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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those ideas include constitutionally limited government, the separation of powers, and due process of law. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF believes that when the federal government brings an enforcement action implicating core private rights the Constitution requires that it do so in a neutral Article III court, subject to the Seventh Amendment jury-trial right if the government seeks legal relief such as punitive civil penalties. AFPF takes no position on whether the tax penalties at issue here are warranted but believes that Petitioners are likely entitled to have a jury make those factual determinations in an Article III court before the

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[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Internal Revenue Service ("IRS") may impose those monetary penalties.

More broadly, AFPF writes to highlight the doctrinal importance of the questions presented by the Petition. This Court's recent decision in *SEC v. Jarkesy*, 603 U.S. 109 (2024), took an important step toward returning this Court's Seventh Amendment and public-rights jurisprudence to constitutional first principles. But the line between private rights subject to Article III and the Seventh Amendment, and public rights exempt from those constitutional requirements remains murky. *Jarkesy*'s structural approach is difficult to reconcile with this Court's functionalist public-rights precedent, exemplified by *Atlas Roofing v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977)—an outlier decision that "depart[ed] from our legal traditions," *Jarkesy*, 603 U.S. at 138 n.4. These conflicting lines of cases have sown confusion in lower courts. This Court should put an end to this muddled state of affairs by articulating a coherent, judicially manageable rule grounded in the Constitution's original public meaning and Founding-era historical traditions.

SUMMARY OF ARGUMENT

This Court has said that "the power to tax involves the power to destroy[.]" *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). That proposition holds doubly true when monetary penalties are layered on top. Juries have historically played an important role in protecting against government abuse of this awesome power. As the Framers understood, the civil jury-trial right operates as "a

safeguard against an oppressive exercise of the power of taxation," The Federalist No. 83 (Hamilton), interposing ordinary citizens between the sovereign and the individual.

Today, however, the Internal Revenue Code ("IRC") deprives taxpayers facing civil penalties of the right to a jury trial in an Article III court unless they first pay the deficiency asserted by the IRS, penalties included. These IRS-imposed monetary penalties can be nearly double the assessed tax liability. 26 U.S.C. §§ 6651(a)(1), (f). And the price of a jury trial can be staggeringly expensive—for each set of Petitioners, for example, upwards of $15 million. *See* Pet. 7. Only then can they sue for a refund in an independent federal court and assert their right to be tried by a jury of their peers. *See* 28 U.S.C. §§ 1346(a)(1), 2402. Taxpayers who cannot afford to do so are out of luck. The only other option taxpayers have to contest the IRS's administrative charges is to do so in a so-called Article I court—in reality, an Article II body wielding the same Executive power as the IRS—without a jury trial or the procedural protections that obtain in Article III courts.

This arrangement is fundamentally unfair to taxpayers facing daunting monetary penalties—particularly those who lack the ability to *pay* for their day in a federal court and *right* to demand a jury trial. It also appears difficult to square with the Seventh Amendment and Article III, both under *Jarkesy* and as an original matter. At the least, the IRC's civil-penalty scheme raises serious constitutional questions that deserve to be answered on the merits and not merely brushed aside without reasoning, as happened below. *See* App. 2a.

Under this Court's precedent, the collection of tax *revenue* may be a public right that falls outside of Article III and the Seventh Amendment, and which may be effectuated in administrative proceedings. But there is good reason to think that tax *penalties* stand on distinct constitutional footing and should therefore be subject to higher procedural protections, including the right to a jury trial *before* the IRS may impose these sanctions. More broadly, the Tax Court's reasoning below, *see* App. 3a–9a; Pet. 27–28, and in other cases, *see* Pet. 28–29; *Silver Moss Props., LLC v. Comm'r*, 165 T.C. No. 3, 2025 WL 2416867, at *6–10 (Aug. 21, 2025), highlights the need for this Court to take up where it left off in *Jarkesy* and "definitively explain[] the distinction between public and private rights[.]" 603 U.S. at 131 (cleaned up). This Petition provides an ideal vehicle to start that process.

Petitioners' objections to the IRC's juryless process are weighty. *See* Pet. 19–31. And had the Eleventh Circuit assessed those claims without putting a heavy thumb on the scale against granting relief—an approach in the majority of circuits when the jury-trial right is at stake, *see* Pet. 10–14—Petitioners may well have prevailed. The highly restrictive mandamus standard that obtains in the Eleventh Circuit likely dictated the outcome. The vindication of the jury-trial right should not turn on geography in this way.

This Court should grant the Petition.[2]

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[2] At a minimum, this Court should hold the Petition pending disposition of *FCC v. AT&T*, No. 25-406, and *Verizon Communications Inc. v. FCC*, No. 25-567, which raise questions about whether a back-end jury trial satisfies the Constitution.

ARGUMENT

I. The Jury-Trial Right Is a Key Check Against Arbitrary Government Power.

"The trial by jury is justly dear to the American people," *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.), and has been described as "the spinal column of American democracy," *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part). It is not only a "politically important" right that is "valuable for jurors" but "essential for limiting government and preserving liberty." Philip Hamburger, *The Value of Jury Trial Rights*, 93 Geo. Wash. L. Rev. 1283, 1295 (2025) (citations omitted). The jury-trial right is "one of our most vital barriers to governmental arbitrariness," *Reid v. Covert*, 354 U.S. 1, 10 (1957) (plurality), promising "parties that their fates can be decided by individuals who are apt to see their case very differently than a government official" and "letting ordinary people be the ultimate decision makers," Hamburger, 93 Geo. Wash. L. Rev. at 1295.

The civil jury-trial right is deeply rooted in our history and tradition. "Veneration of the jury as safeguard of liberty predates the American Founding." *Jarkesy v. SEC*, 34 F.4th 446, 451 n.2 (5th Cir. 2022), *aff'd sub nom.*, 603 U.S. 109 (2024). Blackstone, for example, described "the trial by jury" "as the glory of the English law." 3 William Blackstone, Commentaries on the Laws of England, A Facsimile of the First Edition of 1765–1769, at 379 (1789) (University of Chicago Press 1979).

"Prominent among the reasons colonists cited in the Declaration of Independence for their break

with Great Britain was the fact Parliament and the Crown had 'depriv[ed] [them] in many cases, of the benefits of Trial by Jury.'" *Erlinger v. United States*, 602 U.S. 821, 829 (2024) (quoting Decl. of Independence ¶ 20). This cited grievance extended to the Crown's collection of taxes. Indeed, "the denial of the right to a jury in tax cases became a chief complaint animating the American Revolution." *United States v. Stein*, 881 F.3d 853, 859 (11th Cir. 2018) (en banc) (Pryor, J., concurring). "Colonists bitterly complained both about taxation without representation and about the use of the vice-admiralty courts for revenue matters that, in England, would have been tried to a jury in the Court of Exchequer."[3] Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2464 (2016).

For the Founding generation, the jury-trial right was a core protection of individual liberty. The Framers "considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States v. Haymond*, 588 U.S. 634, 640–41 (2019) (plurality) (citation omitted). "If the Federalists and Anti-Federalists disagreed about anything when it came to the civil jury trial right, it may have only been about whether the right was '*the* most important of all individual rights, or simply one of the most important rights.'" *Thomas v. Humboldt*

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[3] This "rise of the vice-admiralty courts" was "prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries." *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 140–42 (1943).

Cty., 223 L.Ed.2d 141, 141–42 (2025) (Gorsuch, J., statement respecting denial of *certiorari*) (citation omitted). The absence of a textually guaranteed civil jury-trial right in the Constitution "almost prevented the ratification of" our founding document. *Stein*, 881 F.3d at 860 (Pryor, J., concurring).

This fundamental procedural protection is enshrined in the Seventh Amendment, which was "the price exacted in many States for approval of the Constitution."[4] *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 342 (1979) (Rehnquist, J., dissenting). It promises that "[i]n Suits at common law . . . the right of trial by jury shall be preserved," U.S. Const. amend. VII, "securing it against the passing demands of expediency or convenience," *Jarkesy*, 603 U.S. at 122 (cleaned up).[5] This provision "operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property." *Id.* at 141 (Gorsuch, J., concurring). And consistent with its importance, this Court has long made clear that any "encroachment upon" the Seventh Amendment's jury-trial guarantee must be

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[4] *See* Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013, 1015 (1994) ("[O]nly by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.").

[5] The decisions "made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

"watched with great jealousy," *Parsons*, 28 U.S. (3 Pet.) at 446, and "any seeming curtailment of" its protections "should be scrutinized with the utmost care," *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

II. Civil Penalties Trigger Seventh Amendment Protections.

"[F]rom the start, the Seventh Amendment was understood to protect th[e jury-trial] right 'not merely' in suits recognized at common law, but in '*all* suits which are' of legal, as opposed to 'equity [or] admiralty[,] jurisdiction.'"[6] *Jarkesy*, 603 U.S. at 165 (Gorsuch, J., concurring) (quoting *Parsons*, 28 U.S. (3 Pet.) at 447 (emphasis added)). This means that it "requires trial by jury in actions unheard of at common law," *Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974), and "appl[ies] to actions enforcing statutory rights, . . . if the statute creates legal rights and remedies," *Curtis v. Loether*, 415 U.S. 189, 194 (1974). And Congress cannot "conjure away" its demands by funneling such "traditional legal claims" to "administrative tribunal[s]." *Granfinanciera v. Nordberg*, 492 U.S. 33, 52 (1989).

Jarkesy reaffirmed that the civil jury-trial right "extends to a particular statutory claim if the claim is 'legal in nature.'" 603 U.S. at 122 (quoting

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[6] According to Professor Hamburger, "what led to the adoption of the Seventh Amendment were demands for jury rights in civil actions, and the amendment therefore guarantees juries in *suits at common law*—that is, in all civil cases outside of equity and admiralty—not merely in *common law actions*." Philip Hamburger, Is Administrative Law Unlawful? 246–47 (2014).

Granfinanciera, 492 U.S. at 53). Under *Jarkesy*, this inquiry turns on both "the cause of action and the remedy[.]" *Id.* at 123 (citation omitted); *see AT&T, Inc. v. FCC*, 149 F.4th 491, 497 (5th Cir. 2025), *cert. granted*, No. 25-406. Of these considerations, *Jarkesy* teaches that the relief matters more and can be "all but dispositive." 603 U.S. at 123. Indeed, *Jarkesy* suggests that in some instances "the remedy *alone* may be enough to invoke the Seventh Amendment," *Int'l Union of Operating Eng'rs, Stationary Eng'rs, Local 39 v. NLRB*, 155 F.4th 1023, 1063 (9th Cir. 2025) (Bumatay, J., dissenting) (citing *Jarkesy*, 603 U.S. at 123–24), such as where an agency seeks civil penalties, *see NLRB v. Starbucks Corp.*, 159 F.4th 455, 474 (6th Cir. 2025) (Seventh Amendment applies "whenever an agency seeks civil penalties or pursues common law actions" (citation omitted)).[7]

Monetary relief is "legal" and therefore triggers the Seventh Amendment's jury-trial right "if it is if it is designed to punish or deter the wrongdoer," as opposed to "solely to 'restore the status quo.'" *Jarkesy*, 603 U.S. at 123 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)). That well describes the daunting and retributive tax penalties at issue here, which are intended "not to compensate for loss, but to punish and deter wrongful conduct." *Asphalt Indus.,*

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[7] It is thus of no moment whether the government's action is conceived "as a civil-penalties suit or something akin to a traditional fraud claim: At the founding, both kinds of actions were tried in common-law courts." *Jarkesy*, 603 U.S. at 150–51 (Gorsuch, J., concurring). In any event, it appears likely the Seventh Amendment applies for the independent reason that tax penalties are akin to traditional fraud actions. *See* Pet. 25–26.

Inc. v. Commissioner, 384 F.2d 229, 234–35 (3d Cir. 1967). "A civil penalty was a type of remedy at common law that could only be enforced in courts of law."[8] *Tull*, 481 U.S. at 422. Such is the case here and therefore the Seventh Amendment right is implicated.

III. The IRC's Tax Penalty Scheme Appears a Poor Fit For The Public-Rights Exception.

"Unless a legal cause of action involves 'public rights,' Congress may not" legislatively abrogate the Seventh Amendment's promise of a jury trial. *Granfinanciera*, 492 U.S. at 53. "The original idea" animating the public-rights doctrine "appears to have been that certain rights belong to individuals inalienably . . . and they may not be deprived except by an Article III judge," *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1278 (10th Cir. 2015), subject to the jury-trial right.[9] At the same time, this doctrine

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[8] Historically, that principle has also applied "[a]ctions by the Government to recover civil penalties under statutory provisions, which were "viewed as one type of action in debt requiring trial by jury." *Tull*, 481 U.S. at 418–19.

[9] As originally understood, private rights include "life, liberty, and property[.]" *Axon Enter. v. FTC*, 598 U.S. 175, 198 (2023) (Thomas, J., concurring); *see* Jennifer Mascott*, Constitutionally Conforming Agency Adjudication,* 2 Loyola U. Chi. J. Reg. Compliance 22, 45 (2017) (describing federal "deprivations or transfers of life, liberty, or property" as "'core' of cases" reserved to Article III courts). *Cf. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). "In fact, the Founding generation insisted that any time the government deprived someone of life, liberty, or property, it was depriving him of private rights." *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 485 (3d Cir. 2025) (Bibas, J., concurring).

posits that "additional legal interests," which we would today call public rights, "may be generated by positive law and belong to the people as a civic community and disputes about their scope and application may be resolved through other means, including legislation or executive decision."[10] *Id.*

"*Jarkesy* creates uncertainty on how the public rights doctrine now considered as an exception applies to tax fraud penalties." Bryan T. Camp, *The Impact of SEC v. Jarkesy on Civil Tax Fraud Penalties*, 27 Fla. Tax Rev. 478, 508 (2024). On the one hand, under this Court's precedent collection of tax *revenue* is a public right that can be adjudicated in a non-Article III tribunal in the first instance.[11] *See Jarkesy*, 603 U.S. at 152–53 (Gorsuch, J., concurring) (public rights "ha[ve] traditionally included the collection of revenue"). This function of the Tax Court poses no constitutional problem under current precedent. *See Phillips v. Comm'r*, 283 U.S. 589, 595–96 (1931). The knottier question is what happens when the Tax

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[10] "[T]he presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982). Instead, "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.

[11] *But cf.* Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281, 1338 (1978) (suggesting that Founding-era "precedents do not support the conclusion . . . that 'taxes may constitutionally be assessed and collected . . . with the relevant facts in some instances being adjudicated only by an administrative agency'" (citation omitted)).

Court veers off from tax revenue collection and adjudicates what appears to be a garden-variety private-rights dispute where the IRS seeks quintessential "legal" monetary relief in the form of punitive civil penalties, as happened here. Intuitively, it makes sense to separate the two. And *Jarkesy* appears to indicate that heightened procedural safeguards are required in the latter case. *See* 603 U.S. at 132.

At a higher level, *Jarkesy* "turn[ed] the [public-rights] doctrine from a rule into an exception, rebalancing the interests of citizens and the executive branch in having Article III involvement in government operations." Camp, 27 Fla. Tax Rev. at 501. As *Jarkesy* explained, "[t]he public rights exception is . . . an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles." 603 U.S. at 131. "Even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Id.* at 132 (cleaned up). *Jarkesy* further suggests that as a matter of constitutional first principles courts should "(1) presume that a cause of action does not involve public rights, unless (2) it fits within the public-rights categories that existed when Article III was ratified." *Axalta*, 144 F.4th at 483 (Bibas, J., concurring).

Although the matter is not free from doubt, there are at least two reasons to think that the IRC's tax penalty scheme may fit poorly, if at all, within the public-rights exception under *Jarkesy*'s framework.

First, even if the monetary penalties at issue here *arguably* fall within the public-rights exception by

virtue of their connection to the collection of tax revenue, application of *Jarkesy*'s presumption in favor of private rights counsels that imposition of these penalties implicate core private rights—and the attendant constitutionally required protections.

Second, "traditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree." *Jarkesy*, 603 U.S. at 153 (Gorsuch, J., concurring). "[U]nder the common law of England in 1791, an action by the Crown to recover a judgment for taxes was a suit at common law in which the right of jury trial existed." *Damsky v. Zavatt*, 289 F.2d 46, 49 (2d Cir. 1961); *see* Kirst, 126 U. Pa. L. Rev. at 1338 (common law "clearly recognized the right of a taxpayer to a jury trial in an action against the collector"). "Before and after the American Revolution, tax penalties were collected by suit against the taxpayer." 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, 58 (2025). "That early American tradition of jury trial for tax penalties continued through the founding era into the first years of the Civil War[.]" *Id.* at 59. Tax penalties thus appear to lack a historical pedigree dating to the Founding. That, too, appears to suggest that these penalties fall outside of the public-rights exception as articulated in *Jarkesy*.[12]

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[12] "Though *Jarkesy* did not expressly limit public rights to the kinds recognized at the Founding, its analysis implied as much." *Axalta*, 144 F.4th at 483 (Bibas, J., concurring).

IV. The IRC's Tax Penalty Scheme Is Hard to Square With Article III.

There may well be another related constitutional defect with a statutory scheme authorizing the Tax Court to adjudicate IRS-imposed tax penalties: to the extent these monetary penalties implicate vested private property rights falling outside of the public-rights exception as articulated in *Jarkesy*, the Constitution requires an exercise of judicial Power a non-Article III tribunal like the Tax Court cannot constitutionally possess.[13]

Under the Constitution, "[t]he judicial Power" "extend[s] to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States[.]" U.S. Const. Art. III, § 2, cl. 1. Under the original understanding, it "extended to 'suit[s] at the common law, or in equity, or admiralty.'" *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 348 (2018) (Gorsuch, J., dissenting) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284).

This Court "ha[s] repeatedly explained that matters concerning private rights may not be removed from Article III courts." *Jarkesy*, 603 U.S. at 127 (citing *Murray's Lessee*, 59 U.S. (18 How.) at 284; *Granfinanciera*, 492 U.S. at 51–52; *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). Instead, "an exercise of the judicial power is required when the government wants to act authoritatively upon core private rights that

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[13] "[T]here is only one public-rights test across both" Article III and the Seventh Amendment. *Axalta*, 144 F.4th at 484 (Bibas, J., concurring).

had vested in a particular individual." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting) (cleaned up). This means that "when private rights are at stake, full Article III adjudication is likely required." *Axon*, 598 U.S. at 198 (Thomas, J., concurring). That may be the case here. If so, the Tax Court cannot provide that Article III adjudication, as it is in a different branch of government.[14]

V. This Court Should Build On *Jarkesy* and Repudiate *Atlas Roofing*.

This Court's precedent "governing the public rights exception have not always spoken in precise terms" and "has not definitively explained the distinction between public and private rights[.]" *Jarkesy*, 603 U.S. at 130–31. *Jarkesy* likewise "d[id] not claim to do so[.]" *Id.* at 131. "[T]he boundary

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[14] The Tax Court's constitutional status is murky. *See Freytag v. Commissioner*, 501 U.S. 868, 908–09 (1991) (Scalia, J., concurring in part, concurring in judgment). It is often described as an "Article I court." *See, e.g., Curtin v. Commissioner*, No. 32212-15, 2023 U.S. Tax Ct. LEXIS 3824, at *3 (T.C. Oct. 2, 2023). But it may be more accurate to describe it as an Article II Executive-branch entity. *See Kuretski v. Comm'r of IRS*, 755 F.3d 929, 943 (D.C. Cir. 2014) ("[T]he Tax Court exercises its authority as part of the Executive Branch."); Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 Tex. L. Rev. 1013, 1053 (2025). One thing seems certain: the Tax Court is *not* an Article III court. *See Kuretski*, 755 F.3d at 943. Therefore, it follows that the Tax Court cannot possess or exercise the "judicial Power" the Constitution exclusively reserves to Article III courts—any attempt to do so would be void. *See Murray's Lessee*, 59 U.S. (18 How.) at 275. *But cf. Freytag*, 501 U.S. at 890–91.

between private and public rights has proven anything but easy to draw[.]" *In re Renewable Energy Dev. Corp.*, 792 F.3d at 1278. And as Judge Kethledge has observed, "[t]he law in this area has a potluck quality." *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012). That observation remains true today.

In *Jarkesy*, this Court took an important step to return to constitutional first principles, making clear that the so-called public-rights exception to Article III and the Seventh Amendment is just that: a limited exception to the Constitution's promise that Americans are entitled to a trial in an independent court, subject to the jury-trial right. But *Jarkesy*'s public-rights analysis sits uneasily with this Court's decision in *Atlas Roofing*—an outlier decision that may well be the "high-water mark of the movement toward agency adjudication." *Jarkesy*, 603 U.S. at 157 (Gorsuch, J., concurring). At least when that misguided decision is read broadly, "any time Congress creates a cause of action enforced by the government, *Atlas Roofing* presumes that it involves a public right." *Axalta*, 144 F.4th at 483 (Bibas, J., concurring). *Atlas Roofing*'s bespoke public-rights analysis thus flips *Jarkesy*'s presumption in favor of private rights on its head.

This makes a hash of this Court's public-rights doctrine, not to mention the Constitution's demands. As Judge Bibas has thoughtfully observed:

> *Atlas Roofing* and its progeny created a test for public rights that dragged the doctrine far from the Constitution's original meaning. *Jarkesy* then announced a return to first principles

> that put the law on sounder footing theoretically—but it preserved a test for public rights that directly conflicts with those principles.[15]

Id. at 482 (Bibas, J., concurring). That is a constitutional problem. And this doctrinal morass should not be allowed to stand. The Court should "take this accreted jumble and order it into a rule that is coherent, consistent, and true to the Constitution's original safeguards." *Id.* at 485 (Bibas, J., concurring). This Petition is an opportunity to begin that process.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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[15] A possible explanation for this conflict is that the public-rights doctrine has become "misshapen in recent years thanks to seesawing battles between competing structuralist and functionalist schools of thought" on the Court. *In re Renewable Energy Dev. Corp.*, 792 F.3d at 1278. This Court should clear up this doctrinal confusion by repudiating the functionalist approach exemplified by cases like *Atlas Roofing*, returning to first principles, and enforcing the structuralist protections enshrined in the Constitution.