No. 25-739

In the Supreme Court of the United States

HERBERT HIRSCH, ET AL.,
Petitioners,

v.

UNITED STATES TAX COURT,
Respondent.

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

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BRIEF OF THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Internal Revenue Code violates the Seventh Amendment and Article III by authorizing the IRS to order the payment of monetary penalties for fraud without providing the taxpayer a jury trial.

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INTEREST OF *AMICI 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 help restore the principles of limited constitutional government that 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.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

This case interests Cato and NFIB Legal Center because adherence to the U.S. Constitution's guarantee of a jury trial in civil proceedings is essential to individual liberty and government accountability.

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[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 *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For centuries on both sides of the Atlantic, the jury has served as a critical check on governmental power. English and early American history featured many examples of "powerful actors attempting to evade jury authority—not by eradicating the institution, but by creating or expanding alternative tribunals."[2] Infamously, one of the primary complaints the Founders listed against the British colonial government was the Crown's increasing practice of shunting Americans into vice-admiralty courts. *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); John Adams, *Instructions of the Town of Braintree to Their Representative*, Oct. 14, 1765, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 40 (2000). This diversion of cases denied jury trials to American subjects and shielded British judges and prosecutors from accountability to juries. Admiralty courts also lacked the impartiality and procedural protections of traditional courts.

In response to that experience, the Framers entrenched the jury trial right in the Seventh Amendment, guaranteeing trial by jury in "[s]uits at common law." U.S. CONST. amend. VII. Two terms ago, in *SEC v. Jarkesy*, this Court recounted the history of, import of, and motivation for the Seventh Amendment. 603 U.S. 109, 121–22 (2024). This reminder was needed, unfortunately, because U.S. lawmakers—resembling their British forbears—have passed laws shunting

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[2] Richard L. Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. 1187, 1198 (2023).

Americans into specialized and jury-less "courts," including at the U.S. Tax Court.[3]

Under settled Seventh Amendment doctrine, when a statutory action is analogous to a common-law cause of action and the relief sought is "legal" in nature, the right to a jury trial attaches. *Jarkesy* affirms this principle in unmistakable terms. The tax fraud penalties at issue in this case fit squarely within that framework. Allegations of tax fraud resemble common law fraud claims in both their elements and their proof, and the penalties imposed here are punitive rather than compensatory. At common law, such claims were tried by juries.

We write separately to add specific historical context that confirms this answer. Since at least the 17th century, juries have adjudicated tax-related disputes. At the Founding, tax penalties were enforced through civil actions in court—not through summary administrative proceedings. The First Congress itself drew a sharp distinction between tax collection and tax penalties, authorizing summary procedures for the former while requiring judicial process for the latter. That choice reflected a shared understanding that when the

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[3] The Tax Court does not fit neatly within any single branch of government. Congress has designated it as an Article I court, outside the Executive Branch. 26 U.S.C. § 7441. Its judges, however, are removable by the President for cause. *Id.* § 7443(f). And this Court has held that the Tax Court is an Article I court that "exercises judicial, rather than executive, legislative, or administrative, power." *Freytag v. Comm'r*, 501 U.S. 868, 890–91 (1991); *but see id.* at 912 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the Tax Court exercises executive power and is better conceived as part of the Executive Branch).

government seeks to punish alleged wrongdoing, it must submit its case to a jury.

The IRS refused to afford petitioners a jury trial, and the Eleventh Circuit did not provide relief from that decision. That refusal irreconcilably conflicts with *Jarkesy* and departs from our constitutional tradition. This Court should grant the petition to reaffirm that Congress cannot evade the Seventh Amendment's jury trial guarantee by assigning punitive claims to jury-less tribunals.

ARGUMENT

I. TAX FRAUD IS CLEARLY ANALOGOUS TO COMMON LAW FRAUD AND THUS IMPLICATES THE SEVENTH AMENDMENT.

The Seventh Amendment requires jury trials in "[s]uits at common law." U.S. CONST. amend. VII. This Court's decision in *Jarkesy* was a sweeping affirmation of the Seventh Amendment's guarantee of a jury trial in cases involving civil penalties. *See Jarkesy,* 603 U.S. at 140–41. The Court explained that "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *Id*. at 122 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). That includes "actions brought to enforce statutory rights that are analogous to common-law causes in actions ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera*, 492 U.S. at 42 (quotation omitted).

In many cases, "the remedy is all but dispositive." *Jarkesy*, 603 U.S. at 123. Here, the IRS seeks to impose more than $15 million on each set of petitioners under a fraud penalty statute. *See* Pet. 7; 26 U.S.C. § 6663.

The IRS itself treats tax fraud as akin to common law fraud. It relies on indirect evidence known as "badges of fraud," derived from common law, to establish that tax fraud has occurred. Bryan T. Camp, *The Impact of* SEC v. Jarkesy *on Civil Tax Fraud Penalties*, 27 FLA. TAX REV. 478, 506 (2024)*; see Niedringhaus v. Comm'r,* 99 T.C. 202, 211 (1992) (listing badges of fraud in a tax context). Badges of fraud "have been considered for centuries in common law fraud cases." Steve R. Johnson, Jarkesy*, the Seventh Amendment, and Tax Penalties,* 79 U. MIAMI. L. REV. 461, 494 (2025).

Moreover, when Congress uses the term "fraud" in statutory schemes, this Court has consistently inferred that Congress intended to incorporate the common-law meaning of that term. Camp, *supra*, at 506. *See Neder v. United States,* 527 U.S. 1, 21 (1999).

Finally, both the label and the operation of the challenged sanctions confirm that IRS fraud penalties are punitive penalties, not restitution. That distinction is critical because, as this Court emphasized in *Jarkesy*, "only courts of law issued monetary penalties to 'punish culpable individuals.'" *Jarkesy*, 603 U.S. at 123 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)). Where, as here, the government seeks to impose civil penalties to punish alleged fraud, that fact alone "effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims." *Id*. at 125.

II. AT COMMON LAW, JURIES ADJUDICATED TAX DISPUTES AND TAX PENALTIES.

The Seventh Amendment was ratified against a historical backdrop in which English common law courts were increasingly asserting jurisdiction over

taxation and revenue disputes. That development shaped the Founders' understanding of the jury's role in constraining governmental power. It also explains why the First Congress legislated and provided a jury trial right in customs penalty cases.

A. At Common Law, Even Tax Collection Disputes Increasingly Involved Juries.

Even apart from tax penalties, juries had a growing role in English tax disputes prior to the American Founding, as matters of taxation migrated from purely administrative forums to common law courts. This shift influenced the Framers' understanding of the jury as a safeguard against abusive taxation. Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment,* 125 U. PA. L. REV. 1281, 1320 (1978).

The primary tax collection methods in England in the 17th and 18th centuries were the Crown's "land tax" and the locally assessed "poor rate." *Id.* at 1315. If not paid voluntarily, authorities employed a procedure known as "distress and sale," under which local officials—acting in an administrative capacity—issued a warrant or precept authorizing a collector to seize and sell a taxpayer's property to satisfy the tax debt. *Id.* at 1315–16. The process was summary and administrative: the collector seized property and sold it, with no prior judicial process. *Id.* at 1315–17.

Critically, however, this summary procedure extended only to the collection of taxes owed, not to the adjudication of fraud or penalties. And while there was no right to a jury trial before the tax was collected, after collection a subject could sue a collector personally in a common law action. *Id.* at 1316–17. These actions

took many forms—including trespass and conversion—and were brought in multiple courts, but a common feature was that juries resolved disputed facts. *Id.* at 1318–20. And this assertion of jurisdiction by the English common law courts was transplanted to the American colonies. *Id.* at 1320. Indeed, "jury determination of liability in taxpayer cases was part of the common law known in colonial procedure." *Id.* at 1321 (citing *Erving v. Cradock*, Quincy 553 (Mass. Prov. 1761)). As in England, liability was determined through common-law actions brought against the tax collectors in their personal capacity. *Id.*

Some courts—like the Tax Court here—have pointed to this history to argue that, because "there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States." *Mathes v. Comm'r,* 576 F.2d 70, 71 (5th Cir. 1978). That formulation, however, elides the deliberate structure of common law tax challenges. Taxpayers sued collectors in their personal capacity precisely because no suits would lie against the sovereign. Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act,* 63 DUKE L.J. 1673, 1688 (2014). There was no suit against the sovereign—but there was an established mechanism for jury adjudication of tax liability through common law actions.

Nor does the modern "pay-penalties-first, sue-later" model replicate that historical safeguard. The procedure here *collapses tax assessment and punitive penalties into a single proceeding* before a jury-less tribunal, with jury review available only—if at all—after full payment of both tax and penalty. And modern, jury-less tax proceedings assess crippling penalties—

the penalties here exceed $15 million per set of taxpayers. That structure bears little resemblance to the historical practice the Seventh Amendment preserves.

B. At the Founding, Tax Penalties Were Enforced Through Jury Trials

At the Founding, taxation was overwhelmingly imposed via external duties rather than internal income taxes. "[T]axes on external revenue . . . made up some 95% of federal revenue until the Civil War." Camp, *supra,* 27 FLA. TAX REV. at 485 n.39. As a result, tax enforcement frequently took the form of penalties imposed for violations of customs and trade laws rather than direct assessments on income or property.

Notably, the First Congress carefully distinguished between tax collection and tax penalties. Their customs statutes allowed for the summary seizure of goods for nonpayment of duties, but any penalties could be recovered only through civil action in court. *See* Act of July 31, 1789, ch. 5, § 36, 1 Stat. 47 (providing that "all penalties" for customs violations "shall be sued for . . . in the name of the United States of America, in any court proper to try the same"); Act of Aug. 4, 1790, ch. 35, § 67 (same). In fact, in the Founding Era and early American history, Congress never employed summary tax collection procedures to collect a penalty. Kirst, *supra*, at 1296.

This legislative choice reflected longstanding Anglo-American practice. Prior to the Founding, both Britain and the American colonies enforced tax penalties through civil suits. *See* Gray Proctor, *Twelve Angry Taxpayers: Why the Constitution Might Guarantee a Jury Trial for Accuracy and Fraud Penalties in Tax Cases after* SEC v. Jarkesy*,* 99 FLA. BAR. J. 58, 59

(2025). The 17th-century Navigation Acts governed the operation of tax penalties in America. Under those statutes, forfeiture actions were tried before juries comprising colonial subjects. Kirst, *supra*, at 1296. As Anglo-American tensions escalated, the colonial juries often refused to impose forfeitures in revenue cases—even when violations appeared clear. *Id*.

"[E]ventually the problem became too great to be ignored." *Id*. Parliament responded by diverting forfeiture proceedings into admiralty courts, where juries were not used. *See id*. This policy was one of the chief grievances animating the American Revolution and memorialized in the Declaration of Independence, which charged the King "For depriving us in many cases, of the benefits of Trial by Jury." THE DECLARATION OF INDEPENDENCE (U.S. 1776).

These experiences shaped the ratification debates. The absence of express jury trial protections in the Constitution alarmed the Anti-Federalists, who viewed juries as essential safeguards against oppressive taxation. Kirst, *supra*, at 1323–24. One of their animating concerns was that the Constitution failed to guarantee trial by jury as "a safeguard against an oppressive exercise of the power of taxation." THE FEDERALIST No. 83 (Alexander Hamilton). The Seventh Amendment must be understood against this historical backdrop.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Respectfully submitted,

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