

In the Supreme Court of the United States

HARVEY BIRDMAN, DIANE BIRDMAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF
CERTIORARI FROM NOVEMBER 18, 2025, TO JANUARY 20, 2026**

To the Honorable Justice Thomas, as Circuit Justice for the Eleventh Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30, petitioners Harvey Birdman and Diane Birdman respectfully request that the time to file a petition for a writ of certiorari in this case be extended by 60 days to and including January 20, 2026.¹ The United States Court of Appeals for the Eleventh Circuit issued its order in this case on May 30, 2025 (App. A), and denied Petitioners' timely petition for rehearing on August 20, 2025 (App. B).

Absent an extension, the petition for a writ of certiorari would be due on November 18, 2025. Petitioners are filing this application more than ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254 to review this case.

¹ January 19, 2026, is a Monday and will be observed as Martin Luther King Jr. Day.

BACKGROUND

In June 2024, this Court held, in no uncertain terms: “[a] defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator.” *Sec. & Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 140 (2024). In reaching this decision, it was of no moment that the SEC exclusively used in-house hearings to seek civil penalties imposed by the Executive Branch, and that this method of adjudicating such disputes was business as usual in securities litigation. The bottom line remained: when the civil penalty sounds in “fraud,” the Seventh Amendment requires that a jury determine whether the Government has proven its fraud allegations. *Id.*

When seeking to impose punitive monetary exactions, there is no principled distinction between the fraud penalties the SEC brought in *Jarkesy* and fraud penalties the IRS brought in this case. Rather, consistent with Justice Gorsuch’s concurrence, the Constitution “limit[s] how the government may go about depriving an individual of life, liberty, or *property*.” *Id.* at 141 (Gorsuch, *J.*, concurring) (emphasis added). The premise is as simple as it is structurally critical: when the Government seeks to *penalize* someone by taking their property *for fraud*, a jury must make that decision.

After the Tax Court rebuffed Petitioners’ attempts to vindicate that right, they sought a writ of mandamus in accordance with this Court’s clear and long-held position that “the right to grant mandamus to require jury trial where it has been improperly denied is settled.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959).

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended by 60 days, for several reasons.

First, the press of other matters will make submission of the petition difficult absent an extension. Undersigned counsel has been extremely busy with numerous recent and upcoming deadlines including the following:

- Post trial briefing for a one-plus week specially set trial in the U.S. Tax Court in Miami, FL, that commenced on August 18, in three consolidated cases covering twelve taxable years in *Curtin v. Comm’r of Internal Revenue*, Docket Nos. 32212-15, 21530-16, and 2241-18, which includes over 200 stipulated exhibits totaling over 20,000 pages, for which the opening brief (seriatim) is due on December 19 and subject to an 80-page word limit (exclusive of the statement of proposed findings of fact and conclusions of law).
- A multi-week trial in a Florida state felony criminal case (Fla. 17th Cir.), *State v. Augustin*, Case No. 20-3084CF10A, which commenced on October 14 and continued through October 29 and resulted in a mistrial on all counts, which are required to be retried within 90 days.
- An October 29 deadline for a petition for a writ of certiorari with this Court in *Wright v. Comm’r of Internal Revenue*, No. 24-10563, 2025 WL 2167378 (11th Cir. July 31, 2025) (*pro bono* case).
- A November 3 deadline for an opening brief in *United States v. Lizon-Barias*, case no. 25-10824 (11th Cir.).
- A multi-day trial in a Florida state felony criminal case (Fla. 17th Cir.), *State v. Jean*, Case No. 25-4630CF10A, pursuant to a speedy trial demand, which is scheduled to commence on November 17.
- A multi-day bench trial starting on December 2 in *Est. of Evelyn Solomon, et al. v. Comm’r*, case no. 20102-19 (U.S. Tax Ct.).
- Oral argument before the U.S. Court of Appeals for the Third Circuit during the week of December 8 in *United States v. Girard*, case no. 24-2097 (3d Cir.).

Second, no prejudice would result from the requested extension. Whether the extension is granted or not, the petition can be considered this Term—and, if granted, the case will be argued and decided next Term. Counsel for Respondent² has kindly confirmed that Respondent has no objection to the requested relief.

Finally, the petition is likely to be granted. The Tax Court’s decision denying a jury trial on the issue of fraud liability is incompatible with this Court’s decision in *Jarkesy*—indeed, to the extent there are any meaningfully distinguishing characteristics, they have gone unmentioned by the Tax Court and remain unconsidered by this Court.

This Court made abundantly clear, the technical and procedural contours of Tax Court litigation are not controlling; rather the form gives way as “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. To that end, just as in *Jarkesy*, “[t]his is a common law suit in all but name” and Petitioners have the right to have the determination of fraud penalties decided by a jury. *Id.* at 136. Just as in the SEC context, the question to be presented to this Court is *not* whether the IRS “is free to pursue all of its charges against [Petitioners,]” but whether the IRS—as the SEC is constitutionally required to do when it alleges fraud—must do so “[i]n a court, before a judge, and with a jury.”

² Michael J. Haungs has represented that DOJ Tax (Appellate) does not object the requested relief, but Mr. Haungs was unsure whether the Petitioners needed consent from the Solicitor General’s Office. The undersigned has contacted the Solicitor General’s Office but has yet to receive a response.

Id. at 167. Regardless of the Tax Court’s and IRS’s preferences, a jury determination is what the Constitution requires.

And the Court of Appeals’ decision erroneously applied the wrong standard, effectively abrogating this Court’s clear command in *Beacon Theaters* and this Court’s unbroken line of jurisprudence ever since.

Indeed, for more than a century, this Court has recognized that an order denying a jury trial represents a structural error “that should be dealt with now, before the [party] is put to the difficulties and the courts to the inconvenience” of a trial that will inevitably need to be repeated. *In re Simons*, 247 U.S. 231, 239-40 (1918). To that end, “Supreme Court and other decisions make it clear that mandamus may be used *routinely* to require a jury trial if it has been denied improperly.” 9 Wright & Miller, Fed. Prac. & Proc. Civ. § 2322 (4th ed. 2024) (emphasis added).

In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962), this Court reversed the Third Circuit’s denial of mandamus relief with respect to a district court’s order striking a jury-trial demand. In determining that the “district judge erred in refusing to grant petitioner’s demand for a trial by jury” and that “[t]he Court of Appeals should have corrected the error of the district judge by granting the petition for mandamus,” *id.* at 479-80, this Court “emphasize[d] the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury,” *id.* at 472.

Dairy Queen was issued just a few years after *Beacon Theaters*, where this Court reversed the Ninth Circuit’s refusal to grant mandamus relief to a petitioner who was improperly denied the right to a jury trial. 359 U.S. at 511. Rejecting the argument that “mandamus is not available under the All Writs Act” to correct this error, *id.* at 511 & n. 20, this Court emphasized the Seventh Amendment’s “importance” and “place in our history and jurisprudence.” *Id.* at 501. Therefore, “any seeming curtailment of the right to such a jury trial should be scrutinized with the utmost care.” *Id.* (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

This Court’s long line of jurisprudence makes clear that “the right to grant mandamus to require a jury trial where it has been improperly denied” is “settled.” *Beacon Theaters*, 359 U.S. at 511 & n. 20.

This Court’s binding precedents were disregarded by the courts below. Accordingly, it is likely that the petition will be granted for this Court to correct those errors.

CONCLUSION

Accordingly, for the foregoing reasons, Petitioners respectfully request that an order be entered extending the time to file a petition for a writ of certiorari for 60 days, up to and including January 20, 2026.

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Dated: November 6, 2025

Respectfully submitted,

By: /s/ Joseph A. DiRuzzo, III

Joseph A. DiRuzzo, III

Counsel of Record

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APPENDIX A

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-10420

In re: HERBERT HIRSCH,
BONITA HIRSCH,

Petitioners.

On Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Georgia
D.C. Docket No.

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Order of the Court

25-10420

No. 25-10426

In re: HARVEY BIRDMAN,

Petitioners.

On Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Georgia
D.C. Docket No.

Before BRANCH, GRANT, and BRASHER, Circuit Judges.

BY THE COURT:

Before this Court are two consolidated petitions for writs of mandamus filed by Petitioners Herbert and Bonita Hirsch and Petitioners Harvey and Diane Birdman. Petitioners ask this Court to issue writs of mandamus compelling the Tax Court to grant them jury trials on their respective petitions for redetermination of tax fraud penalties assessed against them by the Internal Revenue

25-10420

Order of the Court

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Service. Petitioners' motion for leave to file a joint reply brief is GRANTED.

A writ of mandamus is “a drastic and extraordinary remedy reserved for really extraordinary causes amounting to a judicial usurpation of power or a clear abuse of discretion.” *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1238 (11th Cir. 2014) (quotation marks omitted). A petitioner is entitled to the writ only if: (1) he has “no other adequate means to attain the relief he desires”; (2) he has a “clear and indisputable . . . right to issuance of the writ”; and (3) the issuing court determines, in the exercise of its discretion, that the writ is appropriate under the circumstances. *Rohe v. Wells Fargo Bank, N.A.*, 988 F.3d 1256, 1265 (11th Cir. 2021). The petitioner has the burden of showing that the petitioner has no other avenue of relief and that the right to relief is clear and indisputable. *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989). Petitioners have not met that burden here.

Accordingly, the consolidated petitions for writs of mandamus are DENIED.

APPENDIX B

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-10420

In re: HERBERT HIRSCH,
BONITA HIRSCH,

Petitioners.

On Petition for Writ of Mandamus to the
United States District Court for the
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On Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Georgia
D.C. Docket No.

Before BRANCH, GRANT, and BRASHER, Circuit Judges.

BY THE COURT:

Petitioners’ “Petition for Panel Rehearing or Rehearing *En Banc*,” which the Court construes as a motion for reconsideration of the order denying Petitioners’ petitions for writs of mandamus, is DENIED.