No. 24-685

IN THE

Supreme Court of the United States

SUSAN MCBRINE, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The American Association for Justice, whose core mission is to preserve the constitutional right to trial by jury for all Americans, believes that the issues raised by Petitioners merit this Court's attention, and AAJ urges this Court to grant the Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The American Association for Justice urges this Court to grant the Petition to address important questions concerning the preservation of the Seventh Amendment right to trial by jury. Congress enacted the Camp Lejeune Justice Act (CLJA) to provide a

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

cause of action for monetary damages for those injured by contaminated water at the facility.

The district court below denied Plaintiffs' request for a jury trial in contravention of the plain text of statute which—as distinguished from the Federal Torts Claims Act (FTCA), which requires bench trials—expressly states that nothing in the CLJA "shall impair the right of any party to a trial by jury." That reason alone warrants this Court's grant of the Petition and reversal of the decision below.

2. In addition, the district court's premise that the Seventh Amendment does not apply to actions against the government where Congress has waived sovereign immunity, contravenes the expansive scope of the Seventh Amendment. This Court recently made clear that the constitutional right to trial by jury "in suits at common law" is not limited to the specific causes of action known to the common law in 1791. Rather, the Founders intended to preserve the right to a jury trial in statutory causes of action that are analogous to actions tried in the law courts of England, as distinguished from the admiralty or maritime courts or the courts sitting in equity. Petitioners' statutory cause of action for money damages, a quintessential remedy at law, fits squarely within the scope of the Seventh Amendment.

Consequently, when Congress removed the bar of sovereign immunity in the CLJA and vested the district court with jurisdiction to hear claims against the United States for money damages, Congress "affirmatively and unambiguously" provided plaintiffs with the right to try their case before a jury. Congress can

affirmatively deny the right to trial by jury in a cause of action it has created, but it has not done so here.

3. The district court, ignoring the statutory text, based its denial of Petitioners' jury trial request on a novel and unusually strong presumption: When Congress creates a cause of action against the federal government, plaintiffs seeking a jury trial must demonstrate that Congress "clearly and unequivocally departed from its usual practice of permitting only bench trials in civil actions against the United States." Moreover, the district court added, even if Congress has expressly provided for jury trials, if that provision is susceptible to any alternative interpretation, no matter how unlikely or remote, plaintiffs cannot overcome the district court's novel presumption against trial by jury.

The notion that the federal judiciary might put its thumb on the scales to deny trial by jury in legal controversies between Americans and the federal government would have shocked and dismayed the Founding generation. They were assuredly not firm believers in the proposition that the King can do no wrong. They insisted upon incorporating the jury right into the constitution precisely because they viewed that right as a precious, centuries-old legacy from the common law. Its advocates viewed the jury as a means for private citizens to vindicate their interests in litigation against the government. Much of the impetus for the adoption of the Seventh Amendment was the determination by the former colonists that the abuse of their rights by the British Crown in transferring litigation away from local juries to the control of Crown-appointed judges in vice-admiralty and chancery courts

not be repeated. The district court's ruling that causes of action brought by Petitioners against the federal government be decided by federal-government judges instead of local juries echoes the same violation of rights.

This Court's decision in *Lehman v. Nakshian* does not support the district court's ruling. Congress was not required to employ specific "magic words" in the CLJA to preserve the right to a jury trial. Nor is the bench trial the default "normal practice" when Congress waives sovereign immunity. On the contrary, trial by jury is its usual procedure.

4. The district court's presumption against jury trials in actions against the federal government reinforces an erroneous bias against the American jury that further erodes the protections secured by the Seventh Amendment.

Powerful interests that seek to evade accountability by diminishing and diluting the jury's role have waged a decades-long cynical attack on American juries. This tort-reform campaign has featured false portrayals of the Americans who sit on civil juries as incompetent and emotional, unable to understand complicated facts and eager to hand out lavish verdicts out of sympathy toward plaintiffs or antipathy for corporate defendants. That campaign has devalued the work of American juries in the eyes of legislators and the public generally.

Social scientists and legal scholars who have examined the actual performance of sitting jurors have repeatedly established that juries' damage awards are rationally based on the factual details and severity of

the injuries in the particular case. This Court itself has observed empirical studies that undercut much of the anti-jury rhetoric. Those studies show that damage awards are not random or products of juror sympathy. Empirical data has repeatedly shown that jurors are capable of understanding and evaluating the evidence before them, even in complex civil actions, and their damage awards are strongly correlated to the facts and injuries in the case. Trial judges, who closely observe jurors at work, generally give jurors high marks in understanding the evidence presented to them and following the court's instructions. Overwhelmingly, the surveyed trial judges believed that the right to trial by jury is an essential safeguard which must be retained.

5. The practice of trying cases to juries of ordinary citizens who represent a cross-section of the community serves important functions in American democracy. As the Founders were aware, jurors possess attributes that judges do not in that they more closely reflect the common sense and values of their community. For example, the judgment of ordinary citizens as to whether the conduct of a defendant or a plaintiff is "reasonable" is a more reliable gauge of community values. They also make their decisions after deliberating among themselves, where they can check the accuracy of their observations and uncover hidden biases. In contrast, judges are subject to their own biases stemming from the fact that they are repeat actors in similar cases and may be influenced by previous encounters with attorneys in the case.

Decisionmaking by ordinary Americans also strengthens the legitimacy of the work of the judicial

branch. Jurors play a unique role in the judicial branch. They have no financial or professional interest in the outcome, they serve for one case only, and they labor in relative anonymity. Consequently, their decisions are rightly viewed by the public as shielded from corruption or ambition, and the jury's decision can serve as a lightning rod by assuming responsibility for decisions that might be viewed with suspicion if rendered by a professional judge. When litigation arises between the government and its citizens, it is often vital that the parties and the public be confident that the outcome is based on the honest effort by their fellow citizens to do justice and was not directed by the presiding judge's federal government employer.

Finally, the practice of trying cases to citizens selected from the community bolsters civic engagement and the commitment of Americans to their democracy. For example, jury service has been shown to lead to increased participation in voting. Jury service enables citizens to learn self-government by doing self-government.

This Court should grant the Petition to fulfill its commitment that any curtailment of the fundamental right to trial by jury be scrutinized with the utmost care.

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' RIGHT TO A JURY TRIAL FOR CLAIMS UNDER THE CAMP LEJEUNE JUSTICE ACT CONTRAVENES THE PLAIN TEXT OF THE STATUTE.

At Marine Corps Base Camp Lejeune, from the 1950s to the 1980s, the water provided to homes, schools, and hospitals for drinking, washing, and bathing was heavily contaminated with toxic chemical solvents. Thousands of members of the armed forces, civilian staff, and their families developed cancer and other diseases. *See* Meghan E. Brooks, *Early Reflections on a New Cause of Action for Camp Lejeune Veterans*, 14 Wake Forest J.L. & Pol'y 157 (2024).

Many of those servicemembers and civilians brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671–2680, *et seq*. That effort to do justice failed as federal courts granted the government's motion to dismiss Plaintiffs' FTCA causes of action on various grounds. *E.g.*, *In re Camp Lejeune N. Carolina Water Contamination Litig.*, 263 F. Supp. 3d 1318 (N.D. Ga. 2016), *aff'd sub nom. In re Camp Lejeune, N. Carolina Water Contamination Litig.*, 774 F. App'x 564 (11th Cir. 2019); *Clendening v. United States*, 19 F.4th 421 (4th Cir. 2021).

Congress responded by enacting the Camp Lejeune Justice Act of 2022 (CLJA), Pub. L. No. 117-168, § 804, 136 Stat. 1759, 1802–04 (Aug. 10, 2022) (codified at 28 U.S.C. ch. 171 prec. note). The CLJA establishes a federal cause of action against the United States for servicemembers and others to recover compensatory damages to pay medical bills and other expenses caused by the diseases they developed from the water at Camp Lejeune. Congress specifically intended the CLJA to serve as "an alternative remedy to the FTCA." *Clendening v. United States*, 143 S. Ct.

11, 11 n.2 (2022) (Thomas, J., dissenting). Most importantly, Congress explicitly rejected the requirement that FTCA actions "be tried by the court without a jury." 28 U.S.C. § 2402. Instead, Congress affirmatively provided that "nothing" in the new law "shall impair the right of any party to a trial by jury." CLJA § 804(d).

The district court, however, declared that § 804(d) "does not unequivocally, affirmatively, and unambiguously provide plaintiffs the right to a jury trial." Appx. 34a. It plainly does. The common law, when the Bill of Rights was adopted, tried claims for money damages in the law courts to juries. The Seventh Amendment commands that the federal courts "preserve[]" that right.[2] The text of § 804(d) can mean nothing less than that when Congress consented to suits against the United States by Camp Lejeune victims, it also affirmatively safeguarded their right to present their cases to a jury.

Because the lower court ignored the plain text of the CLJA, this Court should grant the Petition and reverse the judgment of the court below.

II. THE DISTRICT COURT'S NARROW VIEW OF THE SEVENTH AMENDMENT CONTRAVENES THE EXPANSIVE SCOPE OF THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY "IN SUITS AT COMMON LAW."

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[2] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. Const. amend. VII.

AAJ submits that the decision below is reversible as well because it disregards this Court's long-established view of the scope of the Seventh Amendment. This Court has instructed the lower courts that the right to a jury "in suits at common law" reaches broadly to include statutory causes of action seeking money damages. Petitioners' actions for compensatory damages under the CLJA fit squarely within the scope of the Seventh Amendment guarantee.

The court below based its decision largely on the proposition that, because the Seventh Amendment applies in "suits at common law," and the common law precluded suits against the sovereign, "the Seventh Amendment does not apply" to suits under the CLJA. Appx. 22a. The court went on to state that Petitioners had no right to trial by jury unless they could prove that the statute affirmatively and unambiguously *created* such a right. *Id.*

This Court recently had occasion to address the fallacy of this line of reasoning. In *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109 (2024), Chief Justice Roberts focused on the text of the Seventh Amendment, which applies in "[s]uits at common law." That phrase "is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified. *Id.* at 110 (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)). Moreover, within living memory of the enactment of the Seventh Amendment, Justice Story explained that the Framers used the term "common law" in the broadest sense, to encompass all actions decided by the law courts, "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons v. Bedford, Breedlove & Robeson*, 28

U.S. (3 Pet.) 433, 446 (1830).[3] Thus, the Seventh Amendment applies to "all suits which are not of equity or admiralty jurisdiction, *whatever may be the peculiar form which they may assume*." *Jarkesy*, 603 U.S. at 122 (quoting *Parsons*, 28 U.S. at 447) (emphasis added). The relevant fact is not that Petitioners' cause of action was made possible by Congress's waiver of sovereign immunity. It is the fact that Congress created a remedy for monetary damages, "the prototypical common law remedy." *Jarkesy*, 603 U.S. at 123. That fact "is all but dispositive." *Id.*

This Court has repeatedly made clear that the Seventh Amendment guarantees the right to trial by jury in statutory causes of action that were created by Congress but are "analogous to common-law causes of action ordinarily decided in English law courts" in 1791. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). As Justice Thomas later explained while writing for a unanimous Court, "analogous" did not refer to the type of action, but to whether the cause of action was one heard in the law courts, as distinguished from the English courts of equity or admiralty. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998).

Consequently, in the CLJA, when Congress removed the bar of sovereign immunity and vested the

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[3] The broad scope of the Seventh Amendment phrase "suits at common law" is also evident in the Judiciary Act of 1789, in which the first Congress required that "the trial of issues in fact in the circuit courts shall in all suits, except these of equity, and of admiralty and maritime jurisdiction, be by jury." Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 80 (1789). *See also Parsons*, 28 U.S. at 447.

district court with jurisdiction to hear claims against the United States for money damages, Congress "affirmatively and unambiguously" provided plaintiffs with the right to try their case before a jury. Congress can, of course, deny the right to trial by jury in a cause of action it has created. *Granfinanciera,* 492 U.S. at 52. It did so in the FTCA. *See* 28 U.S.C. § 2402. But Congress has not done so here.

III. THE LOWER COURT'S NOVEL PRESUMPTION AGAINST THE RIGHT TO TRIAL BY JURY CONTRAVENES THIS COURT'S MANDATE TO PROTECT THAT FUNDAMENTAL CONSTITUTIONAL GUARANTEE.

The decision by the court below does not rest on the text of the statute, which nowhere makes the waiver of sovereign immunity contingent on prohibiting jury trials. The district court instead created a novel and unusually strong presumption: Plaintiffs have no right to a jury unless they can demonstrate that Congress "clearly and unequivocally departed from its usual practice of permitting only bench trials in civil actions against the United States." Appx. 23a.[4]

Moreover, the lower court added, even if Congress has expressly provided for jury trials, if that provision is susceptible to any alternative interpretation, no matter how unlikely or remote, the statute fails to overcome the presumption against the right to a jury. Appx 30a-32a.

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[4] If that were truly the case, the provision in the FTCA providing that actions "be tried by the court without a jury," would be redundant surplusage. 28 U.S.C. § 2402.

A. The Seventh Amendment Preserves the Jury's Role in the Civil Justice System as a Shield for Americans in Litigation Involving the Federal Government.

The notion that the federal judiciary might put its thumb on the scales to deny trial by jury in legal controversies between Americans and the federal government would have shocked and dismayed the Founding generation. They were acutely aware that they did not create that right, but rather inherited it through a long and sacred tradition. "The framers all seem to have agreed that trial by jury could be traced back in an unbroken line to the . . . Magna Charta." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 653 n.44 (1973). But they so valued that right that they charged the judicial branch to preserve it.

To the Founders, the fundamental importance of the jury did not lie primarily in resolving controversies between private parties. According to the Antifederalists, the guarantee of a civil jury trial meant "vindication of the interests of private citizens in litigation with the government." Wolfram, *supra*, at 671. The jury was to "provide the common citizen with a sympathetic forum in suits against the government." *Id.* at 708.

The Founders were not firm believers in the proposition that the King can do no wrong. One particular point of contention was the assessment of forfeitures and fines under the Stamp Act and Townsend Acts. To avoid leaving enforcement decisions in the hands of sympathetic local juries, the Crown siphon[ed] adjudications to juryless admiralty, vice admiralty, and

chancery courts. *Jarkesy*, 603 U.S. at 121. There, in an ever-expanding reach of cases, Crown-appointed judges decided the fates of the colonists. *Id.* at 145–47 (Gorsuch, J., concurring). The colonists complained bitterly and at length declared themselves independent of England, citing as a reason, "depriving us in many cases, of the benefits of Trial by Jury." Declaration of Independence para. 20 (U.S. 1776).

It was vital to many new Americans that the abuse of their rights at the hands of the Crown's vice-admiralty court judges be permanently barred by an explicit constitutional guarantee of the right to a jury trial. When the drafters of the Constitution emerged from their Philadelphia convention with no such guarantee, the ratification of the Constitution itself was most imperiled by "the want of a constitutional provision for the trial by jury in civil cases." The Federalist No. 83 (Alexander Hamilton). *See generally* Jeffrey R. White, *The Civil Jury: 200 Years Under Siege,* Trial, June 2000, at 18.

The district court in this case, perhaps reflecting the same out of distrust of local juries in litigation with the government, has essentially repeated the British Crown's vice-admiralty gambit.

B. This Court's Decision in *Lehman* Does Not Support the Lower Court's Denial of a Jury Trial.

In support of its presumption against jury trials, the district court relied on this Court's statement that, when a statutory cause of action does not "affirmatively and unambiguously" grant the right to a jury trial, it is presumed that "Congress did not depart

from its normal practice of not providing a right to a trial by jury when it waived the sovereign immunity of the United States." Dist. Ct. 22a (quoting *Lehman v. Nakshian*, 453 U.S. 156, 168–69 (1981)).

But *Lehman* cannot bear the load the district court demands of it. Unlike the statute in *Lehman*, CLJA § 804(d) *does* affirmatively and unambiguously grant plaintiffs the right to a jury trial. For the district court to demand that Congress employ a particular formulation of "magic words" to do so "violates the baseline rule of legislative supremacy." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 166–67 (2010).

Moreover, Congress's "normal practice" in this regard is to the contrary. This Court has repeatedly instructed that, as Justice Brandeis explained, where Congress has conferred exclusive jurisdiction on the district courts to hear statutory causes of action against the United States, the "usual procedure of the court in actions at law for money compensation" includes the right to a jury trial. *Law v. United States*, 266 U.S. 494, 496 (1925) (finding error in the denial of a jury trial). *See also United States v. Pfitsch*, 256 U.S. 547, 550 (1921). As is evident from the FTCA, Congress's normal practice when it wants to restrict actions against the government to bench trials, is to expressly so provide. *See* 28 U.S.C. § 2402.

The district court also relied on this Court's instruction that, "[l]ike a waiver of immunity itself, which must be unequivocally expressed," the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Appx 20a (quoting

Lehman, 453 U.S. at 161). But in this case, the military personnel and their families are not asking the Court to ignore the limits or conditions that Congress imposed on its waiver of sovereign immunity or to imply any exception. Congress did not impose any such limits or conditions but instead expressly protected Petitioners' right to a jury trial from impairment. CLJA § 804(d).

IV. THE DISTRICT COURT'S PRESUMPTION AGAINST JURY TRIALS REFLECTS AND REINFORCES AN ERRONEOUS BIAS AGAINST THE AMERICAN JURY THAT FURTHER ERODES THE PROTECTIONS SECURED BY THE SEVENTH AMENDMENT.

The district court's holding—that plaintiffs suing the federal government under an Act of Congress that *expressly preserves* jury rights must be *denied* the right to trial by jury—is novel and without precedent. Yet it is the latest troubling example of "the 'gradual process of judicial erosion'" which threatens "'the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting) (quoting *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J., dissenting)). That erosion has dramatically accelerated in the last few decades, leading Justice Gorsuch to ask "why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption." *Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from the denial of certiorari)).

One reason is that powerful interests who expect to profit from diminishing and diluting the jury's role have waged a decades-long cynical attack on American juries. False portrayals of the Americans who sit on civil juries as incompetent and emotional, unable to understand complicated facts and eager to hand out lavish verdicts out of sympathy toward plaintiffs or antipathy for corporate defendants have been "the processional music of the tort reform movement." Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. Dayton L. Rev. 307, 307 (2006). The campaign has made frequent use of seeming ridiculous but false stories of tort "horror stories." *See, e.g.*, Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 1–59 (1995); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 Ariz. L. Rev. 717 (1998). The campaign has not only achieved the enactment of damage caps and other legislative protections, but also has devalued the work of juries in the eyes of the public generally. *See* Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 Emory L.J. 1225, 1262 (2004).

The tort reform campaign has prompted social scientists and legal scholars to examine the actual performance of Americans when they sit as jurors. This Court itself has taken note of the fact that "the most recent studies tend to undercut" much of the criticism of jury awards in the area of punitive damages, where contrary to tort reformers' heated claims, juries have "not mass-produced runaway awards." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008).

Instead, careful studies have repeatedly established that juries' damage awards are rationally based on the factual details and severity of the injuries at issue in the particular case. *E.g.*, Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908, 941 (1989). Awards of noneconomic damages are not random or the product of juror sympathy, but are strongly correlated to the amount of economic damages. *See* Herbert Kritzer et al., *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 Wm. & Mary L. Rev. 971, 1010–13 (2014). *See also* Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"* 25 Conn. L. Rev. 1083, 1090, 1094–98 (1993) (finding that jurors competently evaluate scientific evidence, even in complex cases).

Summarizing five research projects concerning "jury competence in ordinary trials," the Project Director in the Division of Research at the Federal Judicial Center, and colleagues concluded that "doubts about jury competence expressed by jury critics" are not borne out by "the judgments of scholars who conduct research on jury decisionmaking." Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 728, 744–45 (1991). To the contrary, "empirical evidence consistently points to the general competence of the jury." *Id.* at 745.

Other studies of juror behavior demonstrate that "[c]laims about jury incompetence, irresponsibility, and bias" are not supported by "the many studies that

have examined these issues from various methodological perspectives." Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 Am. J. Pub. Health S137, S142 (2005). For example, a "substantial body of research" indicates that jurors can follow and critically evaluate testimony provided by both lay and expert witnesses. Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 Notre Dame L. Rev. 1, 14 (2013); Valerie P. Hans et al., *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 Law & Human Behavior 60, 69 (2011).

One of the largest empirical studies of actual jury performance, sponsored by the Roscoe Pound Foundation, found that:

> Juries overwhelmingly take their duties seriously, . . . are evidence-oriented . . . [and] are able to arrive at legally supportable verdicts in a very large majority of cases. . . . [J]urors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy.

John Guinther, The Jury in America 101–02 (1988). The author concludes that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of research method, has reached that conclusion." *Id.* at 230.

Trial judges are professional observers of jurors at work, and they generally give jurors high marks in un-

derstanding the evidence presented to them and following the court's instructions. For example, a survey of 800 state and 200 federal judges sponsored by the Aetna Life and Casualty Company found that an overwhelming majority believed that juries "make a serious effort to apply the law as they are instructed," and did not believe that "the feelings jurors have about the parties often cause them to make inappropriate decisions." *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. Rev. 731, 746 (1989). The judges also believed that "the right to trial by jury is an essential safeguard which must be retained." *Id.*

V. THE PRESUMPTION AGAINST JURY TRIALS UNDERMINES THE IMPORTANCE OF THE JURY TO OUR DEMOCRACY.

A. The Jury Brings the Views of the Community to Important Government Decisions That Affect the Community.

The district court treats jury trial as simply another mode of dispute resolution, on a par with bench trials but not to be preferred. Not so. The Founders insisted upon a constitutional guarantee of the right to trial by jury precisely because juries render decisions that are qualitatively different from federal judges. They recognized that "jurors possess attributes that judges do not." Richard Jolly et al., *Democratic Renewal and the Civil Jury*, 57 Ga. L. Rev. 79, 87 (2022).

Justice Story explained the advantage of trial by jury: "It is assumed that twelve men know more of the

common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & P. Ry. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873). As Chief Justice Rehnquist emphasized,

> Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community.

Parklane Hosiery, 439 U.S. at 343–44 (Rehnquist, J., dissenting).

Jurors selected from a cross-section of the community bring a variety of life experiences to their task. A "substantial body of theory and research on juror decisionmaking confirms that jurors draw on their life experiences, attitudes, and perspectives as they assess and weigh evidence in the trial." Jolly et al., *supra*, at 102. This true reflection of the values of the community is especially important as jurors assess the "reasonableness" of a defendant's or plaintiff's conduct, among other questions of fact.

Researchers have found that "judges' determinations, like those of juries, are influenced by their experiences and cultural perspectives. Valerie P. Hans, *What's It Worth? Jury Damage Awards as Community Judgments*, 55 Wm. & Mary L. Rev. 935, 959–60 (2014). But the range of personal, educational, and professional experiences that most federal judges can draw upon is typically much narrower. In addition,

unlike jurors, judges are repeat players. They may be led astray by confirmation bias or by prior experience with attorneys in the case. These factors are "particularly consequential" when, as in this case, the same district court judges may be presiding over very similar suits, often involving the same counsel. Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity and the Bench Trial*, 53 U. Rich. L. Rev. 1039, 1041–42 (2019).

Jurors have an additional advantage in that they render their decisions after discussing the evidence and their courtroom observations among themselves. In their deliberations, jurors can check the accuracy of what they witnessed, compare their conclusions, and expose unconscious biases. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1275 (2000).

Finally, the justice system is designed to assist lay jurors in making reliable decisions. This Court, as it charged trial judges with the task of excluding unreliable expert testimony, has cautioned against being "overly pessimistic about the capabilities of the jury." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.*

B. Decisionmaking by Ordinary Americans Strengthens the Legitimacy of the Work of the Judicial Branch.

When Americans are sworn in as jurors, they become part of the judicial branch of government, serving, as the Founders envisioned, as its "lower house." *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1189 (1991). But their role is unique. A juror's primary job qualification is that he or she represents the larger community. They have no financial or professional interest in the outcome, they serve for one case only, and they labor in relative anonymity. Consequently, their decisions are rightly viewed by the public as shielded from corruption or ambition.

For that reason, jurors can serve as a "lightning rod" or pressure valve by making decisions that might be unpopular or viewed with suspicion if made by professional judges. Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DePaul L. Rev. 221, 239–40 (1998).

When litigation arises between the government and its citizens, it is vital that the parties and the public at large be confident that the outcome, if not what they had hoped, is based on the honest effort by their fellow citizens to do justice and was not directed by the presiding judge's federal government employer.

C. Jury Service Strengthens Participatory Democracy.

The Founders knew and took to heart Blackstone's view that the jury "preserves in the hands of the people that share which they ought to have in the administration of public justice." 3 William Blackstone, Commentaries *380. All sides of the ratification debate recognized that the jury box as well as the ballot box were fundamental prerequisites to self-government. Amar, *supra,* at 1186, 1188.

French political thinker Alexis de Tocqueville astutely recognized as he toured the new United States that the jury in America operates as "a gratuitous public school, ever open, in which every juror learns his rights . . . and becomes practically acquainted with the laws. Alexis de Tocqueville, Democracy in America, 295 (Vintage ed. 1945). The practice of trying cases to juries makes all citizens "feel that they have duties toward society and that they take a share in its government." *Id*. at 291. In short, jury service enables citizens to learn self-government by doing self-government. Amar, *supra*, at 1196.

Empirical research has repeatedly proved de Tocqueville correct. Political scientists find that "jury service fosters a general sense of empowerment that frequently leads to other forms of civic engagement." James B. Binnall, *A "Meaningful" Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 SMU L. Rev. F. 35, 46 (2020). *See also* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* Verdict: Assessing The Civil Jury System 282, 298–300 (Robert E. Litan ed., 1993) (discussing studies on

the impact on individuals of civil jury participation); John Gastil et al., The Jury And Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation 45–47 (2010). One well-documented example is that jury service has been shown to lead to increased participation in voting. Valerie P. Hans et al., *Deliberative Democracy and the American Civil Jury*, 11 J. Empirical Legal Stud. 697, 710–12 (2014).

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This Court should grant the Petition because "trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law." *Dimick v. Schiedt*, 293 U.S. 474, 485–86 (1935). The jury "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." *Id.* at 486. "A right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York*, 315 U.S. 752, 752–53 (1942).

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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