

No. 25-739

IN THE
Supreme Court of the United States

HERBERT HIRSCH, BONITA HIRSCH,
HARVEY BIRDMAN, AND DIANE BIRDMAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

The government agrees the petition implicates a deeply entrenched circuit split, and it offers no reason to shield the critical questions regarding the jury-trial right in tax fraud penalty cases from this Court's review.

On the mandamus standard, the government concedes that the circuits are divided yet urges this Court to leave the split standing because Congress has not authorized jury trials in the Tax Court. But *Jarkesy* confirms that Congress may not dispense with the Seventh Amendment's requirements by routing common-law suits to non-Article III courts with no power

to conduct the jury trials the Constitution requires. And contrary to the government's suggestion, this Court's precedents firmly establish the jury-trial right's unique "place in our history and jurisprudence," *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024), and confirm "the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect th[at right]," *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962).

On the merits, the government agrees with the fundamentals of the Seventh Amendment and Article III question presented: the monetary penalties the government seeks are legal in nature, and tax fraud penalties were sought through common-law actions at the Founding. The government insists that the *alternative* possibility of paying fraud penalties *now* and pursuing a back-end refund action satisfies the Seventh Amendment. That view lacks support in this Court's precedents and would impose an unconstitutional condition on the exercise of the jury-trial right; indeed, as amici have explained, most taxpayers cannot afford to pay in full first to secure their right to a jury. The government also invokes the public-rights doctrine, but the cases it cites concern tax *revenue* collection, which is different in purpose and historical pedigree from the adjudication of fraud penalties like the \$30 million penalty imposed on petitioners here.

The Court should grant the petition to resolve these critical questions and reverse.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Implicates a Deeply Entrenched Split Over the Mandamus Standard When a Jury Trial Is Wrongly Denied.

The government concedes that “courts of appeals have long applied different standards when evaluating mandamus petitions that challenge district courts’ denials of jury trials.” Br. in Opp. 10; *see* Pet. 10-19. Despite acknowledging this circuit conflict, the government argues that this Court’s intervention is unwarranted for two reasons. First, in the government’s view, there is no basis for applying a different mandamus standard in the jury-trial context. Br. in Opp. 6-10. Second, the government argues the split is not implicated because this case arises from the Tax Court. *Id.* at 10-11. Neither argument withstands scrutiny.

A. Most courts of appeals correctly hold that the traditional mandamus standard “does not apply in the extraordinary case where the petitioner claims erroneous deprivation of a jury trial.” *In re Cnty. of Orange*, 784 F.3d 520, 525-26 (9th Cir. 2015). Instead, “[i]f the plaintiffs are entitled to a jury trial, their right to the writ is clear.” *Id.* at 526 (quoting *Tushner v. U.S. Dist. Ct.*, 829 F.2d 853, 855 (9th Cir. 1987) (Kennedy, J.)); *see* Pet. 10-14.¹

Contrary to the government’s suggestion (at 7), the basis for this rule is evident. As this Court has explained, the “[m]aintenance of the jury as a fact-

¹ Although the decisions from the First and Federal Circuits were vacated on other grounds, Br. in Opp. 11, the government identifies no authority suggesting those courts have reverted to the traditional mandamus standard.

finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (citation omitted). That exacting standard is inconsistent with a rule that permits courts to deny mandamus relief simply because the jury-trial question is novel or complex. The importance of the right also requires courts to consider these questions “*before* the plaintiff is put to the difficulties” of participating in a constitutionally deficient bench trial. *In re Simons*, 247 U.S. 231, 239 (1918) (emphasis added). Mandamus is thus the appropriate vehicle for vindicating the jury-trial right, even if the petitioner could obtain relief on appeal from final judgment following a non-jury trial.

The government concedes that the jury-trial right is “important” but argues that “the nature of the right” is irrelevant. Br. in Opp. 7 (citation omitted). That contention contravenes the long line of precedent recognizing that the “right to a jury trial . . . has occupied an exceptional place in the history of the law of federal mandamus.” *Wilmington Tr. v. U.S. Dist. Ct.*, 934 F.2d 1026, 1028 (9th Cir. 1991); see *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). And the deprivation of a fundamental constitutional right that infects the structure of the proceeding and will always require a new trial is a far cry from the “denial of a discovery request” or a “wrongful evidentiary ruling” that may qualify as harmless error. Br. in Opp. 7.

The majority rule is also firmly grounded in this Court’s precedents, which have reaffirmed the availability of mandamus relief to prevent the wrongful denial of a jury trial. See *Dairy Queen*, 369 U.S. 469;

Beacon Theatres, 359 U.S. 500; *In re Simons*, 247 U.S. 231. The government argues that those cases show only “that mandamus may be available ‘[i]f denial of a jury trial threatens injury that is irreparable in the sense that appellate review would not avail . . . because the judge’s decision would be preclusive.” Br. in Opp. 8 (citation omitted). But the Court nowhere discussed the availability of appellate review in concluding that mandamus relief was appropriate in those cases. *See* Pet. 19. Nor is it clear that review of the jury-trial question would have been foreclosed on appeal from final judgment. In *Dairy Queen*, for example, the district court struck the demand for a jury trial because the action was “purely equitable.” 369 U.S. at 470. An appellate court presumably could have reviewed that holding in the ordinary course, too.

The government’s practical objections to the majority rule fare no better. *See* Br. in Opp. 6. Several circuits have applied that rule for decades, and the consequences the government fears have not materialized. In any event, the majority rule does not deprive courts of ordinary docket-management tools, as the government implies. If a case might “soon be resolved at summary judgment,” *id.* at 7, the trial court presumably would grant summary judgment and dismiss as moot the jury-trial demand. And the possibility that mandamus proceedings might “disrupt a long-scheduled trial,” *id.*, is precisely the point: Petitioners are entitled to have their jury-trial right vindicated “*before*” they are “put to the difficulties and the courts to the inconvenience” of participating in a constitutionally deficient bench trial. *In re Simons*, 247 U.S. at 239 (emphasis added).

B. This deep circuit split is squarely implicated here. Had the Eleventh Circuit applied the majority approach, it would have determined that petitioners were entitled to a jury trial, *see infra* Section II, and the writ would have issued. Instead, the court did not engage with the merits, concluding only that petitioners had not established that they “ha[d] no other avenue of relief” and that “the right to relief is clear and indisputable.” Pet. App. 2a.

The government insists that the split is not relevant here because this case arises from the Tax Court. But elsewhere, the government acknowledges that “courts of appeals are authorized to review the Tax Court’s decisions ‘in the same manner and to the same extent as decisions of the district courts.’” Br. in Opp. 5 (quoting 26 U.S.C. § 7482(a)(1)). Thus, courts of appeals can and should review the wrongful denial of a jury trial in Tax Court, just as they would the same denial in district court.

The government errs in contending that the Tax Court’s inability to hold a jury trial necessitates a different standard. Br. in Opp. 8-11. It cannot be that petitioners are not entitled to relief simply because Congress chose not to authorize jury trials in Tax Court. Indeed, this Court has long rejected the suggestion that Congress can “conjure away the Seventh Amendment” by routing the relevant claims to a tribunal it designed without the capacity to honor the jury-trial right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989).

In any event, granting mandamus would not require the Tax Court to empanel a jury. Rather, this Court need only hold that the Seventh Amendment

entitles a taxpayer to a jury trial before the IRS can demand payment of tax fraud penalties. Because the fraud penalties here were imposed without respecting that right, an order granting the writ would simply direct the Tax Court to conclude that the penalties were unlawfully imposed and thus that the penalty portion of the deficiency notice is null and void. *Cf. Scar v. Commissioner*, 814 F.2d 1363, 1367-70 (9th Cir. 1987) (notice of deficiency was invalid where it was not based on a lawful determination of deficiency of tax); *Mukhi v. Commissioner*, 163 T.C. 150, 162 (2024) (concluding that Commissioner did not have the authority to impose a particular penalty). As in *Jarkesy*, the government would then be free to attempt to pursue the fraud penalties via a jury-eligible mechanism.

II. A Taxpayer Is Entitled to a Jury Trial When the IRS Imposes Fraud Penalties.

As to the two controlling considerations in the Seventh Amendment analysis, there is very little dispute. The government does not question that the IRS's fraud penalties are "legal in nature" and designed to "punish and deter," or that tax fraud penalties were adjudicated in common-law courts during the Founding era. *Jarkesy*, 603 U.S. at 122-23, 125; Pet. 19-31. That should make this case easy under *Jarkesy*—and none of the government's responses has merit.

A. First, the government claims that the possibility of a *different* proceeding solves the problem with this one: a taxpayer could pay fraud penalties in full, then bring a refund suit in district court where a jury would be available. Br. in Opp. 12; *contra* Pet. 29-31. But the Seventh Amendment guarantees a jury trial at the "*initial* adjudication" of a common-law suit, *Jarkesy*,

603 U.S. at 127-28 (emphasis added), not after the government has levied and collected its fraud penalty. Requiring taxpayers to pay penalties they believe to be unlawful first to exercise their jury-trial right is no way to honor the Seventh Amendment.

The “pay first” precedents the government cites (at 12) do not suggest otherwise—most did not address the Seventh Amendment at all. *See, e.g., Flora v. United States*, 357 U.S. 63, 75 (1958) (holding that, as a matter of statutory interpretation, a taxpayer must pay a deficiency before suing for refund); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977) (describing general revenue-collection authority); *Cheatham v. United States*, 92 U.S. 85, 89 (1875) (similar). A footnote in *Phillips v. Commissioner*, 283 U.S. 589, 599 n.9 (1931), addressed the Seventh Amendment, but only in the context of *revenue* collection—which serves a different purpose and carries a different historical pedigree than fraud penalties, *see* Pet. 23-25.

Moreover, a pay-now-trial-later scheme imposes an unconstitutional burden on petitioners’ jury-trial rights. This Court has long recognized the “overarching principle” that the government may not “coerc[e] people into giving” up their constitutional rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (collecting cases). Thus, any statute that “unreasonably obstructs the right of trial by jury” by placing “the defendant in circumstances which render [the] right unavailing for his protection” is “unconstitutional and void.” *Cap. Traction Co. v. Hof*, 174 U.S. 1, 20, 45 (1899) (citation omitted). Here, forcing taxpayers to pay tens of millions of dollars to access a jury is precisely “the type of coercion that the

unconstitutional conditions doctrine prohibits.” *Koontz*, 570 U.S. at 604-05. Nor is a collection suit a viable alternative: Courts cannot redetermine penalties in those suits, and the IRS can collect penalties via administrative mechanisms before filing suit.

B. Next, the government argues that the Tax Court proceeding is not a “suit at common law” because the Tax Court “lacks the authority to enter a final judgment ordering a taxpayer to pay taxes or penalties.” Br. in Opp. 12-13. But when the Tax Court agrees that penalties were correctly imposed, the IRS can immediately levy assets (wages or bank accounts), Social Security benefits, and retirement income, *see* 26 U.S.C. § 6331(a), and seize and sell property to satisfy the debt, *see id.* § 6331(b); *see also id.* §§ 6321-6326. The unpaid penalties also accrue interest. *Id.* § 6601. The consequences of the Tax Court’s order are thus no different than a money judgment and contrast sharply with administrative orders that “do[] not require payment, create a debt, or trigger the accrual of interest,” Br. for Fed. Parties at 2, *FCC v. AT&T, Inc.*, No. 25-406 (U.S. Mar. 20, 2026).

C. The government also claims (at 13) that the jury-trial right cannot attach because this action is styled as one against the government. But “what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled,” *Jarkesy*, 603 U.S. at 135, and the government does not dispute that the “substance” of this suit concerns its *own* attempt to impose fraud penalties, *see* Pet. 27. The cases the government cites (at 13) involved a private party’s voluntary suit against the sovereign, not the government’s affirmative imposition of penalties like those petitioners face. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156,

163 (1981) (age discrimination suit against the Navy); *Galloway v. United States*, 319 U.S. 372, 388-89 (1943) (suit for disability benefits); *McElrath v. United States*, 102 U.S. 426, 440 (1880) (suit for compensation).

D. Nor is there any merit to the government’s suggestion—echoing the *Jarkesy* dissent—that this case does not implicate the Seventh Amendment because Congress has “properly assign[ed]” the matter to “a non-Article III tribunal.” Br. in Opp. 13 (quoting *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 345 (2018)); see *Jarkesy*, 603 U.S. at 172-73 (Sotomayor, J., dissenting). The key word is “properly”: the very question in this case is whether the power to adjudicate a common-law suit was properly assigned to a non-Article III court. And the government is incorrect to suggest that Article III is not relevant here—petitioners have relied on Article III in the questions presented and in argument. See Pet. i, 30; see also *Jarkesy*, 603 U.S. at 150-51 (Gorsuch, J., concurring) (explaining that non-jury adjudication of fraud claims violates Article III).

E. Finally, the “public rights” exception does not apply. Pet. 28-29; CTR Br. 9-16. Arguing otherwise, the government points to the collection of tax *revenue*, but that does not address punitive penalties for fraud, which were historically adjudicated in common-law courts. See Pet. 22-25. The government does not contest this penalty-specific history, and that settles the matter, as the public-rights exception applies only to matters that “historically could have been determined *exclusively* by the executive and legislative branches.” *Jarkesy*, 603 U.S. at 128 (emphasis added) (citation omitted).

The government similarly misreads *Helvering v. Mitchell*, 303 U.S. 391 (1938), as holding that “the public-rights doctrine extends to penalties for tax fraud.” Br. in Opp. 14. *Helvering* considered a double-jeopardy question in a tax fraud case (not the Seventh Amendment), and it recognized that tax fraud penalties serve to “reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer’s fraud.” 303 U.S. at 401. That is a law enforcement function, not a revenue-collection one, and this Court has never extended the public-rights doctrine to fraud penalties like those at issue here.

III. This Case Presents a Clean Vehicle To Resolve These Important Questions.

This case is the ideal vehicle to resolve these significant issues with profound consequences for taxpayers accused of fraud. *See* Pet. 31-33; AFPP Br. 3; CTR Br. 3-4.

The government (at 15) urges the Court to await a circuit split before addressing the Seventh Amendment question. But the Court regularly grants certiorari to resolve constitutional questions before a split develops, including in *Jarkesy* itself. And the Eleventh Circuit’s failure to address the merits of the Seventh Amendment question only strengthens the case for review. *Contra* Br. in Opp. 15-16. Under the correct mandamus standard, a court “can—and must”—grapple with the merits of the jury-trial question, even if it is novel or complex. *In re Express Scripts, Inc.*, __ F.4th __, 2026 WL 1355370, at *3 (4th Cir. May 15, 2026). And even courts applying the minority approach have assessed the merits in determining whether the right was clear or indisputable. *See* Pet.

14-15. By failing to engage with the merits at all, the court below only heightened the need for immediate resolution of this conflict.

The interlocutory posture of this case similarly amplifies the need for review. The mandamus standard embraced in this case—if left uncorrected—will seriously undermine a party’s ability to protect his jury-trial right. This Court has recognized the importance of review in precisely these circumstances. *Dairy Queen* also arose from the denial of mandamus, and the Court granted certiorari, notwithstanding that interlocutory posture, because the lower court decisions were “inconsistent with protections” for the “important constitutional right to trial by jury.” 369 U.S. at 470. The same result should follow here.

At a minimum, the Court should hold this petition pending resolution of *FCC v. AT&T* (No. 25-406) and *Department of Labor v. Sun Valley Orchards, LLC* (No. 25-966). Both cases will resolve important questions about the scope of the jury-trial right following *Jarkesy* that could bear on the proper disposition of the constitutional question presented here.

CONCLUSION

The Court should grant the petition for a writ of certiorari; at minimum, it should hold this petition pending resolution of *AT&T* and *Sun Valley*.

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