No. 24-1180

In the Supreme Court of the United States

CORINNE MORGAN THOMAS, *ET AL.*,
Petitioners,

v.

COUNTY OF HUMBOLDT, CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Seventh Amendment right to a jury trial in suits at common law is incorporated against the States by the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the Constitution and its principles, which are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Amicus's interest in this case arises from its mission to ensure that the guarantees of the Constitution extend to all citizens.

[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

"In [voting and jury trials] consist wholly, the liberty and security of the people: They have no other fortification against wanton, cruel power: no other indemnification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and cloathed like swine and hounds."

Letter from John Adams (Jan. 27, 1766).[2]

The Seventh Amendment guarantees all citizens the right to a civil jury trial in cases where the claim exceeds $20. U.S. CONST. amend. VII. Most of the Bill of Rights has been incorporated against the states through the Fourteenth Amendment, but the Seventh Amendment right to a jury trial has not. It is time for that to change. The central importance of civil juries to past and present American public life calls for the incorporation of the Seventh Amendment against the states.

Of the first eight amendments, all but two have been partially or entirely held to be incorporated against the states. *See, e.g.*, *Everson v. Bd. of Ed.*, 330 U.S. 1, 18 (1947) (incorporating the First Amendment's Establishment Clause against the states); *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (incorporating the Fourth Amendment search and seizure clause); *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (incorporating the Sixth Amendment right to a jury trial for non-petty criminal cases). Only the Third and Seventh Amendments remain completely unincorporated under this Court's precedents. The Third Amendment,

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[2] Adams, writing anonymously as the Earl of Clarendon, was responding to letters written and published in the *Boston Gazette* by William Pym. Available at https://tinyurl.com/39be57jp.

which prevents the government from requiring citizens to quarter soldiers, has rarely been litigated; otherwise, it would likely have been held to be incorporated by this Court as well. U.S. CONST. amend. III; *see, e.g.*, *Engblom and Palmer v. Carey*, 677 F.2d 957 (2d Cir. 1983) (incorporating the Third Amendment in New York, Connecticut, and Vermont). The Fifth Amendment is almost completely incorporated; only its grand jury protections remain confined to the federal government under current doctrine. *See* Roger A. Fairfax, Jr., *Interrogating the Nonincorporation of the Grand Jury Clause*, 108 CARDOZO L. REV. 855, 857 (2022).

In this context, the Seventh Amendment is unique. There is no other currently unincorporated amendment that embodies such vital protections that are fundamental to the Nation's constitutional system of ordered liberty. Only the Seventh Amendment has no current purchase on state government—despite ongoing litigation at the lower levels of the judiciary that demonstrates the need for such protections. Petitioners now face extraordinary injustices at the hands of their local government, with no recourse except to lose their property or pay millions of dollars in fines.

The Seventh Amendment satisfies the test for incorporation set out in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Timbs v. Indiana*, 586 U.S. 146 (2019), which respectively incorporated the Second and part of the Eighth Amendment against the states.[3] As those cases explained, an amendment is

[3] *Timbs* incorporated only the Excessive Fines Clause of the Eighth Amendment, as the provision banning cruel and unusual punishment had already been incorporated. *See Robinson v. California*, 370 U.S. 660, 666 (1962).

incorporated when the right at issue is "deeply rooted in history and tradition" or "fundamental to our Nation's scheme of ordered liberty." The Seventh Amendment should be held to be incorporated for many of the same reasons it was originally added to the Bill of Rights. Yet it currently has no force at the state or local level despite the central role of the American jury in the lives of everyday people—for instance, between 9 and 10 percent of the U.S. population are summoned for jury service every year. *See* Mona Chalabi, *What Are the Chances of Serving on a Jury?*, FIVETHIRTYEIGHT (June 5, 2015).[4]

Furthermore, stare decisis is no obstacle to the Court's application of the modern jurisprudence of incorporation. Although this Court rejected Seventh Amendment incorporation more than a century ago in *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916), that opinion's central argument is incompatible with modern incorporation doctrine.

Recent Supreme Court opinions suggest that *Bombolis*'s negative findings about Seventh Amendment incorporation are controversial or outmoded. For instance, *Jarkesy* unambiguously states that the right to a jury trial is central to our Constitution's separation of powers. *See SEC v. Jarkesy*, 603 U.S. 109, 140 (2024). As a general matter, *Bombolis*'s holding rested on the idea that the protections of the Bill of Rights do not bind the states, and the path of the law since then makes that general proposition impossible to defend. However, lower courts are (quite reasonably) resistant to any shift in position on Seventh Amendment incorporation without express direction from this Court.

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[4] Available at https://tinyurl.com/3mb8j5wm.

Over the last two decades, the doctrine of selective incorporation has inched closer to what might be called total incorporation; the Seventh Amendment now constitutes one of the last two territories the doctrine has not yet reached in this Court. Because *Bombolis* is in sharp tension with modern incorporation jurisprudence, it is no longer persuasive and it should not be this Court's last word on the question. In short, the better course of action is to grant review, consider the incorporation question in light of modern doctrine, and overturn *Bombolis* so as to facilitate justice in the states.

The denial of civil jury trial protections in Humboldt County puts Californians at risk of losing their property, their income, and their livelihoods. All this while the county simultaneously obtains gigantic settlements and requires landowners to admit to cannabis violations that are sometimes categorically false. Hundreds of Californians have already fallen victim to the county's regulatory scheme. Without the protection of the Seventh Amendment, factually innocent citizens will remain without the protections offered by civil juries. The Court should grant certiorari to address the long-percolating issue of Seventh Amendment incorporation and revisit *Bombolis*—a century-old opinion that has been overtaken by intervening

precedent and that leaves state plaintiffs vulnerable to virtually incontestable state judgments.

ARGUMENT

I. THE SEVENTH AMENDMENT SATISFIES THE TEST FOR INCORPORATION LAID OUT IN *TIMBS V. INDIANA* AND *MCDONALD V. CITY OF CHICAGO*.

This Court should grant certiorari to clarify whether the Seventh Amendment passes the test for selective incorporation set out in *Timbs v. Indiana*, 586 U.S. 146, 150 (2019), and *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). It is particularly important that this Court do so soon, because multiple state courts have already begun to diverge from the approach to jury rights that this Court took when applying the Seventh Amendment in *Jarkesy*. *See, e.g.*, *Parish of Jefferson v. Fayard*, No. 24-432, 2025 La. App. LEXIS 389, at *21, *22 (Feb. 26, 2025) (finding that defendant's "reliance on *Jarkesy* is misplaced" and affirming civil fines for feeding stray cats); *Blue Beach Bungalows DE, LLC v. Delaware Dep't of Just. Consumer Prot. Unit*, 2024 Del. Super. LEXIS 780, at *37 (Dec. 4, 2024) (finding that *Jarkesy* neither applied the Seventh Amendment to the states nor provided an analogous framework from which to analyze state-based claims).

Those state courts have held that they are bound by *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), which found that the Seventh Amendment's protections did not apply at the state level. Because of *Bombolis*, all Seventh Amendment rulings by

this Court currently have no effect at the state or local level. *See* Pet. Br. at 24–25.

But *Jarkesy* is important for another reason; it supports Seventh Amendment incorporation because the underlying principles that this Court identified apply to state and federal courts in equal measure. *See Jarkesy*, 603 U.S. at 140 (explaining that to deny the right to a jury trial in an SEC civil enforcement action for fraud "would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch[, which] is the very opposite of the separation of powers that the Constitution demands"). In the wake of *Jarkesy*, now is the perfect time to address Seventh Amendment incorporation.

Not only should the Court take this case; it should also rule in favor of the Petitioners on the merits. Over the last two decades, this Court has established a straightforward test for selective incorporation. *McDonald* was the first case to clearly state the modern test—a test shaped by earlier decisions that wrestled with the developing nature of incorporation in the modern era. *See McDonald*, 561 U.S. at 767; *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Under *McDonald*'s formulation, an amendment is incorporated if it is "fundamental to *our* scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (emphasis in original). In *Timbs v. Indiana*, this Court similarly held that the Eighth Amendment's Excessive Fines Clause is incorporated by the Fourteenth Amendment's Due Process Clause. *Timbs v. Indiana*, 586 U.S. 146, 149–50 (2019). This Court arrived at this conclusion by applying *McDonald*'s criteria: whether the "safeguard . . . is

'fundamental to our scheme of ordered liberty'" or has "dee[p] root[s] in [our] history and tradition." *Id.* (alterations in original).

The Seventh Amendment right to a civil jury trial easily passes this test, because it is fundamental to our scheme of ordered liberty. The Founders believed that the institution of the jury trial was a cornerstone of a just society. Thomas Jefferson wrote that trial by jury is "the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789).[5]

But the Seventh Amendment is not simply vital to liberty; it also stands as the final protection against violations of the Constitution. Indeed, the values that animate the Seventh Amendment played a central role in the debates over constitutional ratification—so much so that the absence of a civil jury right in the original Constitution nearly derailed the delegates' approval of the text. *See* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 411–12 (1999). Antifederalists took particular issue with the absence of civil jury protections in the proposed Constitution, and the promise of the Seventh Amendment may well have been the linchpin that carried the proposed Constitution through the ratification process. *Id.*; *see also Trial by Jury: "Inherent and Invaluable,"* W. VA. ASSOC. FOR JUST. (last visited June 8, 2025) [hereinafter *Trial by Jury*].[6] Given this historical background, the Seventh Amendment must be understood as having no lesser

[5] Available at https://tinyurl.com/5n6dvy47.
[6] Available at https://tinyurl.com/n27tv2ru.

claim than any other amendment to confer a fundamental right.

When the federal government violates its citizens' rights, the right to be heard by a jury of one's peers is the final roadblock against absolute despotism. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Yet states, which play an outsized role in the everyday lives of their citizens, remain exempt from the Seventh Amendment's authority. One aspect of "ordered liberty" is that government must be designed to repel both internal and external forces destructive of our system of checks and balances. Our constitutional system is therefore *not* "a machine that would go of itself"; rather, it requires vigilant defense.[7] It requires a mechanism that allows the people to hold the government accountable. In the United States, civil jury trials exist for this very purpose.

The Seventh Amendment is not just fundamental—it is deeply rooted in the Nation's history and tradition. Many of the Framers saw civil juries as necessary to prevent governmental abuses and overreach. *See Trial by Jury*, *supra*. The Framers viewed the institution of the jury, with a history dating back to ancient Greece, as fundamental to the Nation's public life. *See id.*

In the wake of England's history of judicial abuse, the Framers would be shocked at the notion that civil juries are not fundamental to the rights of a free people. *See Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, J., dissenting) ("The founders of our

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[7] *Cf.* James Russell Lowell, *The Place of the Independent in Politics, in* LITERARY AND POL. ADDRESSES 252 (Boston: Houghton, Mifflin, 1904).

government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty."). In the sixteenth century, English kings invented a secretive court known as the Star Chamber, which became a mechanism for the government to persecute those who challenged the crown. *See Trial by Jury*, *supra*. The Star Chamber eschewed indictments, juries, witnesses, and appeals, and its hearings were carried out in secret. *Id.* It now survives only as a paradigmatic symbol of judicial oppression. When viewed against the backdrop of English judicial history, it is easy to see why the Antifederalists were especially concerned about judicial abuse and why they focused on the counterweight of the right to trial by jury.

Given the extensive history of juries in the United States, the modern test for incorporation points to only one answer: states should be bound to protect the rights of their citizens to a jury trial in civil cases. This is particularly vital when there is a miscarriage of justice perpetrated by a state government or its agents, creating adverse interests that work against a state's own citizens. An adjudicative process where the judge has "never ruled against the government"—even in the face of plain error by the state—is anathema to the fair, independent assessment by a trial that was envisioned by the Framers. *See* Pet. Br. at 5. The Framers trusted juries of ordinary citizens to produce fair decisions in civil disputes and fair adjudications of disputes between citizens and their government. The case at hand demonstrates both the growth in state power that has occurred since the Founding and the growth in its potential for abuse.

If the Seventh Amendment had not been addressed in *Bombolis* in 1916, and this case came before this

Court unaccompanied by that century-old opinion, *McDonald*'s analysis would almost certainly demand incorporation of the Seventh Amendment. Indeed, there is arguably no other Amendment more fundamental to our scheme of ordered liberty and more deeply rooted in our history and tradition. The Court should grant review to ensure that *Bombolis* does not remain its last word on the question.

II. STARE DECISIS SHOULD NOT PREVENT THE INCORPORATION OF ONE OF THE LAST REMAINING UNINCORPORATED GUARANTEES IN THE BILL OF RIGHTS.

This Court should revisit its 1916 decision in *Bombolis* because a proper understanding of stare decisis does not prevent incorporation here. Stare decisis is a useful tool for weighing the merits of a novel interpretation of the law, but it is only one of several considerations. *See* Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37 (2013) (noting the "tension between allowing past decisions to remain settled and establishing a body of legal rules that is flexible enough to adapt and improve over time"). For several reasons, a mechanical application of stare decisis is not appropriate here.

This Court's decision against applying the Seventh Amendment to the states came down more than 100 years ago, before any portion of the Bill of Rights had been held to be incorporated. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). For that reason, reliance on that decision's reasoning is unwarranted. The decision rests on a general theory of non-incorporation that has already been invalidated by decades of selective incorporation. *Id.* ("[T]he first ten Amendments . . . deal only with federal action . . . .

And, as a necessary corollary . . . the Seventh Amendment applies only to proceedings in courts of the United States.").

The core rationale in *Bombolis* has been abandoned since the rise of selective incorporation. Indeed, the *Bombolis* opinion condemned the argument for incorporation in no uncertain terms:

> So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution . . . that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and federal governments or the authority of state and federal courts and their mode of procedure from the beginning.

Id.

The remarkable certitude of this passage stands in sharp contrast to the rapid collapse of its arguments. In less than a decade, the Court began to incorporate the First Amendment. *See Gitlow v. New York*, 268 U.S. 652, 654, 666 (1925) (holding that a state statute banning "advocacy of criminal anarchy" did not violate the Due Process Clause of the Fourteenth Amendment).

Despite *Bombolis*'s sharp rhetoric, its insistence that the theory of incorporation was so meritless that it deserved no discussion soon began to ring false. Stare decisis was no roadblock to the incorporation of any of the other provisions in the Bill of Rights that

can now be applied against the states. The Seventh Amendment deserves similar treatment, and several modern cases provide clear support for its incorporation.

This Court's recent decision in *Ramos v. Louisiana* illuminates the considerations a court must undertake to apply stare decisis—and that decision demonstrates that correct action in this sphere is more complex than mechanical adherence to precedent. *See Ramos v. Louisiana*, 590 U.S. 83, 106 (2020). In *Ramos*, this Court held that the Sixth Amendment requires a unanimous jury verdict in criminal trials; the Court rejected the argument that a right could be interpreted differently depending on whether one is in state or federal court. *See id.* at 93–94. A just decision requires a complex, balanced historical analysis—both to determine what the law is, but also to determine what it is not. *Id.* at 105 ("[S]tare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true."). Indeed, stare decisis requires that judges examine the whole picture to determine the continuing relevance of challenged laws. *Id.* at 100 ("When the American people chose to enshrine [the Sixth Amendment] in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses.").

This Court's decision in *SEC v. Jarkesy* last year also supports the argument that states must supply civil jury trials, even despite the precedent of *Bombolis*. While *Jarkesy* did not involve a state civil jury, it upended decades of federal agency adjudications. *Jarkesy* thus paved the way for similar determinations at the state level; unfair state-level adjudications ought to be discarded for the same reasons, no matter how longstanding. Although the question of

incorporation was not raised in that case, it has become a flashpoint in state courts over the last several months.

Jarkesy's reasoning demonstrates the unfairness of state adjudicative proceedings that purport to be impartial but nonetheless deny due process by unwaveringly ruling in the state's favor, no matter how the evidence contradicts such a ruling. That is what has happened here. Humboldt County acted outside the scope of its authority and has provided its victims with untenable options: either pay ever-increasing fines while waiting months for a hearing or settle with the county. This set of terrible alternatives is what John Adams referred when he mused that, without civil juries and the vote, the people have "[n]o other defence against fines, imprisonments, whipping posts, gibbets, bastenadoes and racks." Letter from John Adams, writing anonymously as the Earl of Clarendon, to William Pym (Jan. 27, 1766).[8] As this case demonstrates, state and local governments today impose fines and other penalties accompanied by significant legal and financial barriers that prevent challenges from succeeding on the merits.

While this Court has occasionally mentioned *Bombolis*'s holding in subsequent cases, such brief allusions serve as no more than dicta underscoring the extent to which the absence of the Seventh Amendment's incorporation is a historical outlier. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 735 (2009); *Osborn v. Haley*, 549 U.S. 225, 252 (2007); *Georgia v. McCollum*, 505 U.S. 42, 52 (1992). The case at hand gives this Court an opportunity to protect citizens against bad actors in state governments. It is an appropriate vehicle to

[8] Available at https://tinyurl.com/39be57jp.

address the incorporation of the Seventh Amendment. The groundwork has already been laid by an extensive series of incorporation cases and by *Jarkesy*. All that remains is the formal application of the Seventh Amendment guarantee of a civil jury trial against the states.

In sum, the case for Seventh Amendment incorporation does not imply wholesale rejection of precedent. Rather, the development of the law of incorporation demonstrates that precedent has now *undercut* the foundations of *Bombolis,* and so more recent (and persuasive) precedent demonstrates that *Bombolis* must now collapse. The modern and multiple precedents of incorporation show that it is time for *Bombolis* to be jettisoned. *Bombolis* has stuck around, like gum on the bottom of a shoe, for 109 years. No matter how many times it has been picked at and scraped, a vestige remains. Now, with this issue squarely before this Court for the first time in the modern era, it is time to remove it completely by overturning *Bombolis* once and for all.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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