No. 22-107

In The
SUPREME COURT OF THE UNITED STATES

Marianne E Burke,
Petitioner

vs.
Criterion General and
Alaska USA Federal Credit Union,
Respondents

On Petition of Writ of Certiorari
to the Alaska Supreme Court

PETITION OF REHEARING

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Jurisdiction
Is the same as what is in Certiorari filed July 24, '22.

ARGUMENT

I. AN IMPLIED GARANTEE:

Whereas-

The Seventh Amendment provides: **"In all 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 by a court of the United States."**. US Constitution-

Is this not, an implied warranty, an implied GARANTEE to the public, that this Amendment, this Bill of Right to a jury trial in our US Constitution holds available to us, should we ever need it?

I believe that it is.

As in Real Estate Law (I was a California real estate broker), there is implied agency that we had to be very careful of. It seems to me that this is also true with our US Constitutional Bill of Rights- **there is an implied usage or guarantee to those Amendments for the public!**

Yet, as I study this, it says that the Seventh Amendment jury trial is guaranteed for *only* the federal courts?

How has this been, that all of our common law rights have been eroding away, right before our very eyes by attorneys of the law and our legislative representatives who are *suppose to be* upholding the rights of the people?!

II. A GRADUAL ERRODING

In *Galloway v. United States*, in which the government prevailed, Justice Black, joined by Justices Douglas and Murphy asserted in their dissent, **"Today's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."**[1]

Yet, my daughter's death stands, still, unjustified, along with every other workplace accident because of Workers' Compensation's "exclusive remedy" clause, unfounded in the US Constitution, in my belief.

These accidents, especially by negligence, gross negligence, or criminally gross negligence are continuing to occur, as did my daughter's accident because *there is no consequence to the sloppy employer whatsoever.*

And in Alaska, there is no consequence to the 3rd parties either-- **No one is responsible for workplace death! This is Unconstitutional- "*someone* has to be responsible", as Judge Guido said** at the Superior Court at our first Hearing, previously documented.

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[1] 319 U.S. 372, 397. The case, being a claim against the United States, need not have been tried by a jury except for the allowance of Congress.

III. A TRIAL IS NEEDED FOR THE GROSSLY, CRIMINALLY NEGLIGENT-

Therefore, I have *needed* a trial of the wrongful death of my daughter, Abigail E Caudle on June 20, 2011. The respondent/ defendants Criterion General and Alaska USA Federal Credit Union were *grossly, criminally, negligent.*

A. As the Findings of Fact in my Certiorari stated, my daughter was electrocuted as a brand-new apprentice, put on live wire to take lighting down, under-supervised, with inadequate tools of a non-contact tester.

B. The defendant Criterion General did not make or follow a Safety plan, as outlined in the Certiorari for this Petition.

C. The defendant Alaska USA Federal Credit Union did not have proper labels on their circuit breaker.

D. Workers' Compensation "significant remedy" was merely the guilty paying for the hospital and funeral costs of her death; the guilty cleaning up their mess, with NO compensation to the family for that loss!

There has been NO compensation for the loss of my daughter's life, no deterrent for gross negligent behavior by the defendants. Thus, this sloppy, negligent, wrongful death action is *still occurring* in workplaces today!! This MUST be changed!!

E. I have had NO ACCESS TO THE COURTS for this wrongful death because of Workers' Compensation's "exclusive remedy clause", which is *unlawful* in that I received NO DUE PROCESS for my daughter's death!!

IV. ONE WEEK PREPARATION. I have had only about one week to prepare this document. I could not even *think* about anything after the denial of certiorari on October 3, 2022 regarding the wrongful death of my daughter.

In the back of my mind, however, I realized that I could maybe do a Petition of Rehearing. I was able, emotionally, to finally investigate that possibility about one week ago. Then, I found law information on jury trials, downloaded it, reformatted it, and proceeded to read it, to try to understand it. Because—

V. NO LAWYER WANTS THESE WORKER COMPENSATION CASES.

These cases waste the lawyer's time when they have tried them at the State Supreme Court and have lost many times.

Therefore, victim families, like mine, have no legal counsel. All that we are able to do is to try to defend ourselves pro se'. And paying for lawyer fees is out of our budget, except a for a few lawyers who freely gave me a half hour of their time.

VI. Jury Trial Laws:

According to https://courts.uslegal.com/jury-system/constitutional-right-to-a-jury-trial/, three separate provisions of the U.S. Constitution provide for the right to a trial by jury:

A. Article III, Sec. 2 provides: "The trial of all crimes shall be by jury and such trial shall be held in the state where the said crimes have been committed."

B. The Sixth Amendment says: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state where the said crimes shall have been committed."

C. For Civil Matters, the Seventh Amendment provides: "In all 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 by a court of the United States."

Although the Seventh Amendment in present day (according to a 1999 decision) is supposed to only apply to the federal courts, the Founders of our Constitution did not intend it so.

Below, I state cases and Justices' dissent (II above) that reveal that the Founders intended for all citizens with grievous complaint, to be able to ask for and receive a trial by jury!

VII. The Right and the Characteristics of the Civil Jury.

A. History.—On September 12, 1787, as the Convention was in its final stages, a guarantee of right to jury in civil cases was one of the amendments urged on Congress by the ratifying conventions [2] and it was included from the first among Madison's proposals to the House.[3]

It does not appear that the text of the proposed amendment or its meaning was debated during its passage according to the Annals of Congress.[4] This sounds like, then, that they were of one mind in deciding the Seventh Amendment.

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[2] J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836) (New Hampshire); 2 id. at 399–414 (New York); 3 id. at 658 (Virginia).

[3] 1 ANNALS OF CONGRESS 436 (1789). **"In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."**

[4] It is simply noted in 1 ANNALS OF CONGRESS 760 (1789), that on August 18 the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved." On September 7, the SENATE JOURNAL states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150 (1971).

B. Composition and Functions of Civil Jury.— Traditionally, the Supreme Court treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[5]

In the reference of the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[6]

The primary purpose of the Amendment, the Court thought, is to preserve "**the common law distinction between the province of the court and that of the jury**, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."[7]

Those matters that were tried by a jury in England in 1791 are to be so tried today and those matters, such as matters that fall under equity, and admiralty and maritime jurisprudence, that were tried by the judge in England in 1791 are to be so tried today,[8] and **when new rights and remedies are created "the right of action should be analogized to its historical counterpart**, at law or in equity, for the purpose of determining whether there is a right of jury trial".[9]

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[5] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1913); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830).

[6] 413 U.S. at 155–56 (1973). "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community."

[7] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931); Dimick v. Schiedt, 293 U.S. 474, 476, 485–86 (1935).

[8] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377–78 (1913); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). *But see* Ross v. Bernhard, 396 U.S. 531 (1970), which may foreshadow a new analysis.

[9] Luria v. United States, 231 U.S. 9, 27–28 (1913).

VIII. Application of the Amendment—

Much of the following information is taken from https://courts.uslegal.com/jury-system/constitutional-right-to-a-jury-trial:

A. Cases "at Common Law"-- The coverage of the Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[10]

"The Seventh Amendment **does** apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[11]

If Congress assigns such cases to Article III courts, a jury may be required. In *Tull v. United States*,[12] the Court ruled that the Amendment requires trial by jury in civil actions to determine liability for civil penalties under the Clean Water Act, but not to assess the amount of penalty.

The penal nature of the Clean Water Act's civil penalty remedy distinguishes it from restitution-based

remedies available in equity courts, and therefore makes it a remedy of the type that could be imposed only by courts of law.[13] However, a jury need not invariably determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

Later, **the Court relied on a broadened concept of "public rights"** to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. In *Granfinanciera, S. A. v. Nordberg*,[14] the Court declared that **Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury."**

The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.[15] As a general matter, "public rights" involve " 'the relationship between the government and persons subject to its authority,'" **whereas "private rights" relate to " 'the liability of one individual to another.'"**[16] *(A corporation, as is the Respondents/ Defendants, are considered an "individual")*

Although finding room for "some debate," the Court determined that a bankruptcy trustee's right to recover for a fraudulent conveyance "is more accurately characterized as a private rather than a public right," at least when the defendant had not submitted a claim against the bankruptcy estate.[17]

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[10] Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

[11] Curtis v. Loether, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id. at 195. *See also* Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. International Bhd. of Electrical Workers Local 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim); Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analogue at common law, even though the relief sought is not actual damages but statutory damages based on what is "just").

[12] 481 U.S. 412 (1987).

[13] The statute itself specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in the legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.

[14] 492 U.S. 33, 51–52 (1989).

[15] "[I]f a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.' And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." 492 U.S. at 53–54 (citation omitted).

[16] 492 U.S. at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)). The Court qualified certain statements in *Atlas Roofing* and in the process refined its definition of "public rights." There are some "public rights" cases, the Court explained, in which "the Federal Government is not a party in its sovereign capacity," but which involve "statutory rights that are integral

parts of a public regulatory scheme." It is in cases of this nature that Congress may "dispense with juries as factfinders through its choice of an adjudicative forum." This does not mean, however, that Congress may assign "at least the initial factfinding in *all* cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts." 492 U.S. at 55 n.10 (emphasis added).

[17] 492 U.S. at 55. On the other hand, a creditor who submits a claim against the bankruptcy estate subjects himself to the bankruptcy court's equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. Langenkamp v. Culp, 498 U.S. 42 (1990).

B. The Continuing Law-Equity Distinction

The fundamental nature of the jury trial right needs to be stressed and be protected against diminution through resort to equitable principles.

In *Beacon Theatres v. Westover*,[18] the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims.

Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[19]

Then, in *Dairy Queen v. Wood*,[20] in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before a jury, because the primary rights being adjudicated were legal in character.

Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished.[21]

In *Ross v. Bernhard*,[22] the Court further held that the right to a jury trial depends on the nature of the issue to be tried rather than the procedural framework in which it is raised. The case involved a stockholder derivative action,[23] which has always been considered to be a suit in equity. The Court agreed that the action was equitable but asserted that it involved two separable claims.

The first, the stockholder's standing to sue for a corporation, is an equitable issue; the second, the corporation's claim asserted by the stockholder, may be either equitable or legal. Because the 1938 merger of law and equity in the federal courts eliminated any procedural obstacles to transferring jurisdiction to the law side once the equitable issue of standing was decided, the Court continued, if the corporation's claim being asserted by the stockholder was legal in nature, it should be heard on the law side and before a jury.[24] Whether this analysis will be followed in other areas so that the right to a jury trial extends to all

legal issues in actions formerly within equity's concurrent jurisdiction is a question now open.[25]

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[18] 359 U.S. 500 (1959).

[19] 359 U.S. at 510–11.

[20] 369 U.S. 469 (1962).

[21] If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

[22] 396 U.S. 531 (1970).

[23] The stockholders' derivative action is a creation of equity made necessary by the traditional concept of "the corporate entity" or the "concept of separate personality." That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. But if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them and the common law courts would not allow the shareholders to bring an action running to the "separate personality" of the corporation; equity thus permitted a derivative action in which the shareholder is permitted to set in motion the adjudication of a cause of action belonging to the corporation. Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

[24] Justices Stewart and Harlan and Chief Justice Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the Rules simply preserved the right as it had existed, and that it was error to think that the two could somehow "magically interact" to enlarge the right in a way that neither did alone. Ross v. Bernhard, 396 U.S. 531, 543 (1970).

[25] Among the possibilities in which a legal right was enforceable in equity in the absence of an adequate remedy at law are suits to compel specific performance of a contract, suits for cancellation of a contract, and suits to enjoin tortious action. On *Ross'*

implications, *see* J. MOORE, FEDERAL PRACTICE §§ 38.11[8.–8], 38.11[9] (2d ed. 1971).

C. According to https://courts.uslegal.com/jury-system/constitutional-right-to-a-jury-trial/, the primary purpose of the Seventh Amendment was to preserve the historic line separating the province of the jury from that of the judge.

Even though the legislatures across the nation voted in Workers' Comp, (though it seems to usually be in the interest of big business), the people do *not* know what is going on when it comes to wrongful death in the workplace, until it happens to them. This is what happened to me with my daughter dying in the workplace and only her funeral costs were paid for her life- I realized that Workers Comp in no way compensated for my daughter's life, nor did it help to prevent it.

In fact, the lack of consequence in the workplace, actually *causes* workplace sloppiness and negligence that, then, *causes accidents!!*

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[26] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 n.8 (2007).

[27] 551 U.S. at 327.

[28] 551 U.S. at 328 (quoting Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902)).

D. Jury Trial Under the Federal Employers' Liability Act- which sound a lot like Workers' Compensation Law.—

One aspect of the problem of delineating the respective provinces of judge and jury divided the

Justices for a lengthy period but now appears dormant—cases arising under the Federal Employers' Liability Act.

Cases **under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery,** involved peculiarly difficult decisions as to the adequacy of proof of negligence, which, again, sounds like Workers' Compensation to me.

"Special and important reasons for the grant of certiorari in these cases are certainly present," the Court wrote in a leading case, "**when lower federal and state courts persistently deprive litigants of their right to a jury determination.**"[26]

The operating test was: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

There was certainly negligence in my daughter's accident as evidenced by 5 Citations given the employer, and by extension of "no liability" through Workers' Compensation to the 3rd Party respondents because of SB303 (2004).

Similar issues have arisen under such statutes as the Jones Act[27] and the Safety Appliance Act.[28]

"*Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not*

the evidence allows the jury a choice of other probabilities.'[29]

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[26] Rogers v. Missouri Pacific R.R., 352 U.S. 500, 510 (1957).

[27] Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960). *See also* Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957); A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962).

[28] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 525 n.2 (1957) (Justice Frankfurter dissenting).

[29] Rogers v. Missouri Pacific R.R., 352 U.S. at 507. The cases are collected at 510 n.26. The cases are tabulated and categorized in Wilkerson v. McCarthy, 336 U.S. 53, 68–73 (1949) (Justice Douglas concurring), and Harris v. Pennsylvania R.R., 361 U.S. 15, 16–25 (1959). *See also* Harrison v. Missouri Pac. R.R., 372 U.S. 248 (1963); Basham v. Pennsylvania R.R., 372 U.S. 699 (1963).

IX. CONCLUSION:

Abigail's life and those of workers in Alaska and across the Union are Valuable!!

Do I need to state the value of, not just the soul, emotions, spirit, personality, potential accomplishments, and children and grandchildren coming from a human being, but the value of their physical body?

- A kidney is valued at
- A heart is valued at
- A brain is valued at

You get the idea, I'm sure.

And how much has the wrongful loss of a human being been valued in settlements in courts of

laws across the nation? Millions and even many, many millions.

So this Seventh Amendment *should apply* for the value of a human being attributing that of *immensely greater* than the required $20 according to the US Constitution.

Please tell me, then, why will you not do your job as Justices of our Nation and Protectors of the US Constitution, honored representatives of millions of human lives across our country, in addressing this Great Problem in Workers' Rights and in our victim families of not getting *access to the courts*?!

This MUST be addressed or many, many more lives continue to be, not only hurt but maimed for life, and worse still, lost forever in this life....as my daughter's life was.

I certify this word count, minus footnotes, beginning parts, and this statement to be: 2,940.

Marianne E Burke (online signature)