No. 24-1180

IN THE

Supreme Court of the United States

CORRINE MORGAN THOMAS, *ET AL.*,

Petitioners,

v.

HUMBOLDT COUNTY, CALIFORNIA, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROFESSORS STEVEN G. CALABRESI AND GARY S. LAWSON AND THE LANDMARK LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

AMIT R. VORA
Counsel of Record
MARILYN VACCARO
KASOWITZ LLP
1633 Broadway
New York, New York 10019
(212) 506-1834
avora@kasowitz.com

Counsel for Amici Curiae

July 10, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Legislative Materials

Other Authorities

INTEREST OF AMICI CURIAE[1]

Steven G. Calabresi is the Clayton J. & Henry R. Barber Professor of Law at Northwestern Pritzker School of Law, and Gary S. Lawson is the Levin, Mabie & Levin Professor at the University of Florida Levin College of Law. They are scholars of the Constitution's original public meaning. This Court has relied on their scholarship. *See, e.g.*, *United States v. Vaello Madero*, 596 U.S. 159, 169 (2022) (Thomas, J., concurring) (citing Calabresi); *id.* at 181 (Gorsuch, J., concurring) (citing Lawson). This Court has also specifically relied on their scholarship concerning incorporation, the issue here. *See, e.g.*, *Timbs v. Indiana*, 586 U.S. 146, 152-53 (2019) (citing Calabresi); *McDonald v. City of Chicago*, 561 U.S. 742, 775-77 (2010) (same).

Landmark Legal Foundation is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution, and individual rights.

Amici submit this brief to assist this Court in determining whether to incorporate the Seventh Amendment right to a civil jury against the States under the Fourteenth Amendment.

---

[1] Under this Court's Rule 37.2, amici state that counsel of record for all parties received notice of amici's intent to file this brief more than ten days before the brief's due date. And under this Court's Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission, and that no person other than amici and their counsel made such a monetary contribution.

INTRODUCTION & SUMMARY OF ARGUMENT

The right to trial by jury dates back to twelfth-century England, and it is *the* most deeply rooted right in American history and tradition. Long considered essential to the protection of individuals from arbitrary and oppressive centralized governmental power, the right is premised on the insight that, with some exceptions, only a group of everyday peers—not a monarch, not a judge, and not a bureaucrat—is equipped to decide facts that might condemn a private citizen to liability or guilt.

Although the Seventh Amendment right to a civil jury in suits at common law applies to the federal government, this Court has not yet "incorporated" the right against the States—that is, this Court has not yet made the right applicable to the States via the Fourteenth Amendment. Private citizens thus remain vulnerable to the injustice described in this petition. State and municipal government agencies may, as they did here, impose ruinous fines through administrative processes without ever having to test their cases against "the best criterion, for investigating the truth of facts, that was ever established in any country," *see* 3 William Blackstone, Commentaries *385.

That sort of local governmental overreach should stop, and the time for incorporating the Seventh Amendment right to a civil jury—one of the few rights articulated in the Bill of Rights that remains unincorporated—is now. Incorporation is especially warranted now that the load-bearing brick in the foundation of *Bombolis* has eroded to dust. There, this Court declined to incorporate the Seventh Amendment

against the States—but only because, in 1916, it was "completely and conclusively" settled that the Bill of Rights had no bearing on "state action," rendering the concept of incorporating the Seventh Amendment "new and strange." *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 217-18 (1916). But as *Timbs*, *McDonald*, and other recent decisions illustrate, *Bombolis*'s premise is no longer good law.

This Court should grant review.

ARGUMENT

I. The Numbers Militate for Incorporating the Seventh Amendment.

The Bill of Rights was originally enacted in 1791 to constrain Congress; protections against state overreach were left to state constitutions. *See Barron v. Baltimore*, 32 U.S. 243 (1833) (holding, before the Fourteenth Amendment's ratification, that the Bill of Rights did not apply to the States). But the Fourteenth Amendment was created to provide federal protection against state power, and since the Civil War, this Court has held—through the process of "incorporation"—that nearly all the rights articulated in the Bill of Rights apply to the States via the Fourteenth Amendment.

The Seventh Amendment right to a civil jury, however, remains unincorporated. Yet the civil-jury right was among the three civil rights most deeply rooted in American history and tradition at the time of the ratification of the Bill of Rights in 1791 and at the time of the ratification of the Fourteenth Amendment in 1868. The other two were the right to a criminal jury

and the right to the free exercise of religion.

The right to a civil jury, in fact, is *the* most important right articulated in the Bill of Rights that remains unincorporated. The other two unincorporated rights are the Third Amendment's protection against the quartering of soldiers in an individual's private home (a practice that no longer happens) and the right to indictment by a grand jury (a guarantee that has become toothless now that prosecutors can persuade grand juries to indict even a "ham sandwich," *see* John R. Bunker, *"You Could Look It Up": The Judicial Opinions of Sol Wachtler on the New York Court of Appeals*, 52 Syracuse L. Rev. 847, 881 n.3 (2002) (recounting this memorable quip by Judge Wachtler of the New York Court of Appeals)).

This Court recently recognized the centrality of civil juries in *Jarkesy*, which held that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial. *SEC v. Jarkesy*, 603 U.S. 109, 140 (2024). As this Court observed: "The right to trial by jury is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care." *Id.* at 121 (citation modified).

Given the civil-jury right's firm historical and jurisprudential roots, incorporating the Seventh Amendment now is at least as urgently needed as was incorporating the Excessive Fines Clause in *Timbs v. Indiana*, 586 U.S. 146 (2019), or the Second Amendment in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In the latter case, this Court decided to

incorporate the Second Amendment because the right to keep and bear arms was deeply rooted in American history and tradition. *Id.* at 778. When the Fourteenth Amendment was ratified in 1868, 22 of the 37 States in the Union protected the right to keep and bear arms in their state bills of rights. *Id.* (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 Texas L. Rev. 7, 50-55 (2008)). That equates to 59% of the States and 61% of the American people living in 1868—a sizable super-majority. Calabresi & Agudo, *supra*, at 50-51. Based on this and other evidence, *McDonald* rightly concluded that the Fourteenth Amendment protected the right to keep and bear arms—even though, when the federal Bill of Rights was ratified in 1791, only five of the twelve States with new constitutions and bills of rights protected the right. Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Review 1451, 1485-87 (2012); *see also id.* at 1543-44 (noting that, in 1791, twelve of the fourteen States had new constitutions and bills of rights, while Rhode Island and Connecticut retained their colonial charters but struck all references to the King of Great Britain).

Compared with the case for incorporating the Second Amendment, the case for incorporating the Seventh Amendment is even stronger. In 1868, 36 of 37 state constitutions guaranteed the right to jury trials in all civil or common-law cases. Calabresi & Agudo, *supra*, at 77-78. That is, "[f]ully 98% of all Americans

in 1868 lived in jurisdictions where they had a fundamental state constitutional right to jury trial in all civil or common law cases." *Id.* at 77. The lone State in the Union not to recognize a right to a civil jury in 1868 was Louisiana—an easily explicable outlier: due to its French and Spanish roots in the civil-law tradition, Louisiana diverged from the other States' common-law tradition. *Id.*

In 1791, all twelve of the fourteen States with new state constitutions and bills of rights protected the right to a civil jury. Calabresi et al., *State Bills of Rights*, *supra*, at 1511-12. This means that, in 1791, more than 85% of the American people lived in States where their right to a civil jury was constitutionally protected. *Id.* As for Connecticut and Rhode Island—the two States that, as noted, did not afford a constitutional protection due to the absence of newly crafted state constitutions—they nonetheless protected the right to a civil jury through other means. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 655 (1973) ("In all of the thirteen original states formed after the outbreak of hostilities with England, the institution of civil jury trial was continued, either by express provision in a state constitution, by statute, or by continuation of the practices that had applied prior to the break with England.").

Today, 49 of the 50 States—representing 98% of the States and 98.5% of the U.S. population—guarantee the right to jury trials in civil cases within their state constitutions; Louisiana is the only outlier. Steven G. Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted*

in a Modern-Day Consensus of the States?, 94 Notre Dame L. Rev. 49, 113 (2018).

II. The Right to a Civil Jury Is Deeply Rooted in American History and Tradition.

The idea of the civil jury has ancient origins. The great English law commentator, Sir William Blackstone, extolled the jury-trial right's virtues, deeming it "ever esteemed, in all countries, a privilege of the highest and most beneficial nature," "the best criterion, for investigating the truth of facts, that was ever established in any country," and "so valued by the people, that no conquest, no change of government, could ever prevail to abolish it." 3 William Blackstone, Commentaries *350, *385. Blackstone was widely read by the framers, and his views inspired founding-era attitudes. *See* Wolfram, *supra*, at 653 n.44 ("The framers all seem to have agreed that trial by jury could be traced back in an unbroken line to … Magna Charta").

The colonists and founders of our fledgling nation adopted the venerable English view. They, too, recognized the wisdom in securing the right to jury trial—not only for criminal cases, but also for civil suits at common law. The Declaration of Independence complained in 1776 of "pretended Legislation … depriving us in many cases of the benefit of Trial by Jury." The Continental Congress in the Ordinance for the Northwest Territory ensured that the "inhabitants of the said territory shall always be entitled to the benefits of … the trial by jury." An Ordinance for the Government of the Territory of the United States, Northwest of the River Ohio art. II (1787). This Ordinance was reenacted by the First Congress. Reginald Horsman, *The Northwest Ordinance and the Shaping of an*

Expanding Republic, The Wisconsin Magazine of History (1989), at 73 (1): 21-32. And the Judiciary Act of 1789 provided for jury trials in "all suits at common law in which the United States sue[s]," even before the ratification of the Seventh Amendment in 1791. An Act to Establish the Judicial Courts of the United States § 9, 1 Stat. 73,77 (1789).

The civil jury-trial guarantee's absence from the Constitution was among the Antifederalists' chief objections, as they concurred with Blackstone that the right was a critical check on abuses of power by tribunals of all stripes. For example, the New Hampshire Farmer—a pseudonymous Antifederalist—warned that juries were integral to curbing the power of corrupt judges, "who may easily disguise law, by suppressing and varying fact," and stopping a backslide into "despotism." Essays by a Farmer, Md. Gazette (March 21, 1788), in 5 *The Complete Anti-Federalist* 36, 37-40 (Herbert J. Storing ed. 1981). The framers wisely responded to the Antifederalists' warning by putting the Seventh Amendment in the federal Bill of Rights. The original Constitution was ratified only because the Federalists promised that the omission of a civil jury-trial guarantee from the text did not support an *expressio unius, exclusio alterius* inference. *See, e.g.*, The Federalist No. 83 (Alexander Hamilton) (urging that the Constitution's silence on the civil-jury guarantee meant only that "the institution [would] remain precisely in the same situation in which it is placed by the State constitutions").

In particular, the Antifederalists understood that the civil-jury guarantee was an especially vital shield for liberty in cases of the sort at issue here: suits

between private citizens and the government. The pseudonymous Democratic Federalist thus warned in 1787 of possible abuses by military officers, "excise or revenue officers," or constables arguing that:

> [I]n such cases a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same: but what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen …? What refuge shall we then have to shelter us from the iron hand of arbitrary power?

Letter from a Democratic Federalist (Oct. 17, 1787), *in The Founders' Constitution* 354 (P. Kurland & Ralph Lerner eds. 1987). The reference to "excise or revenue officers" makes clear that civil suits between citizens and government agents were particularly worrisome to the writer.

James Monroe echoed this sentiment at the Virginia ratifying convention, where he expressed concern about the possible loss of jury trials in tax disputes with the federal government. 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 218 (Jonathan Elliot ed. 1891). The logic underpinning Monroe's point applies with equal force to a tax dispute between a private citizen and a state revenue officer, or a victim's allegation of police brutality leveled at a state police department.

The Antifederalists also understood that the guarantee to a civil jury trial was, at its core, a republican ideal. The jury was to a judicial branch of government

what the lower Houses of the federal or state legislatures were to the legislative branch:

> The trial by jury is very important in another point of view. It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill [for] which an expensive education is required, cannot answer any valuable purposes for them; they are not in a situation to be brought forward and fill those offices …. The few, the well-born, etc. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed and very naturally too, to favour those of their own description.
>
> The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community.

Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), *in* 2 *The Complete Anti-Federalist* 249-50 (Herbert J. Storing ed. 1981).

Notably, the first dictionary of the English language as it was spoken in the United States—by Noah Webster in 1828—defined "jury" as follows:

> A number of freeholders, selected in the manner prescribed by law, empaneled and sworn to inquire into and try any matter of fact, and to

> declare the truth on the evidence given them in the case. Grand juries consist usually of twenty four freeholders at least, and are summoned to try matters alleged in indictments. *Petty juries, consisting usually of twelve men, attend courts to try matters of fact in civil causes*, and to decide both the law and the fact in criminal prosecutions. The decision of a petty jury is called a verdict.

Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added), https://websters-dictionary1828.com/Dictionary/JURY. To Webster in 1828, then, there existed a universal (or nearly universal, given Louisiana) jury-trial right in all federal and state civil cases in the United States.

During the years leading up to the Civil War, abolitionists complained bitterly about the lack of federal or state jury trials for cases adjudicating whether alleged fugitive slaves in the North were free. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 269-70 (1998). The right to a civil jury was as foundational to the framers of the Fourteenth Amendment as it was to the framers of the Bill of Rights. This is hardly surprising given that, as noted, 36 of 37 States constitutionally guaranteed the right to a civil jury in 1868, when the Fourteenth Amendment was ratified.

III. There Are No Doctrinal or Policy Barriers to Review.

A. *Bombolis* Is No Longer Good Law.

As the petition shows, States are ignoring or reading too narrowly their state constitutions—going so

far as to impose ruinous multi-million-dollar fines in administrative proceedings against impoverished defendants while denying them their fundamental civil right to a trial by jury. Here, for example, respondent Humboldt County imposed a $7,470,000 fine on petitioner Rhonda Olson, and a $1,080,000 fine on petitioners Corrine and Doug Thomas, for purported code violations supposedly related to cannabis on their properties—even though the petitioners never grew cannabis on their properties. Pet. 7-9. And rather than having to prove its claims to a jury, the County channeled its claims through a code-enforcement regime under which, unsurprisingly, the County never loses. *Id.* By granting review, this Court can take the first step toward curbing this sort of practice.

The last time the Supreme Court considered in any detail whether to incorporate the Seventh Amendment was in 1916, 109 years ago, in *Minneapolis & St. Louis R. Co. v. Bombolis* 241 U.S. 211 (1916). But this Court's incorporation case law has shifted mightily since then, and the premise of *Bombolis*—that incorporation is not a valid doctrinal move—is no longer good law. This Court has never gone back and overruled *Bombolis*. It should do so now.

B. Incorporation Is Warranted via the Privileges-or-Immunities Clause or the Due Process Clause.

Justice Thomas in *McDonald* and Justice Gorsuch in *Timbs* expressed interest in the view that the Fourteenth Amendment's Privileges or Immunities Clause—not the Fourteenth Amendment's Due Process Clause—is the appropriate vehicle for

incorporation. *See Timbs* 586 U.S. at 157 (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."); *McDonald*, 561 U.S. at 806 (Thomas, J., concurring in part and concurring in the judgment) ("I cannot agree that [the right to keep and bear arms] is enforceable against the States through a Clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."). Professor Akhil Amar endorses this view. *See* Amar, *supra*, at 166-67.

Incorporating the Seventh Amendment is just as warranted under the privileges-or-immunities approach as it is under the due-process approach. The Seventh Amendment right to a civil jury is certainly a right of national citizenship—akin to the right to travel to the "seat of government" in Washington, D.C., mentioned in the *Slaughter-House Cases*, 83 U.S. 36, 79 (1872), as falling under the Privileges or Immunities Clause's ambit. Indeed, in presenting the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction, Senator Jacob Howard stated:

> It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. …
>
> To these privileges and immunities … should be added the personal rights guaranteed and secured by the first eight amendments of the

> Constitution: such as the freedom of speech and of the press; the right of the people to peaceably assemble and petition for redress of grievances, … the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a home without the consent of the owner; the right to be exempt from unreasonable searches and seizures; and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the charges against him, *and his right to be tried by a jury of the vicinage*; and also the right to be secure against excessive bail and against cruel and unusual punishments.

39th Cong. Globe 2765 (1866) (emphasis added).

Thus, whichever test is the appropriate mechanism for incorporating the Bill of Rights, the Seventh Amendment should clearly be incorporated. If the test for incorporating the Seventh Amendment is whether the right to a civil jury is "a privilege or immunity of citizenship of the United States," the answer is clearly "yes." Alternatively, if the test is whether the right to a civil jury is deeply rooted in American history and tradition per the doctrine of substantive due process, *see, e.g.*, *Dobbs v. Jackson Women's Heath Org.*, 597 U.S. 215, 239-40 (2022), the answer is also clearly "yes," because every State protected this right when the federal Bill of Rights was ratified in 1791, and 36 of 37 States protected this right when the Fourteenth Amendment was ratified in 1868.

C. Policy Arguments Rooted in Federalism Do Not Trump Constitutional Law.

From the Philadelphia Constitutional Convention of 1787 to the present day, there have been those who have believed that the right to jury trial is less important in civil cases than in criminal cases, in part because private citizens must always face off with the government in a criminal case, whereas many civil cases involve a contest between two more or less coequal private parties. But as this very case shows, that is not always true.

When individuals are caught up in civil litigation, their most fearsome opponent may often be the government. It is in part for this very reason that the Seventh Amendment was included in the Bill of Rights, and it is in part for this very reason that the Antifederalists demanded a federal constitutional right to a civil jury as part of the federal Bill of Rights. During the years leading up to the Civil War, for example, the federal government used federal commissioners instead of juries to adjudicate whether alleged fugitive slaves in the North were free, to the dismay and horror of abolitionists. And recently, this Court recognized the need for the civil-jury right to shield individuals from government action in *Jarkesy*, where a private litigant had to face off in a "Case in Law" against the SEC, a powerful agency of the federal government.

Regardless of the merits of policy arguments on whether the civil-jury right is a good idea, the Seventh Amendment protects the right as a matter of constitutional law. And the Fourteenth Amendment—under the reasoning of *McDonald* and *Timbs*—settles the

question whether the civil-jury right should be incorporated against the States. It is, in fact, one of the most deeply rooted constitutional rights in American history and tradition. Although federalism and competition among States are desirable in most circumstances, policy arguments cannot operate to weaken fundamental American rights such as freedom of religion, freedom of expression, the right to keep and bear arms, or the right to criminal and *civil* jury trial.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Amit R. Vora
Counsel of Record
Marilyn Vaccaro
Kasowitz LLP
1633 Broadway
New York, New York 10019
(212) 506-1834
avora@kasowitz.com

Counsel for Amici Curiae

July 10, 2025