No. 25-627

IN THE

Supreme Court of the United States

MACY'S INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

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

BRIEF OF FORMER U.S. ATTORNEYS GENERAL EDWIN MEESE III AND MICHAEL B. MUKASEY AND PROFESSORS STEVEN G. CALABRESI AND GARY S. LAWSON AS AMICI CURIAE SUPPORTING PETITIONER

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January 2, 2026

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INTEREST OF AMICI CURIAE[1]

The Honorable Edwin Meese III served as the seventy-fifth Attorney General of the United States. Previously, Mr. Meese was Counselor to the President. During his tenure as Attorney General, the Department of Justice defended proper limits on federal power.

The Honorable Michael B. Mukasey served as the eighty-first Attorney General of the United States. Previously, Mr. Mukasey was a judge of the U.S. District Court for the Southern District of New York. During his tenure as Attorney General, the Department of Justice defended proper limits on federal power.

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).

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[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.

Amici submit this brief to assist the Court in interpreting the Seventh Amendment's original public meaning, especially as it relates to the novel damages remedies that the National Labor Relations Board (NLRB) has been pursuing. Amici address only the petition's second question presented.

INTRODUCTION & SUMMARY OF ARGUMENT

From 1935 to late December 2022, the NLRB understood its assignment: it dutifully complied with its statutory mandate to address unfair labor practices only through equitable remedies. Because equitable remedies—e.g., cease-and-desist, reinstatement, and backpay orders, *see* 29 U.S.C. § 160(c)—do not require a jury trial under the Seventh Amendment, it posed no problem when the NLRB ordered such remedies without affording respondents a jury trial.

But in *Thryv*, the NLRB crossed a constitutional line. It determined that it could order employers to "compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of" unfair labor practices. *See Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951, at *1 (Dec. 13, 2022), *overruled on other grounds*, *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024). Although *Thryv* "danc[ed] around the term," *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993), the NLRB had unmistakably arrogated to itself the power to award compensatory and consequential damages. That innovation was constitutionally defective. Unlike equitable remedies, damages trigger the Seventh Amendment right to a jury trial—a right that employers are categorically denied when the NLRB funnels charges through in-house administrative proceedings. As this Court reaffirmed in *Jarkesy*,

a civil case must be tried to a jury if it is "legal" rather than "equitable" in nature, a distinction that turns principally on whether the remedy was traditionally awarded by courts of law rather than by courts of equity. *SEC v. Jarkesy*, 603 U.S. 109, 123 (2024). And because "money damages are the prototypical common law remedy," *id.* (quoting *Mertens*, 508 U.S. at 255), *Jarkesy* compels the conclusion that the NLRB violates the Seventh Amendment when it orders employers to pay compensatory and consequential damages without affording them a jury trial.

All the courts of appeals that have addressed the issue see *Thryv* remedies for what they are: unlawful damages awards. Except for one. In the decision under review, a divided Ninth Circuit panel held that *Thryv* remedies rest on firm constitutional ground. In the panel's telling, *Thryv* remedies are "equitable in nature," and thus may be imposed on respondents in juryless administrative proceedings, because they are designed to "restore the status quo." Pet. App. 34–35 n.11 (citation modified). But as the Fifth Circuit recognized, "that feature alone does not render the ordered relief equitable." *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 728 (5th Cir. 2025). Damages—the prototypical legal remedy—also aim to make victims whole. *Id.* Nor have the Third or Sixth Circuits bought the NLRB's theory that a *Thryv* order—to "compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of" unfair labor practices—is somehow something other than a damages award. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 96 (3d Cir. 2024); *NLRB v. Starbucks Corp.*, 159 F.4th 455, 471 (6th Cir. 2025).

The Ninth Circuit's outlier approach, moreover, disregards the jury-trial right's paramount importance. Of ancient vintage, the right to trial by jury is *the* most deeply rooted right in American history and tradition. So for good reason, it "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). When it comes to the Seventh Amendment, then, there is no room for linguistic sleight of hand. No matter what label the NLRB and the Ninth Circuit might give it, the *Thryv* remedy is a damages remedy, which—as the prototypical common law remedy—falls squarely within the Seventh Amendment's scope, triggering the right to a civil jury. *See Jarkesy*, 603 U.S. at 123.

This Court should grant review and reverse.

ARGUMENT

I. The Decision Below Disregards the Civil-Jury Right's Centrality to Our Constitutional Order.

All twelve States that wrote constitutions and bills of rights between 1776 and 1791 protected the civil-jury right. Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1511–12 (2012). While Rhode Island and Connecticut retained their colonial charters and thus did not generate bills of rights, they honored jury-trial rights as a matter of common law. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 655 (1973). When the Fourteenth Amendment was ratified in 1868, the civil-jury right was guaranteed in 36 of 37 States.

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 Tex. L. Rev. 7, 76–77 (2008). Today, the civil-jury right is protected in every State but Louisiana. Steven G. Calabresi, James Lindgren, Hanna M. Begley, Kathryn L. Dore & Sarah E. Agudo, *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, 116 (2018).

The jury-trial right's prominence in American history and tradition should have come as no surprise. It traces its lineage to antiquity, and Blackstone himself extolled its 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 also understood that the right was a powerful bulwark against power grabs by disparate governmental bodies. As he observed: "Every new tribunal, erected for the decision of facts without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step towards establishing aristocracy, the most oppressive of absolute governments." *Id.* at *380.

The colonists and founders adopted the venerable English view. After all, Blackstone's works "constituted the preeminent authority on English law for the founding generation." *See District of Columbia v.*

Heller, 554 U.S. 570, 593–94 (2010) (citation modified); *see also* 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 Declaration of Independence itself complained of "pretended Legislation … depriving us in many cases of the benefit of Trial by Jury." Soon after, 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); *see also* Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding Republic*, The Wisconsin Magazine of History (1989), at 73 (1): 21-32 (noting that the First Congress reenacted the Ordinance). 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 Seventh Amendment's ratification in 1791. An Act to Establish the Judicial Courts of the United States § 9, 1 Stat. 73, 77 (1789).

The civil-jury 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 warned that juries were integral for curbing the power of corrupt judges, "who may easily disguise law, by suppressing and varying fact," and for 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).

Of particular relevance here, the Antifederalists also recognized that the civil-jury guarantee was an especially vital shield for liberty in civil disputes between private parties and the government. The Democratic Federalist thus insisted that the jury, not a "lordly court of justice," was the "safest resource" to "shelter" the "weak and helpless citizen" from "the iron hand of arbitrary power"—a threat emanating not only from "military officers," but also from "excise or revenue officers." Letter from a Democratic Federalist (Oct. 17, 1787), *in* The Founders' Constitution 354 (P. Kurland & Ralph Lerner eds. 1987). As he proceeded to implore, channeling Blackstone: "O! my fellow citizens, think of this while it is yet time, and never consent to part with the glorious privilege of trial by jury, but with your lives." *Id.*

The Federal Farmer, for his part, said it plain: "I have already observed upon the excellency and importance of the jury trial in civil as well as in criminal causes, instead of establishing it in criminal causes only: we ought to establish it generally." Letter from a Federal Farmer (Jan. 20, 1788), *in* 2 The Complete Anti-Federalist 327 (Herbert J. Storing ed. 1981).

James Monroe later echoed such sentiments at the Virginia ratifying convention, where he expressed concern about failing to afford 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). And in the Philadelphia ratifying convention, James Wilson urged that the civil-jury right's absence from the original Constitution did not preclude Congress from affording it via statute. Wilson further denied that Article III's reference to the courts' jurisdiction

over facts signaled that the framers were seeking to abolish the civil-jury right or shoehorn the detested Roman legal tradition into the American experiment. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 488–89, 515–19 (Jonathan Elliot ed. 1836). James Iredell and Alexander Hamilton agreed that the civil-jury right's omission from the text did not support an *expressio unius, exclusio alterius* inference. James Iredell, *Answers to Mr. Mason's Objections to the New Constitution*, *in* Pamphlets on the Constitution of The United States 361–62 (P. Ford ed. 1968); The Federalist No. 83 (Alexander Hamilton) (urging that the Constitution's silence on the civil-jury right meant only that "the institution [would] remain precisely in the same situation in which it is placed by the State constitutions").

Ultimately, James Madison heeded the Antifederalists' warnings, proposing what became the Seventh Amendment as part of the Bill of Rights. The prevailing founding-era notions about the right were thus woven into the tapestry of the constitutional guarantee. So in presuming that the NLRB may properly seek damages from private parties without affording them a civil jury, the decision below contravenes foundational principles, warranting this Court's review.

II. Contrary to the Decision Below, the *Thryv* Remedy Is Unconstitutional.

A. The Seventh Amendment Requires Civil Juries in Damages Actions.

The Seventh Amendment provides:

> 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. VII. Nothing there excludes common-law suits involving the United States. And a suit for damages is a "Suit[] at common law" that triggers the Seventh Amendment guarantee.

Jarkesy said as much. As this Court explained, a civil suit requires a right to a jury trial under the Seventh Amendment if it is "legal in nature," which turns on (i) whether the cause of action resembles common-law causes of action and (ii) whether the remedy is the sort that was traditionally obtained in a court of law. 603 U.S. at 126. The remedy is "the more important" consideration. *Id.* at 123 (citation modified). And notably here: "While monetary relief can be legal or equitable, money damages are the prototypical common law remedy." *Id.* (citing *Mertens*, 508 U.S. at 255).

B. The *Thryv* Remedy Is a Juryless Damages Award and Violates the Seventh Amendment.

In *Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951, at *1 (Dec. 13, 2022), the NLRB concluded:

> [T]o best effectuate the purposes of the Act, our make-whole remedy shall expressly order respondents to compensate affected employees for all direct or foreseeable pecuniary harms that these employees suffer as a result of the respondent's unfair labor practice.

As *Thryv* proceeded to detail, this compensation may encompass not only "backpay," but also "interest and late fees on credit cards" and other "credit card debt,"

"penalties" based on "early withdrawals" from a "retirement account" to "cover living expenses," compensation for loss of a "car" or "home" based on an inability "to make loan or mortgage payments" or "rent," "increased transportation or childcare costs," and "other costs" to "make ends meet." *Id.* at *14–15. In other words, by its own terms, the *Thryv* remedy sweeps far beyond traditional equitable relief.

To be sure, *Thryv* maintained that this "make-whole remedy is not 'consequential damages' as that term is used in other areas of the law," and that the new remedy did not "implicate Seventh Amendment concerns." *Id.* at *16. In the decision below, the Ninth Circuit endorsed that reasoning. Pet. App. 34–35 n.11.

Yet that position blinks reality. *Thryv*'s provision for monetary relief *is* a damages remedy, and it *is* legal in nature, not equitable. As Professors Dobbs and Roberts explain in their seminal treatise, "[d]amages differs from restitution," an equitable form of monetary relief, in that "damages is measured by plaintiff's loss," while "restitution is measured by defendant's unjust gain." Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages–Equity–Restitution* 213 (3d ed. 2018). As they also observe: "The stated goal of the damages remedy is compensation of plaintiff for legally recognized losses. … [D]amages is an instrument of corrective justice, an effort to put plaintiff in his or her rightful position." *Id.* at 215.

The *Thryv* remedy strives to do just that. Rather than focusing on the defendant's unjust gain, the *Thryv* remedy seeks to "rectify[] the harms actually incurred by the victims … and restor[e] them to where they would have been but for the unlawful conduct." 2022 WL 17974951, at *17; *see also Chauffeurs,*

Teamsters & Helpers, Loc. No. 391 v. Terry, 494 U.S. 558, 573 (1990) (holding that employee's duty-of-fair-representation claim triggered the Seventh Amendment right because damages targeted "the wrong done the individual employee," unlike traditional NLRB remedies); *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (holding that fair-housing claims triggered the Seventh Amendment right because they sought "compensatory and punitive damages" rather than "requiring the defendant to disgorge funds wrongfully withheld from the plaintiff"). More specifically, while *Thryv* relief for direct losses constitutes "compensatory damages," *Thryv* relief for foreseeable, indirect losses constitutes "consequential damages." *See* Dobbs, *supra*, at 231 ("Consequential (or special) damages … refer to damages consequent upon but distinct from harm to plaintiff's entitlement"). At bottom, the *Thryv* remedy is a damages remedy, through-and-through.

In the *Thryv* decision itself, two of the five Board members dissented. While the dissenters agreed that the NLRB could lawfully compensate employees for "direct" harms, they recognized that compensation for "foreseeable" harms "opens the door to awards of speculative damages that go beyond the Board's remedial authority," and could implicate "potential Seventh Amendment issues if [the Board] strays into areas more akin to tort remedies." 2022 WL 17974951, at *25 (Members Kaplan and Ring, dissenting).

Mertens is particularly instructive. There, this Court admonished: "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages

are, of course, the classic form of legal relief." 508 U.S. at 255. So too here, the NLRB cannot dance around the term "money damages" to avoid triggering the Seventh Amendment right.

The Ninth Circuit, however, upheld the *Thryv* invention anyway, straying from hornbook principles and this Court's lessons on remedies. It appears that the key analytical move paving the way for this erroneous holding was inferring, from snippets in *Jarkesy* and *Tull*, that because the *Thryv* remedy purportedly seeks to restore the status quo instead of punishing wrongdoing, it is axiomatically equitable, not legal. *See* Pet. App. 34–35 n.11 (citing *Jarkesy*, 603 U.S. at 111, for the proposition that the *Thryv* remedy is "equitable in nature" because it "restore[s] the status quo") (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.")).

But that reasoning is fundamentally flawed. In *Jarkesy* and *Tull*, this Court commented on a particular form of monetary relief that is plainly legal: a civil penalty. This Court also contrasted that relief with equitable remedies—e.g., restitution, which is "literally the restoration of something," *see* Dobbs, *supra*, at 4. Yet neither *Jarkesy*, nor *Tull*, nor any other precedent could sensibly be read to hold that a civil penalty is the *only* type of legal monetary relief out there, or that every remedy with any restorative aim is *always* equitable. Non-punitive compensatory and consequential damages stand alongside civil penalties as classic

common-law remedies. And numerous remedies, including damages, have restorative functions but are legal, not equitable, in nature. Taken to its logical conclusion, the Ninth Circuit's view would mean that "all instances of compensatory damages could qualify as an equitable remedy," thus collapsing the longstanding law-equity divide. *See Hiran*, 157 F.4th at 728; *see also Starbucks*, 159 F.4th at 480 ("Punitive remedies … are merely a subset of the broader range of legal remedies").

C. The Public-Rights Exception Does Not Justify the *Thryv* Remedy.

Nor do the Ninth Circuit's allusions to "public rights" (*see, e.g.*, Pet. App. 36) salvage *Thryv* remedies from the constitutional dustbin or otherwise militate against review. Under the public-rights exception—which must remain "narrow," *Jarkesy* cautioned, since it "has no textual basis in the Constitution"—Congress may assign certain cases to a non-Article III tribunal and without affording a jury. 603 U.S. at 131. But the list is short: "the collection of revenue," "immigration," "tariffs," "relations with Indian tribes," "the administration of public lands," and "the granting of public benefits." *Id.* at 128–32. Nothing suggests that the NLRB's cases make the cut. And even if this Court perfunctorily upheld the NLRB's traditional remedy of reinstatement with backpay on constitutional grounds long ago, *see NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), that decision—especially in light of *Jarkesy*—says nothing about whether the NLRB's novel *Thryv* remedy passes constitutional muster under the Seventh Amendment.

III. Reviewing the *Thryv* Remedy's Lawfulness Is Exceptionally Important.

The divided Ninth Circuit panel was wrong to uphold the *Thryv* remedy—both as a constitutional matter, and as a statutory matter under the constitutional-doubt canon—and this Court should grant the petition to stamp out the panel's outlier of an opinion.

The split is entrenched and intolerable. The Ninth Circuit (incorrectly) says that *Thryv* remedies are lawful, while the Third, Fifth, and Sixth Circuits (correctly) say that *Thryv* remedies are unlawful. This Court's intervention is thus necessary to ensure that the availability of a remedy as sweeping as *Thryv* does not turn on the luck of the circuit draw—an unacceptably haphazard regime that would undermine the uniformity in labor law that Congress sought to achieve through the NLRA. *See, e.g.*, *Linn v. United Plant Guard Workers*, 383 U.S. 53, 57 (1966).

Review is also imperative because, if left to stand, the Ninth Circuit's opinion invites courts and agencies to defy the inescapable consequences of *Jarkesy*'s reasoning. *Jarkesy*'s logical upshot is that agencies may no longer channel Cases in Law into juryless in-house administrative proceedings. In confirming that constitutional boundary, *Jarkesy* secures the right of private parties to raise the civil-jury shield when the government brings Cases in Law against them—despite the relentless rise of the administrative state. That rule reflects a bedrock principle of our constitutional order: when the government sets its sights on a private party through a Case in Law, that party's fate is best left in the dependable hands of everyday peers—not in those of a monarch, a robed official, or an unaccountable bureaucrat. *See, e.g.*, Blackstone, *supra*, at

*380 (observing that a jury of "the middle rank" will "preserv[e] in the hands of the people that share which they ought to have in the administration of public justice"). Yet the decision below, in blessing the *Thryv* remedy, flouts that sacred, self-evident ideal.

"The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Over the fifteen years since this Court issued that warning, the administrative state has continued to expand, and agencies have correspondingly grown more brazen—as the NLRB's pursuit of *Thryv* damages reflects. Holding the line, and remaining committed to the ancient right to trial by jury—a core premise of ordered liberty—is essential to keeping the administrative state at constitutional bay and individual freedom intact.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 2, 2026