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Case Number 331,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

Dated: October 9, 2025

Delaware Department of Justice

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NATURE OF PROCEEDINGS

Appellants Swan Energy, Inc., Brandon Davis, John Schiffner, and Cody Davis ("Plaintiffs" or "Appellants") request that the Court undertake an extraordinary action: declare the adjudicatory provisions of the Delaware Securities Act, 6 *Del. C.* § 73-101, *et seq*. ("DSA") and its administrative procedures unconstitutional. Such a ruling would ignore legislative intent, the Delaware Constitution, and the pivotal differences between common and statutory law. It would divest the Appellee Investor Protection Unit ("IPU") of the Delaware Department of Justice ("DOJ") and, in turn, numerous other state regulatory agencies, of the adjudicative powers granted to them by the Delaware General Assembly. It threatens to undermine Delaware's long-held separation of courts of equity and law. Legislative enactments are presumptively constitutional: the Superior Court correctly determined that Appellants failed to meet the high bar necessary to overcome that presumption.

IPU commenced an administrative proceeding ("IPU Action") against Swan Energy, Brandon Davis, John Schiffner, Cody Davis, and Dale Frank Phillips[1] ("Respondents" in the IPU Action) on November 2, 2020, alleging violations of the DSA for conducting a scheme to induce Delaware investors, among others, to

[1] Respondent Dale Frank Phillips is not participating in this constitutional challenge.

purchase securities in risky, unregistered oil and gas mining entities. Three years later, Appellants commenced this litigation, alleging that the IPU Action violated their right to a jury trial and due process. The Superior Court dismissed Count I of Appellants' First Amended Complaint ("Complaint"), correctly determining that the Delaware Constitution does not mandate a jury trial for actions brought by IPU under the DSA. Superior Court Opinion, Ex. A ("Opinion") 11-25. The Superior Court rejected Appellants' attempts to import into Delaware jurisprudence the United States Supreme Court's interpretation of the Seventh Amendment to the U.S. Constitution ("Seventh Amendment") in its recent opinion *Jarkesy v. SEC*, 34 F. 4th 446 (5th Cir. 2022), *aff'd and remanded*, 144 S. Ct. 2117 (2024). Opinion at 11-22. The Superior Court also rejected Plaintiff's suggestion that IPU Action's securities fraud count and its securities registration count were so analogous to actions at common law that a right to a jury trial nonetheless applied under Article I Section 4 of the Delaware Constitution. Opinion at 17-23.

The Superior Court likewise rejected the Appellants' due process claims in Count II, finding that no deprivation of life, liberty, or property had occurred. Opinion at 5-6.

SUMMARY OF ARGUMENT

IPU denies that the Superior Court erred in dismissing Count I and Count II of Appellants' complaint. Appellants failed to demonstrate that they have a constitutional right to a jury trial or that their due process rights were violated in the IPU Action. Appellants also did not meet their high burden needed to demonstrate that the relevant provisions of the DSA should be invalidated. Appellants thus failed to state a claim on which relief could be granted.

1. Denied. The Superior Court correctly held that Article I, Section 4 of the Delaware Constitution does not require a jury trial when 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.
2. Denied. The Superior Court correctly held that Article I, Section 4 of the Delaware Constitution does not require a jury trial when IPU brings an administrative action for fines.
3. Denied. The Superior Court correctly held that Appellants' claim for violation of Article I, Sections 7-9 of the Delaware Constitution was not ripe because no deprivation has occurred.

The Superior Court correctly dismissed Count I and Count II of Appellants' complaint. Its opinion should be affirmed.

STATEMENT OF FACTS

In 2020, IPU filed an administrative complaint charging Respondents with conducting a long-running scheme to induce investors to purchase risky, unregistered oil and gas mining securities disguised as "joint ventures." IPU's Second Amended Administrative Complaint ("IPU Compl.") A35-A84. Through this scheme, Respondents raised over $800,000 from two investors in Delaware, one of whom was elderly. IPU Compl. A37 ¶ 6. The securities industry – in which Respondents chose to participate – is necessarily highly regulated to protect investors and maintain market integrity. IPU's administrative hearing process is well-equipped to determine whether industry participants are abiding by the DSA and the rules thereunder, and to hold wrongdoers accountable.

The IPU Action charges Respondents with multiple DSA violations in seventy-one causes of action, only one of which is for fraud, seeking restitution, injunctive relief and fines – both equitable and monetary relief. IPU Compl. A75-A84 ¶¶ 123-163, IPU's Reply Brief in Support of Motion to Dismiss ("Rep. Br.") A414-415. Once the administrative complaint was filed, the Attorney General appointed a Presiding Officer from outside IPU to adjudicate the matter pursuant to the procedures set forth in Rule 225A of the Rules Pursuant to the DSA ("Rules"). IPU's Opening Brief in Support of Defendant's Motion to Dismiss ("IPU MtD") A138.

Plaintiffs initially brought this constitutional challenge in the Court of Chancery, asserting that the DSA and the IPU Action violate their right to a jury trial and to due process, respectively. Complaint A8-A32, ¶¶ 1-78, ¶¶ a-d, IPU MtD A141.

The parties agreed to stay the IPU Action and voluntarily transfer this matter to Superior Court. IPU MtD A141. IPU did not waive its substantive arguments.

On April 10, 2024, Plaintiffs filed the operative complaint in Superior Court, seeking a declaration that the DSA and the IPU Action violate their right to a jury trial and due process, respectively. Complaint A8-A32. IPU moved to dismiss the complaint for failure to state a claim on which relief could be granted, and, on June 24, 2025, the Superior Court dismissed Plaintiffs' claims, correctly determining that neither the DSA nor the IPU Action violate Plaintiffs' right to a jury trial or due process. IPU MtD A128-171, Opinion.

The Superior Court held that the Delaware Constitution does not mandate a jury trial for actions brought by IPU under the DSA and that the Seventh Amendment does not apply to the IPU Action. Opinion at 11-25. The Superior Court also rejected Plaintiff's suggestion that the IPU Action's securities fraud count and its securities registration counts were so analogous to actions at common law that a right to jury trial nonetheless applied under Article I Section 4 of the Delaware Constitution. Opinion at 17-23.

The Superior Court likewise rejected the Plaintiffs' due process claims in Count II, finding that no deprivation of life, liberty or property had occurred. Opinion at 5-6.

ARGUMENT

I. Appellants Do Not Have a Right to a Jury Trial in the IPU Action.

A. Question Presented

Did Appellants meet their high burden necessary to overcome the presumption of constitutionality of the DSA by showing that Article I, Section 4 of the Delaware Constitution guarantees a jury trial when the IPU brings an administrative action for securities fraud and registration violations pursuant to the DSA? IPU MtD A136, A144-A156, Rep. Br. A408, A411-A422, Opinion at 4, 11-25.

B. Scope of Review

Review of the Superior Court's dismissal of a complaint under Superior Court Civil Rule 12(b)(6) is *de novo*. *State ex. rel. Jennings v. Monsanto Co.*, 299 A.3d 372, 381 (Del. 2023) (citation omitted). Questions of law and constitutionality are reviewed *de novo*. *Caprilione v. State ex rel. Jennings*, 279 A.3d 803, 806 (Del. 2021). Legislative enactments receive a "strong presumption" of constitutionality under Delaware law. *Op. of Justs.*, 425 A.2d 604, 605 (Del. 1981); *Snell v. Engineered Systems and Designs, Inc.*, 669 A.2d 13, 17 (Del. 1995). When interpreting the provisions of the DSA, consideration of its "prophylactic and remedial purposes" is of "paramount importance … particularly in any judicial review of sanctions or penalties…and of motions or requests by persons affected to stay such sanctions or penalties." 6 *Del. C.* § 73-101(b).

C. Merits of Argument

The Superior Court correctly held that Appellants are not entitled to a jury trial for the fraud and securities registration claims asserted by IPU. Appellants ask this Court to declare § 73-601 of the DSA unconstitutional because its non-jury administrative hearings violate the jury trial right guaranteed under the Delaware Constitution. Complaint A23 ¶ 60. Specifically, Appellants contend a jury trial attaches because securities fraud and registration claims existed at common law, Complaint A22 ¶¶ 56-58, and because IPU requests fines, "the quintessential legal remedy." Complaint A22-23 ¶ 59.

Appellants' arguments fail because IPU's causes of action did not exist at common law.[2] In Delaware, courts undertake a historical analysis of the common law to determine whether a right to a jury trial attaches to a particular cause of action.[3] If a cause of action did not carry a right to a jury trial at common law, or did not exist at common law, then no jury trial right for that cause of action exists today.[4] Delaware has preserved a "significant substantive difference"[5] in the way courts

[2] *State v. Cahill*, 443 A.2d 497, 500 (Del. 1982); Opinion at 15-16, 21-25.
[3] *Bon Ayre Land LLC v. Bon Ayre Cmty. Assn*., C.A. No. K14A-08-001 WLW, 2015 WL 893256, at *4 (Del. Super. Feb. 26,2015) (*rev'd on other grounds*, 133 A.3d 559 (Del. 2016)); Opinion at 13-25.
[4] *Cahill*, 443 A.2d at 499-500; Opinion at 13-15.
[5] *Claudio v. State*, 585 A.2d 1278, 1290 (Del. 1991).

determine the right to a jury trial under the Delaware Constitution compared to the Seventh Amendment, under which a jury trial right attaches to all actions at law, with the focus on the remedy.[6]

Appellants urge that IPU's request for fines entitles them to a jury trial because the relief sought is legal in nature. Complaint A22 ¶ 59, A13 ¶ 59, Plaintiffs' Answering Brief in Opposition to Motion to Dismiss ("Ans. Br.") A389. The federal standard underpinning the United States Supreme Court's decision in *Jarkesy*, upon which Appellants rely heavily, is at odds with Delaware's approach.[7]

Here, neither cause of action at issue existed at common law. Therefore, no right to a jury trial attaches under Delaware's Constitution. A securities fraud enforcement action is a modern legislative creation that did not exist until the 20th Century, and thus is a distinct cause of action from common law fraud. Securities were not required to be registered under common law. And even looking beyond the common law, the English statutes cited by Appellants neither were adopted by Delaware's legislature in 1776 as required for the jury trial right to attach, nor were meaningfully similar to the DSA's modern requirements.

[6] *Cahill*, 443 A.2d at 497, 499; Opinion at 11-25.
[7] *Bon Ayre,* 2015 WL 893256, at *4; Opinion at 15.

1. To determine whether the right to a jury trial exists, Delaware Courts examine whether a cause of action invoked the right to a jury at common law.

Delaware's Second Constitution, adopted in 1792, guarantees its citizens the right to a trial by jury "as heretofore" at Article I, Section 4. In *Claudio v. State*, this Court determined that Delaware's 1792 Constitution did not "mirror" the U.S. Constitution concerning a right to a jury trial: "it is untenable to conclude that the right to trial by jury in the Delaware Constitution means exactly the same thing as that right in the United States Constitution."[8] The right to a jury trial in Delaware is a matter of state law as the Seventh Amendment has not been applied to the states through the Fourteenth Amendment.[9]

Delaware's right to trial by jury, based on common law, has remained unchanged since 1792.[10] Thus, under the Delaware Constitution, the inquiry into whether a right to jury trial exists is a historical one, grounded in determining (i) whether the cause of action existed at common law and if so, (ii) whether it then carried a right to a jury trial. If either of these questions is answered in the negative,

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[8] *Claudio*, 585 A.2d at 1298.
[9] *FirstString Research Inc., v. JSS Med. Research Inc*., C.A. No. 2020-03322-KSJM, 2021 WL 2182829, at *7 (Del. Ch. May 28, 2021); *see also Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875) and *McCool v. Gehret,* 657 A.2d 269 (Del. 1995).
[10] *Claudio*, 585 A.2d at 1298.

then there is no right to a jury trial under the Delaware Constitution.[11] In *Ellery*, this Court found no right to a jury trial in condemnation cases after examining the common law to determine that, prior to 1897, condemnation cases did not invoke the right to a jury trial.[12] Similarly, in *Bon Ayre*, the court found there was no right to a jury trial under the statute at issue: "absent a newly created statutory right to trial by jury, if the right for a particular cause of action did not exist at common law, then it does not exist today."[13] In both cases, the courts' analysis focused on whether the specific cause of action existed and invoked the right to a jury trial at common law, and because the actions did not, they do not have one now.[14]

The Delaware approach differs from the Seventh Amendment inquiry, in which whether the remedy is legal or equitable is "all but dispositive."[15] Here, the Superior Court summarized the key distinction between the Delaware and Federal Constitutions' right to jury trial:

> Under the Supreme Court of the United States' Seventh Amendment analysis, federal courts look to the remedy sought

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[11] *Ellery v. State ex rel. Sec'y of Dep't of Transp.*, 633 A.2d 369 (Del. 1993*); Bon Ayre*, 2015 WL 893256, at *4.
[12] *Ellery*, 633 A.2d 369.
[13] *Bon Ayre*, 2015 WL 893256, at *4.
[14] *Id*.; *Ellery*, 633 A.2d 369. *See also Village Two Apartments v. Molock*, 1987 WL 8697, at *2-3 (Del. Super. Feb. 5, 1987) ("the administrative procedures ... were not matters for which a trial by jury existed at common law ... neither a Seventh Amendment right to trial by jury nor an Art. 1, Sec. 4 State constitutional right to a jury trial is applicable....").
[15] *Jarkesy*, 603 U.S. at 123.

> to determine if a claim must be heard by a jury in federal court. Delaware, by contrast, looks to whether the cause of action received a trial by jury at common law. Opinion at 15.

The court below was correct: Delaware courts use a different framework to determine whether there is a right to a jury trial under the Delaware Constitution than federal courts do when analyzing the Seventh Amendment. Appellants' reliance on *Tull v. U.S.,* 481 U.S. 412 (1987), is thus misplaced: *Tull* focused on whether the remedy "is legal or equitable in nature."[16] This is not the correct analysis in Delaware.[17]

2. The United States Supreme Court's *Jarkesy* decision does not change the analysis in Delaware for determining the existence of a right to a jury trial.

Appellants argue that this Court should look to *Jarkesy* to find that a constitutional right to a jury trial exists for claims brought by IPU under the DSA. Appellants' Opening Brief ("Op. Br.") 13-14, 18-39. *Jarkesy*, a federal case interpreting the Seventh Amendment, is neither applicable nor instructive here. Federal law asks whether the action in question is legal or equitable in nature, as opposed to whether the cause of action existed and was accompanied by the right to a jury trial at common law, which is the appropriate analysis under Delaware law.[18]

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[16] *Tull*, 481 U.S. at 418.
[17] *Ellery*, 633 A.2d 369; Opinion at 15.
[18] *Compare* Opinion at 15 ("federal courts look to the remedy .... Delaware, by contrast, looks to [] the cause of action") with *Jarkesy*, 630 U.S. at 122 (the "Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'"). *See also Ellery*, 633 A.2d 369.

The distinction between the right to a jury trial under Delaware and federal law can be further understood through an analysis of the clean-up doctrine. The clean-up doctrine, which existed at common law in 1776, gives the Court of Chancery jurisdiction over "purely legal causes of action that are before it as part of the same controversy over which the Court originally had subject matter jurisdiction…."[19] The Court of Chancery routinely exercises jurisdiction over legal claims via the clean-up doctrine, and it decides those without a jury. This approach would be impermissible under the Seventh Amendment, which requires jury trials to be held whenever a legal remedy is sought, even when the determination of a legal remedy is intertwined with equitable issues, as in the IPU Action.[20] Thus, the right to a jury trial under the Delaware Constitution does not lend itself to a simple "legal-vs.-equitable" analysis; it requires courts to instead engage in a historical analysis of the common law.[21]

Other states' courts considering this issue have eschewed Appellants' proposed federal roadmap. For example, in *Ridlon v. New Hampshire Bureau of Sec. Regulation*, 214 A.3d 1196 (N.H. 2019), the respondent – like Appellants – filed a

[19] *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 974 (Del. Ch. 2016).
[20] *FirstString Research,* 2021 WL 2182829, at *10. If the IPU Action had been filed in court, to receive the legal and equitable relief IPU seeks, it would have had to file in the Court of Chancery; Appellants would not have been entitled to a jury trial.
[21] *See State v. Cahill,* 443 A.2d 497, 499 n.5 (Del. 1982).

declaratory judgment petition to enjoin the state securities regulator's administrative proceeding, arguing that the action was, in essence, an action for common-law fraud, entitling it to a jury trial. New Hampshire's Supreme Court disagreed, refusing to apply the federal analysis set forth in *Tull*, upon which Appellants here also rely, to a state law matter.[22] *Ridlon* held that New Hampshire's securities act "is not analogous to common law fraud or deceit because it requires proof of significantly different elements and satisfaction of a different standard of proof."[23] Pennsylvania also does not follow the federal legal-vs.-equitable framework in determining the right to a jury trial.[24] Pennsylvania's framework is especially relevant, as Delaware's constitutional right to jury trial derives from Pennsylvania's Constitution.[25] Several other states also reject this federal framework.[26]

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[22] *Ridlon,* 214 A.3d at 1199.
[23] *Id*. at 1204.
[24] *See Wertz v. Chapman Twp*., 741 A.2d 1272, 1278 (Pa. 1999) ("[T]his court has eschewed a focus on the remedy sought and has embraced a view which looks to the cause of action in determining the right of a jury trial pursuant to [state] Constitution").
[25] Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 41 (2d ed. 2017).
[26] *See State v. Schweda*, 736 N.W.2d 59, 59 n.9 (Wis. 2007) ("[o]ur approach in interpreting this state's constitution is different [from the federal standard]"; *Maryland Aggregates Ass'n, Inc. v. State*, 655 A.2d 886, 897 n.14 (Md. 1994) (declining to apply the federal standard as "the Seventh Amendment ... does not apply to the States....") (citation omitted).

3. Appellants are not entitled to a jury trial on IPU's fraud claim.

Appellants argue that a common law cause of action need only be "similar in substance" to a statutory cause of action for a right to a jury trial to attach. Op. Br. at 19. But *Cahill* actually asks, "[i]s the new statutory civil cause of action in substance **so similar** to the [common law] cause of action that the constitutional right to a jury trial attaches?"[27]

On the few occasions where statutory claims adopted after 1776 have been held unconstitutional because they lacked a right to a jury trial, it is because the statutes *replaced* a cause of action that existed at common law and extinguished the common law right to a jury trial. *See*, *e.g., Hopkins v. Justice of Peace Court No. 1*, 342 A.2d 243, 244 (Del. Super. Ct. 1975) (holding unconstitutional a statute assigning common law replevin claims in garagemen lien cases to the Justice of Peace Court without a jury trial); *Allstate Ins. Co. v. Rossi Auto Body, Inc*., 787 A.2d 742, 749 (Del. Super. Ct. 2001) (holding unconstitutional portions of a statute that replaced the common law claim for ejectment but provided for summary disposition instead of a jury trial). The legislature did not replace or eliminate common law fraud when it enacted the DSA.

A historical analysis demonstrates that securities fraud under the DSA neither existed at common law nor is "in substance so similar" to common law fraud "that

[27] *Cahill*, 443 A.2d at 500 (emphasis added).

the constitutional right to a jury trial attaches."[28] Modern day securities regulation did not exist at common law "as heretofore" in 1792 because the DSA (and other state securities laws, commonly referred to as blue-sky laws) were enacted to fill an identified void in early 20th century law: the inability to deal with rampant securities fraud.[29] "The standard view among historians is that the blue-sky laws represented a response by the political system to serious abuses in securities markets."[30] The need for modern legislation is unsurprising given that much has changed in the 232 years since Delaware adopted the common law. State and federal legislators recognized the need to increase market transparency and investor protection beyond the minimal protections afforded by common law. Indeed, at common law, there was no regulatory enforcement regime for investment-related frauds, only private causes of action for fraud.

Private common law fraud has not gone away or been replaced by modern blue-sky laws. Rather, modern statutes like the DSA have expanded upon and supplemented the protections afforded at common law by creating entirely new causes of action and the ability of the government to assert them. Indeed, through the DSA, the legislature made clear that it was intentionally expanding the cause of

[28] *Cahill,* 413 A.2d at 500.
[29] *See* Jonathan R. Macey, *Origin of the Blue Sky Laws*, 70 Tex. L. Rev. 347, 348–49 (1991).
[30] *Id.*

action for fraud beyond the common law, defining "fraud" as "not limited to common-law deceit." § 73-103(a)(9).

Comparing the elements of statutory securities fraud with common law fraud demonstrates their differences. While common law fraud requires scienter, reliance, causation, and damages, these elements are *not* required for IPU to state a claim under the DSA because the State is enforcing its *own right* to protect its citizens through IPU.[31] Common law fraud requires a plaintiff to show intent, or scienter; unintentionally false statements are generally not actionable. By contrast, the DSA permits a cause of action for securities fraud to be based on unintentionally false statements.[32]

That IPU need not establish scienter was made clear in 2013, when the DSA was amended to add the following language to § 73-201: "In interpreting this Section, courts will be guided by the interpretations given by Federal Courts to

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[31] 6 *Del. C.* § 73-101(b) ("The purpose of the Delaware Securities Act is to prevent the public from being victimized… ."); *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 116 (Del. Ch. 2001) ("[c]ommon law fraud differs [] from 'statutory fraud'" where "[s]cienter, intent to induce action, reliance, and damages" are missing from the statute).

[32] *See* 6 *Del C.* § 73-201(b) (prohibiting making "any untrue statement of a material fact" or omissions needed "to make any statements made ... not misleading"); *Aaron v. SEC,* 446 U.S. 680, n.7 (1980) (finding that the SEC is generally not required to establish scienter in a civil enforcement action: "it would be preferable to place liability for negligent misstatements on the shoulders of those responsible for their dissemination rather than require innocent investors to suffer").

similar language set forth in Section 17(a) of the Securities Act of 1933 [15 U.S.C. Section 77q] and Rule 10b-5 [17 C.F.R. Section 240.10b-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." IPU MtD A153-154, Rep. Br. A470-471.

The Superior Court correctly concluded that, through this amendment, the General Assembly partially superseded *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345 (Del. 1993) to the extent *Hubbard* held IPU to the pleading standard for private plaintiffs rather than the government. Opinion at 18. Specifically, the Superior Court, looking to the federal case of *Aaron v. SEC*, found that IPU did not need to plead scienter or other elements critical to Appellants' effort to analogize statutory securities fraud to common law fraud. Opinion at 18. To establish a violation of Section 73-201(2) and (3) in the IPU Action, IPU would have to demonstrate that Appellants made (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities. *See* IPU's Supplemental Brief in Support of Motion to Dismiss.[33] A457-A477. In adopting the 2013 amendment, the General Assembly purposefully gave IPU different pleading requirements than those

[33] *S.E.C. v. Koenig*, No. 02 C 2180, 2007 WL 1074901, *3 (N.D.IL April 5, 2007), citing *Aaron v. SEC*, 446 U.S. 680, 702 (1980). Some cases require negligence. *See S.E.C. v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (citing *Aaron*).

required of private litigants enforcing their own rights. In so doing, it clarified that IPU's claim for securities fraud under the DSA is substantially different than common law fraud. IPU MtD A152-A154, Rep. Br. A470-A471.

The longer statute of limitations available to IPU under the DSA is yet another difference from common law fraud. IPU enforcement actions benefit from a five-year limitations period, while common law fraud claims have a three-year limitations period.[34] Pennsylvania courts, interpreting language in the Pennsylvania Constitution that is nearly identical to Art. I § 4 of the Delaware Constitution, have found that different limitations periods between statutory fraud and common law fraud is relevant to determining whether a right to jury trial exists.[35]

Further, the DSA is designed to encompass a broader class of claims than does the common law, stating in its definitional section that "'fraud,' 'deceit' and 'defraud' are not limited to common-law deceit." § 73-103(a)(9). Regulatory antifraud statutes such as the DSA serve different purposes, and provide different remedies, from common law fraud. Moreover, the General Assembly intended for IPU's enforcement of the DSA to vindicate the public interest, rather than redress private

[34] Compare § 73-503 of the DSA (5-year limitations period) with *Winklevoss Capital Fund, LLC v. Shaw, et al.*, C.A. No. 2018-0398-JRS, 2019 WL 994534, at *5 (Del. Ch. Mar. 1, 2019)(common law fraud limitations period is three years).
[35] *Fazio v. Guardian Life Ins. Co. of Am.*, 62 A.3d 396, 411-12 (Pa. Super. Ct. 2012) (where common law and statutory fraud "claims have different statutes of limitations, [that] provides further support that such claims are separate causes of action").

harms that fraud remedied at common law. Common law fraud provided the injured party with a means to redress a wrong arising from that party's reliance on intentional deceit by another. By contrast, IPU's enforcement of Sections 73-201(2) and 73-201(3) of the DSA does not require proof of intent, as it serves an important "prophylactic and remedial" function calculated to compel compliance for the public good, rather than compensate private parties for wrongs experienced. § 73-101(b). IPU serves a distinct role that is broader than that of private litigants.

Accordingly, IPU enforcement actions can proceed administratively under the DSA. By contrast, private litigants seeking damages under the DSA must bring a lawsuit in court. Because IPU represents the public interest rather than the particular transactional interest of any investor, IPU has available to it remedies not found in common law, including the denial or revocation of professional licenses, the freezing of accounts to prevent potential misconduct, and the imposition of civil penalties.[36] Where IPU is authorized to seek remedies on behalf of investors -- restitution and rescission -- these remedies are equitable in nature.[37] The availability of such an array of remedies reflects that IPU's charge in enforcing the DSA is to deter and punish actions that harm market participants generally and not to obtain damages for an investor(s).

[36] DSA Section 73-601(a).
[37] DSA Section 73-601(a) permits restitution to be ordered administratively. Section 73-602 permits the Court of Chancery to order rescission and other relief.

This is not the first time this year this Court has been asked to weigh in on the constitutionality of an administrative hearing process involving statutory fraud claims. In *Blue Beach Bungalows DE, LLC vs. The Delaware Department of Justice Consumer Protection Unit,* this Court, in case number 14, 2025, has been asked to review the Superior Court's holding that the Delaware Department of Justice Consumer Protection Unit's administrative hearing process did not require a right to jury trial. There, the Superior Court held that the statutory claim under the Consumer Fraud Act was "not known at common law" and was "significantly different than common law fraud."[38]

4. Appellants are not entitled to a jury trial on IPU's registration claims.

Appellants contend that securities registration under 6 *Del. C.* § 73-202 is "similar in substance to common-law securities registration, entitling Appellants to trial by jury." Op. Br. at 28. This argument fails because Appellants misconstrue the definition of "common law," and the differences between 6 *Del. C.* § 73-202 and the English statutes they cite.

First, Appellants misconstrue the concept of the "English common law." Black's Law Dictionary defines "common law" as "the body of law derived from

[38] *Blue Beach Bungalows DE, LLC v. Delaware Dep't of Just. Consumer Prot. Unit*, C.A. No.: S24A-04-001, 2024 WL 4977006 (Del. Super. Ct. Dec. 4, 2024), amended, 2024 WL 5088688 (Del. Super. Ct. Dec. 12, 2024).

judicial decisions, *rather than from statutes or constitutions*."[39] Thus, the English statutes cited by Appellants are not part of the common law. *See The Evolution of Limited Liability in American Industry: Massachusetts*, E. Merrick Dodd, Harvard Law School, 61 HVLR 1351, n. 1. ("In the eighteenth century, the English law of joint-stock companies consisted of the common law ... and the Bubble Act," implicitly noting that common law differs from the Bubble Act). Because the right to a jury trial in Delaware is based upon whether the common law provided a right to a jury trial for a cause of action, these English statutes are irrelevant.

Appellants also posit that Black's Law Dictionary's definition of "common law" is "internally inconsistent, as that dictionary also contains an entry for a 'common-law statute.'" Op. Br., 17 n.4. However, Appellants' failure to include the definition of this term is telling, as it actually supports the Superior Court's interpretation of "common law." A "common-law statute"

> encompasses a rich body of common-law tradition on a subject and is written in sweeping, general terms. Because the statutory language is broad, it is sometimes said that the legislature delegates wide interpretive power to the courts. And because these statutes are based on long-established common-law principles rather than legislative formulations, they are sometimes said to be exempt from the usual principles of statutory interpretation.[40]

[39] *Common Law*, Black's Law Dictionary (12th ed. 2024) (emphasis added).
[40] *Common-Law Statute*, Black's Law Dictionary (12th ed. 2024).

Rather than an inconsistency, this definition highlights that common law and statutes are not the same. The fact that some statutes are based on common law does not mean that a statute *is* common law. The Delaware Constitution of 1776 makes this distinction clear: "The common law of England, *as well as* so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force …" Del. Const. of 1776 art. 25 (emphasis added). As the Superior Court below correctly stated, "The Delaware Constitution of 1776 thus treats statutes and common law as separate bodies. For an English statute on securities registration to remain effective post-independence, it must have been adopted in Delaware in 1776." Opinion at 24. And there is no evidence that these statutes were adopted by Delaware in 1776. Since the English statutes were not part of the common law, they are not relevant to the historical analysis that Delaware courts undertake when determining if a right to a jury trial exists.[41]

Even if the common law included the English statutes relied upon by Appellants, their argument still fails because the DSA's registration provisions are not "in substance so similar"[42] to the English statutes as to require a jury trial. Appellants note that the statutes "require[] governmental preapproval to offer or

[41] *See Claudio,* 585 A.2d at 1298 ("[T]he 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").
[42] *Cahill*, 443 A.2d at 500.

sell securities [and] preparation, maintenance and filing of such records." Op. Br. 30. They ignore the fact that DSA § 73-202 creates an entire registration regime, incorporating numerous requirements, authorities and 20th-century concepts that are intertwined with modern securities registration, filing requirements, and exemptions. Further, the DSA was passed by the Delaware General Assembly in the 1970s, well after the passage of the Delaware Constitution, and purposefully created a non-jury administrative process to oversee violations of the registration provisions. As discussed *supra*, state securities laws like the DSA were a legislative response passed to the common law's failure to adequately protect investors. The DSA's extensive securities registration regime, like its prohibition against securities fraud, is designed to protect investors from practices that ran rampant with only the protections of the common law.[43] Were the common law sufficient, there would have been no need for the General Assembly to pass the DSA to protect investors.

Appellants cite to the Bubble Act of 1720, which made it "a criminal offense for an unincorporated company to act as a corporation."[44] The criminal focus of the Bubble Act, which unremarkably supported the use of a jury trial at

[43] *See* Jonathan R. Macey, *Origin of the Blue Sky Laws*, 70 Tex. L. Rev. 347, 348–49 (1991).
[44] *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership,* Kelvin Dickinson, 33 AMULR 559, n. 69.

common law, is not instructive for assessing whether that right should attach in a modern civil enforcement context under the DSA. IPU has no power to bring a criminal action administratively. As the Superior Court found, § 73-202 of the Act created "'a new statutory cause of action intended by the General Assembly to be tried without a jury.'" Opinion at 25. (*quoting Cahill*, 443 A.2d at 500).

In addition to the ample indicia of the DSA's constitutionality, Appellants fail to meet the high burden required to declare legislation unconstitutional. In Delaware, all legislative enactments are cloaked with "a strong presumption of constitutionality" which "the court will be reluctant to ignore .... One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity."[45] Constitutional prohibitions to legislative action must be shown by "clear and convincing evidence."[46] Appellants cannot meet this burden, and thus fail to state a claim upon which relief can be granted.

[45] *Justice v. Gatchell*, at 102; *Opinion of the Justices*, 425 A.2d 604, 605 (Del. 1981) ("Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor"); *Snell v. Engineered Systems and Designs, Inc*., 669 A.2d 13, 17 (Del. 1995); *Wilm. Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978).

[46] *Albence v. Higgin*, 295 A.3d 1065, 1088-1089 (Del. 2022) (citation omitted).

II. IPU's Request For Civil Penalties Does Not Implicate The Right To A Jury Trial.

A. Question Presented

Whether the inclusion of civil penalties transforms a modern statute addressing matters unknown to the common law into one implicating the right to a jury trial pursuant to Article I, Section 4 of the Delaware Constitution. IPU MtD A154-A156, Rep. Br. A417-A418 n.10, A427.

B. Scope of Review

IPU respectfully submits that the scope of review is identical to that set forth in Argument I.B

C. Merits of Argument

A request for civil penalties for statutory violations does not unilaterally transform a modern statute addressing matters unknown to the common law into one implicating the right to a jury trial where the statutory framework established by the Delaware General Assembly for the regulation of securities grants no such right.[47] Opinion at 24, IPU MtD A154-A156, Rep. Br. A417-A418 n.10, A427. Appellants erroneously argue that IPU's pursuit of a legal remedy, namely civil penalties, universally entitles them to a jury trial. Complaint A21 ¶ 55. But Appellants' proposed remedy-dispositive framework, like the one followed by *Jarkesy,* is at odds with the analysis Delaware courts follow. Opinion at 15. What drives the right to a

[47] *Claudio*, 585 A.2d 1278, 1291 (Del. 1991).

jury trial in Delaware, as detailed *supra*, is whether the cause of action existed and triggered the right to a jury trial at common law prior to 1776.[48] If, as here, the cause of action in question did not exist at common law, the remedy for the cause of action is irrelevant to the analysis. Further, *Jarkesy* has already been distinguished in federal court, allowing an administrative enforcement action with civil penalties to stand.[49]

Here, IPU seeks civil penalties for statutory violations. IPU Compl. A84. Appellants assert that this is no different than an action to recover a debt at common law. Op. Br. 31-24. But the DSA, enacted to protect the public, is completely different from a cause of action in which one private party seeks to recover a debt previously incurred by another party. Indeed, Appellants would have this Court declare unconstitutional any regulatory enforcement action undertaken by a Delaware state agency that sought penalties, fines, or other monetary remedy in an administrative proceeding. This is not how the right to a jury trial is determined in Delaware.

Like they differ from common law fraud, the DSA's securities fraud and registration causes of action are not "in substance so similar"[50] to an action to recover

[48] *Ellery*, 633 A.2d 369 (Del. 1993); *Bon Ayre* at *4.
[49] *Ortega v. Off. of the Comptroller of the Currency*, No. 23-60617, 2025 WL 2588495 (5th Cir. Sept. 8, 2025)
[50] *Cahill*, 443 A.2d at 500

a debt that the right to a jury trial applies. For this reason, the grant of a civil jury trial for an action of debt at common law in *Getty Ref. & Mktg. Co. v. Park Oil, Inc.* does not require a jury trial in this case.[51] The addition of a civil penalty as a remedy does not change this conclusion. Appellants cite to *American Appliance, Inc. v. State ex rel. Brady* to compare an action for civil penalties to an action to recover a debt.[52] However, in *American Appliance,* the right to a jury trial was not in question; the court was assessing subject matter jurisdiction.[53] In cases where the right to a jury trial is actually in question, Delaware courts repeatedly focus on whether the cause of action was accompanied by the right to a jury trial at common law, not on the remedy.[54]

In support of their outcome-determinative view of civil penalties, Appellants' reliance on *Hopkins v. Justice of Peace Court No. 1*, 342 A2d 243 (Del. Super. Ct. 1975) and *State v. Fossett,* 134 A.2d 272 (Del. Super. Ct. 1957) is misplaced. Op. Br. 35. In *Hopkins*, the court found that the right to a jury trial attached to a modern statutory summary possession proceeding because that statute had, in effect, repealed and replaced ejectment actions, which at common law entitled parties to a

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[51] *Getty Ref, & Mktg. Co. v. Park Oil, Inc*., 385 A.2d 147, 151 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979).
[52] *American Appliance, Inc. v. State ex rel. Brady*, 712 A.2d 1001, 1003 (Del. 1998).
[53] *Id.* at 1001.
[54] *Ellery,* 633 A.2d 369; *Bon Ayre*, 2015 WL 893256, at *4.

jury trial.[55] Like *Hopkins*, the *Fossett* court found that a right to jury trial existed at common law for forfeiture – therefore, the court held, the party accused under a modern forfeiture statute was likewise entitled to a jury trial.[56] Neither of those opinions found the availability of civil penalties to be determinative, nor did either opinion address a cause of action, like here, that (1) did not exist at common law, and (2) does not supplant an action that existed in 1776.[57]

[55] *Hopkins*, 342 A.2d at 245.
[56] *State v. Fossett,* 134 A.2d 272 (Del. Super. Ct. 1957).
[57] As Appellants concede, common law fraud still exists. *See* Op. Br., *passim*.

III. Appellants Have Failed to State a Due Process Claim in Count II.

A. Question Presented

Whether Count II of the Complaint below, in which Appellants allege that the administrative action to which they were subjected was unfair in violation of Article I, Sections 7-9 of the Delaware Constitution, states a claim upon which relief can be granted. IPU MtD A157-A169, Rep. Br. A422-A426.

B. Scope of Review

The dismissal of a claim 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

Appellants' due process claim likewise fails because Appellants were unable to articulate a requisite deprivation to state such a claim. Moreover, the claim is based on litigation and FOIA disputes, rather than constitutional issues, and Appellants' recast as-applied challenge as a facial attack is contradicted by the DSA. The Superior Court properly dismissed this claim.

Appellants asked the Superior Court to prospectively declare that the eventual adjudication of the pending administrative proceeding – not any provision of the statute – is unconstitutional on due process grounds. *Compare* Complaint A23 ¶ 60, summarizing Count I ("Plaintiffs seek a declaratory judgment that *the IPU Action and 6 Del. C. § 73-601* violate their constitutional rights to trial by jury.") *with*

Complaint A31 ¶ 78, summarizing Count II ("Plaintiffs seek a declaratory judgment that *the IPU Action* violates their constitutional rights to due process.") (emphasis added).

In other words, Count II was not a facial or structural challenge to the DSA but rather a challenge to how the process contemplated by the DSA *might be applied* to Appellants, a standard procedural due process claim. *See, e.g.,* Complaint A27-28 ¶¶ 73-74, ("[A] fundamental tenet of due process is that 'all persons similarly circumstanced shall be treated alike.' … [It is] impossible for Plaintiffs and this Court to know whether Plaintiffs have been subjected to disparate treatment ....").

Appellants' attempt to resurrect their due process claim, by arguing structural bias due to IPU's supposed financial reliance on penalties ordered by the presiding officer, is premised upon stubborn mischaracterizations of the DSA's provisions regarding the Investor Protection Fund ("Fund"). Complaint A13-A14 ¶ 22, Rep. Br. A424-A426. The plain verbiage of the DSA §73-703(c) demonstrates that there is no correlation between the presiding officer's decisions and money credited to the Fund. Rep. Br. A424-A426.

1. Appellants failed to plead a deprivation of a protected interest.

Axiomatically, a deprivation of a person's liberty or property by a state actor must have already occurred before any action alleging a procedural due process

violation may be brought.[58] Count II, as pleaded, articulates no such existing deprivation, but rather their alleged inability to marshal evidence that could support their contention that the proceeding *would be* adjudicated unfairly against them. IPU MtD A157.

Appellants put the cart before the horse. As the Superior Court correctly held, "[o]nly after finding the deprivation of a protected interest does the Court look to see if the State's procedures comport with due process."[59]

Here, Appellants conceded that no deprivation had occurred: "the IPU *seeks to deprive* Appellants of their protected liberty and property interests" and "the IPU *seeks* an order for fines." Complaint A23 ¶ 64. Moreover, Appellants' concerns were couched in hypothetical terms: whether the presiding officer *might be* biased, and whether the rulings and penalties *might be* inconsistent. Complaint A27-A30 ¶¶ 72-77.

The Superior Court thus correctly dismissed Appellants' due process claim as unripe, noting "Appellants might succeed in the IPU Action, avoiding any loss of property or liberty." Opinion at 5.

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[58] Erwin Chemerinsky, Procedural Due Process Claims, 16 Touro L. Rev. 871-72, 888 (2015).

[59] Opinion at 5 (citing *Croda, Inc. v. New Castle Cty.*, C.A. No. 2020-0677-MTZ, 2021 WL 5027005 (Del. Ch. Oct. 28, 2021), *aff'd*, 282 A.3d 543 (Del. 2022) (citation modified); *In re New Maurice J. Moyer Acad., Inc.*, 108 A.3d 294, 317-18 (Del. Ch. 2015) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999))).

2. The issues raised in Appellants' due process claims are not constitutional issues.

None of the core issues in Appellants' due process challenge requires IPU or the (independent) presiding officer "to decide matters of constitutional law," as Appellants claim. Ans. Br. A392. Appellants use the phrase "IPU Presiding Officer" to conflate two separate, independent entities. IPU MtD A138, A163. ("While the [DSA and Rules] permit the Director … to exercise her enforcement power unilaterally, she did not do so in this case, instead *seeking appointment of Presiding Officers who were, as required by statute, not members of the IPU*. Each substantive determination in the IPU Action was made by a Presiding Officer.") IPU MtD A163 (emphasis added). To be clear, the due process analysis is applied to the proceeding, which is overseen and adjudicated by a presiding officer that is not part of IPU.

The first issue, whether IPU complied with its discovery obligations, is a classic litigation dispute – not a constitutional issue – that should be (and almost was) resolved by the presiding officer. IPU MtD A139-A140, A161-A162.

The second issue, whether or not all public orders of presiding officers had been published, is a factual issue that could have been assessed and, if needed, corrected by the presiding officer. The crux of Appellants' claim – that access to IPU precedent is so deficient as to deny due process – is absurd considering the number of records available on the IPU website (245), Westlaw (433), and LexisNexis (448). IPU MtD A165. Appellants argue, without any basis, that those sources contain only

a fraction of IPU precedent – precisely the type of conclusory allegation that fails to state a claim.[60]

The third issue, whether the FOIA liaisons for OMB and DOJ – neither of whom is assigned to IPU – complied with their obligations under the FOIA statute (not the statute at issue here), is likewise not a constitutional inquiry.

For those reasons, this Court should affirm dismissal of Count II for failure to state a claim.

3. Appellants pivot, recasting their as-applied challenge as a facial attack, but the text of the statute contradicts the new approach.

When IPU, in its opening brief on its motion to dismiss below, identified the fatal flaws (discussed *supra*) in Appellants' procedural due process claim, Appellants pivoted instead of responding. IPU MtD A157-A168, Ans. Br. A394-A395.

In their answering brief below, Appellants did not dispute that a deprivation of a protected interest is a prerequisite for a ripe due process claim, or that they were unable to overcome the strong presumption of honesty and integrity in those serving as presiding officers.[61] Appellants did float the possibility of improper

[60] *See City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) (citations omitted) (in considering a motion to dismiss, the Court need not "accept every strained interpretation of the allegations [or] credit conclusory allegations ..."); IPU MtD A144-145, Ans. Br. A396.

[61] *See Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 473 (Del. 1989).

communications because the "Presiding Officer and the Deputy Attorneys General in the IPU Action share access to the same servers and internal documents." Ans. Br. A395 n.10. But entirely separate infrastructure "is not necessary … to hold a hearing without infringing on a plaintiff's right to a fair trial."[62] Instead, after having devoted nearly half of their Complaint to the IPU's alleged efforts to deny them access to documents, Appellants abandoned their as-applied claim and, in their reply brief on the motion to dismiss, recast Count II as a structural challenge to the constitutionality of the adjudicatory process contemplated by the statute. Complaint A15-A18 ¶¶ 28-39, A23-A31 ¶¶ 62-78, Ans. Br. A395-A397. To shore up their repackaged version of Count II, Appellants abandoned their document-access claims. Ans. Br. A394. Rather, Appellants argued the deprivation they seek to avoid is "'the here-and-now' injury of subjection to an unconstitutionally structured … process." Ans. Br. A373.

Thus, Appellants contended, "[t]here is nothing to gain by permitting the IPU to decide *whether its own structure affords the requisite due process*." Ans. Br. A393 (emphasis added). And *Blinder's* bar to unsubstantiated attacks on the administrative proceeding was no longer an impediment because "[Appellants'] allegations [are

[62] *Hibbard Brown & Co., Inc. v. Hubbard*, Civ. A. No. 12451, 1992 WL 101611, at *4 (Del. Ch. May 11, 1992) ("I find that the physical attributes of the Securities Division provide no basis for plaintiffs to assume that improper ex parte communications may have occurred.").

not] about actual collusion, unauthorized communications, or bias ….” Ans. Br. A375, a fatal admission for anything less than a structural attack.[63]

According to Appellants, Count II was now solely about structural bias, which in turn was solely about the pecuniary interests of the hearing officer – i.e., “whether the IPU’s prosecutorial success rate is unconstitutionally entangled with its funding structure,” Ans. Br. A396, and ultimately whether that funding structure prevents “a fair trial before an unbiased decisionmaker.” Ans. Br. A394.

Appellants alleged, below, that “*because all fines and costs paid in an IPU proceeding are credited to the Investor Protection Fund*, and the Attorney General is authorized to spend those funds to pay for the operations of the IPU, *Presiding Officers’ decisions will have a material effect on the IPU’s funding*.” Ans. Br. A396. (emphasis added). If Appellants were concerned about the success rate of a particular Presiding Officer, then their challenge was not ripe – the current presiding officer has not ruled yet. Those types of attacks are only ripe on appeal.

But there is no correlation between any presiding officer’s decision and money credited to the Fund. The plain text of the DSA is clear: “Any fines, costs or

[63] *See, e.g., Crocco v. Bd. of Med. Pract.*, C.A. No. 90A-FE-6, 1990 WL 105056, at *4 (Del. Super. Ct. July 13, 1990) (“Dr. Crocco’s case falls far short of overcoming the presumption of honesty and integrity …. where he cannot point to any evidence of any kind which shows that he suffered actual bias.”). Rep. Br. A423.

other moneys (except those obtained as restitution or recission) received by the Director as a result of an administrative order (other than a consent order) shall be credited to the General Fund." 6 *Del. C.* § 73-703(c). IPU is thus not reliant on administrative penalties issued by a presiding officer to "keep[] the money flowing," as Appellants alleged. Ans. Br. A363.

Neither IPU – nor the DOJ as a whole – is directly funded by moneys received as a result of non-consensual administrative orders. Appellants' concerns about the impact of pecuniary incentives on *stare decisis* Ans. Br. A394, and the potential for disparate treatment Ans. Br. A397, are unfounded.

4. Appellants' attempts at resuscitating Count II also fail.

Appellants try again on appeal to recast Count II in the same mold as Count I: "Both claims present 'here-and-now' constitutional questions." Op. Br. 38. However, the Complaint is replete with evidence of the true nature of Count II, namely that it is about the potential for bias and access to documents – an as-applied, rather than structural, challenge. Complaint A15-A18 ¶¶ 28-39, A25-A31 ¶¶ 67-77.

First, Appellants' own summary of Count II identifies the administrative proceeding itself – not the DSA – as the source of its procedural due process woes: "Plaintiffs seek a declaratory judgment that *the IPU Action violates* their constitutional rights to due process …." Complaint A31 ¶ 78. (emphasis added).

Second, Count II expressly described the case-specific deprivations *that could*

come to pass should the IPU Action continue – not deprivations resulting from "being subjected to an illegitimate proceeding" that would apply to all respondents. Complaint A23 ¶ 64. The Superior Court agreed: "Plaintiffs have not yet been penalized for their alleged misconduct." Opinion at 2.

Third, Count II focused on the disparate actions of multiple independent actors – the presiding officer and the FOIA liaisons at OMB and DOJ, none of whom is a member of IPU – that were specific to this matter, not structural issues. IPU MtD A163.

Fourth, Count II focused on the alleged deprivations specifically visited upon Appellants – as opposed to those that would be visited on all other respondents in other administrative actions arising from structural unconstitutionality – namely Appellants' purported inability to access documents. Complaint, A26-A28 ¶ 71-31.

Fifth, Appellants' allegations that the IPU Director's ability to remove the presiding officer creates structural bias fail under *Blinder*'s strong presumption of the honesty and integrity in those serving as presiding officers.[64] This is particularly true where the process employed by IPU here was even less prone to structural bias than the one blessed by the Court in *Blinder,* where the Presiding Officer was the head of IPU.[65]

[64] *Blinder*, 552 A.2d at 473.
[65] *Blinder*, 552 A.2d 466.

Finally, Appellants raise here, for the first time, the argument that "[a]ny moneys paid pursuant to a court order or judgment resulting from the administrative actions 'shall be credited to the Investor Protection Fund' from which the Attorney General may pay 'costs, expenses, and charges …"[66] This argument cobbles together two different subsections of the DSA to suggest that administratively-imposed penalties are credited to the Fund, when the clear language of the statute shows that it is not. Regardless, because Appellants did not make this argument below, this Court should not review it on appeal.[67] And while this Court may consider the argument "if it finds that the trial court committed plain error requiring review in the interests of justice," Appellants' misinterpretation of Section 73-703 does not meet this standard.[68]

Appellants made a *different* argument below, that Section 73-703(b)(2) provides that the proceeds from administrative proceedings fund the IPU, and this factor thereby creates a structural bias in the IPU's administrative proceedings. Specifically, Appellants pleaded in their Complaint: "'[A]ny moneys paid … in a securities action brought by the Attorney General or the Investor Protection Director

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[66] Op. Br. at 40-41, quoting 6 *Del. C*. §§ 73-703(b)(2), 73-703(e).
[67] *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377–78 (Del. 2022) ("Rule 8 provides that only questions fairly presented to the trial court may be presented for review. As a result, this Court does not consider issues that are not raised unless the interest of justice requires it.") (internal quotation omitted).
[68] *Pollard v. State*, 284 A.3d 41, 45 (Del. 2022) (citing Del. Supr. Ct. R. 8) (internal quotation omitted).

… shall be credited to the Investor Protection Fund.' 6 *Del. C.* § 73-703(b)(2)." Complaint, A13-14 ¶22 (ellipses in original).

But Appellants are incorrect: the DSA explicitly provides that proceeds resulting from administrative actions are *not* credited to the Investor Protection Fund. 6 *Del. C.* § 73-703(c). Appellants' first ellipse, and their failure to cite section 73-703(c) of the DSA, created the misimpression that the statute provides the opposite of what it actually requires. With the omitted language restored, Section 73-703(b)(2) provides: "[A]ny moneys paid *pursuant to court order or judgment* in a securities action brought by the Attorney General or the Investor Protection Director … shall be credited to the Investor Protection Fund." (emphasis added). Critically, Section 73-703(c) then provides that "[a]ny fines, costs or other moneys (except those obtained as restitution or rescission) received by the Director *as a result of an administrative order* (other than a consent order) *shall be credited to the General Fund*," not the Investor Protection Fund (emphasis added).

In their answering brief below, Appellants stated that their argument pertained to "all fines and costs paid in an IPU proceeding."[69] The IPU identified the mistake in its reply brief, Rep. Br. A425, and described the issue in detail for the Superior

[69] Ans. Br. A396 ("Here, Plaintiffs allege that because all fines and costs paid in an IPU proceeding are credited to the Investor Protection Fund, and the Attorney General is authorized to spend those funds to pay for the operations of the IPU, Presiding Officers' decisions will have a material effect on the IPU's funding. Compl. ¶¶ 22, 28–39, 76.").

Court at oral argument. Appellants' counsel's only response was "I take what counsel was saying in rejection of our thesis that the Attorney General has a pecuniary interest in what happens in IPU's matters. And maybe discovery bears that out, and maybe it doesn't."[70] But this was not a discovery issue; the issue was Appellants' misreading of the statute, presented in Appellants' Complaint and again in their briefing.

Perhaps to avoid repeating their mistake, Appellants now attempt to revise their statutory interpretation by cobbling together portions of Section 73-703, again without citing or addressing Section 73-703(c), to argue: "Any moneys paid pursuant to a court order or judgment resulting from the administrative actions 'shall be credited to the Investor Protection Fund' from which the Attorney General may pay 'costs, expenses, and charges …" Op. Br. 40-41, quoting 6 *Del. C.* §§ 73-703(b)(2), 73-703(e). This, too, is a misreading of the statute, but a new one. Any contention that Appellants had argued this all along is refuted by the fact that the Complaint fails to refer to Section 73-703(b)(2)'s "court order or judgment" language. If, alternatively, the argument is not new, then it continues Appellants' earlier statutory misinterpretation. In either event, the Court should decline to consider it.

Even if the Court does consider this new argument, it still misreads the plain

[70] Transcript of Oral Argument B-41-43, B-91-92.

language of the statute, and the Court should affirm dismissal. According to Appellants, this new reading creates a similar structural bias as the argument they tried to make below. Op. Br. 7, 36, 39-42. *See also* Op. Br. 7 ("…the punitive monetary fines demanded are revenue-producing support for the IPU."); Op. Br. 40 ("Appellants plead the appearance of a pecuniary interest in the outcome of the IPU Action by the Presiding Officer.").[71]

But these arguments fail. Under Section 73-703(c) of the DSA, monies received by the IPU "Director as a result of an administrative order (other than a consent order) shall be credited to the General Fund"—not the Fund—and that is true whether the administrative order is later affirmed by a court or not. There are no facts in the record that support Appellants' new argument, and had Appellants raised this argument below, IPU would have refuted it. Under Section 73-703(c), monies ordered by a Presiding Officer do not go to the Investor Protection Fund. Further, to be clear, *all* of the moneys credited to the Investor Protection Fund are from non-administrative proceeding sources:[72] (i) registration fees collected by the Unit,[73] (ii) moneys paid pursuant to a *court* order,[74] and (iii) moneys received as a

[71] Here, again, Appellants' allegations fail for the additional reason that the Presiding Officer was not part of IPU, and could not have had a pecuniary interest even under Appellants' recast allegations.
[72] DSA §73-703(a).
[73] DSA §73-703(b)(1).
[74] DSA §73-703(b)(2).

result of a settlement agreement.[75] Appellants' unsupported allegations are insufficient to meet their burden to show by clear and convincing evidence that an enactment of the Legislature is unconstitutional.[76]

Regardless of whether Appellants' structural bias argument is a new argument or an existing claim premised on a mischaracterization in the complaint, it has no merit, and the Court should affirm its dismissal.[77]

[75] DSA §73-703(b)(3).
[76] *Albence v. Higgin*, 295 A.3d 1065, 1088-1089 (Del. 2022) (citation omitted).
[77] *Protech Minerals*, 284 A.3d at 377–78.

CONCLUSION

The Superior Court applied the proper analysis required by the Delaware Constitution with respect to when a right to a jury trial attaches, and correctly determined that the Appellants are not entitled to a jury trial in the IPU Action. Moreover, the Supreme Court correctly determined that Appellants failed to meet the high burden required to invalidate a statute. The Superior Court also correctly held that Appellants had failed to articulate a deprivation that could give credence to their due process challenge. Accordingly, this Court should affirm the Superior Court's dismissal of Appellants' First Amended Complaint.

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Dated: October 9, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIRMENT AND TYPE VOLUME LIMITATION

1. I, Ian R. Liston, hereby certify that the foregoing Appellee Response Brief (the "Brief") complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word for Microsoft 365.

2. The Brief complies with the type-volume limitation Rule 14(d)(i) because it contains **9,973** words, which were counted using the word counter function of Microsoft Word for Microsoft 365.

/s/ *Ian R. Liston* (#5507)
Ian R. Liston