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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SWAN ENERGY, INC., BRANDON DAVIS, JOHN SCHIFFNER, and CODY DAVIS, Appellants, v. INVESTOR PROTECTION UNIT OF THE DELAWARE DEPARTMENT OF JUSTICE, Appellee.	No. 331, 2025 Court Below: Superior Court of the State of Delaware C.A. No. N24C-03-071 MAA

APPELLANTS' OPENING BRIEF

Dated: September 9, 2025

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NATURE OF PROCEEDINGS

This case presents the novel question of whether the Investor Protection Unit of the Delaware Department of Justice ("IPU") constitutionally may prosecute and adjudicate an administrative action for securities fraud and securities registration, depriving Appellants Swan Energy, Inc., Brandon Davis, John Schiffner, and Cody Davis ("Appellants") of a jury trial and other safeguards that would be required if the action were brought in a court of law. The answer should be "no."

The IPU brought an administrative action (the "IPU Action") pursuant to 6 *Del. C.* § 73-601 against Appellants seeking fines based on (1) alleged securities fraud in violation of 6 *Del. C.* § 73-201 and (2) the alleged offer and sale of unregistered securities in violation of 6 *Del. C.* § 73-202. Because the IPU Action involves claims and civil penalties historically triable by jury in courts of law, Appellants are deprived of their rights to trial by jury. Further, the IPU Action lacks basic due-process protections. Subordinates of the same Attorney General act as both prosecutor and judge, and the punitive monetary fines demanded are revenue-producing support for the IPU. Discovery is one-sided. And, at the end, meaningful judicial review is thwarted because the IPU does not publish reasoned decisions, foreclosing any defense or review based on adjudicative neutrality and consistency.

The Superior Court erroneously dismissed Appellants' claims that 6 *Del. C.* § 73-601 and the IPU Action violate their rights to trial by jury and due process.

SUMMARY OF ARGUMENT

The Superior Court erred by holding that:

1. Article I, Section 4 of the Delaware Constitution permits the IPU to bring an administrative action for securities fraud pursuant to 6 *Del. C.* § 73-201 and securities registration pursuant to 6 *Del. C.* § 73-202 without providing a jury trial.

2. Article I, Section 4 of the Delaware Constitution permits the IPU to bring an administrative action for fines without providing a jury trial.

3. Appellants' claim for violation of Article I, Sections 7–9 of the Delaware Constitution is not ripe because the IPU has not yet deprived them of life, liberty, or property, thereby ignoring the due-process injury of being forced to undergo an unconstitutional administrative action.

STATEMENT OF FACTS

Founded in 1977, Appellant Swan Energy, Inc. ("Swan") works with companies and partnerships in the oil and gas, trucking, disposal, and mining industries. A9 ¶ 6. Swan forms joint ventures to raise capital from accredited investors who seek an active role in the management of oil and gas development, production, and related commercial activity. *Id.* Appellants Brandon David, John Schiffner, and Cody Davis work or worked for Swan. A10 ¶¶ 7–9.

The IPU brought an in-house administrative proceeding against Appellants. A14 ¶ 23. In the IPU Action, as in all in-house administrative proceedings brought by the IPU, the Director of the IPU (a Deputy Attorney General) serves as both prosecutor and judge. A10 ¶¶ 11–12. The Director may, and did here, delegate her adjudicatory role to another Deputy Attorney General, who serves as the Presiding Officer on an ad-hoc basis subject only to the Director's unilateral, discretionary revocation. A11 ¶ 13.

In its administrative complaint, the IPU alleges that Appellants committed securities fraud in violation of 6 *Del. C.* § 73-201, A14 ¶ 25 (citing A80–A82 ¶¶ 149–152), and offered and sold unregistered securities in violation of 6 *Del. C.* § 73-202, A14 ¶ 24 (citing A35–A80 ¶¶ 1–148). The IPU seeks, among other remedies, "an order providing for restitution plus interest . . . an assessment of costs, fines in such amount as [the Presiding Officer] deems appropriate, an order to cease

and desist the offer and sale of unregistered securities in Delaware and to Delaware investors, and such other relief as she determines to be in the public interest." A14–A15 ¶ 26 (citing A84). Each of the 71 counts is punishable by a fine of up to $10,000 "plus the costs of investigation and prosecution." A15 ¶ 26 (quoting 6 *Del. C.* § 73-601(b)). Any moneys paid pursuant to a court order or judgment resulting from the IPU Action "shall be credited to the Investor Protection Fund," from which the Attorney General may pay "costs, expenses, and charges [incurred] in connection with the activities of the Investor Protection Unit under this chapter, including enforcement, training, education" and more. A13–A14 ¶ 22 (quoting 6 *Del. C.* §§ 73-703(b)(2), 73-703(e)). The IPU is not required to return moneys collected to alleged victims or put them toward other remedial uses. *See* 6 *Del. C.* § 73-703.

This statutory structure, infrequently used, is constitutionally flawed. The IPU is not authorized to bring an enforcement action in any court established by Article IV of the Delaware Constitution. A12 ¶ 16. The IPU's authority to bring an action in the Court of Chancery is limited to applications for contempt orders, 6 *Del. C.* § 73-403, appeals from orders of the Director, 6 *Del. C.* § 73-502, and requests for injunctive and "other ancillary relief," 6 *Del. C.* § 73-602. A12 ¶ 16. And the IPU's authority to bring an action in the Superior Court is limited to applications for contempt orders, 6 *Del. C.* § 73-601(c)(2), and criminal actions, 6 *Del. C.* § 73-604(d). A12 ¶ 16. Thus, in the IPU Action, Appellants have no ability to demand a

jury trial, and the IPU has no ability to provide a jury trial, regardless of whether Article I, Section 4 of the Delaware Constitution guarantees one. A12 ¶ 17.

Further, no statute, rule, or regulation permits Appellants to take discovery in the IPU Action. A17 ¶¶ 33–35. The subpoena power rests exclusively with the IPU. A15 ¶¶ 28–29 (citing 6 *Del. C.* § 73-402; 6 *Del. Admin. C.* §§ 301, 302, 304). Nevertheless, to meet the IPU's allegations and mount a defense, Appellants requested information about how often a Presiding Officer resolved an administrative action favorably to the IPU, how much money respondents were ordered to pay, and where those monetary payments went. A15–A18 ¶¶ 28–39. Appellants sought this information from the IPU's prosecutors through three sets of discovery requests, all of which went unanswered. A17–A18 ¶¶ 33–39. Through FOIA requests, Appellants also sought this information from the Attorney General and the Office of Management and Budget (to whom the IPU must provide "reports as to the expenditure of moneys from the Investor Protection Fund" under 6 *Del. C.* § 73-703(f)), but these requests, too, were summarily rebuffed. A16–A17 ¶¶ 30–32.

Appellants presented constitutional objections to the Presiding Officer, A18–A19 ¶¶ 40–42, but the Presiding Officer declined to decide them, ordering Appellants to present them to a court of competent jurisdiction, A19–20 ¶ 46. Accordingly, Appellants filed an action in the Court of Chancery seeking (a) a declaration that the IPU Action and 6 *Del. C.* § 73-601 violate Appellants' rights to

trial by jury and due process and (b) an injunction enjoining the IPU Action from proceeding until Appellants' declaratory judgment claims are fully and finally resolved, including any appeal to this Court. A20 ¶ 49. Appellants and the IPU later agreed to a stipulation, endorsed by the Court of Chancery, in which the parties agreed to stay the IPU Action pending resolution of Appellants' constitutional objections. A21 ¶ 50. With Appellants' request for equitable relief rendered moot, the action was transferred to the Superior Court. A21 ¶ 52.

In the Superior Court, the IPU moved to dismiss Appellants' complaint. A128. Appellants opposed the motion, A353, and the IPU replied, A402. Following oral argument, the Superior Court ordered the parties to file supplemental briefs. A456; A457; A480. The Superior Court later issued an Opinion granting the IPU's motion to dismiss. *See* Exhibit A, filed herewith ("Ex. A"). Appellants filed a timely Joint Notice of Appeal.

ARGUMENT

I. The IPU Action For Securities Fraud And Securities Registration Entitles Appellants To Trial By Jury.

A. Question Presented

Whether Article I, Section 4 of the Delaware Constitution guarantees a jury trial when the IPU brings an administrative action for securities fraud pursuant to 6 *Del. C.* § 73-201 and securities registration pursuant to 6 *Del. C.* § 73-202. A21–A23 ¶¶ 54–60; A365–A389; A484–A492.

B. Scope of Review

The dismissal of a complaint under Superior Court Civil Rule 12(b)(6) is reviewed *de novo*. *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372, 381 (Del. 2023). Questions of law and constitutionality are reviewed *de novo*. *Capriglione v. State ex rel. Jennings*, 279 A.3d 803, 806 (Del. 2021).

C. Merits of Argument

Appellants brought this declaratory judgment action to enforce their rights to trial by jury when defending against the IPU's administrative action for securities fraud and securities registration. The Superior Court erred in concluding that the IPU's claims are not analogous to claims that were, at common law, triable by jury in courts of law. Moreover, the Superior Court's conclusion is inconsistent with the U.S. Supreme Court's recent conclusion in *SEC v. Jarkesy*, reached after thorough historical analysis, about when the accused in an in-house securities enforcement

action is entitled to trial by jury. The Superior Court's effort to distinguish the federal analysis and conclusion is unpersuasive and, respectfully, erroneous.

"The right to trial by jury which is provided for in the Delaware Constitution has a long and distinguished historical origin." *Claudio v. State*, 585 A.2d 1278, 1290 (Del. 1991). "Jury trial came to America with English colonists and received strong support from them." *Id.* (quotations omitted) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968)). "The legal heritage from England was followed in the Delaware courts. It is probable that a jury was empaneled in Delaware as early as 1669. By 1675, trial by jury had become a fixed institution in Delaware." *Id.*

In 1776, Delaware adopted its Declaration of Rights, which provided that "trial by jury of facts where they arise is one of the greatest securities of the lives, liberties, and estates of the people." *Id.* Shortly thereafter, with the enactment of its first Constitution, "Delaware commenced its existence as an independent State with an unambiguous expression of its intention to perpetuate the right to trial by jury, as it had existed at common law, for its citizens." *Id.* at 1291.

Article I, Section 4 of the Delaware Constitution reads, in its entirety, "Trial by jury shall be as heretofore." Del. Const. art. I, § 4. "As heretofore," a phrase "which has remained unchanged in the Delaware Constitution since 1792, demonstrates an unambiguous intention to equate Delaware's constitutional right to trial by jury with the common law characteristics of that right." *McCoy v. State*, 112

A.3d 239, 256 (Del. 2015); *see McCool v. Gehret*, 657 A.2d 269, 282 (Del. 1995) ("Consequently, since its inception in 1776, the Delaware Constitution has afforded its citizens the right to trial by jury in both criminal and civil proceedings. In doing so, the Delaware Constitution has expressly preserved all of the fundamental features of the jury system as they existed at common law.").

Therefore, "the proper focus of any analysis of the right to trial by jury, as it is guaranteed in the Delaware Constitution, requires an examination of the common law." *Claudio*, 585 A.2d at 1298; *see id.* at 1297 ("Because of this situation, reference must always be made to common law to properly interpret the meaning of the present constitution."); Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 33 (2002) [hereinafter *Holland*] (when analyzing Article I, Section 4, courts "apply historic principles of common law").[1] The analysis is the same under the corollary Seventh Amendment to the U.S. Constitution. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989).[2]

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[1] Appellants file contemporaneously herewith a Compendium of Authorities unavailable on Westlaw or otherwise difficult to access.

[2] Although the Seventh Amendment has not yet been incorporated against the States, the U.S. Supreme Court will consider later this month whether to grant a writ of certiorari in *Thomas v. Humboldt County*, a case presenting that exact issue. *See* Pet. for Writ of Cert. at i, *Thomas v. Humboldt Cnty.*, No. 24-1180 (U.S. filed May 15, 2025); Dkt. Entry, *Thomas v. Humboldt Cnty.*, No. 24-1180 (U.S. July 30, 2025) (distributing for conference on September 29, 2025). If the U.S. Supreme Court grants the writ, the Seventh Amendment and *Jarkesy* will become even more important to the questions presented here.

Actions that at common law were triable by jury in courts of law trigger Article I, Section 4. *See McCool*, 657 A.2d at 282 ("A *sine qua non* of that common law jurisprudence is the principle that either party shall have the right to demand a jury trial upon an issue of fact in an action at law."). By contrast, actions that at common law were not triable by jury, but only by a court of equity, do not trigger Article I, Section 4. *See Park Oil, Inc. v. Getty Ref. & Mktg. Co.*, 407 A.2d 533, 535 (Del. 1979) ("The right to a jury trial, however, applies to an action at law; it does not apply in an equity suit."); *Holland* at 33 ("The common law right to trial by jury exists for actions at law but not for actions brought in equity.").[3] Today, "there remains an historic and constitutional separation of law and equity" in Delaware, with the Superior Court hearing all actions "at common law" and serving as the only court authorized to order punitive damages and provide a binding civil jury trial and the Court of Chancery hearing all actions "in equity" and serving as the only court

[3] "The distinction between the courts of law and equity dates back to medieval England, where the English Court of Chancery evolved to provide judicial relief to those left remediless because of the procedural rigidity, corruption, and inadequate enforcement machinery of the common law." *LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 98 A.3d 135, 141 (Del. Ch. 2014) (quotations omitted), *aff'd*, 114 A.3d 1246 (Del. 2015). "When litigants could not obtain relief in the common law courts, they petitioned the king, appealing to the sovereign's oath to provide equal and right justice to his subjects." *Id.* (quotations omitted). As Sir William Blackstone explained, "courts of law and equity applied the same substantive rules, but they used different procedures to administer the rules and issued different remedies to implement their decisions[.]" *Id.* at 142. Principally, those procedural differences were "the mode of proof, the mode of trial, and the mode of relief." *Id.* (quotations omitted).

authorized to issue equitable relief. *See Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 738 (Del. 1983) (citing Del. Const. art. IV, §§ 7, 10; 10 *Del. C.* § 341).

The Superior Court's conclusion that statutes are not part of the "common law" is erroneous.[4] Indeed, "a right secured by the common law of this State" may derive "from the ancient statutes." *See Mo.-Kan. Pipe Line Co. v. Warrick*, 22 A.2d 865, 868 (Del. 1941). The U.S. Supreme Court has recognized this historical fact as well. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970) ("[M]uch of what is ordinarily regarded as 'common law' finds its source in legislative enactment.").

Article I, Section 4 guarantees the right to trial by jury in all actions that were triable by jury in courts of law, both statutory and non-statutory. *See State v. Cahill*, 411 A.2d 317, 320 (Del. Super. Ct. 1980), *rev'd on other grounds*, 443 A.2d 497 (Del. 1982). The U.S. Supreme Court has reached the same conclusion under the Seventh Amendment to the U.S. Constitution. *See Curtis v. Loether*, 415 U.S. 189, 193 (1974) ("[W]e have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights as a matter too obvious to be doubted."

[4] The principal support for the Superior Court's conclusion, an entry in Black's Law Dictionary, is internally inconsistent, as that dictionary also contains an entry for a "common-law statute." *See Common-Law Statute*, Black's Law Dictionary (12th ed. 2024).

(quotations omitted)); *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024) ("As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis.").

Reaching the opposite conclusion, the Superior Court cited *State v. Cahill*, but *Cahill* similarly recognized that statutes post-dating the adoption of Article I, Section 4 trigger the right to trial by jury when they are similar "in substance" to actions that were, at common law, triable by jury in courts of law. *See* 443 A.2d 497, 499–500 (Del. 1982). This is true regardless of whether the General Assembly intended the statute to trigger the right to trial by jury. *See id.* (citing *Curtis*, 415 U.S. 189). Indeed, "it is the nature of the proceeding rather than its designation which determines whether it is traditionally triable by jury." *Hopkins v. Just. of Peace Ct. No. 1*, 342 A.2d 243, 246 (Del. Super. Ct. 1975).[5] The U.S. Supreme Court has applied the same analysis, holding in *Jarkesy* that a respondent accused of violating federal securities statutes "has the right to be tried by a jury of his peers before a neutral adjudicator." 603 U.S. at 140. The potential for administrative disruptions did not deter the U.S. Supreme Court from conducting the proper analysis in *Jarkesy*—a comparison of the statutory action with its common law analog—and this Court should not be deterred either.

[5] For instance, parties to statutory actions for summary possession, actions similar in substance to non-statutory real property disputes, are entitled to trial by jury. *Hopkins*, 342 A.2d at 245. Similarly, parties to statutory actions for civil forfeiture, actions similar in substance to non-statutory personal property disputes, are entitled to trial by jury. *State v. Fossett*, 134 A.2d 272, 276–77 (Del. Super. Ct. 1957).

The IPU accuses Appellants of committing securities fraud in violation of 6 *Del. C.* § 73-201, *see* A14 ¶ 25 (citing A80–A82 ¶¶ 149–152), and offering and selling unregistered securities in violation of 6 *Del. C.* § 73-202, *see* A14 ¶ 24 (citing A35–A80 ¶¶ 1–148). Appellants are entitled to trial by jury because (1) securities fraud under 6 *Del. C.* § 73-201 is similar in substance to common-law fraud (*see infra* Section I.C.1) and (2) securities registration under 6 *Del. C.* § 73-202 is similar in substance to common-law securities registration (*see infra* Section I.C.2).

1. The IPU Action For Securities Fraud Entitles Appellants To Trial By Jury.

Securities fraud under 6 *Del. C.* § 73-201 is similar in substance to common-law fraud, entitling Appellants to trial by jury. There was no contention below that common-law fraud actions were not triable by jury in courts of law. To the contrary, it is undisputed that they were. *See, e.g.*, *Sowerby v. Warder*, 30 Eng. Rep. 124 (Ex. 1791) (fraud claim tried by jury); *Pasley v. Freeman*, 100 Eng. Rep. 450 (KB 1789) (deceit claim tried by jury). Today, common-law fraud actions remains triable by jury in courts of law. *See, e.g.*, Del. P.J.I. Civ. §§ 16.1–16.4 (2000) (Superior Court pattern jury instructions for fraud and deceit).

In *Jarkesy*, the U.S. Supreme Court recognized that federal securities statutes share a "close relationship" with common-law fraud because they "target the same basic conduct: misrepresenting or concealing material facts," use "common law terms of art" to incorporate "prohibitions from common law fraud," and draw upon

"common law fraud principles when interpreting" the federal statutes. 603 U.S. at 125–26.

6 *Del. C.* § 73-201 shares this same close relationship with common-law fraud. Like common-law fraud, 6 *Del. C.* § 73-201 targets false representations and omissions ("make any untrue statement of a material fact" and "omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading"), uses common-law terms of art to incorporate common-law prohibitions ("engage in any act, practice or course of business which operates or would operate as a fraud or deceit"), and draws upon common-law fraud principles. *See, e.g.*, *Van Roy v. Sakhr Software Co.*, 2014 WL 3367275, at *3–5 (D. Del. July 8, 2014) (analyzing claim under 6 *Del. C.* § 73-201 alongside common-law fraud claim, applying common-law principles to both, and concluding that they rise and fall together).

At common law, making untrue statements of material fact and omitting statements of material fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading, constitutes fraud. *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005). Likewise, 6 *Del. C.* § 73-201(2) declares it "unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to

make the statements made, in the light of the circumstances under which they are made, not misleading," and 6 *Del. C.* § 73-201(3) declares it "unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly . . . [t]o engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."

Moreover, 6 *Del. C.* § 73-201 is "virtually identical" to "Rule 10b–5 promulgated by the SEC . . . ." *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 348 (Del. 1993) (citations omitted).[6] "[T]he similarity of that provision with Rule 10b–5 evidences the General Assembly's intent that it be governed by similar principles." *Id.* at 349. Indeed, they "share the goal of protecting investors by preventing deception." *Id.* "It is also significant that securities fraud provisions of other states which are modeled on Rule 10b–5 have been interpreted using federal case law applicable to that Rule." *Id.* Thus, it is highly relevant that "Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law 'ancestor.'" *See Jarkesy*, 603 U.S. at 125.

Despite these similarities, the Superior Court reasoned that Appellants are not entitled to trial by jury because "[t]he analogy between common law fraud and securities fraud is imperfect." Ex. A at 17. Article I, Section 4 does not, however,

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[6] When *Hubbard* was decided, the Delaware securities fraud statute was codified at 6 *Del. C.* § 7303. The statute was later redesignated as 6 *Del. C.* § 73-201 by 78 Laws 2011, ch. 175, § 122, effective November 14, 2011.

require "perfect" symmetry; it requires only that the action be similar "in substance" to an action triable by jury in a court of law. *See Cahill*, 443 A.2d at 499–500; *cf.* Ex. A at 22 n.97 ("*Cahill* indicates that the focus should be directed towards identifying any closely analogous common law cause of action for the cause of action at issue."). The Seventh Amendment does not require "identical" symmetry either, and in fact, several differences exist between common-law fraud and federal securities fraud. *See Jarkesy*, 603 U.S. at 126 (recognizing various ways in which federal securities fraud is narrower or broader than common-law fraud). Nevertheless, the "close relationship" between common-law fraud and federal securities fraud triggers the right to trial by jury. *See id.* The same should be true for Delaware securities fraud.

The primary imperfection between common-law fraud and 6 *Del. C.* § 73-201 cited by the Superior Court is a difference in "pleading standard[s]" resulting from a 2013 statutory amendment. Ex. A at 18.[7] The Superior Court agreed with the IPU that this Court had, in *Hubbard v. Hibbard Brown & Co.*, "incorrectly established the pleading standard for government-brought securities fraud claims as the Supreme Court defined identical elements for private and government-brought actions." Ex.

[7] In *Jarkesy*, the U.S. Supreme Court rejected a similar argument by the SEC, which asserted that the right to trial by jury had not been triggered because the agency was subject to a more lenient pleading standard than that applicable to private litigants. *See* 603 U.S. at 126.

A at 18. The Superior Court further concluded that the 2013 amendment had partially superseded *Hubbard* regarding the elements of 6 *Del. C.* § 73-201. Ex. A at 18. This Court has never so held.

The import of the 2013 amendment, however, goes beyond mere pleading standards. The 2013 amendment provides that in interpreting 6 *Del. C.* § 73-201, "courts will be guided by the interpretations given by Federal Courts to similar language set forth in Section 17(a) of the Securities Act of 1933 and Rule 10b-5 promulgated under the Securities Exchange Act of 1934, to include, without limitation, any difference in pleading requirements governing actions brought by securities regulators as opposed to private litigants." 6 *Del. C.* § 73-201 (emphasis added). Section 17(a) and Rule 10b-5 are two of the federal laws that *Jarkesy* held triggered the right to trial by jury. *See* 603 U.S. at 116. The 2013 amendment therefore compels Delaware courts to be guided not only by the federal courts' interpretations of federal pleading requirements, but also by the U.S. Supreme Court's historical analysis of the close relationship between common-law fraud and securities fraud. *See* 6 *Del. C.* § 73-201; *see also Jarkesy v. SEC*, 34 F.4th 446, 455 (5th Cir. 2022) (holding that Section 17(a) and Rule 10b-5 "created causes of action that reflect common-law fraud actions," that "[t]he statutes under which the SEC brought securities fraud actions use terms like 'fraud' and 'untrue statement[s] of material fact' to describe the prohibited conduct," that the U.S. Supreme Court "has

often looked to common-law principles to interpret fraud and misrepresentation under securities statutes," and that "fraud actions under the securities statutes echo actions that historically have been available under the common law"), *aff'd and remanded*, 603 U.S. 109 (2024).

Separately, the Superior Court reasoned that Appellants are not entitled to trial by jury because "[c]ommon law fraud and securities fraud serve different purposes," the former to remedy private harms and the latter to protect Delawareans. Ex. A at 20.[8] To endorse this reasoning would be to hold that Article I, Section 4 permits the IPU to (1) prove fewer elements than are required of private litigants at common law, (2) impose penalties unavailable to private litigants at common law, and (3) prosecute and adjudicate securities fraud actions administratively, without providing a jury trial or other safeguards guaranteed at common law, all because the agency is "assert[ing] its own right to protect its citizens." *See* Ex. A at 20. As the primary bulwark against government overreach, the right to trial by jury is not so permissive. *See Claudio*, 585 A.2d at 1305 ("And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it

[8] In *Jarkesy*, the U.S. Supreme Court rejected a similar argument by the SEC, which asserted that the right to trial by jury had not been triggered because the agency, rather than a private litigant, had brought the action. *See* 603 U.S. at 135–36 ("Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. . . . the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. This is a common law suit in all but name." (citations omitted)).

be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."). Indeed, even a private litigant who brings a securities fraud action, lacking the advantages and resources of the IPU, may be subject to trial by jury. 6 *Del. C.* § 73-605(a)(2) (creating private right of action "at law" for "damages").

Lastly, in concluding that Appellants are not entitled to trial by jury, the Superior Court relied on two inapposite cases. *See* Ex. A at 20–21. First, respectfully, the Superior Court misread *Blue Beach Bungalows* as requiring a "perfect" analogy between the statutory claim and its common-law analog, but *Blue Beach Bungalows* did not so hold—and that is not the law. As an initial matter, *Blue Beach Bungalows* had nothing to do with securities fraud; the case involved an action for consumer fraud. *See* 2024 WL 4977006, at *2 (Del. Super. Ct. Dec. 4, 2024), *amended*, 2024 WL 5088688 (Del. Super. Ct. Dec. 12, 2024). Neither the Delaware Securities Act nor the IPU was involved. *See generally id.* Further, *Blue Beach Bungalows* conducted no historical analysis whatsoever, summarily concluding that consumer fraud claims "have significant differences from routine

civil, common law fraud claims." *See id.* at *14. Yet the court hesitated even for those claims, characterizing the question as a constitutional "gray area" and cautioning that "the State Legislature cannot override Constitutional guarantees." *See id.* And although *Blue Beach Bungalows* ultimately ruled that the consumer fraud action did not trigger Article I, Section 4, the court correctly recognized that statutory actions similar to actions "known at common law" would have that very effect. *See* 2024 WL 4977006, at *14 & n.58 (citing *Hopkins*, 342 A.2d 243); *contra* Ex. A at 21 (misreading *Blue Beach Bungalows* as ruling that "differences in the elements of the causes of action prevented a perfect analogy between claims under the CFA and common law fraud" and that this "perfection" standard was the sole basis "prevent[ing] a finding of unconstitutionality" (emphasis added)).

Second, the Superior Court relied on a 3-2 decision of the New Hampshire Supreme Court, with a vigorous dissent, that interpreted the New Hampshire Constitution. *See* Ex. A at 21. In *Ridlon*, the New Hampshire Supreme Court applied its peculiar constitutional analysis for "purely statutory" actions, "consider[ing] the comprehensive nature of the statutory framework to determine whether the jury trial right extends to the action." *Ridlon v. N.H. Bureau of Sec. Regul.*, 214 A.3d 1196, 1199–1200 (N.H. 2019). Under that analysis, because the relevant statutory framework was "comprehensive" and "designed to facilitate a simple and speedy determination of the claims brought by the secretary," and

because there were differences between elements and standards of proof, the right to trial by jury was held not triggered. *Id.* at 1201 (quotations omitted). *But see id.* at 1211 (Hantz Marconi, J., dissenting) ("[E]levating comprehensiveness to the forefront of the analysis, as the majority does here, suggests that the nature of the case and the nature of the relief sought are less important than the existence of a comprehensive statutory scheme, out of which the claim at issue arises. In effect, this approach allows the legislature to nullify the constitutional right of trial by jury by mere statutory enactments." (brackets and quotations omitted)); *accord Jarkesy*, 603 U.S. at 139–40 (jury-trial right cannot be avoided through "game" of administrative efficiency).

In our State, statutory complexity and administrative expediency are not grounds for avoiding the strictures of Article I, Section 4. *See Claudio*, 585 A.2d at 1305 (cautioning against "permitting inroads into the common law right to trial by jury for the sake of judicial economy"). Additionally, like the statutory framework in *Jarkesy*, the statutory framework in *Ridlon* permitted the agency to bring the securities fraud action in a court of law, an option not available to the IPU. *Compare* N.H. RSA 421-B:6-603 (authorizing New Hampshire Attorney General and Secretary of State to bring action in Superior Court), *with* 6 *Del. C.* § 73-501 (authorizing IPU to prosecute only "administrative proceedings"). Further, New Hampshire common-law fraud requires proof by clear and convincing evidence,

whereas Delaware common-law fraud requires proof by only a preponderance of the evidence. *Compare Ridlon*, 214 A.3d at 1203–04, *with Sofregen Med. Inc. v. Allergan Sales, LLC*, 2024 WL 4297665, at *16 (Del. Super. Ct. Sept. 26, 2024).

The Superior Court's cited cases are readily distinguishable on another ground as well: neither involved a legislative mandate like the one here. The General Assembly declared in 2013 that 6 *Del. C.* § 73-201 should be interpreted the way the federal courts have interpreted the federal securities fraud statutes. *See* 6 *Del. C.* § 73-201. The U.S. Supreme Court has interpreted the federal securities fraud statutes as triggering the right to trial by jury because of their close historical and legal similarities with common-law fraud. *Jarkesy*, 603 U.S. at 140. The Superior Court erred in disregarding the close historical and legal similarities between 6 *Del. C.* § 73-201, federal securities fraud, and common-law fraud. This Court should reverse the Superior Court's dismissal of Count I.

2. The IPU Action For Securities Registration Entitles Appellants To Trial By Jury.

Securities registration under 6 *Del. C.* § 73-202 is similar in substance to common-law securities registration, entitling Appellants to trial by jury. Again, there was no contention below that at common law, accusations of offering or selling unregistered securities were not triable by jury in courts of law. To the contrary, it is undisputed that English law in the 17th and 18th centuries imposed registration and licensure requirements on corporations and individuals acting as brokers,

requirements similar in substance to those of 6 *Del. C.* § 73-202, and that alleged violations of these requirements were triable by jury in courts of law.

In 1697, for example, Parliament passed the Brokers Act, which prohibited acting as a broker in London or Westminster unless licensed by the government. 8 & 9 Will. 3 c. 32 §§ 1–15. Violations of this law were punishable by civil penalty, *id.*, and triable by jury, *see, e.g.*, *Smith v. Westall*, 91 Eng. Rep. 1106 (KB 1697); *Mitchell v. Broughton*, 91 Eng. Rep. 1349 (KB 1701); *The Annual Register, or a View of the History, Politics, and Literature, for the year 1767* at 68 (2d ed. 1767) (in 1767, two individuals accused of buying and selling securities in London without a license were tried and acquitted by a jury).[9] Similarly, in 1720, Parliament passed the Bubble Act, which prohibited offering or selling stock without a royal charter. 6 Geo. 1 c. 18, §§ 18–19. Violations of this law were likewise punishable by civil penalty, *id.*, and triable by jury, *see, e.g.*, *Rex v. Webb*, 104 Eng. Rep. 658 (KB 1811) (jury verdict for defendants under Bubble Act set aside). Finally, in 1733, Parliament passed Sir John Barnard's Act, which required brokers to prepare and maintain a register of all transactions in which the broker was involved. 7 Geo. 2 c. 8, §§ 1, 4–9. Again, violations of this law were punishable by civil penalty, *id.*, and

[9] Cited as "KB," the King's Bench was a common-law court that used juries. *See* Joseph A. Miron, Jr., *The Constitutionality of A Complexity Exception to the Seventh Amendment*, 73 Chi.-Kent L. Rev. 865, 874 (1998).

triable by jury, *see, e.g.*, *Child v. Morley*, 101 Eng. Rep. 1574 (KB 1800) (jury directed to enter verdict for defendant under Sir John Barnard's Act).

These laws are similar in substance to 6 *Del. C.* § 73-202. Like the Brokers Act, Bubble Act, and Sir John Barnard's Act, 6 *Del. C.* § 73-202 requires governmental preapproval to offer or sell securities as well as the preparation, maintenance, and filing of such records as may be necessary to obtain that preapproval. *See* 6 *Del. C.* §§ 73-202, 73-203–73-211. Appellants are therefore entitled to trial by jury. *See McCool*, 657 A.2d at 282; *Holland* at 33.

Despite these similarities, the Superior Court reasoned that Appellants are not entitled to trial by jury because the "common law" excludes statutes. As discussed above, this reasoning overlooks that it is the nature of the proceeding, not its designation, that determines when Article I, Section 4 is triggered. *See Hopkins*, 342 A.2d at 246. Both this Court and the U.S. Supreme Court have recognized that a statutory claim may trigger the right to trial by jury. *See Cahill*, 443 A.2d at 499–500; *Jarkesy*, 603 U.S. at 122. All that is required is an analogous claim triable by jury at common law, a requirement clearly satisfied here. Because 6 *Del. C.* § 73-202 is similar in substance to the Brokers Act, Bubble Act, and Sir John Barnard's Act—all punishable by civil penalty and triable by jury—Appellants are entitled to trial by jury. This Court should reverse the Superior Court's dismissal of Count I.

II. The IPU's Request For Fines Entitles Appellants To Trial By Jury.

A. Question Presented

Whether Article I, Section 4 of the Delaware Constitution guarantees a jury trial when the IPU brings an administrative action for fines. A21 ¶ 55; A389–A391; A488–A489 & n.3.

B. Scope of Review

The dismissal of a complaint under Superior Court Civil Rule 12(b)(6) is reviewed *de novo*. *Monsanto Co.*, 299 A.3d at 381. Questions of law and constitutionality are reviewed *de novo*. *Capriglione*, 279 A.3d at 806.

C. Merits of Argument

When the SEC seeks civil penalties, the accused is entitled to trial by jury under the Seventh Amendment. *Jarkesy*, 603 U.S. at 120. This is because, as the U.S. Supreme Court explained in *Tull v. United States*, "[a]ctions by the Government to recover civil penalties under statutory provisions . . . historically had been viewed as a type of action in debt requiring trial by jury." *Id.* at 122 (brackets and quotations omitted) (quoting 481 U.S. 412, 418–19 (1987)).

For the same reason, when the IPU seeks civil penalties, the accused is entitled to trial by jury under Article I, Section 4. In *American Appliance, Inc. v. State ex rel. Brady*, this Court held that "[a]n action to recover a civil penalty is an action of a civil nature and is akin to a common law action to recover a debt." 712 A.2d 1001, 1003 (Del. 1998) (quotations omitted). For support, this Court cited *Tull* and

Anthony Plumbing of Maryland v. Attorney General, the latter of which held that "an action to recover civil penalties under a federal statute is a common law action of debt." *Id.* at n.10 (brackets omitted) (citing 481 U.S. at 422; 467 A.2d 504, 509 (Md. App. Ct. 1983)).

Four years earlier, in *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, this Court affirmed a Court of Chancery ruling that "[t]he common law granted a civil jury trial for an action of this nature" (said nature being "an action of debt") and that "[t]his right has been preserved by Article I, [§] 4 of the Delaware Constitution." 385 A.2d 147, 151 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979). Indeed, it has long been the law of Delaware, as elsewhere, that a debtor who "desires to prove [a] debt should be compelled to bring an action at law, where the debtor would be entitled to plead any legal defense [they] might have, and upon issue joined on the pleadings, to have a trial of [the] case before a jury." *Parsons v. Cannon's Ex'r*, 88 A. 470, 471 (Del. Super. Ct. 1912); *Hopkins*, 342 A.2d at 246 (recognizing that "a claim for debt or for money damages" was a "matter[] historically triable before a jury"); *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975) ("At common law, suits for civil penalties were tried as actions for debt, and actions for debt were triable before a jury."); *Grossblatt v. Wright*, 239 P.2d 19, 26 (Cal. Dist. Ct. App. 1951) ("A jury trial was a matter of right in the common-law action of debt, and

consequently it exists in all civil actions under modern practice which formerly would have fallen within this form of action.").

Appellants are further entitled to trial by jury because the IPU seeks fines pursuant to 6 *Del. C.* § 73-601. A14–A15 ¶ 26 (citing A84). These fines are designed to "punish and deter, not to compensate," a "type of remedy at common law that could only be enforced in courts of law." *See Jarkesy*, 603 U.S. at 125 (quotations omitted) (quoting *Tull*, 481 U.S. at 422). Indeed, like the statute in *Tull*, 6 *Del. C.* § 73-601 does not impose punishment "on the basis of equitable determinations, such as the profits gained from violations of the statute, but simply imposes a maximum penalty of $10,000 per day of violation." *Compare* 481 U.S. at 422 & n.7, *with* 6 *Del. C.* § 73-601(b) (authorizing IPU Director to "order the payment of fines and other monetary sanctions for any violation . . . in an amount not to exceed $10,000 for each and every violation. . . . Each independent violation of the Act counts as a separate instance for purposes of calculating penalties" (emphasis added)).

"Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Tull*, 481 U.S. at 422; *see Jarkesy*, 603 U.S. at 123 ("And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to punish culpable individuals.

Applying these principles, we have recognized that civil penalties are a type of remedy at common law that could only be enforced in courts of law." (brackets and quotations omitted)); *see also Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) ("Chancery historically and traditionally did not enforce forfeitures or penalties and that this was the rule of law in the high court of chancery in England in 1776 and is therefore the rule in this Court today."). Thus, the IPU's request for fines is analogous to a common-law action of debt, triggering Article I, Section 4. *See Am. Appliance*, 712 A.2d at 1003 & n.10; *Getty Ref.*, 385 A.2d at 151.[10]

Addressing the issue in two footnotes, the Superior Court concluded that the IPU's request for fines did not trigger Article I, Section 4 because neither *American Appliance* nor *Getty Refining* "articulates a remedies-oriented test for determining if the right to trial by jury applies to a cause of action." *See* Ex. A at 21–23 nn.94, 97. By "remedies-oriented test," the Superior Court was referring to *Tull*'s observation that, under the Seventh Amendment, "the relief sought is more important than finding a precisely analogous common-law cause of action." *See Tull*, 481 U.S. at 421 (brackets and quotations omitted). But the Superior Court failed to recognize

[10] Further evidencing the punitive nature of its request, the IPU, like the SEC, is not required to return any money to victims or otherwise restore the status quo. *Compare Jarkesy*, 603 U.S. at 124 (citing 15 U.S.C. § 7246(a)), *with* 6 *Del. C.* § 73-703. Worse, and pertinent to Count II, moneys paid in an enforcement action brought by the IPU must, when incorporated into a court order or judgment, be credited as revenue to the Investor Protection Fund, from which the Attorney General may finance enforcement activities. *See* 6 *Del. C.* §§ 73-703(b)(2), 73-703(e).

that this observation about remedies (one of two factors used to evaluate actions at law) followed the U.S. Supreme Court's acknowledgment that some causes of action have both legal and equitable analogs. *See id.* at 420. That is why *Tull* observed that finding a singular, precisely analogous common-law cause of action is less important than the characterization of the relief sought. *See id.* at 420–21. It would be error to view the cause of action as irrelevant under the Seventh Amendment. To the contrary, the inquiry under the Seventh Amendment "is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors." *Id.* at 421 n.6.

Just as the Seventh Amendment inquiry considers both the cause of action and the remedy, the analysis under Article I, Section 4 does as well. In *Hopkins*, for example, then-Superior Court Judge Walsh rejected the argument that a "summary proceeding for possession" under the Landlord-Tenant Code was a "new and distinct remedy," analogizing it to a common-law "dispute[] over possession of real property" remediable by ejectment. 342 A.2d at 245–46. Similarly, in *Fossett*, then-Superior Court Judge Herrmann ruled that an action for civil forfeiture is analogous to a common-law dispute over possession of personal property, remediable by declaration of ownership. 134 A.2d at 276–77. The IPU's causes of action entitle Appellants to trial by jury, and its request for fines further supports that conclusion. This Court should reverse the Superior Court's dismissal of Count I.

III. Appellants' Claim For Violation Of Due Process Is Ripe.

A. Question Presented

Whether Appellants' claim for violation of Article I, Sections 7–9 of the Delaware Constitution, based on being subjected to an unfair and unconstitutional administrative action, is ripe. A15–A18, A23–A31 ¶¶ 10–39, 61–78; A391–A397; A487 n.2.

B. Scope of Review

The dismissal of a complaint under Superior Court Civil Rule 12(b)(6) is reviewed *de novo*. *Monsanto Co.*, 299 A.3d at 381. Questions of law and constitutional claims are reviewed *de novo*. *Capriglione*, 279 A.3d at 806.

C. Merits of Argument

The IPU Action deprives Appellants of a fair trial in violation of Article I, Sections 7–9 of the Delaware Constitution. Appellants have been prevented from testing the neutrality of the IPU's Presiding Officer, a subordinate Deputy Attorney General who, like the IPU's prosecutors, depends on the Attorney General for compensation, assignments, and career advancement. Further, all moneys paid pursuant to court orders or judgments are revenues which the Attorney General may use to pay costs, expenses, and charges relating to enforcement activities. Worse, the Presiding Officer is appointed on an ad-hoc basis subject only to the Director's unilateral, discretionary revocation. In the absence of discovery and accessible reasoning, review for adjudicative neutrality and consistency is unfairly thwarted.

"A fair trial in a fair tribunal is a basic requirement of due process that applies to administrative agencies as well as to courts." *Sullivan v. Mayor of Elsmere*, 23 A.3d 128, 135 (Del. 2011) (quotations omitted). A fair administrative trial requires at least "adequate notice to all concerned; a full opportunity to be heard by any person potentially aggrieved by the outcome; a decision which reflects the reasons underlying the result and, most importantly, an adherence to the statutory or decisional standards then controlling." *Cnty. Council of Sussex Cnty. v. Green*, 516 A.2d 480, 481 (Del. 1986) (per curiam). These last two requirements work together, given that unless the agency explains its reasoning, a reviewing court has no means to determine whether the agency deviated arbitrarily from controlling law. *See Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986).

Citing a law review article about federal jurisprudence, the Superior Court summarily dismissed Appellants' due-process claim, reasoning that because the IPU merely "seeks to deprive" Appellants of their protected liberty and property interests, the claim is not ripe. Ex. A at 5. This was erroneous. Federal jurisprudence does not require administrative respondents to plead a deprivation where, as here, *see* A23–A31 ¶¶ 61–78, they challenge the fundamental fairness of participating in an administrative action, *see Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The neutrality requirement helps to guarantee that life, liberty, or property <u>will not be taken</u> on the basis of an erroneous or distorted conception of the facts or the law. . . .

by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." (emphasis added)).

The Superior Court's attempt to distinguish between a ripe jury-trial claim and an unripe due-process claim is untenable. As the Superior Court itself recognized, "being subjected to an unconstitutional adjudicative process enables a litigant to raise a constitutional challenge before the close of an administrative proceeding." Ex. A at 6 n.33 (citing *Axon Enter. Inc. v. FTC*, 598 U.S. 175, 192 (2023)). Both claims present "here-and-now" constitutional questions; neither turns on whether Appellants will ultimately succeed in the IPU Action. *See Axon*, 598 U.S. at 192. Appellants' due-process injuries, just as much as their jury-trial injuries, would be "impossible to remedy once the proceeding is over . . . ." *See id.* at 191 ("The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone.").

Further, Appellants state a claim for violation of their due-process rights. Due process requires not only that adjudicative officers be neutral, but also that they appear neutral. *See Home Paramount Pest Control v. Gibbs*, 953 A.2d 219, 222 (Del. 2008). Under both the Delaware Constitution and the U.S. Constitution,

whether an adjudicative officer appears neutral is an objective, fact-intensive analysis. *See id.*; *Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam).

Analyzing adjudicative neutrality under the U.S. Constitution, the U.S. Supreme Court held in *Ward v. Village of Monroeville* that a "mayor-judge" who stood to benefit indirectly from the payment of administrative fines "occupies two practically and seriously inconsistent positions, one partisan and the other judicial," a situation incompatible with due process. 409 U.S. 57, 60 (1972) (citing *Tumey v. Ohio*, 273 U.S. 510, 534 (1927)). This was true despite a disqualification statute and the opportunity for a trial *de novo* on appeal, neither of which is available in the IPU Action, since the respondent was "entitled to a neutral and detached judge in the first instance." *See id.* at 61–62.

Later, the U.S. Supreme Court held in *Marshall v. Jerrico, Inc.* that an administrative regime led by an "assistant regional administrator" did not violate due process where the administrator's salary was not affected by the penalties he imposed and those penalties amounted to less than 1% of the agency's budget. 446 U.S. at 247. In *Marshall*, however, the administrator could not "be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable," since he "is not a judge," "performs no judicial or quasi-judicial functions," "hears no witnesses," and "rules on no disputed factual or legal questions," all of which the IPU's Presiding Officer indisputably does. *See id.*

Given that the due-process protections of the Delaware Constitution have "substantially the same meaning" as those of the U.S. Constitution, these federal decisions are highly relevant to Count II. *See Op. of the Justs.*, 246 A.2d 90, 92 (Del. 1968). Moreover, the Delaware Constitution guarantees that Appellants' challenge to the fairness of the IPU's administrative regime will be "seriously addressed." *See Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989). In particular, there are "situations where experience teaches that there is too high a probability of bias on the part of a decision-maker to be constitutionally acceptable." *Id.* at 473. One such risk exists when an adjudicative officer has or appears to have a pecuniary interest in the outcome of the administrative action. *See id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).[11]

Appellants plead the appearance of a pecuniary interest in the outcome of the IPU Action by the Presiding Officer. A10–A18, A23–A31 ¶¶ 10–39, 61–78. In every administrative action, the Director of the IPU serves as both prosecutor and judge. A10–A11 ¶¶ 11–12. The Director may, and did here, delegate her adjudicatory role to another Deputy Attorney General, who serves as the Presiding Officer on an ad-hoc basis subject only to the Director's unilateral, discretionary revocation. A11 ¶ 13. Any moneys paid pursuant to a court order or judgment

[11] *Withrow* involved tenured hearing officers, unlike the IPU's Presiding Officers, who serve at the pleasure of the Attorney General. *See* 421 U.S. at 37.

resulting from the administrative actions "shall be credited to the Investor Protection Fund," from which the Attorney General may pay "costs, expenses, and charges [incurred] in connection with the activities of the Investor Protection Unit under this chapter, including enforcement, training, education" and more. A13–A14 ¶ 22 (quoting 6 *Del. C.* §§ 73-703(b)(2), 73-703(e)). Punitive fines are available, and the IPU is not required to return moneys collected to alleged victims or put them toward other remedial uses. *See* 6 *Del. C.* § 73-703. In other words, the IPU's enforcement actions are the agency's lifeblood, funding its existence and operations.[12]

To overcome the rebuttable presumption of honesty and integrity, Appellants and a reviewing court must be able to test whether there was "collusion or unauthorized communication" between the prosecuting and adjudicating Deputy Attorneys General or "specific evidence of bias" on the part of the Presiding Officer. *See Blinder*, 552 A.2d at 473. For example, Appellants plead that the Director of

[12] The Uniform Law Commission recommends—and about half of the States have already adopted—centralized agencies which assign independent adjudicative officers to preside over other agencies' enforcement actions. *See* Model State Administrative Proc. Act § 601 & cmt. (Unif. L. Comm'n 2010). Even some major cities outsource their adjudicative officers for the sake of neutrality. *See, e.g.*, Hon. Asim Rehman, *The NYC Office of Administrative Trials and Hearings: Forty-Five Years of Delivering Impartial Adjudications and Providing Access to Justice*, 46 Cardozo L. Rev. 1065, 1087–88 (2025) ("In the administrative law context, an individual or entity should be able to challenge a government action or defend against an accusation by government, and the government must meet its burden of proving that the individual or entity engaged in the alleged violation. Ensuring that this process is impartial not only serves the interests of the individual litigants, but it promotes overall trust in government.").

the IPU "occupies two practically and seriously inconsistent positions, one partisan and the other judicial." *See* A30–A31 ¶ 77 (citing *Ward*, 409 U.S. at 61; *Tumey*, 273 U.S. at 532). But Appellants have been prevented from challenging the Director's delegate (the Presiding Officer) on the basis that her salary and some quantum of the IPU's budget is buoyed by the penalties she imposes. *See Marshall*, 446 U.S. at 245–48. Appellants repeatedly requested this information, but their efforts were rebuffed. A15–A18 ¶¶ 28–39. This serious claim, dismissed erroneously as unripe, deserves examination on the merits.

Moreover, the IPU is required by regulation to make "[e]ach order, decision, and proposed decision of a Presiding Officer . . . available for inspection by the public from the date of entry, unless the order or decision is nonpublic. A nonpublic order or decision shall be available for inspection by any person entitled to inspect it from the date of entry." 6 *Del. Admin. C.* § 206. Unfortunately, despite diligently searching the IPU's website and propounding discovery and FOIA requests, Appellants can view only a fraction of the IPU's orders, decisions, and proposed decisions, most of which are conclusory consent orders devoid of analysis. A15–A18 ¶¶ 28–39. Without access to these rulings, neither Appellants nor a reviewing court can assess the IPU's in-house success rate, even though a perfect or abnormally high success rate would be powerful specific evidence of bias. *See Jarkesy*, 603 U.S. at 143 (Gorsuch, J., concurring) ("Going in, then, the odds were stacked against

[respondent]. . . . [D]uring the period under study the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court."). In turn, neither Appellants nor a reviewing court can determine whether "there are other similarly-situated people who were treated differently" during the liability or penalty phase of the IPU Action, a glaring equal-protection problem. *See Smith v. Guest*, 16 A.3d 920, 932 (Del. 2011) (analyzing "class of one" theory of equal protection).

The rebuttable presumption of honesty and integrity is just that: rebuttable. Due process therefore demands that Appellants be allowed the means to test the Presiding Officer's neutrality, rather than merely accept the IPU's assurances. *See Tumey*, 273 U.S. at 532 (due process "is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice"). This Court should reverse the Superior Court's dismissal of Count II.

CONCLUSION

The Delaware Constitution admits of no exceptions for administrative convenience. Undoubtedly, it would be faster to try cases without juries and neutral decision-makers. But when an agency brings claims analogous to those triable by jury in courts of law, requests punitive fines, or thwarts judicial review for fundamental fairness, our Constitutional traditions and precedents require more.

For these reasons, this Court should reverse the dismissal of Appellants' First Amended Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2025, I caused to be served via File & ServeXpress a true and correct copy of the above and foregoing document on the following counsel of record:

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