No. 24-685

In the Supreme Court of the United States

SUSAN MCBRINE, ET AL., PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), this Court held that a "plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." *Id.* at 168. The Camp Lejeune Justice Act of 2022 (CLJA), Pub. L. No. 117-168, tit. VIII, 136 Stat. 1802, allows certain individuals to "bring an action" to "obtain appropriate relief for harm that was caused by exposure to the water at [the] Camp Lejeune" military base in North Carolina. CLJA § 804(b), 136 Stat. 1802. Section 804(d) confers "exclusive jurisdiction" on the United States District Court for the Eastern District of North Carolina and makes that court the "exclusive venue" for actions brought under the CLJA. CLJA § 804(d), 136 Stat. 1803. Section 804(d) further states that "[n]othing in this subsection shall impair the right of any party to a trial by jury." *Ibid.*

The questions presented are:

1. Whether the court of appeals abused its discretion in denying a petition for a writ of mandamus to direct the district court to hold jury trials in CLJA suits against the United States.

2. Whether the ordinary mandamus factors govern a request for mandamus relief based on an alleged denial of a statutory jury-trial right.

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OPINIONS BELOW

The order of the court of appeals denying mandamus (Pet. App. 1a) is reported at 2024 WL 5237643. The opinion and order of the district court granting the government's motion to strike the jury trial demand (Pet. App. 10a-49a) is reported at 715 F. Supp. 3d 761. The order of the district court denying petitioners' motion to certify the issue for interlocutory appeal (Pet. App. 2a-9a) is available at 2024 WL 2198651.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2024. A petition for rehearing en banc was denied on October 4, 2024 (Pet. App. 50a). The petition for a writ of certiorari was filed on December 23, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 2022, Congress enacted the Camp Lejeune Justice Act (CLJA), Pub. L. No. 117-168, Tit. VIII, 136 Stat. 1802. The CLJA authorizes certain individuals to bring a tort action to "obtain appropriate relief for harm that was caused by exposure to the water at [the] Camp Lejeune" military base in North Carolina. CLJA § 804(b), 136 Stat. 1802.

The CLJA expressly precludes the United States from relying on certain defenses that would otherwise be available in tort suits against the United States under the Federal Tort Claims Act (FTCA), including the discretionary function exception, see 28 U.S.C. 2680(a), and state statutes of repose, see CLJA § 804(f) and (j), 136 Stat. 1803-1804. The United States had successfully invoked those defenses in FTCA suits relating to water contamination at Camp Lejeune before the CLJA's enactment. See *Clendening* v. *United States*, 19 F.4th 421, 431, 436 (4th Cir. 2021), cert. denied, 143 S. Ct. 11 (2022); *In re Camp Lejeune, N.C. Water Contamination Litig.*, 774 Fed. Appx. 564, 566 (11th Cir. 2019) (per curiam), cert. denied *sub nom.*, *Bryant* v. *United States*, 140 S. Ct. 2825 (2020). Congress, in enacting the CLJA, made clear that such defenses cannot be invoked in suits brought under the CLJA.

The CLJA also requires claimants to first present their claims to the Department of the Navy before filing suit in district court. See CLJA § 804(h), 136 Stat. 1803 (requiring compliance with the FTCA's administrative-exhaustion provision). If the Navy does not either grant or deny an administrative claim within six months, the claimant may treat the failure to act as a denial of the claim and bring suit in court. 28 U.S.C. 2675(a).

Section 804(d) of the CLJA is titled "Exclusive Jurisdiction and Venue." CLJA § 804(d). It provides that the U.S. District Court for the Eastern District of North Carolina "shall have exclusive jurisdiction over any action filed" under the CLJA and shall "be the exclusive venue for such an action." *Ibid.* Section 804(d) further states that "[n]othing in this subsection shall impair the right of any party to a trial by jury." *Ibid.*

2. a. Since the CLJA's enactment, over 408,000 claimants have presented CLJA claims to the Navy, and over 2,700 plaintiffs have filed suit in district court. The four district judges in the Eastern District of North Carolina have adopted various measures to manage and coordinate the large volume of suits filed in that single district. The judges have created a master docket for submitting filings related to the Camp Lejeune litigation and appointed a plaintiffs' leadership group. See *In re Camp Lejeune Water Litigation*, No. 23-cv-897 (E.D.N.C.). The judges have adopted joint protocols for discovery, trial, and settlement. And pursuant to the court's orders, the parties have identified the first 25 cases to be tried, with those trials scheduled to begin by 2026.

The plaintiffs' leadership group filed a master complaint, which (among other things) demanded a jury trial on plaintiffs' CLJA claims. Pet. App. 110a. The United States moved to strike the jury trial demand, *id.* at 10a, explaining that the Seventh Amendment does not guarantee a jury trial in actions against the federal government and that the CLJA does not independently confer such a right.

b. In an order signed by all four district judges overseeing the Camp Lejeune litigation, the district court

granted the motion to strike, concluding that the CLJA does not grant plaintiffs the right to trial by jury.

The district court explained that the operative question is "whether Congress 'unequivocally expressed' and 'affirmatively and unambiguously' granted the right to a trial by jury in the CLJA," so as to have "'clearly and unequivocally' departed from its usual practice of not permitting a jury trial against the United States." Pet. App. 22a (quoting *Lehman* v. *Nakshian*, 453 U.S. 156, 160, 162, 168 (1981)). The court determined that "[n]o part of the CLJA's text contains an unequivocal, affirmative, and unambiguous right to a trial by jury against the United States." *Id.* at 27a. The court emphasized that the sole provision in the CLJA that references a jury trial is "phrased in the negative," stating only that the statute "does '[n]othing' to 'impair the right of any party to a trial by jury' that may exist outside subsection 804(d)." *Id.* at 33a, 40a (brackets in original) (quoting CLJA § 804(d), 136 Stat. 1803). Section 804(d), the court explained, thus cannot be construed to "affirmatively[] and unambiguously provide plaintiffs the right to a trial by jury in actions" brought under the CLJA. *Id.* at 41a-42a.

c. Although their cases are not in the first group slated for trial and are currently stayed for all purposes, see D. Ct. Doc. 25, at 4, the two petitioners here—Susan McBrine and David L. Petrie—moved to certify the jury-trial issue for interlocutory appeal under 28 U.S.C. 1292(b). The district court declined to certify its order, finding no "substantial ground for a difference of opinion" on the merits of the legal question. Pet. App. 5a (citation omitted). The court explained that its ruling reflected a straightforward application of the governing "legal standard under *Lehman* * * * and other applicable

precedent and canons of construction." *Id.* at 6a-7a. The court further observed that the judges in the Eastern District of North Carolina are "prepared to proceed expeditiously with bench trials," and that any dissatisfied party "can challenge [the] ruling concerning jury trials" in an appeal from a final judgment. *Id.* at 7a.

3. Petitioners sought a writ of mandamus from the court of appeals. Pet. App. 1a. After full briefing, the Fourth Circuit summarily denied mandamus. *Ibid.* The court of appeals also denied rehearing en banc, with no judge requesting a vote. *Id.* at 50a.

ARGUMENT

Petitioners renew their contention (Pet. 12-30) that thousands of plaintiffs who have already sued the United States under the Camp Lejeune Justice Act, and potentially scores of thousands more, are entitled to trials by jury, all in the Eastern District of North Carolina. All four district judges overseeing the Camp Lejeune litigation rejected that argument, all four judges declined to certify the issue for interlocutory review, and the court of appeals summarily declined to issue a writ of mandamus. That is because a "plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute," *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1981), and the CLJA contains no such affirmative or unambiguous grant. The district court correctly applied *Lehman*'s settled rule to the statutory text at issue here, and that decision does not conflict with any decision of this Court or another court of appeals. Review by the Court is particularly unwarranted at this time because the decisions below are interlocutory.

Petitioners' contention (Pet. 30-35) that this Court should grant review on the question whether the ordinary mandamus factors apply to an alleged denial of a statutory jury-trial right likewise does not warrant review. The court of appeals' order does not shed light on which factors the court relied upon. And petitioners do not identify any decision by any court holding that a plaintiff alleging denial of a statutory jury-trial right need not satisfy the ordinary mandamus factors to obtain relief.

1. The four district judges overseeing the Camp Lejeune litigation correctly rejected petitioners' jury-trial request, and the court of appeals correctly denied the extraordinary remedy of mandamus.

a. The Seventh Amendment preserves the right to trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. Amend. VII. Because there was no right to trial by jury at common law for claims against the sovereign, "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); see *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) (describing that understanding as "settled law").

Although a federal statute can grant a right to trial by jury even where the Seventh Amendment does not, Fed. R. Civ. P. 38(a), Congress has "almost always conditioned" any waiver of the United States' sovereign immunity "upon a plaintiff's relinquishing any claim to a jury trial," *Lehman*, 453 U.S. at 161. And like the "waiver of [sovereign] immunity itself," the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions

thereto are not to be implied." *Id.* at 160-161 (citation and internal quotation marks omitted). *Lehman* thus made clear that to determine whether a statute confers a jury-trial right against the United States, the "appropriate inquiry" is "whether Congress clearly and unequivocally departed from its usual practice" by "affirmatively and unambiguously grant[ing] that right by statute." *Id.* at 162, 168.

Here, the CLJA contains no language "grant[ing]" plaintiffs the right to a jury trial—let alone granting that right "affirmatively and unambiguously." *Lehman*, 453 U.S. at 168.

Petitioners principally rely (Pet. 17-22) on the CLJA's "Exclusive Jurisdiction and Venue" provision. The first sentence of that provision vests "exclusive jurisdiction" over CLJA actions in the Eastern District of North Carolina and makes that district court the "exclusive venue" for such suits. CLJA § 804(d), 136 Stat. 1803. The second sentence states that "[n]othing in this subsection shall impair the right of any party to a trial by jury." *Ibid.* Petitioners' claim that the CLJA authorizes jury trials against the United States for thousands of existing claimants (and potentially scores of thousands more) rests on that second sentence.

But by its terms, that sentence does not affirmatively grant *anything*. Instead, that provision "is phrased in the negative," Pet. App. 40a, providing that "[n]othing" in Section 804(d) shall "*impair*" the right of any party to a jury trial. CLJA § 804(d), 136 Stat. 1803 (emphasis added). "Impair" means "to make or cause to become worse," or to "diminish," "weaken," or "damage." *The Random House Dictionary of the English Language Unabridged* 958 (2d ed. 1987); see also, *e.g.*, *Oxford English Dictionary* 696 (2d ed. 1989) (defining

"impair" to mean "[t]o make worse, less valuable, or weaker; to lessen injuriously; to damage, injure"). The CLJA thus cautions that nothing in subsection (d) should be construed to diminish or lessen "the right of any party to a trial by jury" that might otherwise attach because of some legal basis independent of the CLJA, § 804(d), 136 Stat. 1803—but the CLJA does not itself create any such right.

This Court reached a similar conclusion in analyzing a statutory provision with parallel syntax in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004). There, the Court examined Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which provides an express cause of action to allow persons who have undertaken efforts to clean up properties contaminated by hazardous substances to seek contribution from other parties "during or following" specified civil actions. 42 U.S.C. 9613(f)(1); *Cooper Industries*, 543 U.S. at 160, 162-163. The last sentence of Section 113(f)(1) then provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution" in the absence of the specified civil actions. 42 U.S.C. 9613(f)(1). This Court rejected the argument that the quoted sentence "itself establish[es] a cause of action" for contribution or "authorize[s]" any additional actions for contribution. *Cooper Industries*, 543 U.S. at 167. Instead, the Court explained, "[t]he sole function of the sentence is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)." *Id.* at 166-167. The same holds true here: the "sole function" of the second sentence of Section 804(d) of the CLJA is to "clarify" that subsection (d) "does nothing

to diminish" any jury trial right "that may exist independently" of that subsection—it does not "itself establish" any jury-trial right. *Ibid.*[1]

Importantly, Section 804(d)'s text sharply contrasts with the kind of language Congress used in other statutory provisions when it plainly did intend to grant a jury trial right in suits against the United States. For example, 28 U.S.C. 2402 grants a jury-trial right for certain tax-refund claims by providing that "any action against the United States [for such claims] shall, at the request of either party to such action, be tried by the court with a jury." Similarly, the Presidential and Executive Office Accountability Act specifies that, in certain actions by federal employees against executive agency employers, "any party may demand a jury trial where a jury trial would be available in an action against a private defendant under the relevant law." 28 U.S.C. 3901(b). Nothing approaching that sort of affirmative language appears in the CLJA. See Pet. App. 24a.

That is not to suggest that Congress must use "magic words," Pet. 25, to grant a jury-trial right against the United States. As noted above, there is no dispute that Congress can use, and has used, various formulations to grant jury-trial rights—the only, but essential, requirement is that Congress speak affirmatively and unambigu-

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[1] As petitioners observe (Pet. 23), the Court in *Cooper Industries* also emphasized that a contrary reading of Section 113(f)(1) would render superfluous a separate provision establishing a cause of action for contribution in specific circumstances. See 543 U.S. at 167. But that additional reasoning does not undermine the Court's assessment that Congress uses constructions like "nothing in this subsection shall diminish"—parallel to Section 804(d)'s "nothing in this subsection shall impair"—to make clear that the subsection in question does not affect rights that exist "independently" of the subsection in question. *Cooper Industries*, 543 U.S. at 166-167.

ously. See pp. 6-7, *supra*. And here, the four district judges considered "the CLJA's entire text" and utilized ordinary tools of statutory interpretation in determining that "[n]o part of the CLJA's text contains an unequivocal, affirmative, and unambiguous right to a trial by jury against the United States," Pet. App. 27a—exactly the sort of "careful examination" that petitioners say is required, Pet. 16.

Congress's decision *not* to create a new jury trial right for CLJA actions, moreover, is consistent with the nature of the cause of action and the history of tort litigation against the United States. For almost 80 years, since the FTCA's enactment in 1946, tort claims against the United States have proceeded without a jury. See 28 U.S.C. 2402. In declining to grant a jury-trial right against the United States in the CLJA, Congress thus continued the long tradition that "in tort actions against the United States," "trials shall be to the court without a jury." *Lehman*, 453 U.S. at 161.[2]

b. Petitioners' contrary arguments lack merit. Most fundamentally, petitioners openly rely on speculation about "expectation[s]" (Pet. 17) and "misimpression[s]" (Pet. 18) that Congress might have had—a mode of analysis that runs headlong into this Court's mandate that no jury-trial right is available in suits against the

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[2] Petitioners get things backwards in emphasizing (Pet. 22-23) that Congress did not repeat "the FTCA's bar on jury trials" in the CLJA. Congress need not act to *preclude* jury trials against the United States, but rather must affirmatively act if it wishes to *grant* a jury-trial right (as it did for tax-refund suits in the same provision that confirms that jury trials are not generally available in FTCA actions, 28 U.S.C. 2402). Here, no language in the CLJA affirmatively grants such a right.

United States absent clear and affirmative statutory language granting such a right. See pp. 6-7, *supra*.

But petitioners' arguments also fail on their own terms. For example, petitioners emphasize that subsection (d) "expressly preserves '*the* right' to a jury trial," and that "[t]he 'use of the definite article' connotes that the noun that follows—here, 'right'—is 'specifically provided for.'" Pet. 17 (quoting *Nielsen* v. *Preap*, 586 U.S. 392, 408 (2019); CLJA § 804(d), 136 Stat. 1803). Petitioners argue that subsection (d) must therefore "refer to a right that *actually* exists, not merely the abstract possibility that a jury-trial right *might* exist." *Ibid.*

That reasoning is difficult to follow. In *Nielsen*, this Court explained that the "scope" of a statutory reference to "the alien" referred to an alien that was "specifically provided for"—that is, "previously specified"—in preceding references to an alien who had committed certain predicate offenses. 586 U.S. at 407-408 (citation omitted). Here, however, it is undisputed that no preceding provision in the CLJA "specifically provide[s]" or "previously specifie[s]," *id.* at 408 (citation omitted), a jury-trial right to which the second sentence in Section 804(d) could be referring. Nothing in *Nielsen* supports the notion that Congress's mere use of a "definite article" in Section 804(d) suffices to itself grant a jury trial right for CLJA actions absent any previous references to such a right—particularly when Section 804(d) is not framed as an affirmative grant of rights at all.

Petitioners argue (Pet. 17) that "[i]t makes no sense" for Congress to have "preserve[d] something that doesn't exist." But there is nothing strange about Congress making clear that Section 804(d) of the CLJA does not disturb any right to a jury that might otherwise attach, "in a more general excess of caution," *Cyan, Inc.*

v. *Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 435 (2018), given the risk that Section 804(d)'s restrictions on venue and jurisdiction might be misunderstood to restrict other rights. In any event, the existence of a jury-trial right in some CLJA suits is not an "abstract possibility," Pet. 17; indeed, petitioners do not dispute that "a fraud counterclaim asserted by the government against a CLJA plaintiff" and "third-party complaints by the United States against other entities or persons" could give rise to the right to a jury trial, Pet. 19, 20; see Pet. App. 33a (explaining that Section 804(d) makes clear that the CLJA does not "'impair the right of any party to a trial by jury' that may exist outside subsection 804(d), including for a third-party complaint or a counterclaim") (citation omitted). What actually "makes no sense," then, is petitioners' reading of subsection (d): that Congress tried to create an unprecedented jury-trial right in vastly expansive tort litigation against the United States by saying that "nothing" in subsection (d) of the CLJA shall "impair" such a right, notwithstanding the settled rule that any such right must be granted clearly and affirmatively.

Petitioners' assertion (Pet. 17) that the second sentence of Section 804(d) "unmistakably reflects Congress's expectation that CLJA plaintiffs could elect to try their cases to juries" thus lacks merit. To the contrary, as already explained, the plain text of Section 804(d) embodies Congress's determination that the CLJA would not *disturb* any party's right to a jury, leaving courts to determine whether a case should be tried to a judge or a jury based on legal doctrines independent of the CLJA. Equally fundamentally, any such "expectation" would not suffice to establish a jury trial right under the CLJA. As already explained, this Court

has long made clear that it will not construe a statute to confer a jury-trial right against the United States absent "affirmative[] and unambiguous[]" language "grant[ing]" such a right, *Lehman*, 453 U.S. at 168—and that long-settled rule is precisely the kind of "common rule[] with which [courts] presume congressional familiarity," *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Accordingly, petitioners' speculation about Congress's "expectation" is not a basis for interpreting the CLJA to confer a jury trial right in tort suits against the United States absent any explicit language to that effect.[3]

Petitioners do not advance their argument by pointing (Pet. 23) to the first sentence in the jurisdiction and venue provision, which establishes that the U.S. District Court for the Eastern District of North Carolina "shall have exclusive jurisdiction" and "shall be the exclusive venue" for CLJA actions. CLJA § 804(d), 136 Stat. 1803. As already explained, the most natural understanding of why Congress "house[d]" (Pet. 23) the jury-trial language in Section 804(d) is that Congress may have been concerned that restricting venue and jurisdiction

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[3] Petitioners similarly argue (Pet. 18) that they are entitled to a jury trial because Congress may have been operating "under the misimpression that courts presumptively construe statutes like the CLJA to authorize jury trials against the United States." There is no basis to assume that Congress was operating under that (obviously mistaken) "misimpression"; as already explained, it is far more likely that Congress acted to ensure that, although subsection (d) of the CLJA restricts venue and jurisdiction to a particular district court, that subsection should not be understood to restrict other rights a party might have. Moreover, speculation that Congress was operating under a "misimpression" cannot suffice to establish that a plaintiff has a jury-trial right in an action against the United States.

to a particular district court might be misunderstood to restrict other rights (such as a jury-trial right that might otherwise attach in CLJA suits). Petitioners' assertion that "[t]he phrasing of the second sentence as a caveat to [the first sentence's] grant of exclusive jurisdiction" instead makes clear that "the exclusive jurisdiction of the Eastern District does not authorize the district court to resolve questions of fact," Pet. 23 (emphasis omitted), simply rewrites the statutory text, which says nothing about whether the district court has authority to resolve questions of fact.

Petitioners' attempts (Pet. 17-18) to analogize Section 804(d)'s syntax to that of the Second, Fourth, and Seventh Amendments likewise fail. None of those provisions contains anything akin to the CLJA's "[n]othing * * * shall impair" language, which makes clear that the CLJA does not disturb any jury-trial rights that might otherwise exist, but also does not itself affirmatively grant any plaintiff a new jury-trial right.

Nor can petitioners overcome the need for clear statutory authority by resorting to legislative history. A "plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute," *Lehman*, 453 U.S. at 168; the grant "must be both unequivocal and textual," *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989). And in any event, "[p]ost-enactment legislative history" of the sort petitioners present here —premised on the views of one Member of Congress expressed over a year after the CLJA's passage (see Pet. 24)—does not "shed light" on what legislators had in mind "when they voted" on the law. *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011). Indeed, this case highlights the hazards of relying on such after-the-fact

statements, because the contemporaneous legislative record reflected a widespread understanding that legislators viewed the CLJA action as creating a type of action "under the Federal Tort Claims Act," and such FTCA actions have always been tried without a jury. Pet. App. 45a-46a (citations omitted); see p. 10, *supra*.

Petitioners also emphasize that while the bill that became the Camp Lejeune Justice Act was pending before Congress, the Office of Legislative Affairs in the Department of Justice offered technical assistance that advocated for an alternative "no-fault compensation scheme" and raised several equitable and administrative concerns with permitting litigation in federal court. Pet. 23; see Pet. App. 113a. Based on a preliminary assessment, that assistance incorrectly assumed that the proposed legislation would "permit[] jury trials that would not be available under the FTCA." Pet. App. 114a; *id.* at 115a-116a (warning that allowing such cases to be tried in court "potentially before a jury" would be "expensive and time-consuming" and may "produce a broad range of remedial outcomes"). But Congress's subsequent decision to enact the CLJA "without removing or altering" language, Pet. 23-24, does not shed light on the question whether the CLJA grants plaintiffs a jury-trial right. Legislators may well have recognized that there was no need to make revisions on this score because, under cases like *Lehman*, the statutory language (as proposed and enacted) does *not* grant a jury trial right. Cf. *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (noting that Congress's failure to adopt a proposal may reflect the judgment that the legislation already encompasses that proposal).

It is far more telling that petitioners have not identified, and the United States is not aware of, "a single

reference in the legislative history" to any Member of Congress mentioning "the subject of jury trials in cases brought against the Federal Government." *Lehman*, 453 U.S. at 166. Petitioners' position rests on the unfounded assumption that Congress departed from the established principle that jury trials are unavailable against the United States without a word of discussion about the consequences that thousands of potential jury trials would have for the United States, the district court, and the people in the Eastern District of North Carolina. That assumption is especially hard to square with the reality that Congress had before it ready models in other statutes, see, *e.g.*, 28 U.S.C. 2402, 3901(b), as well as a bill co-sponsored by one of the CLJA's principal proponents, see H.R. 5375, 113th Cong., 2d Sess. § 3 (2014), granting an affirmative, unambiguous waiver.

c. The decision below does not conflict with any decision of this Court or any other court of appeals.

i. The district court's decision striking the jury-trial demand rested squarely on this Court's holding in *Lehman* that Congress must "affirmatively and unambiguously grant[]" a jury trial "right by statute" in order for a plaintiff to assert such a right in a suit against the United States. *Lehman*, 453 U.S. at 168. Indeed, petitioners at times seemingly concede that the district court's decision—which looked to "whether the statute 'clearly and unequivocally granted a right to trial by jury' and whether 'Congress has affirmatively and unambiguously granted that right by statute'"—engaged in precisely the analysis that *Lehman* required. Pet. 26 (alteration omitted) (quoting *Lehman*, 453 U.S. at 162, 168).

At other times, however, petitioners suggest that the district court erred because, under this Court's precedents, a jury-trial right against the United States can be inferred from something less than affirmative and unambiguous language granting such a right. See, *e.g.*, Pet. 16 (suggesting that it is appropriate to find a jury trial right in the CLJA by "implication"). That is incorrect—as evidenced by petitioners' reliance on inapposite decisions from this Court that pre-date *Lehman*, see Pet. 15-16.

In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), for example, the Court determined that individuals have a right to jury trial when suing their private employers for monetary damages under the Age Discrimination in Employment Act of 1967. *Id.* at 585. Because the case arose in the context of a private civil action, the Court had no occasion to address the clarity with which Congress must speak when authorizing a jury trial against a government entity. See *Lehman*, 453 U.S. at 163 (distinguishing *Lorillard* on the basis that it involved "litigation between private parties").

Galloway v. *United States*, 319 U.S. 372 (1943), similarly does not undermine the standard set forth in *Lehman*. In *Galloway*, this Court in dictum left open the possibility of a jury trial right in a disability suit against the United States under the War Risk Insurance Act, in order to reach its holding that entry of a directed verdict would not compromise any such right, even if it were to exist. *Id.* at 388. In a footnote, the Court discussed the potential basis for a jury trial under the relevant law, noting that Congress had amended the statute at issue to remove language that expressly precluded jury trials against the United States. See *id.* at 389 n.18.

Lehman's references to *Galloway* do not in any way undercut the standard that *Lehman* actually announced. In *Lehman*, this Court cited *Galloway* to support the unremarkable propositions that "the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government," *Lehman*, 453 U.S. at 160, and that legislation enacted by Congress therefore dictates the circumstances in which jury trials are available in such actions, *id.* at 162. There is no basis for petitioners' apparent view that in citing *Galloway* for those settled propositions, the *Lehman* Court actually held that a jury trial right against the United States can be inferred without any express statutory language granting such a right. Indeed, that would directly contradict the express holding of *Lehman* itself that Congress must "affirmatively and unambiguously grant[]" the right "by statute." *Id.* at 168.

The more recent decisions that petitioners invoke (Pet. 13-14) only reinforce the vitality of *Lehman*'s mode of analysis. Neither *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42 (2024), nor *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 599 U.S. 382 (2023), examined the question whether jury trials are permitted in suits against the United States. But both cases reaffirmed that "a waiver of sovereign immunity must be unmistakably clear in the language of the statute." *Kirtz*, 601 U.S. at 49 (quotation marks omitted); *Lac du Flambeau*, 599 U.S. at 387. Applying that test, the Court in each case found an explicit waiver in the statute's text, which affirmatively authorized relief against "any person," including "any governmental agency," *Kirtz*, 601 U.S. at 50 (alterations and citations omitted), and against "governmental unit[s]," including

the United States, States, and "other foreign or domestic government[s]," *Lac du Flambeau*, 599 U.S. at 388-903 (citation omitted). Here, the CLJA's text does not contain any language affirmatively granting a jury-trial right against the United States.

Finally, petitioners briefly suggest for the first time in these proceedings that it would be appropriate to "limit [*Lehman*] to its specific holding on the [statute at issue]" or to "reconsider [this Court's] holding * * * that the Seventh Amendment does not require jury trials in actions against the government." Pet. 26-27. Neither of these newly raised issues is fairly included in or encompassed by the questions presented in the petition. See Pet. i; *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (holding that discussion of an issue "in the text of [a] petition for certiorari" is insufficient to bring the issue before the Court).

Regardless, both the constitutional and statutory holdings have storied pedigrees. This Court has many times affirmed as "settled law" the proposition that the Seventh Amendment does not apply in suits against the United States. *City of Monterey*, 526 U.S. at 719; see *Lehman*, 453 U.S. at 160; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Petitioners provide no justification for upending centuries of established practice that Congress must expressly provide for jury trials against the United States by statute.

And *Lehman*'s requirement that such statutory grants must be clear and unambiguous derives from the venerable principle dating back to the Founding that the United States as sovereign may set the conditions on which it consents to be sued. See *Schillinger* v. *United States*, 155 U.S. 163, 166 (1894) (explaining that

Congress may "specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 148-151 (2010). This Court "ha[s] said on many occasions that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text," *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012) (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996), and citing other examples), and has applied that rule to "construe any ambiguities in the scope of a waiver in favor of the sovereign," *id.* at 291. The jury-trial right is one such context in which questions about the scope of a waiver can arise—and this Court has thus held that Congress must clearly and unambiguously grant any such right. See *Lehman*, 453 U.S. at 160-162.

ii. Nor is there any conflict in the court of appeals on the relevant legal question; petitioners have not identified any court of appeals that has applied a different test to determine whether a statute confers a jury-trial right against the United States or that has understood *Lehman* in a manner inconsistent with the decision here. To the contrary, the district court collected numerous examples where courts of appeals "have applied *Lehman*" in the same fashion to determine that various federal statutes "did not grant plaintiffs the right to a jury trial against the United States." Pet. App. 39a-40a. Indeed, the absence of any dispute over the operative legal inquiry is precisely why four district judges unanimously declined to certify the jury-trial question for interlocutory appeal here, after unanimously rejecting petitioners' position on the merits.

Petitioners correctly observe (Pet. 30) that all suits under the CLJA must be brought in the Eastern

District of North Carolina. But notwithstanding that "no other court of appeals will address the" CLJA, the broad consensus among the circuits across a range of statutory schemes underscores that courts are not divided on the import of *Lehman*'s standard. And at bottom, the district court simply "applied the correct legal standard under *Lehman* * * * and other applicable precedent and canons of construction" to conclude that the CLJA does not confer a right to trial by jury. Pet. App. 6a-7a. That straightforward application of settled and agreed-upon legal principles to the CLJA was correct and does not warrant further review.

d. Review of the jury-trial question would also be premature because the court of appeals' decision denying mandamus relief is interlocutory. As petitioners do not dispute (Pet. 29), these cases will proceed in the district court and petitioners will be able to raise their jury-trial claim, together with any other claims that may arise from future proceedings in the lower courts, in a single appeal and, ultimately, in a petition for a writ of certiorari, following those proceedings. The lack of a final judgment is itself a sufficient basis to deny certiorari at this juncture. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Petitioners' concerns (Pet. 28-29) about timing and resources are misplaced. "[T]he burden of correcting a mistaken denial of jury trial is easily equaled by the burdens of correcting many other types of errors that cannot be reviewed before final judgment." Charles Alan Wright, et al., *Federal Practice and Procedure* § 3935.1, at 698 (3d ed. 2012). And here, the district

court has engaged in various forms of case management to ensure the fair and orderly resolution of the thousands of CLJA cases already filed and the possibly scores of thousands of CLJA actions yet to be filed. See p. 3, *supra*. The judges are "prepared to proceed expeditiously with bench trials." Pet. App. 7a. And petitioners acknowledge the high probability that "the first slate of trials will occur before this Court would issue a decision on the merits." Pet. 29. Petitioners' request to empanel juries would threaten unnecessary delay and disruption, particularly when no judge has expressed agreement with their position on the merits. Once the first set of trials has concluded, the court of appeals can take up this issue, and any others that arise, in an appeal from a final judgment (reviewable on certiorari by this Court as appropriate), and its disposition can then guide the remaining thousands of cases. Injecting this Court into the proceedings now would not promote judicial economy.

Furthermore, the district court found that petitioners could not satisfy the requirements of 28 U.S.C. 1292(b) for an interlocutory appeal. In that statute, Congress made the judgment that interlocutory review is warranted only where a district court certifies that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion," and "immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b). Here, the four district judges unanimously concluded that the jury trial ruling did not qualify for that exception to the usual rule of finality. See Pet. App. 2a-9a. Review of the substance of the district court's jury-trial decision by reviewing the court of appeals' denial of mandamus relief is particularly unwarranted in

these circumstances. Cf. *City of Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258 (1949) ("It is argued that the importance of an interlocutory order denying or granting jury trial is such that it should be appealable. Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions.").

Moreover, the "lack of an appellate opinion," Pet. 30, would frustrate this Court's review. The court of appeals stated only that "[u]pon consideration of the petition for writ of mandamus, the court denies the petition." Pet. App. 1a. As petitioners acknowledge (Pet. 11), that disposition does not establish whether the court of appeals agreed with the district court's substantive analysis of the jury-trial question or instead determined that petitioners failed to satisfy another traditional mandamus factor. Particularly given that uncertainty, the most productive course would be to await a reasoned decision from the court of appeals in an appeal from a final judgment and at that time examine whether the criteria for granting certiorari are satisfied. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (This Court is one "of review, not of first view.").

2. Petitioners also contend that this Court should grant certiorari to address whether parties who allege they have been denied a right to trial by jury may obtain mandamus relief without satisfying the "ordinary criteria." Pet. 32; see Pet. 30-35. Petitioners' position, seemingly, is that parties who have been denied a statutory right to trial by jury may categorically obtain mandamus relief without showing that they lack "other adequate means to attain the relief" and that issuance of the writ is "appropriate under the circumstances,"

Cheney v. *United States Dist. Court for D.C.*, 542 U.S. 367, 380-381 (2004) (citation omitted); see Pet. 32.

This would be an unsuitable vehicle in which to address that question because the court of appeals' summary order does not explain the basis for denying the petition. See p. 23, *supra*. Instead, petitioners can only speculate about the basis for the denial. Given *Lehman*'s clarity and its obvious application to the CLJA, the court of appeals may well have agreed with the district court on the merits that CLJA plaintiffs are not entitled to a jury trial—which even petitioners agree would be a valid basis for denying mandamus. It makes little sense to grant certiorari to review whether the court of appeals could have appropriately relied on other factors when there is no indication that the court in fact relied on such factors.

Review of this question is unwarranted in any event. Petitioners appear to assert (Pet. 30-31) that appellate courts are obligated to grant mandamus whenever a district court erroneously denies a statutory right to a jury trial. But no court has so held. Indeed, petitioners make no attempt to square their arguments with the discretionary nature of the writ of mandamus, which "may" be issued where "necessary or appropriate" to protect the court's jurisdiction to resolve a legal issue at a later stage. 28 U.S.C. 1651(a). Nor do plaintiffs address this Court's teachings that mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes" satisfying three demanding conditions, *Cheney*, 542 U.S. at 380 (citation omitted), and that "[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy," *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam).

Instead, petitioners rely (Pet. 32-33) on cases from this Court involving denials of the constitutional right to trial by jury, in circumstances where that right could not fully be vindicated in an appeal from a final judgment because of the presence of both legal and equitable claims. Petitioners emphasize, for example, this Court's statement in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 504 (1959), that "we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Id.* at 511. There, however, the plaintiff alleged a violation of the Seventh Amendment right to trial by jury and there was a substantial risk that an appeal at the end of the case would not result in all legal issues being tried to a jury. See *id.* at 504 (discussing risk that conducting a bench trial on equitable issues would "operate either by way of res judicata or collateral estoppel" to "limit the petitioner's opportunity fully to try [the legal issues] to a jury"). Petitioners likewise emphasize this Court's statement in *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), noting "the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." *Id.* at 472. But *Dairy Queen*, again, involved the Seventh Amendment jury-trial right and a risk that an appeal at the end of the case would not be able to fully vindicate that right, given the existence of both equitable and legal claims. *Id.* at 478-480.

Even if unique treatment were appropriate for Seventh Amendment jury-trial rights in certain circumstances, petitioners here primarily allege a statutory jury trial right. And nothing prevents dissatisfied CLJA plaintiffs, including petitioners, from fully

vindicating any improper denial of that jury-trial right if they prevail on appeal from a final adverse judgment.[4]

Nor is there any conflict in the courts of appeals over the appropriate mandamus standard for alleged denials of a statutory jury-trial right. The decisions that petitioners cite (Pet. 33-34) largely dealt with the constitutional right. In one of the cited cases, *In re Vorpahl*, 695 F.2d 318 (1982), the Eighth Circuit denied a writ of mandamus because neither the Seventh Amendment nor the Employee Retirement Income Security Act of 1974 granted the plaintiffs a right to jury trial. *Id.* at 318-319. The court thus had no reason to decide whether mandamus is available based solely on a meritorious claim to a jury trial under a federal statute. Petitioners assert (Pet. 34) that there is no basis for distinguishing between statutory and constitutional jury-trial rights, but this Court has long recognized that alleged constitutional violations may sometimes warrant particular judicial review procedures. See, *e.g.*, *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 195 (2023). In any event, the fact that no court of appeals has ever adopted petitioners' preferred rule—*viz.*, that appellate courts are obligated to grant mandamus whenever a district court erroneously denies a statutory right to a jury trial—counsels against granting review on that issue here.

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[4] The other cases that petitioners invoke (Pet. 31-32) are even further afield. *In re Skinner & Eddy Corp.*, 265 U.S. 86 (1924), and *In re Peterson*, 253 U.S. 300 (1920), predated the creation of the modern system of appeals, arising during a period when this Court directly reviewed rulings from trial courts. The cases stemmed, respectively, from an order declining to allow the plaintiff to dismiss its lawsuit and an order referring a preliminary hearing to an auditor, not from decisions involving the alleged denial of a jury-trial right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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