lend money for big construction when the private investor will not do it?"); *see generally* NHA – Senate Hearing, *supra*, at 17 (noting that insurance was "necessary if conservative financial institutions are to be induced to make mortgages of this type at a reasonable rate to the borrower"). Detractors complained that the existence of FHA insurance took the "private" out of "private enterprise," Amendments to NHA, *supra*, at 177 (Morton Bodfish, Chicago Building & Loan League) ("Should the leadership and Treasury of the Federal Government be thrown behind the building of large apartment dwellings for rent?"), leaving taxpayers "holding the bag" for poor investments, NHA – House Hearing, *supra*, at 60 (Sen. Wolcott); *id*. at 207 (Sen. Brown) ("we ought to try to prevent a situation where the Government is going to take over the bad mortgages and leave to the savings banks and insurance companies good mortgages").

In response, advocates of the insurance program insisted that insured mortgages would be subject to regulation to protect the government's investment. NHA – Senate Hearing, *supra*, at 27 (Frank Walker, Director of National Emergency Council) ("they are going to provide rules and regulations with reference to the paper, so that the loan shall be of a type of a good bankable loan"); *id*. (Sen. Williams) (noting that the FHA would have the power to regulate "purely private corporations"); NHA – House Hearing, *supra*, at 14 (John Fahey, Chairman

of Federal Home Loan Bank Board) (noting that lenders "should have such supervision as is necessary to make them safe and sound"). Borrowers of FHA-insured mortgages for multifamily housing projects, for example, were subject to detailed requirements concerning rent, capital structure, stock issuance, and compensation. *See* Fed. Hous. Admin., *Circular No. 3: Low Cost Housing* 14-17 (1935) (describing rules relating to low-cost housing projects insured under NHA § 207). These regulations were incorporated into mortgage contracts, and, for corporate borrowers, set forth in the borrower's certificate of incorporation. *See id.* at 14, 22; *see, e.g.*, *Mason v. Rock Creek Plaza, Inc.*, 164 F. Supp. 269, 273 (D.D.C. 1958) ("[n]umerous provisions are in defendant's charter designed to give to FHA the right to police defendant's corporate activities for the protection of FHA as guarantor of the loans and for guarding against practices inconsistent with the purposes of the NHA").

Participants also always faced consequences if they did not comply with the program's strictures. FHA regulations for insured multifamily housing projects required lenders to foreclose on the mortgaged property whenever borrowers failed to comply with FHA regulations. *See Circular No. 3*, *supra*, at 22-25. The FHA could also regulate corporate borrowers by requiring the corporation to deed shares of special stock to the agency, so that it would "acquire majority voting rights" in the event of a violation of the rules and regulations pertaining to the project. *Id.* at

14; *see also* NHA Amendments of 1938 § 207(b)(2), 52 Stat. at 16 (authorizing the administrator to purchase stock in the mortgagor "as he may deem necessary to render effective such restriction or regulation"). Later, Congress gave federal housing authorities the power to "refuse the benefits of participation" in the insurance program to anyone who "knowingly or willfully" violated any provision of the NHA or related regulations, or "failed materially to properly carry out contractual obligations." *See* National Housing Act of 1954, Pub. L. No. 83-560, § 132, 68 Stat. 590, 610; 12 U.S.C. § 1731a.

B. Over time, Congress empowered federal housing agencies to issue more tailored sanctions on corporate mortgagors and mortgagees. In the 1970s and 1980s, HUD was involved in a series of scandals involving internal fraud and abuse, leading to a bombshell HUD Inspector General report, a series of congressional investigations and hearings, and widespread calls for legislative reform. *See Hous. and Urb. Dev. (HUD) Influence-Peddling Scandal Unfolds Before Hill Panels*, *in* CQ Almanac 1989, at 639-53 (45th ed. 1990), http://library.cqpress.com/cqalmanac/cqal89-1139712. HUD's Inspector General concluded that "[o]wners and agents of Multifamily Housing projects have been misusing and diverting project assets and income for years," and that the "problem ha[d] continued because of poor oversight and lack of effective action by HUD." Dep't of Hous. & Urb. Dev., Office of Inspector General Report to the Congress

22 (1989). HUD requested a series of reforms that it presented to Congress, including "legislative authority to impose civil monetary penalties on owners who fail to comply with certain portions of the Regulatory Agreement" between FHA and mortgagors. *Id*. at 40.

For HUD, the civil penalty power would give the agency the flexibility to impose adverse consequences on borrowers without significantly harming tenants and HUD itself. Some of the most potentially effective sanctions, such as "declaring the mortgage in technical default for violation of the regulatory agreement, stopping subsidy payments, or foreclosing on the mortgage," tended to have "a more adverse effect on [HUD] and the tenants than on the mortgagor," because they resulted in the foreclosure of the property and the "consequent reduction in services to tenants." HUD Reform Hearing, *supra*, at 261. Other possibilities, including "letters of admonishment," were simply ineffective. *Id.* at 107. Without a middle-ground option, agency officials often ended up waiting for recalcitrant property managers to file for bankruptcy while the project "deteriorated to the point of being worthless." *Id.* at 108; *see id.* at 107 ("HUD's hands have been tied in trying to attack these problems early. Its enforcement tools are currently limited to either letters of admonishment or the drastic step of debarment—but nothing in between"). Monetary penalties, Congress concluded,

would "deter mortgagors from disregarding their contractual obligations," while preserving low-income housing. *Id.* at 261.

When creating HUD's penalty scheme, lawmakers sought to prevent violations that put federal priorities and funds at risk. By focusing on "serious violators," 101 Cong. Rec. 31190 (1989) (Rep. Wylie); *see id.* at 31378 (Sen. Kerrey) (emphasizing that the "knowing and material" standard would ensure that "trivial" contract violations would not be penalized), HUD's civil penalty power would protect the public interest and prevent FHA-insured borrowers from "reap[ing] huge profits at public expense," *id.* at 31371 (Sen. Bryan); *id*. at 31368 (Sen. Riegle) (explaining that developers had been "permitted to layer public subsidies until rehabilitating low-income units were the most lucrative game in town"); *id.* at 31359 (Sen. Cranston) ("This bill provides immediate remedies for the gross mismanagement and fraud that devastated the Nation's housing programs."); *see also* Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, 111 Stat. 1384, 1387 (expanding civil monetary penalties because "FHA-insured multifamily rental properties are a major Federal investment," and penalties "ensure that the public interest is safeguarded and that Federal multifamily housing programs serve their intended purposes").

III. The Court Below Correctly Applied the Public Rights Doctrine.

A. As this history makes clear, the court below was right to conclude that this is a matter involving public rights. *See* Order, R. 23, PageID # 979-84. In supervising banks and their officers, HUD is not regulating "transactions between private individuals interacting in a pre-existing market." *Jarkesy*, 603 U.S. at 121. Rather, HUD acts as an insurer or even "in the position of an owner," Harrison, *supra*, at 198, distributing valuable benefits—the government-backed assets the FHA insurance funds—and protecting those assets accordingly. *Cf.* 12 U.S.C. § 1735d(b) (permitting the HUD Secretary to borrow from the U.S. Treasury to make payments of insurance benefits); *United States v. Scholnick*, 606 F.2d 160, 164 (6th Cir. 1979) (federal law applied in appeal of judgment of foreclosure on federally-insured property because it would promote the "overriding federal interest in protecting the funds of the United States and in securing federal investments").

The FHA's civil penalties work to protect the agency's insurance funds, facilitating an "ordinary dut[y] of the executive department[]," rather than generic economic regulation. *Decatur v. Paulding*, 39 U.S. 497, 516 (1840). Like the administration of public land or the granting of public benefits, HUD's distribution of federal insurance involves a resource that is subject to complete congressional control and falls within the public rights doctrine. *Jarkesy*, 603 U.S. at 130; *Axalta*

Coating Sys. LLC v. Fed. Aviation Admin., 144 F.4th 467, 484 (3d Cir. 2025) (Bibas, J., concurring) (referring to "a public-rights exception known at the Founding, such as a dispute over government benefits"); *cf. Brott v. United States*, 858 F.3d 425, 435 (6th Cir. 2017) (claims for compensation against the government are "public-right[s] claims" because they are connected with "historical and constitutional function of the legislative branch, namely, the control and payment of money from the treasury").

The applicability of the public rights doctrine is underscored by the fact that the federal government has complete authority to determine who receives the benefits of participating in the FHA mortgage insurance program. The political branches are "even authorized . . . to 'exclude[]' [borrowers] . . . entirely," *Jarkesy*, 603 U.S. at 130 (quoting *Bakelite*, 279 U.S. at 446), by prohibiting them from getting a mortgage in the first place. And if HUD does give a mortgagor insurance, it retains significant powers over the property. By statute, participants in the mortgage insurance program must obtain the HUD Secretary's approval to sell or reconstruct the mortgaged property, *see* Appellees Br. 5, and the Regulatory Agreements in this case provided that HUD could, in the event of a violation, take possession of and operate the property until the violation was cured, Compl. App. A, R. 1-1, PageID # 23, ¶ 11. "As security for . . . [their] obligations," Appellants also assigned HUD their "rights to the rents, profits, income and charges" gained

from the operation of the mortgaged property, such that any profit Appellants earned while operating the property was only by "permission" from HUD. *Id.* ¶ 12 (providing "upon default this permission is terminated as to all rents due or collected thereafter"); *cf. Horne*, 576 U.S. at 359 (emphasizing that a property interest exists for purposes of the Takings Clause when it "cannot be appropriated or used by the government itself"). Given the FHA's "total" authority over the distribution of mortgage insurance benefits, it can certainly dictate "the terms upon which a right to [operate a mortgaged property] may be exercised." *Oceanic Steam*, 214 U.S. at 335.

Put another way, the FHA's regulation of borrowers and lenders involves "mere privileges," Nelson, *supra*, at 580, rather than "vested right[s]," *Jarkesy*, 603 U.S. at 129. The Supreme Court has applied the public rights doctrine when "voluntary participants," *Union Carbide*, 473 U.S. at 589, receive a "valuable Government benefit" in exchange for participation on the government's terms, *Horne*, 576 U.S. at 366 (internal citation omitted). Borrowers and lenders voluntarily participate in the FHA insurance program to access government benefits such as favorable rates, longer amortization periods, and "nonrecourse" financing, which protects a borrower's personal assets in the case of default. *See* Young et al., *supra*, at 323; Appellees Br. 3-4 (describing the benefits of HUD mortgage insurance and noting the favorable premiums currently charged by

HUD). While due process may apply before the government rescinds these benefits, *see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (requiring due process protections through internal agency processes for the withholding of welfare benefits and noting that benefits are "a 'privilege' and not a 'right'"), this type of voluntary scheme does not implicate "purely 'private' right[s]," *Union Carbide*, 473 U.S. at 589.

Because the administration of these benefits involves public rights, the Court has explained, the executive branch is permitted to issue monetary fines and penalties on beneficiaries. *Oceanic Steam*, 214 U.S. at 337; *Passavant v. United States*, 148 U.S. 214, 222 (1893) (permitting imposition of an "additional duty or penalty" by the Board of General Appraisers); *see generally* Appellees Br. 21-24 (noting that a jury trial is not required when the government exercises its "public right" to recover the overpayment of social security benefits (quoting *Austin v. Shalala*, 994 F.2d 1170, 1177 (5th Cir. 1993)); 20 C.F.R. § 498.100 (providing for civil monetary penalties for violations involving the application or use of benefits under the Social Security Act). This rule should apply to property developers no differently than it does to the recipients of social security benefits.

B. Appellants argue that HUD's claims are "akin to traditional debt and contract actions at common law" and that an Article III court is therefore required. Appellants Br. 26-29. As an initial matter, HUD's claims are not standard contract

or debt claims. The FHA has used agreements with insured parties to provide for regulation of borrowers and lenders since its inception. *See, e.g.*, *Circular No. 3*, *supra*. These agreements allow the agency to reiterate statutory and regulatory requirements and to tailor regulations to the mortgaged property at issue. Indeed, the core prohibition at issue here—the ban on unauthorized distributions—is also included in regulations and the U.S. Code, which is why HUD's administrative complaint primarily alleged that Appellants "knowingly and materially violated the statute," by making unauthorized distributions, and only drew on the Agreements to ascertain the precise amount of "surplus cash" that they would have been authorized to distribute. HUD SJ Mem., *supra*, at 17-20.

This is not, in other words, a case where an agency is empowered to seek penalties for "*all* contractual obligations . . . applicable" to an administrative scheme. *See Sun Valley Orchards, LLC v. U.S. Dep't of Lab.*, 148 F.4th 121, 128 (3d Cir. 2025) (emphasis added) (quoting 29 C.F.R. § 501.0). Instead, Congress designated particular categories of contractual offenses, including the violation of terms prohibiting unauthorized distributions, as so crucial that a mortgagor who "knowingly and materially" committed them could be penalized. *See generally* 12 U.S.C. § 1735f-15(c)(1)(B); *see also* HUD Reform Hearing, *supra*, at 261 ("[t]he violations for which civil money penalties may be imposed . . . were selected from among the numerous violations which [HUD] may currently sanction").

Furthermore, the fact that HUD "use[d] language that is unmistakably about contract breaches" when requesting civil penalties, *see* Appellants Br. 30 (citing the agency's contention that the violations "denied HUD important benefits that it bargained for"), simply reflects the fact that mortgage insurance is a benefit provided by the federal government, and the agency's regulations exist to ensure that the federal government receives its end of the exchange. That these regulations ensure that HUD gets what it bargained for underscores that the main "purposes of the National Housing Act" are to "protect[] the funds of the United States and . . . secur[e] federal investments," *Scholnick*, 606 F.2d at 164; Appellees Br. 20-21, rather than to regulate a pre-existing market, *see Jarkesy*, 603 U.S. at 136; *Brott*, 858 F.3d at 434 ("what makes a right 'public' rather than private is that the right is integrally related to particular federal government action" (quoting *Stern*, 564 U.S. at 490-91)).

Finally, Appellants emphasize the fact that HUD's claims "sound in debt and contract" as if that were the sum total of the Seventh Amendment inquiry. But that collapses the distinction between two separate components of *Jarkesy*'s test. There, the Court explained that the SEC's claims were "legal in nature," *Jarkesy*, 603 U.S. at 122, but followed this explanation with a separate discussion of why the "case does not fall within the [public rights] exception," *id.* at 127; *see also Sun Valley Orchards*, 148 F.4th at 128 (separately assessing "the nature of DOL's

claim" and whether the public rights doctrine applied). If all that were required for the Seventh Amendment to apply was a claim "akin to . . . action[] in debt," Congress could *never* allow a civil monetary penalty to be enforced in an administrative setting—a prospect that the Supreme Court explicitly rejected in *Jarkesy*. 603 U.S. at 119. As that case acknowledged, agencies can assess penalties in matters that, like this one, "lie[] in the periphery where vested rights do not attach," *Darlington*, 358 U.S. at 90; *Jarkesy*, 603 U.S. at 119.

* * *

In 1934, Congress authorized the FHA to provide valuable insurance benefits to borrowers in exchange for supervision that would prevent the misuse of those benefits. The administration of the program it created falls within an area in which government control is so total that no "vested right[s]" are involved, *Jarkesy*, 603 U.S. at 129, and HUD can assess penalties against voluntary participants in this scheme "without providing an Article III adjudication," *Union Carbide*, 473 U.S. at 589. This Court should not hold to the contrary.

CONCLUSION

For the foregoing reasons, this Court should reject Appellants' Seventh Amendment claim.

Respectfully submitted,

Dated: December 18, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,038 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: December 18, 2025

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