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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' REPLY BRIEF

Dated: October 24, 2025

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Federal Constitution

State Constitution

Federal Cases

State Cases

English Statutes

State Statutes

State Rules of Court

Other Authorities

ARGUMENT

This appeal presents a unique opportunity for the Court to reaffirm that Article I, Section 4 of the Delaware Constitution guarantees at least as much as the Seventh Amendment to the United States Constitution. Despite initial concerns for its efficacy in the wake of *SEC v. Jarkesy*, 603 U.S. 109 (2024), the United States Securities and Exchange Commission continues to bring all the same claims and seek all the same remedies, just in a different, more neutral forum. The IPU should be held to the same standard.

Conversely, the IPU asks the Court to hold, for the first time ever, that Article I, Section 4 guarantees less than the Seventh Amendment. The IPU admits that a private litigant seeking compensation for securities fraud must file in the Superior Court, where a jury trial is available. Yet again, the IPU does not want to be held to the same standard. Instead, the IPU claims an entitlement to prosecute and adjudicate administratively, on proof of fewer elements, seeking civil penalties designed to deter and punish.

In this appeal, the IPU offers erroneous constitutional, statutory, and historical interpretations, fails to address authoritative sources cited by Appellants, and cites cases that do not stand for the propositions stated. The Court should reverse the dismissal of Appellants' First Amended Complaint.

I. The IPU's Jury-Trial Argument Is Contrary To Precedent.

The IPU misunderstands the analytical framework under Article I, Section 4 of the Delaware Constitution. The IPU argues that because securities fraud and securities registration did not exist at common law in their modern statutory forms, Appellants are not entitled to trial by jury. IPU's Br. 8–12. But the IPU admits, as it must, that the Court applies a different framework when analyzing modern statutory causes of action. IPU's Br. 15.

Under Article I, Section 4, when a "new statutory civil cause of action" that did not exist at common law is "in substance so similar" to a cause of action that did exist at common law, the right to trial by jury applies. *See State v. Cahill*, 443 A.2d 497, 500 (Del. 1982). The Court's similar-in-substance framework is reflected in *Bon Ayre Land LLC v. Bon Ayre Community Association*, the Superior Court decision cited throughout the IPU's brief. In *Bon Ayre*, the Superior Court held that a right to trial by jury did not apply to claims brought under the Manufactured Home Owners and Community Owners Act, but only after analyzing whether the statutory cause of action existed at common law and whether the right to trial by jury existed for its "common law equivalent." *See* 2015 WL 893256, at *4–5 (Del. Super. Ct. Feb. 26, 2015), *rev'd on other grounds*, 133 A.3d 559 (Del. 2016) (unreported).

The Court's framework is reflected also in *Hopkins v. Justice of Peace Court No. 1*, in which the Superior Court explained that "it is the nature of the proceeding

rather than its designation which determines whether it is traditionally triable by jury." 342 A.2d 243, 246 (Del. Super. Ct. 1975). That is why parties to modern statutory actions for summary possession, actions similar in substance to non-statutory real property disputes, are entitled to trial by jury, *see id.* at 245, and why parties to modern statutory actions for civil forfeiture, actions similar in substance to non-statutory personal property disputes, are entitled to trial by jury too, *see State v. Fossett*, 134 A.2d 272, 276–77 (Del. Super. Ct. 1957).

Moreover, the Court's similar-in-substance framework is in accord with Seventh Amendment jurisprudence, under which the federal right to trial by jury is triggered by modern statutory causes of action when their common-law analogs were triable by jury. *See SEC v. Jarkesy*, 603 U.S. 109, 125–26 (2024).[1] Attempting to distinguish federal law, the IPU draws untenable distinctions between Article I, Section 4 and the Seventh Amendment, suggesting that the former guarantees less than the latter. IPU's Br. 8–12. The Court has never so held. To the contrary, the Court's "comprehensive historical analysis of the right to trial by jury in *Claudio* demonstrates that the guarantees in the Delaware Constitution for trial by jury were originally intended to be greater than those in the United States Constitution and

[1] The U.S. Supreme Court denied the Petition for Writ of Certiorari in *Thomas v. Humboldt County* on October 14, 2025. *See* Dkt. Entry, *Thomas v. Humboldt Cnty.*, No. 24-1180 (U.S. Oct. 14, 2025) (statement of Justice Gorsuch respecting the denial of certiorari) (acknowledging a "number of 'vehicle' problems" with the petition but advocating for the incorporation of the Seventh Amendment in a future case).

remain that way." *Jones v. State*, 745 A.2d 856, 863 & n.34 (Del. 1999) (citing *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991)). Article I, Section 4 preserves "all of the fundamental features of the jury system, as they existed at common law," *Claudio*, 585 A.2d at 1298, whereas "the effort to preserve all of the common law rights to trial by jury in the federal Bill of Rights" had failed, *id.* at 1295.

The IPU offers a false dichotomy, claiming that Seventh Amendment jurisprudence involves a "simple 'legal-vs.-equitable' analysis" rather than the "historical analysis of the common law" required by Article I, Section 4. IPU's Br. 13. It is a *sine qua non* under Article I, Section 4 that "either party shall have the right to demand a jury trial upon an issue of fact in an action at law," but not in equity. *McCool v. Gehret*, 657 A.2d 269, 282 (Del. 1995); *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."); Hon. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 33 (2002) ("The common law right to trial by jury exists for actions at law but not for actions brought in equity."). The several other States cited by the IPU apply a similar framework. *See Wertz v. Chapman Twp.*, 741 A.2d 1272, 1277 (Pa. 1999) ("[A] jury trial was not denied merely because the action was statutory. Rather the 'common law basis' referred to the nature of the proceeding in common law courts, such as in the Court of Exchequer, but not in the Courts of Admiralty or Chancery."); *State v. Schweda*,

736 N.W.2d 49, 59 n.9 (Wis. 2007) ("We determine whether (1) the cause of action existed, was known, or was recognized at common law in 1848 and (2) whether the cause of action was regarded as at law in 1848." (emphasis added)); *Davis v. Slater*, 861 A.2d 78, 84 (Md. Ct. App. 2004) ("At that time, as today, the entitlement to a jury trial only applied in cases at law as opposed to those in equity.").

The IPU's attempts to distinguish Delaware jurisprudence are equally unpersuasive. The IPU contends that *Hopkins v. Justice of Peace Court No. 1* and *Allstate Insurance Co. v. Rossi Auto Body, Inc.* recognized a right to trial by jury for modern statutory causes of action only because those statutes "replaced a cause of action that existed at common law and extinguished the common law right to a jury trial." IPU's Br. 15 (emphasis omitted). But neither *Hopkins* nor *Allstate* involved any such "replacement" or "extinguishment." In fact, *Hopkins* rejected the argument that the challenged statute was a "new and distinct remedy" which "did not exist 'heretofore' and thus imparts no jury requirement." 342 A.2d at 245. Instead, *Hopkins* recognized that the statute "embraces litigation traditionally triable before a jury" by "moderniz[ing] and reform[ing]" the law. *Id.* at 246. As the IPU concedes, *see* IPU's Br. 16–17, the Delaware Securities Act modernizes and reforms Delaware securities law, thereby embracing litigation traditionally triable before a jury. And in *Allstate*, "[t]he preexisting right to a jury trial was merely preserved," not replaced or extinguished, "when the new lien and replevin actions were created

in th[e] statute." 787 A.2d 742, 747 (Del. Super. Ct. 2001). The same is true of the preexisting right to trial by jury—uncontested by the IPU—for common-law fraud and securities registration actions. *See* Appellants' Br. 19–20, 28–30.

Addressing securities registration actions specifically, the IPU would have the analysis turn on its preferred dictionary definition of "common law." *But see In re Fox Corp./Snap Inc.*, 312 A.3d 636, 647 (Del. 2024) (cautioning against overreliance on dictionaries, which often "lack context and point in different directions" and are "inconclusive and subject to selection bias"). This approach would ignore the historical fact that when Article I, Section 4 was adopted, the ordinary definition of "common law" was "used in contradistinction to equity, and admiralty, and maritime jurisprudence," encompassing "all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Jarkesy*, 603 U.S. at 122 (quotations omitted). Indeed, the Court's similar-in-substance framework aligns with the principle that "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). And when those ancient statutes never provided for trial by jury, their modern statutory forms do not trigger the right to trial by jury either. *See Ellery v. State ex rel. Sec'y of Dep't of Transp.*, 633 A.2d 369 (Del. 1993) (unreported).

The IPU further argues that the Bubble Act is "not instructive" because it had a "criminal focus."[2] IPU's Br. 24–25. This argument, mentioned only in a footnote below, should be deemed waived. *See* Supr. Ct. R. 8. It is also incorrect. The Bubble Act had both criminal and civil enforcement mechanisms, each of which carried the right to trial by jury. *See* 6 Geo. 1 c. 18, §§ 18–21. Other than this mistaken Bubble Act argument, the IPU makes no attempt to distinguish the registration requirements, jury-trial rights, and civil penalties that applied under the Bubble Act, Brokers Act, and Sir John Barnard's Act. *See* Appellants' Br. 28–30.

In sum, the IPU concedes that at common law, securities fraud was actionable through private causes of action, triable by jury, which were "expanded upon and supplemented" by the Delaware Securities Act. IPU's Br. 16. Yet the IPU maintains that it has vastly more power than private litigants: it claims the ability to bring suit for a broader range of conduct (IPU's Br. 16–17, 19 (citing 6 *Del. C.* § 73-103(a)(9))), while proving fewer elements (IPU's Br. 17–19)[3] within a longer

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[2] In making this argument, the IPU highlights its inability to "bring a criminal action administratively," a nod to the IPU's ability to bring a criminal action judicially, pursuant to 6 *Del. C.* § 73-604, which must be filed in the Superior Court. There is no reason to believe that requiring civil actions to be brought in Superior Court would be any more disruptive or burdensome, especially in light of the ease with which the IPU claims to be able to prove violations of 6 *Del. C.* §§ 73-201, 73-202.

[3] The IPU makes no attempt to distinguish the fact that through the 2013 amendment to 6 *Del. C.* § 73-201, the General Assembly instructed Delaware courts to be guided by the federal courts' interpretations of the federal securities laws, which includes *Jarkesy*. *See* Appellants' Br. 23–24.

statute-of-limitations period (IPU's Br. 19 (citing 6 *Del. C.* § 73-503)),[4] and while seeking to "deter and punish" through "the imposition of civil penalties" but "not to obtain damages for an[y] investor(s)" (IPU's Br. 20). Conversely, those targeted by the IPU have vastly fewer protections than those targeted by private litigants: they are deprived of a jury trial, neutral decision-maker, and other fundamental procedural safeguards. This Court should reverse the Superior Court's dismissal of Count I.

[4] The IPU cites no Delaware case for the proposition that differing statutes of limitations are relevant to the Article I, Section 4 inquiry.

II. The IPU's Civil-Penalties Argument Goes Too Far.

The IPU invites the Court to go further than the Superior Court and hold that the remedy sought is "irrelevant" to the Article I, Section 4 inquiry. IPU's Br. 27. The IPU is again misguided. Even under the Seventh Amendment, where "the relief sought is more important than finding a precisely analogous common-law cause of action," the remedy is only one of two factors examined to determine whether the right to trial by jury applies. *See Tull v. United States*, 481 U.S. 412, 421 & n.6 (1987) (brackets and quotations omitted) ("Our search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors.").[5]

The Article I, Section 4 inquiry likewise examines both the cause of action and the remedy sought, and for good reason, as the Court explained in *Cahill*: "there are, for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and, like chameleons they take their color from surrounding circumstances." 443 A.2d at 500 (brackets and quotations omitted) (quoting *Ross v. Bernhard*, 396 U.S. 531, 550 (1970) (Stewart, J., dissenting)). Thus, when a cause of action has both legal and equitable antecedents,

[5] *Ortega v. Office of the Comptroller of the Currency* did not distinguish *Jarkesy* as the IPU suggests, but rather held that "the public-rights exception applies to federal banking enforcement actions," which has no relevance here. *See* No. 23-60617, 2025 WL 2588495, at *11 (5th Cir. Sept. 8, 2025).

examining the remedy sought helps determine whether the right to trial by jury applies. *See id.* To use the Court's example from *Cahill*, in an action for breach of contract, "[i]f a defendant refuses to convey a chattel pursuant to a contract, and the plaintiff claims the chattel is unique and subject to specific performance, the factual issue of the breach is precisely the same in equity as it would be in a damage action at law." *Id.* It is only by examining the remedy sought—either damages (legal) or specific performance (equitable)—that the Court could determine whether the right to trial by jury applies. *See id.*

In this case, the IPU admits that it seeks "civil penalties" to "deter and punish," which are indisputably legal remedies. *See Am. Appliance, Inc. v. State ex rel. Brady*, 712 A.2d 1001 (Del. 1998); *Jarkesy*, 603 U.S. at 123. The IPU accordingly fails to distinguish *Getty Ref. & Mktg. Co. v. Park Oil*, reverting to its cause-of-action arguments rather than addressing the glaring remedy issue. *See* IPU's Br. 27–28 (citing 385 A.2d 147 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979)). The IPU similarly fails to distinguish *American Appliance, Inc. v. State ex rel. Brady*, noting that the Superior Court there was "assessing subject matter jurisdiction" but ignoring the obvious import of its holding that it had jurisdiction: a jury trial was thereby made available. *See* IPU's Br. 28 (citing 712 A.2d 1001).

The IPU's assertion that reversal would prevent State agencies from seeking all "monetary relief" in administrative proceedings, *see* IPU's Br. 27, is wrong.

Monetary relief to "restore the status quo," such as disgorgement and restitution—both important remedies in light of the purpose of the Delaware Securities Act, *see* 6 *Del. C.* § 73-101(b)—would remain viable options. *See Jarkesy*, 603 U.S. at 123 (discussing distinction between legal monetary relief and equitable monetary relief). Presently, however, the IPU doles out punishment not on the basis of equitable determinations, and "not to obtain damages for an[y] investor(s)," *see* IPU's Br. 20, but through statutory fines of up to $10,000 per violation, *see* 6 *Del. C.* § 73-601(b). Absent the right to trial by jury, this is constitutionally impermissible. This Court should reverse the Superior Court's dismissal of Count I.

III. The IPU's Due-Process Argument Miscasts The Scope Of The Claim.

Attempting to support the Superior Court's erroneous determination that Appellants must complete an unfair administrative proceeding before bringing a due process claim, the IPU recasts Count II as limited to an "as applied" challenge to the IPU Action rather than a facial attack on the IPU's statutory structure. IPU's Br. 30–31. This argument, not presented below, should be deemed waived. *See* Supr. Ct. R. 8. It is also inaccurate. Appellants sought a declaratory judgment that the entire in-house process authorized by the Delaware Securities Act deprives them of due process, regardless of whether Appellants win or lose the IPU Action. *See* A23–A31 ¶¶ 61–78. Appellants therefore "protest the here-and-now injury of subjection to an unconstitutionally structured decisionmaking process." *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 192 (2023) (quotations omitted).

The IPU offers no explanation why a declaratory judgment challenge to the fundamental fairness of participating in an administrative action must wait until the action ends. The law is to the contrary. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Even if Appellants win the IPU Action, or even if other future respondents win their administrative actions, the question would remain whether the IPU's in-house administrative proceedings violate Article I, Sections 7–9 of the Delaware Constitution. *See Axon*, 598 U.S. at 191. Judicial review only after the administrative proceedings have ended would "come too late to be meaningful," as

proceedings that have already happened "cannot be undone." *See id.* at 191–92 (analogizing respondents in administrative proceeding deemed unconstitutional after trial with defendants deemed immune from suit after trial).

The IPU next recharacterizes Count II as not constitutional at all, but a dispute about discovery and FOIA. IPU's Br. 33–34. That is both an unfair characterization of Appellants' arguments and dismissive of the important issues presented in this appeal. For support, the IPU cites facts from its motion to dismiss, stating that its Presiding Officer is "independent" and its "precedent" is available, among other factual assurances. IPU's Br. 33–34. Of course, under Superior Court Civil Rule 12(b)(6), the IPU's factual assurances were not properly before the Superior Court, and they are not properly before this Court. *See Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 873 (Del. 2020).

In the same vein, the IPU insists that Appellants have already failed to rebut *Blinder*'s presumption of honesty and integrity because, according to the IPU, it is now "less prone" to structural bias than it used to be. IPU's Br. 38. Needless to say, due process demands more than the IPU's assurances, especially when the IPU's administrative process itself structurally prevents Appellants and any reviewing court from testing its purported neutrality. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (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").

The IPU also incorrectly asserts that Appellants waived the issue of the Presiding Officer's financial neutrality and appearance of neutrality. IPU's Br. 39–43. To the contrary, Appellants squarely presented the issue at every juncture and with citation to the relevant statute, 6 *Del. C.* § 73-703, first in the operative complaint, *see* A10–A18, A23–A31 ¶¶ 10–39, 61–78, next in their opposition to the IPU's motion to dismiss, *see* A396–A397, and again in their Opening Brief, *see* Appellants' Br. 36–43. Relatedly, Appellants' argument does not "cobble[] together two different subsections" of 6 *Del. C.* § 73-703, but rather reads the statute as a whole. *See Del. Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 652 (Del. 2006).

Subsection (b)(2) provides that "[a]ny moneys paid pursuant to court order or judgment, including costs and attorney's fees, in a securities action brought by the Attorney General or the Investor Protection Director pursuant to this chapter shall be credited to the Investor Protection Fund." 6 *Del. C.* § 73-703(b)(2). Subsection (e) provides that "[t]he Attorney General is authorized to expend from the Investor Protection Fund such moneys as are necessary for the payment of costs, expenses, and charges incuarrred [sic] in connection with the activities of the Investor Protection Unit under this chapter, including enforcement, training, education," and more. *Id.* § 73-703(e).

Reading these two subsections together, it is clear that any time an administrative respondent unsuccessfully appeals to the Court of Chancery under 6

Del. C. § 73-502, the moneys paid pursuant to that court's order or judgment must be credited to the Investor Protection Fund, from which the Attorney General may finance the IPU's enforcement activities. Of course, not every respondent, having endured a costly in-house proceeding, will appeal. When there is no appeal, the moneys received by the Director must be credited to the General Fund pursuant to 6 *Del. C.* § 73-703(c). Thus, if a respondent loses a trial and does not appeal, the moneys received by the Director will go to the General Fund, but if the respondent loses the trial and exercises its appellate rights (albeit unsuccessfully), the moneys paid pursuant to the Court of Chancery's order or judgment will go to the Investor Protection Fund, benefitting the IPU. *See* 6 *Del. C.* §§ 73-703(b)(2), (c), (e).[6]

Compounding this troubling structure, and as the IPU acknowledges, *see* IPU's Br. 42–43, the Investor Protection Fund is further buoyed by moneys received pursuant to settlement agreements between the IPU and its respondents, *see* 6 *Del. C.* § 73-703(b)(3). The zenith of the State's coercive power is when Deputy

[6] The IPU offers another unsupported factual assurance, this time to the effect that moneys received by the Director following an administrative order in its favor are not credited to the Investor Protection Fund even if they are incorporated into an order or judgment of the Court of Chancery. IPU's Br. 42. This untested and presently untestable factual assurance is not properly before the Court. *See Windsor I*, 238 A.3d at 873. It also contorts the plain language of the statute, given that in the event of an appeal, no moneys will be "received by the Director" unless and until the Court of Chancery incorporates the moneys into its order or judgment. *See* 6 *Del. C.* §§ 73-703(b)(2), (c).

Attorneys General negotiate a settlement agreement in a case that other Deputy Attorneys General will decide and punish—all without reference to investor harm.

Despite Appellants' extensive efforts, *see* A15–A18 ¶¶ 28–39, the percentage of the Investor Protection Fund supported by unsuccessful appeals and settlement payments, as well as the percentage of the IPU's overall budget reliant on the Investor Protection Fund, remain unknown. Neither Appellants nor any reviewing court can determine whether these funding mechanisms account for 1% of the agency's enforcement budget (as in *Marshall*, 446 U.S. at 245–48), 25%, 50%, or more. Due process demands this inquiry, however, because at some point, there is "too high a probability of bias on the part of a decision-maker" to impose penalties more frequently and more severely. *See Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 473 (Del. 1989). This Court should reverse the Superior Court's dismissal of Count II.

CONCLUSION

The IPU does not want to be treated like the United States Securities and Exchange Commission or even like a private Delaware litigant. It wants to bring easier civil claims, seeking harsher civil penalties, without the oversight of a Delaware jury or Superior Court judge. The Delaware Constitution demands better. The Court should reverse the dismissal of Appellants' First Amended Complaint.

Dated: October 24, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 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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