No. _____

In The

Supreme Court of the United States

DAKOTA TERRITORY TOURS, ACC,

Petitioner,

v.

SEDONA-OAK CREEK AIRPORT AUTHORITY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Seventh Amendment apply to state governments and protect the right to a jury trial in civil forcible-entry-and-detainer actions in state courts?

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14(b), all parties to the proceeding are named in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Dakota Territory Tours, ACC, is a privately held Arizona domestic close corporation. There is no parent corporation and none of its shares is held by a publicly traded company.

RELATED CASES

- *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. V1300-CV2019-80119, Yavapai County Superior Court, State of Arizona. Judgment entered March 6, 2020.
- *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. 1 CA-CV 20-0158. Arizona Court of Appeals. Judgment entered January 12, 2021.
- *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. CV-21-0037-PR. Arizona Supreme Court. Judgment entered July 30, 2021.
- *Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority, Inc.*, No. CV-21-0037-PR. Arizona Supreme Court. Judgment entered December 8, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINION BELOW

December 8, 2021, the Arizona Supreme Court filed its Order Reissuing Previous Order Denying Petition for Review (App. 29) is not officially reported.

JURISDICTION

On December 8, 2021, the Arizona Supreme Court filed its Order Reissuing Previous Order Denying Petition for Review (App. 29) that definitively denied Dakota's petition for review (App. 34) from the Memorandum Decision that the Arizona Court of Appeals had filed against Dakota on January 12, 2021 (App. 1).

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VII, provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and

> no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. XIV, § 1 provides, in relevant part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

1. Introduction.

Dakota Territory Tours, ACC ("Dakota") asks the Court to hold that, under the Fourteenth Amendment's due-process clause, the Seventh Amendment applies to state governments, and in particular, to the State of Arizona. The Seventh Amendment thus protects Dakota's right to a jury trial in a civil forcible-entry-and-detainer ("FED") action. An FED action is a "quick and simple legal proceeding for regaining possession of real property from someone who has wrongfully taken, or refused to surrender, possession." *Black's Law Dictionary* 789 (11th ed. 2019).

The Arizona Supreme Court has decided that the Seventh Amendment right to a jury trial is, in its estimation, a right "not applied to the states by the due process clause of the fourteenth amendment." *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487 n. 5 (1986). In keeping with that tradition, in our case the

Arizona Supreme Court refused to apply the Seventh Amendment to this forcible-entry-and-detainer action. (App. 29).

Dakota raised the Seventh Amendment issue at the Arizona Supreme Court, because it was the only Arizona court that could abrogate *Dombey*, and hold that the Seventh Amendment does indeed apply to Arizona state-court FED actions. (App. 46). The Arizona Supreme Court, however, refused to review the Seventh Amendment issue (App. 29), leaving this Court as the final authority that could hold that the Seventh Amendment does apply to this Arizona state-court FED action and does guarantee the right to a jury trial in FED actions.

This Court has jurisdiction over this petition because, through the Fourteenth Amendment, Dakota is claiming that the Arizona Supreme Court has refused to recognize and enforce its due-process rights and privileges to a jury trial in a civil FED action.

2. Factual and procedural background.

The operative facts are brief and undisputed. Sedona-Oak Creek Airport Authority, Inc. ("SOCAA"), is an Arizona corporation that, among other things, operates the Sedona Airport in Yavapai County, Arizona. Yavapai County leases the Sedona Airport premises to SOCAA under a Master Lease. Through that Master Lease, SOCAA then leases and subleases parts of the airport. (App. 2).

Dakota subleased facilities at the Sedona Airport from SOCAA and used them to conduct helicopter and fixed-wing air tours. Disputes arose between SOCAA and Dakota concerning the sublease. When efforts to resolve the disputes failed, SOCAA filed a FED action against Dakota, seeking to evict it from the leased premises. (App. 3-5).

Dakota diligently and promptly requested a jury trial. Indeed, it requested one *before* it filed its Answer. At 9:21 a.m. on April 30, 2019, Dakota filed its "Request for Jury Trial." It was not until 5:49 p.m. that Dakota filed its "Answer." The timing amply protected the right to a jury trial. (App. 5).

Dakota had, in part, claimed a right to a jury trial based on A.R.S. § 12-1176(B), which provides that a defendant in an Arizona FED action may request a jury trial, and "the request shall be granted." Thus, if timely exercised, as it was here, an Arizona defendant's right to a jury trial in an FED action is absolute. No trial court could deny it.

The right to a jury trial in an FED action has deep roots in Arizona history. During the territorial era, a defendant in an Arizona FED action had an absolute right to demand a jury trial. *See* Howell Code ch. 43, § 8 (1864); Comp. Laws Ariz. Terr. ch. 43, § 8 (1871); Comp. Laws Ariz. Terr. ch. 43, § 2296 (1877); Rev. Stat. Ariz. ch. 29, § 2013 (1887); Rev. Stat. Ariz. Terr. ch. 29, § 2676 (1901). In the statehood era, laws such as A.R.S. § 12-1176 continue to guarantee a right that Arizona citizens have had since 1864.

Dakota was thus exercising a historical Arizona right dating back to the Howell Code, the first Arizona legislative code, which William T. Howell drafted for the Arizona Territory in 1864. *See* John S. Goff, *William T. Howell and the Howell Code of Arizona*, 11(3) Am. J. Leg. Hist. 221 (1967).

Dakota was also entitled to a jury trial under Article 2, § 23 of the Arizona Constitution, which provides that the "right of trial by jury shall remain inviolate." Curiously, the Arizona protection of the right to a jury trial does not, like the Seventh Amendment, protect the right to a jury trial as it existed under the common law.

But the trial court refused to grant the statutory or Arizona constitutional right to a jury in the FED action, which led to a summary-judgment against Dakota—and to the appeal following that. (App. 39).

Dakota did not raise the Seventh Amendment common-law right to a jury trial in a civil FED action at the superior court or at the Arizona Court of Appeals because they had no right or power to overturn the Arizona Supreme Court's position that the Seventh Amendment does not apply to Arizona. But Dakota did raise the Seventh Amendment right at the Arizona Supreme Court (App. 46-48), which refused to grant review. (App. 29). And so we have come to the only Court that can hold that the Seventh Amendment does indeed apply to Arizona and does guarantee the right to a jury trial in Arizona state-court FED actions.

REASONS FOR GRANTING THE PETITION

> [The King of Great Britain] has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation [and for] depriving us, in many Cases, of the Benefits of Trial by Jury.

Declaration of Independence ¶ 15 (1776).

"No civil provision was more highly cherished in the European and American dominions of George III than jury trial." 1 John P. Reid, *Constitutional History of the American Revolution: The Authority of Rights* 4 (1986).

1. The Seventh Amendment should apply to state courts just as it applies to federal courts and to courts in federal enclaves.

The Bill of Rights' framers deeply respected the common law and the trial of civil cases that the common law had guaranteed for centuries. Because of that, they placed in the Bill of Rights a Seventh Amendment stating that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

"At the time when the constitution was submitted to the people for adoption, one of the most powerful

objections urged against it was, that in civil causes it did not secure the trial of facts by a jury." *United States v. Wonson*, 28 F. Cas. 745, 750 (D. Mass. 1812). "Rather than the right to freedom of speech," in fact, "it was the lack of a civil jury right that prompted the first discussions to amend the Constitution. This shows just how important the civil jury right was to the drafters." Joseph Czerwien, *Preserving the Civil Jury Right: Reconsidering the Scope of the Seventh Amendment*, 65 Case W. Res. L. Rev. 429, 440 (2014).

The common-law right to a jury trial in FED cases is just the sort of jury right that is the reason why the Seventh Amendment is part of the United States Constitution. In England, the common-law right to a jury trial in FED actions was well recognized and long established. *See* Charles Viner, 13 *A General Abridgment of Law and Equity*, "Forcible Entry and Detainer" 379-409 (1793). The FED action started as a common-law remedy resolved by juries that evolved into a statutory form of action, still resolved by juries. Alison Reppy, *The Development of the Common-Law Forms of Action, Part III*, 23 Brooklyn L. Rev. 201, 215-21 (1957). *See also* Luis Jorge DeGraffe, *The Historical Evolution of American Forcible Entry and Detainer Statutes*, 13 Seton Hall Legis. J. 130, 131 (1990) ("The conceptual foundation of modern law concerning a landlord's right to evict a tenant without resorting to legal process finds its source in the common law tradition.").

In the United States as well, common-law actions to recover possession of real property have long been regarded as actions at law triable by jury. *Whitehead v.*

Shattuck, 138 U.S. 146, 151 (1891). Indeed, the Seventh Amendment has been construed to apply to "all suits which are not of equity and admiralty jurisdiction." *Parsons v. Bedford*, 28 U.S. 433, 437 (1830). "The history of the Seventh Amendment and the Judiciary Act of 1789 disclose that by 'common law' the framers meant (1) to secure the right of trial by jury in civil cases as guaranteed by the common law of England and (2) to distinguish cases to be tried by a jury-suits at law-from those to be tried without a jury-suits in admiralty and equity." H. Richmond Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 533 (1973).

And so, if a plaintiff's claim was one that a 1791 English common law court would have recognized, "where juries were usually the triers of fact, then he would be entitled to a jury trial." Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 Univ. Chi. L. Rev. 581, 609 (1984). "The application of this rule to simple real-property, tort, or contract claims, for which forms of action existed in 1791, is relatively straightforward." *Id*.

This Court has also firmly rejected "the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial." *Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974). In *Pernell*, Justice Thurgood Marshall acknowledged that an FED action "involved rights and remedies of the sort traditionally heard by a jury at common law, entitling the parties to a jury trial on demand." Lois L. Griffith, *The Seventh Amendment—A Return to*

Fundamentals, 10 Urban L.J. 313, 314 (1975). *See Pernell*, 416 U.S. at 363, 371, 374-76.

It is true that, in 1916, before incorporating provisions of the Bill of Rights to the States became this Court's standard practice, this Court held that "the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action." *Minneapolis & St. Louis Railroad v. Bombolis*, 241 U.S. 211, 217 (1916). In that tradition, on February 20, 1974, this Court stated that, it had "not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment." *Curtis v. Loether*, 415 U.S. 189, 196 n. 6 (1974).

But just two months later, on April 24, 1974, in *Pernell v. Southhall Realty*, 416 U.S. 363 (1974), things changed. On that day, this Court held that, because the right to recover possession of real property is a right that the common law has long recognized and protected, any party involved in a suit under statutes of the District of Columbia establishing a summary procedure for the recovery of possession of real property is entitled under the Seventh Amendment to the Constitution to demand a trial by jury. "Our courts," this Court explained, "were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home." *Id*. at 385.

Notably, *Pernell* does *not* limit its scope or reasoning to federal enclaves. In *Pernell*, this Court treated

the decision of the District of Columbia Court of Appeals concerning the right to a jury trial in FED actions "in a matter similar to the way in which [it would] treat decisions of the highest court of a State on questions of state law." *Id*. at 367.

Pernell is a clear, strong exposition of the principle that "actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury." *Id*. at 370. So, "'where an action is simply for the recovery and possession of specific, real, or personal property, or for the recovery of a money judgment, the action is one at law.'" *Id*. (quoting *Whitehead*, 138 U.S. at 151). Thus, since the right to recover possession of real property is "a right ascertained and protected by courts at common law, the Seventh Amendment preserves to either party the right to trial by jury." *Id*. at 376.

Notably, *Pernell* also "reject[ed] the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial" because, after all, a "landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have a fair opportunity to present their cases." *Id*. at 384-85.

2. The Seventh Amendment's protection of the right to a jury trial in common-law actions is fundamental to the Framers' intent and to our scheme of ordered liberty and system of justice.

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.

Parsons v. Bedford, 28 U.S. 433, 446 (1830) (Justice Joseph Story).

> The objection to the plan of the [constitutional] convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.

The Federalist No. 83 at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

To a modern reader, it may appear "somewhat incongruous" to learn that "the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 657 (1973). But that is just how important the desired constitutional protection of the right to a jury trial in common-law civil cases was to

the delegates representing the American people at the constitutional convention.

The Seventh Amendment "in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). "Litigants are entitled," at a minimum, "to jury trial in modern legal actions that closely resemble those in which juries were required in 1791." Christopher Walt, Shore v. Parklane Hosiery Co.: *The Seventh Amendment and Collateral Estoppel*, 66 Cal. L. Rev. 861, 863 (1978). The FED action, in particular, is one in which there originally was a common-law right to a jury trial. And so, under the Seventh Amendment, there is a right to a jury trial in contemporary state-court FED actions.

Still, despite its strong heritage and tremendous historical importance, of all of the Bill of Rights' guarantees, the Seventh Amendment shares the ignominy of non-incorporation to the states only with the Fifth Amendment's grand-jury clause. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). That is particularly strange because "the American esteem for the civil jury continued unabated through the framing and ratification of the Bill of Rights." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. Univ. L. Rev. 144, 155 (1996). The "Seventh Amendment right to a jury trial in civil cases is surely as much a part of the Constitution as the First Amendment right of free speech or the Fifth Amendment right against self-incrimination." Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to*

Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary 407, 408 (1995).

"One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." *Parsons*, 28 U.S. at 446. "The anti-federalist arguments opposing ratification of the Constitution emphasized its failure to provide for a right to a civil jury trial." Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. Univ. L. Rev. 737, 747 (1989).

This Court should expressly incorporate the Seventh Amendment to state governments. Just over a decade ago, in *McDonald* this Court addressed the scope of the selective-incorporation doctrine and focused its inquiry on "whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice." *McDonald v. Chicago*, 561 U.S. 742, 764 (2010). This Court then held that only "a handful of the Bill of Rights protections remain unincorporated," including the Seventh Amendment. *Id*. at 765 n. 13.

This Court has abandoned the idea that the Fourteenth Amendment supplies only a watered-down version of the Bill of Rights' individual guarantees. Indeed, all incorporated Bill of Rights protections should be enforced against the states under the same standards protecting personal rights against federal encroachment. *Id*. at 765. And so, using that approach,

which sweeps the Seventh Amendment into the incorporation doctrine, this Court "overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States." *Id*. at 766. The time has come for this Court explicitly to incorporate the Seventh Amendment right to FED actions in state courts.

Dakota is not alone in thinking *McDonald* heralds change for the Seventh Amendment's application to state courts. In *McDonald*, this Court "left open the possibility" that "the Seventh Amendment civil jury trial right could be incorporated in the future." Suja A. Thomas, *Nonincorporation: The Bill of Rights after McDonald v. Chicago*, 88 Notre Dame L. Rev. 159, 161 (2012). In fact, Professor Thomas stated that an "examination of the Seventh Amendment jury trial right through selective incorporation shows that the right *was* incorporated." *Id*. at 194 (emphasis added).

"Evidence at the time of the founding through the adoption of the Fourteenth Amendment," Professor Thomas explained, shows "the Seventh Amendment was a fundamental right and thus was incorporated against the states under the due process clause of the Fourteenth Amendment." *Id*. *See also* James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. Tex. L. Rev. 449, 450 (2004) ("Applying the Supreme Court's doctrine of incorporation and legal history, . . . the right to trial by jury in civil cases is implicit in the concept of due process, and

therefore the Seventh Amendment must apply to state governments."). Indeed, the ratifiers of the Fourteenth Amendment also "saw the jury as an important safeguard against the states," appreciating that one of the Fourteenth Amendment privileges "that the states could not abridge" was the right to be a juror. Suja A. Thomas, *The Missing Branch of the Jury*, 77 Ohio St. L.J. 1261, 1283 (2016).

> The comments of our nation's founders in the late eighteenth century provide repeated reference to the importance early Americans placed on civil jury rights. Patrick Henry, speaking in the Virginia Constitutional Convention, called civil juries the "best appendage of freedom," one "which our ancestors secured [with] their lives and property." Thomas Jefferson, who was in France during the Federal Convention, said, "I consider trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution." Thomas Paine felt civil juries were an extension of a natural right. The Federalists opined that eliminating civil jury rights could lead to insurrection.

Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 Ohio St. L.J. 1005, 1008-09 (1992) (footnotes omitted).

The Seventh Amendment has been a constitutional orphan for far too long. Constitutional rights with less clarity, specificity, and force have been incorporated into the laws of the states. This is now a matter for this Court to resolve on a petition for writ of

certiorari. *See Pernell*, 416 U.S. at 376 (**"**Since the right to recover possession of real property . . . was a right ascertained and protected by courts at common law, the Seventh Amendment preserves to either party the right to trial by jury.").

CONCLUSION

The "trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." Sir William Blackstone, 3 *Commentaries on the Law of England* 379 (1768). Determining if the right to a civil jury trial is fundamental to the American scheme of ordered liberty and is thus incorporated to state courts requires ascertaining whether the right is "deeply rooted in this Nation's history and tradition." *McDonald*, 562 U.S. at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The point is not debatable. After all, this Court has "often said" that "trial by jury is a fundamental guarantee of the rights and liberties of the people." *Hodges v. Easton*, 106 U.S. 408, 412 (1882).

The right to a jury trial in FED actions is a due-process liberty interest with strong roots in America's history, tradition, and common law. Trial by jury is not just the glory of English law, it is also the glory of American law. We ask this Court to hold that the

Seventh Amendment incorporates to the states the right to a civil jury trial in FED actions.

Respectfully submitted,

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