No.

In the Supreme Court of the United States

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, AND CODY DAVIS,

Petitioners,

v.

INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment right to a civil jury trial for suits at common law is incorporated against the states under the Fourteenth Amendment.

2. Whether Petitioners are entitled to a jury trial under the Seventh Amendment.

PARTIES TO THE PROCEEDING

Petitioners, plaintiff-appellants below, are Swan Energy, Inc., Brandon Davis, John Schiffner, and Cody Davis.

Respondent, defendant-appellee below, is the Investor Protection Unit of the Delaware Department of Justice.

RULE 29.6 STATEMENT

Swan Energy, Inc. is a Delaware corporation with no parent or publicly held company owning 10% or more of its stock.

STATEMENT OF RELATED CASES

This case arises from the following proceedings:

- *Swan Energy, Inc., Brandon Davis, John Schiffner, and Cody Davis v. Investor Protection Unit of the Delaware Department of Justice*, No. 331, 2025 (Del. July 16, 2026).
- *In re Swan Energy, Inc., Brandon Davis, John Schiffner, and Cody Davis*, No. 18-0026 (Inv. Prot. Dir. State of Del.).

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INTRODUCTION

In 2020, the State of Delaware accused Petitioners of a scheme to defraud investors into purchasing risky oil, gas, and mining securities. It sought civil penalties against them in the amount of $710,000. Delaware's securities laws, like those in many states, are nearly identical to the federal securities laws. Thus, like the federal securities laws, civil penalties are largely punitive, and the elements of securities fraud under Delaware law overlap substantially with common-law fraud.

If the action against Petitioners had been brought in federal court under the federal securities laws, the Seventh Amendment would require a jury trial under this Court's decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024). But because the Seventh Amendment remains one of the few rights in the Bill of Rights not incorporated against the states, the Delaware Supreme Court was free to reject this Court's approach in *Jarkesy* and hold that Petitioners were not entitled to a jury trial under the Delaware Constitution. App. 1a-37a. As a result, Petitioners are currently defending themselves in a juryless administrative proceeding to which the rules of evidence do not apply and which, on appeal, will be reviewed under a "substantial evidence" standard. App. 75a. Authorities in Delaware may thus "dispense with the hassle of proving their case to a jury," and instead allow Petitioners' rights to be adjudged by "agency officials who work side by side with those bringing the charges." *Thomas v. Humboldt Cnty.*, 146 S. Ct. 27, 28 (2025) (Gorsuch, J., statement respecting denial of certiorari).

Delaware is not alone. Almost all state appellate courts that have confronted *Jarkesy*'s reasoning have

declined to follow it. And many others apply very different standards to the civil jury-trial right than does this Court.

As a result, a two-tiered system of justice prevails in America. At the federal level, one is entitled to a jury trial in actions involving private rights and civil money penalties. In many states, the opposite is true. But because the Seventh Amendment has not been incorporated, it is unable to perform its function as a federal floor that ensures the right to a civil jury trial is protected as the fundamental right it most assuredly is.

This Court should grant the petition, incorporate the Seventh Amendment against the states, and hold that Petitioners are entitled to a jury trial.

OPINIONS BELOW

The opinion of the Delaware Supreme Court, App. 1a-37a, is available at 2026 WL 2053613. The decision of the Delaware Superior Court, App. 38a-66a, is reported at 341 A.3d 1036.

JURISDICTION

The Delaware Supreme Court entered judgment on July 16, 2026. On October 2, 2026, Justice Alito granted an extension to file a petition until November 13, 2026. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included at App. 70a-77a.

STATEMENT OF THE CASE

Swan Energy, Inc. (individually, "Swan Energy") is a Delaware corporation with its principal place of business in Houston, Texas. App. 212a. Founded in 1977, Swan Energy works with businesses in the oil-and-gas, trucking, disposal, and mining industries. App. 212a. It forms joint ventures to raise capital from accredited investors who seek participation in the management of oil-and-gas development, production, and related commercial activity. App. 212a.

In November 2020, the State of Delaware, through the Investor Protection Unit (IPU) of the State's Department of Justice, brought an administrative enforcement action against Petitioners Swan Energy; Brandon Davis, its CEO; John Schiffner, its former marketing representative; and Cody Davis, a former officer (collectively, "Swan," unless otherwise noted). App. 216a. The IPU alleges that certain Swan joint-venture investments were in fact securities subject to the Delaware Securities Act, 59 Del. Laws. ch. 208 (1973), 6 Del. C. §§ 73-101-73-704. App. 78a-139a. According to the IPU, Swan engaged in a scheme to induce investors to purchase risky, unregistered securities. App. 78a-79a; 216a-217a. The IPU charged: (i) Swan Energy and Brandon Davis with securities fraud under Section 73-201 of the Delaware Securities Act; and (ii) all Petitioners with the unlawful offer/sale of unregistered securities under Section 73-202. App. 126a-138a. Notably, Sections 73-201 and 73-202 are near-verbatim copies of federal securities laws, *see* 15 U.S.C. § 77q, § 77e, respectively, which sound in fraud. *See, e.g.*, *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1085 (9th Cir. 2010) ("The registration requirement [15 U.S.C. § 77e] arose with

the 1933 Securities Act. It was designed to be a principal statutory tool for protecting the public. The mischief aimed at was rampant fraud in the sale of securities to the financially unsophisticated public."). Finally, the IPU seeks, among other things, fines that could reach $710,000 on seventy-one separate counts. App. 76a.[1]

The adjudication of the IPU's claims, however, cannot proceed in court. Rather, under the Securities Act, the IPU must bring its action before the Director of the Investor Protection Unit, who has delegated adjudicatory power to an administrative hearing officer appointed by the Attorney General. App. 72a, 213a-214a. This "Presiding Officer" is also a Deputy Attorney General. 6 Del. Admin. C. §§ 202, 225A. When conducting these hearings, the Presiding Officer is guided but not bound by the Delaware Rules of Evidence, and hearsay is admissible. App. 77a. Respondents like Swan have no right to compel the production of documents or witness testimony and must instead ask the IPU to issue subpoenas to compel testimony. 6 Del. Admin. C. § 304(b). At the conclusion of the hearing, the Presiding Officer issues a written decision with a summary of the evidence, findings of fact, conclusions of law, and sanctions. 6 Del. Admin. C. § 251. These decisions are appealable to the Delaware Court of Chancery, which does not provide a jury trial or de novo review of the facts. App. 75a.

The IPU's initial complaint was followed by two amended complaints. App. 78a-139a. In response, Swan raised several state and federal constitutional

[1] The IPU also charged Mr. Schiffner with failing to enter into a written advisory contract and breach of fiduciary duty. App. 136a-138a.

defenses, including that "the imposition of any amounts that are punitive in nature or constitute penalties would be fundamentally unfair and would violate the Constitution of the United States" and that the administrative proceeding itself was "unfair, unconstitutional, and violate[s] the Fourteenth Amendment to the Constitution of the United States." App. 199a; 206a. Swan also sought the IPU's prior orders and penalty records, first through public-records requests and then through three sets of document requests. App. 217a-220a. But the IPU refused to comply, insisting that Swan was "not entitled to discovery in this administrative proceeding." App. 219a.

Separately, on December 1, 2023, just two days after this Court held oral argument in *Jarkesy*, Swan filed a complaint in the Court of Chancery to enjoin the IPU's administrative enforcement action. App. 222a. The parties stipulated to stay the administrative action, and because the stay obviated any need for an injunction, Swan's collateral suit was transferred from the Court of Chancery to Superior Court. App. 222a. There, Swan sought an order declaring that the administrative action and the statute under which it was brought violated Swan's right to a jury trial as guaranteed by Article I, Section 4, of the Delaware Constitution. App. 223a-224a. Swan also asked the court to declare that the IPU's process violated Swan's state due process rights. App. 224a-231a. On June 24, 2025, almost exactly one year after this Court decided *Jarkesy*, the Delaware Superior Court dismissed the complaint, concluding that Swan did not have a right to trial by jury under the Delaware Constitution and that its due process claim was not ripe for adjudication. App. 43a-66a.

Swan appealed to the Delaware Supreme Court. Swan again argued that the IPU's claims must be tried with a jury in a court of law and, therefore, IPU's administrative enforcement action deprived Swan of its right to a jury trial under Article I, Section 4, of the Delaware Constitution. App. 23a; 26a-27a. Swan argued that the superior court's decision was inconsistent with Delaware jurisprudence and *Jarkesy*'s common-law analysis under the Seventh Amendment. App. 23a; 26a-27a. Swan identified the similarities between Delaware and federal securities laws, and between modern statutory securities claims and common-law fraud claims. *Id*. Finally, Swan noted that Delaware law requires Delaware courts to follow federal court jurisprudence concerning alleged securities violations. App. 23a-24a.

The Delaware Supreme Court rejected Swan's arguments, drawing heavily on its recent decision in *Blue Beach Bungalows DE, LLC v. State*, 351 A.3d 1007 (Del. 2025). *See* App. 18a-27a. In *Blue Beach*, the Court rejected *Jarkesy*'s application to the analysis of Delaware's jury-trial right. *See Blue Beach*, 351 A.3d at 1037-39. The court held that the IPU's claims against Swan did not have precise common-law analogs and, therefore, that Swan was not entitled to a jury trial under the Delaware Constitution. App. 3a. According to the court, "*Jarkesy* was grounded in the Seventh Amendment, which has not been incorporated and applied to the States by the Fourteenth Amendment. As such, it is not binding on us." App. 23a. Swan petitions this Court to address that precise question.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to protect the fundamental right to a civil jury trial from encroachment by the states.

In every major Seventh Amendment case decided in the last half-century, this Court has sounded a familiar theme: "Maintenance of the jury as a fact-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." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Consistent with that premise, in determining what qualifies as a "Suit[] at common law" under the Seventh Amendment, the Court has focused on whether the action is "legal in nature" and not whether it is legal in form. *See Jarkesy*, 603 U.S. at 122. So long as a modern cause of action shares a close relationship with a common-law cause of action and the remedy is legal, the case must be tried to a jury. *Id.* at 125-26. That a cause of action is based on a new statute or regulatory scheme is immaterial, as Congress may not "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989)*; accord Jarkesy*, 603 U.S. at 135.

By contrast, many state courts require that a cause of action strictly conform to the common law to receive a jury trial. The Delaware Supreme Court epitomizes this approach. It has held that the state constitution requires a near-perfect match between the elements of a current cause of action and the common-law cause of action, and whether the remedy is legal in nature is

of almost negligible importance. *See Blue Beach*, 351 A.3d at 1040-45; App. 18a, 27a.

The result is a stark difference in how the right to a civil jury trial is treated at the federal versus the state level, and that difference is most pronounced in securities actions such as this one. Under this Court's decision in *Jarkesy*, one is entitled to a jury trial in a securities-fraud action in which the government seeks a civil money penalty. *Jarkesy*, 603 U.S. at 140-41. Congress therefore may not assign that action to a juryless administrative tribunal. *Id.* The opposite is true in Delaware. *See Blue Beach*, 351 A.3d at 1040-45; App. 27a. There, a securities-fraud action seeking civil penalties may be assigned to a juryless administrative tribunal *because* that makes it easier to enforce the laws. *See Blue Beach*, 351 A.3d at 1042-43. Whereas this Court has held repeatedly that the right must be secured "against the passing demands of expediency or convenience," *Reid v. Covert*, 354 U.S. 1, 10 (1957) (plurality opinion), Delaware and other states regard ease of enforcement as a feature, not a bug.

While state courts are entitled to interpret their own constitutional provisions as they see fit, they may not abridge the fundamental rights of American citizens. Yet, if the right to a civil jury trial is as central to the American system of justice as this Court—and many other authorities—have repeatedly recognized, then that is precisely what Delaware and other states are now doing.

This two-tiered system of justice prevails because this Court has yet to treat the Seventh Amendment as it has treated nearly every other significant right in the Bill of Rights—as a right incorporated against the

states under the Fourteenth Amendment. The decisions holding otherwise were based on a now-defunct approach to the Fourteenth Amendment according to which "the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action." *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916); *see also Walker v. Sauvinet*, 92 U.S. 90 (1875) (holding that the right to a civil jury trial is not one of the Privileges or Immunities of national citizenship under the Fourteenth Amendment). It is high time this Court revisited these precedents.

There is no benefit to waiting, as there can be no meaningful percolation on either question. State courts cannot decide whether the Seventh Amendment is incorporated against the states. And all they can decide on the question whether individuals such as Petitioners are entitled to a jury trial is whether, as a matter of state law, they will follow a similar approach to that taken by this Court. Such "percolation" will not inform this Court's precedents or future decisions. The only question it will inform is how large the gulf between federal and state protections for the civil jury trial right becomes. The cost will inevitably be borne by a growing number of individuals who are deprived of an essential right.

This Court should grant the petition and hold that the Seventh Amendment is incorporated against the states and that Petitioners are entitled to a jury trial.

I. Because the Seventh Amendment Has Not Been Incorporated, Americans Are Subject to a Two-Tiered System of Justice

A. The Delaware Supreme Court's Approach to the Right to a Civil Jury Trial Differs Fundamentally from This Court's Approach, Which Leads to Different Outcomes in Similar Cases

This Court's operating premise in Seventh Amendment cases has always been that the right to a jury trial must be jealously guarded against every encroachment. *See, e.g.*, *Jarkesy*, 603 U.S. at 121. To accomplish that purpose, the Court has developed a number of foundational principles that ensure that juries remain available in cases that involve legal rights. The Delaware Supreme Court departs from this Court on every one of these principles.

First, this Court focuses on the nature of the action, not the form. In deciding whether a case is a "[s]uit[] at common law" to which the Seventh Amendment applies, this Court asks (1) whether the action is analogous to one historically brought in the English courts of law and (2) whether the remedy sought is legal rather than equitable. *Tull v. United States*, 481 U.S. 412, 417-18 (1987); *Granfinanciera*, 492 U.S. at 42. Historical analogs matter not because old pleading forms carry talismanic significance, but because they identify disputes involving legal rights traditionally tried in common-law courts with a jury, rather than in chancery or admiralty courts. *Id.* at 51-52 (explaining that because juries are necessary to protect private rights, Congress may not "magically convert[]" legal into equitable claims). The right is thus not confined to the "common-law forms of action

recognized" at the founding. *Jarkesy*, 603 U.S. at 122 (quoting *Curtis v. Loether*, 415 U.S. 189, 194 (1974)). What matters is whether the action resembles a traditional legal claim and seeks legal relief. *See Granfinanciera*, 492 U.S. at 43-47; *Tull*, 481 U.S. at 421-25.

By contrast, "Delaware courts do not focus solely on the claim's legal or equitable *nature*." *Blue Beach*, 351 A.3d at 1037 (emphasis added). Instead, "the measure of a jury trial for Delaware *is* the common law . . . and historical analysis is required to determine whether a cause of action existed in that form." *Id.* at 1039.

Second, in determining whether the action is legal in nature, the remedy is the more important consideration. Because "some causes of action sound in both law and equity," the remedy is a more reliable indicator that a cause of action is legal. *Jarkesy*, 603 U.S. at 123. Focusing on the remedy "serves to guard the right of trial by jury preserved by the Seventh Amendment." *Granfinanciera*, 492 U.S. at 48. Civil money penalties are a classic form of legal relief. So long as they are primarily designed to punish or deter, and not "solely to 'restore the status quo,'" they are legal. *Jarkesy*, 603 U.S. at 111 (quoting *Tull*, 481 U.S. at 422).

The Delaware Supreme Court takes the opposite approach. In Delaware, "the measure of a jury trial . . . *is* the common law, not the remedy sought." *Blue Beach*, 351 A.3d at 1039. While the remedy is still a relevant consideration, if it serves a remedial purpose at all, it is not classified as legal. *See id.* at 1042-43.

Third, a claim will be legal in nature if it shares a "close relationship" with a common-law cause of action and "target[s] the same basic

conduct." *Jarkesy*, 603 U.S. at 125. In Delaware, however, the elements of a new cause of action must be nearly identical to an historic common-law cause of action. *Blue Beach*, 351 A.3d at 1039. It is not enough that the two causes have "shared general legal concepts like fraud and deceit." *See id.* at 1042.

Fourth, Congress may not "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." *Jarkesy*, 603 U.S. at 135 (quoting *Granfinanciera*, 492 U.S. at 52). Yet that is the necessary consequence of the Delaware Supreme Court's approach. *See Blue Beach*, 351 A.3d at 1045.

Finally, convenience or efficiency for the government forms no part of the analysis under the Seventh Amendment. As this Court has made clear, the Seventh Amendment does not yield to expediency. *See Jarkesy*, 603 U.S. at 140 (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983)). "Otherwise, evading the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment." *Id.*

In Delaware, however, ease of enforcement is a feature of juryless administrative tribunals that distinguishes them from common-law causes of action that would receive a jury. *See Blue Beach*, 351 A.3d at 1042 (relying on statutory alterations that served the purpose of consumer protection by making it "easier to establish a claim for consumer fraud than common law fraud") (citation omitted). "These statutory changes from the common law make the burden on the State relatively light, and require a limited amount of proof

to satisfy the Act's mandates." *Id.* (citation omitted). They therefore "serve as more support—in addition to the statute's history—to further differentiate the [Consumer Fraud Act] from common law fraud." *Id.*

It is thus no surprise that the Delaware Supreme Court expressly rejected this Court's approach in *Jarkesy*. *See id.* at 1038 (stating that "*Jarkesy* is the product of a different system with different priorities and principles from which . . . Delaware consciously departed."). And following that logic, the Delaware Supreme Court ruled in this case that Petitioners are not entitled to a jury trial under Delaware's securities laws. App. 27a (affirming Superior Court's judgment because some of the elements of securities fraud differ from the elements of common-law fraud).

Whatever the merits of the Delaware Supreme Court's approach under its own constitution, there is no question that fewer individuals will receive a jury trial than would receive one under the Seventh Amendment. Fidelity to history and a strict interpretation of the common law may be important values, but they should not be permitted to override the importance of a right that has been widely recognized—nationally and in Delaware—as a fundamental right. And the result should be particularly troubling given the pivotal role England's efforts to avoid juries played in the adoption of the Seventh Amendment. England moved cases into juryless admiralty, vice-admiralty, and chancery courts. *See Jarkesy*, 603 U.S. at 121-22. Today, governments assign them to juryless administrative tribunals with no fixed rules of evidence, no right to discovery, and a judge who works alongside the prosecutors. This state of affairs prevails because the Seventh Amendment has not been incorporated against the states.

B. Other State Courts Are Increasingly Diverging from This Court's Approach to the Right to a Civil Jury Trial

Delaware is not an outlier. Many other states afford lesser protections for the civil jury right under state provisions than this Court does under the Seventh Amendment. This is a trend, not a coincidence, and it has been going on for decades.

Some states have declined to follow *Tull* and *Granfinanciera* in securities and consumer-fraud actions in ways that mirror the government's and the dissent's arguments in *Jarkesy*. For example, in a decision much like Delaware's in this case, the New Hampshire Supreme Court held that a securities-fraud action involving civil penalties could be tried without a jury because the administrative scheme for such cases was "not compatible with trial by jury." *See Ridlon v. N.H. Bureau of Sec. Regul.*, 172 N.H. 417, 423 (2019). The California Supreme Court took a similar approach in a consumer-protection action, holding that the government's unfair-competition and false-advertising claims were equitable and triable without a jury, even though the government sought civil penalties that "may have a punitive or deterrent aspect." *Nationwide Biweekly Admin., Inc. v. Superior Ct.*, 462 P.3d 461, 487-91 (Cal. 2020) (reasoning that the penalties were equitable because they were "noncompensatory" and designed to "secure obedience"); *see also, e.g.*, *State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 529 P.3d 599, 610 (Colo. 2023) (declining to apply *Tull* and rejecting jury demand for deceptive trade practices with $3 million in civil penalties that the court acknowledged were punitive).

Other states have rejected this Court's approach in environmental enforcement actions that closely parallel *Tull*. *See, e.g.*, *State v. Irving Oil Corp.*, 955 A.2d 1098, 1107 (Vt. 2008) (denying jury trial in an environmental enforcement action seeking civil penalties, reasoning *Tull* was not "persuasive"); *Comm'r of Env't Prot. v. Conn. Bldg. Wrecking Co.*, 629 A.2d 1116, 1122 (Conn. 1993) (finding *Tull* inapplicable and denying jury-trial right in environmental civil penalty action); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 450 (Tex. 1993) (holding jury trial inapplicable to administrative assessment of environmental penalties despite recognizing that a government suit for civil penalties was analogous to an action in debt); *Ala. Dep't of Env't Mgmt. v. Wright Bros. Constr. Co.*, 604 So. 2d 429, 433-34 (Ala. Civ. App. 1992) (denying jury trial for civil penalty action on the view that the jury right "is not applicable to administrative proceedings").

And in the years since *Jarkesy* was decided, state appellate courts have repeatedly declined to follow its approach. Two of those cases are the Delaware decisions discussed above. Two others are securities fraud actions in which the state sought civil penalties. *EFG Am., LLC v. Ariz. Corp. Comm'n*, 569 P.3d 806, 808-09, 810 (Ariz. Ct. App. 2025), *review granted* (Nov. 4, 2025) (declining to follow *Jarkesy* in securities-fraud action and holding that the defendant had no right to jury trial); *Goldata Comput. Servs., Inc. v. Pa. Dep't of Banking & Sec.*, 350 A.3d 278, 309-11 (Pa. Commw. Ct. 2025), *appeal granted in part*, 2026 WL 1890758 (Pa. July 1, 2026) (holding *Jarkesy* inapplicable and denying a jury trial on securities-fraud claims involving civil penalties because the statute's fraud provisions are "not limited to common law fraud or deceit").

The list also includes occupational licensing enforcement actions in which the states sought civil penalties. *See Hagen v. Harrison*, No. 90455, 2026 WL 3265752, at *3 (Nev. Oct. 29, 2026) (rejecting jury-trial right and reasoning its decision was "consistent with the public rights doctrine discussed in the *Jarkesy* dissent and outlined in *Atlas Roofing*"); *Reguli v. Bd. of Pro. Resp. of Sup. Ct. of Tenn.*, No. M2024-00153-SC-R3-BP, 2026 WL 2082926, at *28 (Tenn. July 20, 2026) (rejecting *Jarkesy*'s applicability); *Ball v. N.Y. State Dep't of Health*, 256 N.Y.S.3d 430, 434 n.4 (App. Div. 2026) (rejecting *Jarkesy*'s reasoning and applicability). Other regulatory settings are also covered, from public-utility enforcement to liquor licensing to public-nuisance penalties. *See, e.g.*, *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, 327 A.3d 789, 805 (Vt. 2024) (rejecting jury trial and concluding *Jarkesy* was "nonbinding"); *G-12 Ent., Inc. v. Sanchez*, No. A-1-CA-42662, 2026 WL 2546849, at *4 (N.M. Ct. App. Aug. 27, 2026) (concluding *Jarkesy* "not binding" and "unhelpful" because it did not "evolve[] the concept [of the public rights doctrine] under [the] state's constitution."); *Par. of Jefferson v. Fayard*, 407 So. 3d 879, 890 (La. App. 5th Cir. 2025) (rejecting *Jarkesy*'s applicability to public nuisance claim for civil money penalties). In all of these cases, the courts expressly noted significant differences in the state and federal approaches and declined to follow this Court's decisions because the Seventh Amendment is not incorporated.

This trend will likely continue for at least two reasons. First, "[m]yriad state regulatory statutes implement enforcement by administrative adjudication," and courts often "reject[] jury demands in such matters." Keith Bradley, *Does the Seventh Amendment Limit State Administrative Adjudication?*, Yale J. on

Regul. Notice & Comment (July 18, 2024), https://tinyurl.com/ym9ypjev. Second, states obviously have a strong incentive to prosecute regulatory-enforcement actions without the hassle of a jury. This Court should grant the petition to prevent further erosion of the right to a civil jury trial.

II. Only This Court Can Address Whether the Seventh Amendment Is Incorporated Against the States

In stark contrast to the seriousness with which this Court has treated the Seventh Amendment's protections for the right to a civil jury trial, it has never considered whether the right should be protected under its modern approach to the Fourteenth Amendment. As a result, the right is stuck in the 19th century, and the states are free to treat it like an historical artifact, rather than the fundamental guarantee that it is. Only this Court can correct that oversight.

A. This Court has not Considered Whether the Seventh Amendment Applies to the States in Over a Century

The last time this Court considered whether the Seventh Amendment applies to the states was in 1916, before this Court developed its modern approach to the Fourteenth Amendment. *Bombolis* was a negligence action in state court brought under the Federal Employers' Liability Act. 241 U.S. at 215. In Minnesota at the time, five-sixths of the jury were authorized to reach a verdict if they failed to reach one unanimously after twelve hours. *Id.* at 216. Bombolis argued that because the case arose under a federal statute, the Seventh Amendment controlled and required a unanimous verdict. *Id.*

Relying on the 19th century consensus that "the first ten Amendments . . . deal only with Federal action," *id*. at 217 (citing *Barron v. Baltimore*, 32 U.S. 243 (1833), among other cases), the Court rejected the "new and strange view" that the Seventh Amendment could apply against the states, *id*. at 218. The Court did not consider or address the Fourteenth Amendment at all, but one of the cases on which it relied, *Walker v. Sauvinet*, 92 U.S. 90 (1875), did. The Court's approach in *Walker*, however, was very different than its approach to the Fourteenth Amendment today. *Walker* recognized that a "State cannot deprive a person of his property without due process of law," but it held that this did not "imply that all trials in the State courts affecting the property of persons must be by jury." *Id*. at 92-93. Nor, according to the Court, was the Seventh Amendment a privilege or immunity of citizenship that applied against the states. *Id*. at 92.

Nine years after *Bombolis* was decided, the 19th century view began to give way as the Court accepted that the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 754 (2010), and incorporated certain provisions of the Bill of Rights against the states. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *see also McDonald*, 561 U.S. at 763. Today, the approach focuses not on the privileges or immunities clause of the Fourteenth Amendment, but on the due process clause. *Id*. at 763-66. It asks not whether due process implies the protection of a given right, but whether the right is "fundamental to *our* scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id*. at 767.

Since *Bombolis* was decided, this Court has held nearly every right in the first Eight Amendments to be incorporated against the states. *See Timbs v. Indiana*, 586 U.S. 146, 150 (2019) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States.") (citation omitted). The Seventh Amendment, however, has been left behind. While this Court has recognized that *Bombolis* is outdated, *see id.* at 765 n.13 ("Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation."), it has never revisited the decision. Although stare decisis may be a consideration at the merits stage in deciding whether to overturn *Bombolis*, it is no reason to avoid addressing the question of whether the Seventh Amendment should be incorporated. And, in any event, this Court has never allowed stare decisis to prevent it from incorporating a fundamental right. *See*, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and incorporating the Sixth Amendment's guarantee of the right to assistance of counsel); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937), and incorporating the Fifth Amendment's Double Jeopardy Clause); *McDonald*, 561 U.S. at 759-66, 791 (disregarding three 19th-century precedents and incorporating the Second Amendment); *Ramos v. Louisiana*, 590 U.S. 83, 93-100 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972), and incorporating the Sixth Amendment's unanimity requirement). The Court should address this important question now.

B. The Seventh Amendment Easily Qualifies for Incorporation Under This Court's Modern Test

The civil jury-trial right has been fundamental to the American system of justice since before this Nation's inception. *See*, *e.g.*, *Jarkesy*, 603 U.S. at 121-22 (citing *Dimick*, 293 U.S. at 485-86). When Parliament transferred enforcement of its laws from common-law courts to juryless tribunals, the Founders named the abuse among the reasons for declaring Independence, condemning the King "[f]or depriving us in many cases, of the benefits of Trial by Jury." The Declaration of Independence, para. 20 (U.S. 1776). After the Revolution, the states "restored the institution . . . to its prior prominence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340-41 (1979) (Rehnquist, J., dissenting). Each of the thirteen original states preserved the civil jury, whether through its new constitution, by legislation, or by carrying forward its colonial practice. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973). Indeed, ten weeks after the signing of the Declaration of Independence, the Delaware Declaration of Rights was adopted, proclaiming that "trial by jury of facts where they arise is one of the greatest securities of the lives, liberties, and estates of the people." *Claudio v. State*, 585 A.2d 1278, 1290-91 (Del. 1991) (citing 1 J. Scharf, HISTORY OF DELAWARE 519 (1888)).

The Founders rightly viewed the right to a civil jury trial as a necessity. Thomas Jefferson described the right as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution." Letter from Thomas Jef-

ferson to Thomas Paine, 11 July 1789, https://founders.archives.gov/documents/Jefferson/01-15-02-0259. And while the Federalists and Anti-federalists disagreed on much, their only disagreement on the civil jury trial right was whether it was "the most important of all individual rights." Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1010 (1992). Thus, when the Constitution was proposed without a civil-jury guarantee, that omission became one of the most successful objections to ratification. *See Jarkesy*, 603 U.S. at 121-22 (citing THE FEDERALIST NO. 83, at 495 (Alexander Hamilton) (C. Rossiter ed. 1961)). The Seventh Amendment answered that concern, preserving a right whose importance this Court has recognized since the Republic's earliest days. Since then, "every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

Far from waning after the Founding, the civil jury emerged from the post-Civil War era even more firmly entrenched as a fundamental right. The generation that ratified the Fourteenth Amendment had seen what its absence meant: Before the war, abolitionists decried fugitive-slave proceedings in which a person's freedom was decided without a jury. *See* Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 269-90 (1998). By the time of the Fourteenth Amendment's adoption, the right to a civil jury trial was so deeply rooted that around 98% of all Americans at the time lived in states that guaranteed the right. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEXAS L. REV. 7, 77, 115-16 (2008). Today, every state

protects the civil jury in some form, and forty-seven guarantee it in their constitutions. It is therefore "hard to imagine how the Seventh Amendment might not be among those rights the Fourteenth Amendment secures against the states." *Humboldt Cnty.*, 146 S. Ct. at 27 (Gorsuch, J., statement respecting denial of certiorari).

There can be no serious dispute that the right to a civil jury trial is "fundamental to our scheme of ordered liberty and system of justice" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 764 (citations omitted). It is time for this Court to say so.

III. The Court Should Decide Whether Petitioners Are Entitled to a Jury Trial Under the Seventh Amendment

If the Court grants review to decide whether the Seventh Amendment is incorporated against the states, it should also decide whether Delaware's administrative adjudication of securities violations deprives Swan of its right to a jury trial under the Seventh Amendment. The case here mirrors *Jarkesy* in all relevant respects: The IPU accuses Swan of securities fraud and/or selling unregistered securities, a cause of action that sounds in fraud; it seeks civil monetary penalties; it has assigned the matter to a juryless administrative tribunal without the procedural and evidentiary protections that would apply in court. And because judicial review is based on the "substantial evidence" standard, Swan will never obtain an independent review of the facts.

A remand would be a waste of resources. No developments below will affect whether the Seventh Amendment guarantees Swan a jury trial here. This

question is squarely before the Court, and it should be resolved now.

And a decision on this issue will have effects far beyond this case, because state courts will know that the Court is serious about protecting the right to a jury trial under the federal constitution.

IV. This Case Is an Ideal Vehicle

The Delaware Supreme Court's definitive statement that *Jarkesy* is not binding because the Seventh Amendment has not been incorporated against the states, and its decision denying a jury trial even though *Jarkesy*-like claims and remedies are implicated make this an ideal vehicle for the Court.

A. The Issues Are Properly Before the Court

Certiorari is appropriate when the questions presented were "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Here, the Delaware Supreme Court passed upon both questions presented. First, it held that because "*Jarkesy* was grounded in the Seventh Amendment, which has not been incorporated and applied to the States by the Fourteenth Amendment," "it is not binding on us, and [Swan Energy et al.] concede as much here." App. 23a (citing *Blue Beach*, 351 A.3d at 1038). Second, the court rejected Swan's invitation to apply this Court's reasoning in *Jarkesy* to the Delaware Constitution's jury-trial guarantee. *See* App. 24a (positing that *Jarkesy*'s "comparative exercise . . . was focused on determining whether the enforcement action at issue was 'legal in nature,' an inquiry that, as we explained

in *Blue Beach*, is inapposite to our state constitutional analysis") (citing *Jarkesy*, 603 U.S. at 126).[2]

Thus, while Swan did not expressly press incorporation, this Court's definitive anti-incorporation decision in *Bombolis* cabined the terms of the debate. For lower courts are precluded from reconsidering or overruling *Bombolis*—even though later decisions from this Court have undermined its rationale. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Indeed, because of *Bombolis*, it would have been futile for Swan to have asked the Delaware Supreme Court to incorporate the Seventh Amendment against the states. Nor would Swan's explicitly pressing the issue have helped this Court decide whether to accept this case for review or whether the Seventh Amendment should be incorporated. State courts can do nothing but acknowledge that *Bombolis* precludes their reaching the incorporation issue. *See id.* And this issue itself is a pure question of law that needs no factual development. *Cf. Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."). Only this Court has the authority to address it. *Rodriguez de Quijas*, 490 U.S. at 484.

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[2] In *Blue Beach*, which was issued while the case below was pending, the Delaware Supreme Court emphatically rejected any reliance on *Jarkesy*. *See Blue Beach*, 351 A.3d at 1038 ("[O]ur court has explicitly disavowed reliance on federal case law as it pertains to" issues concerning the Delaware Constitution's jury-trial right.); *id.* at 1039 ("*Jarkesy* is the product of a different system with different priorities and principles from which, as we explained above, Delaware consciously departed.").

Regardless, as this Court has stressed, the question here is whether an issue was "pressed or passed upon," not "pressed and passed upon"; it "operates (as it is phrased) in the disjunctive." *See Williams*, 504 U.S. at 41. Accordingly, it "permit[s] review of an issue not pressed so long as it has been passed upon" below. *Ibid.* Here, in light of *Bombolis*, Swan pressed the Seventh Amendment and this Court's civil-jury-trial jurisprudence as far as it reasonably could have. It argued throughout the case that Delaware should adopt this Court's approach to deciding whether a jury trial is required. *See, e.g.*, App. 50a (recognizing that Swan relied heavily on *Jarkesy*). The IPU objected. *See* Appellee's Answering Br. at 2, *Swan Energy, Inc. v. Inv. Prot. Unit of the Del. Dep't of Just.*, No. 331, 2025 (Del. Oct. 9, 2025) (arguing that "[t]he Superior Court rejected Appellants' attempts to import into Delaware jurisprudence the United States Supreme Court's interpretation of the Seventh Amendment" in *Jarkesy*"). The Delaware Supreme Court agreed with the IPU, recognized that the Seventh Amendment has not been incorporated against the states, and declined to follow *Jarkesy*. App. 23a (citing *Blue Beach*, 351 A.3d at 1038).

And ultimately it is "irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) (citations omitted); *cf. Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court . . . is subject to this Court's broad discretion over the questions it chooses to take on certiorari.") (quoting *Williams*, 504 U.S. at 41).

Finally, the Delaware Supreme Court's cursory discussion of the issue does not alter the fact that it passed upon it. In *Citizens United v. FEC*, 558 U.S. 310, 330 (2010), this Court applied the "pressed or passed upon" rule and concluded that the court below had sufficiently addressed an issue presented, i.e., a facial challenge to a campaign-finance law that would have required overturning two decisions from this Court, *Austin v. Mich. Chamber of Com.,* 494 U.S. 652 (1990), and *McConnell v. FEC,* 540 U.S. 93 (2003). It did not matter that the lower court "[had] not provide[d] much analysis" on the issue "because it could not ignore the controlling Supreme Court decisions in *Austin* and/or *McConnell*." *Ibid.*

The Delaware Supreme Court recognized the non-incorporation holding in *Bombolis*—and applied it to Swan's case here. The questions presented are therefore properly before the Court.

B. The Constitutional Issues Have Been Definitively and Finally Resolved

This case comes to the Court following a collateral constitutional challenge to Delaware's administrative-adjudication regime for alleged securities violations. The Delaware Supreme Court has definitively and finally resolved those questions. App. 69a. And the separate, administrative resolution of the state-securities claims scheduled to proceed will have no effect on the federal constitutional issues already decided. *See* App. 44a-45a ("[Swan et al.] have already been pulled into an IPU administrative proceeding with no opportunity to demand a jury trial. If [they] have a right to a trial by jury on Delaware Securities Act claims, that right has already been infringed by the commencement of the IPU Action."); App. 51a

("With no factual issues to resolve, the Court will determine the applicability of [Delaware's jury-trial guarantee] Article I, Section 4."). Accordingly, the decision below is a final judgment ripe for review by this Court. *See* 28 U.S.C. § 1257(a); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-80 (1975) (noting exceptions to finality requirement when a state's highest court has decided a federal question that requires resolution regardless of future state proceeding, and when additional proceedings will not require the resolution of any other federal questions that may require this Court's review); *Florida v. Thomas*, 532 U.S. 774, 776 (2001) (same).

* * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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