No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,
v.
GEORGE R. JARKESY, JR., *ET AL.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 68 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws." Our U.S. members' principal activities include registering securities offerings, licensing and examining brokers and investment advisers who sell securities or provide investment advice, and pursuing enforcement actions to combat fraud and other violations of state securities laws. The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA supports the work of its members and the investing public by, among other things,

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

promulgating model rules, providing professional development programs, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemakings. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws, securities regulation, and investor protection.

NASAA and its members have a substantial interest in this case. State and federal securities laws form an interlocking and complementary regulatory system to confront and eliminate fraud and other abuses involving securities and investment advice. In order for that system to work properly, federal and state authorities must be able to use the tools provided to them, including administrative adjudication of enforcement actions. The Court's decision in this case could also have ripple effects in state courts as they interpret their own laws. Accordingly, NASAA respectfully submits this brief in support of the continued ability of the Securities and Exchange Commission ("SEC") to enforce the federal securities laws as intended by Congress.

SUMMARY OF ARGUMENT

In the proceedings below, the court of appeals held that the Seventh Amendment prohibits the SEC from pursuing administrative enforcement proceedings that seek civil penalties for violations of the antifraud provisions in the federal securities laws. In reaching that conclusion, the court of appeals

erroneously concluded that the SEC's enforcement action against Jarkesy "is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine." However, the court misapplied the relevant law, and failed to properly consider the purpose, history, and context of the federal securities laws. The SEC's enforcement action to seek civil penalties for Jarkesy's violation of the federal securities laws is precisely the sort of action that may be properly entrusted to agency adjudication under the "public rights" doctrine as applied by this Court in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). The court of appeals' decision must therefore be reversed.[2]

Our Nation's capital markets function and prosper in large part due to investors' trust in the fairness and efficiency of those markets. Maintaining that trust is essential to the Nation's economic wellbeing and relies on effective regulation – including enforcement. State and federal securities laws are designed to maintain this trust by protecting the investing public and the markets from all manner of fraud, manipulation, and other abuses involving securities and investment advice. The securities laws provide regulators with a flexible array of tools to

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[2] This brief is respectfully limited to the first of three questions presented; namely, whether statutory provisions that empower the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment. *See* Brief for the Petitioner, (I), *SEC v. Jarkesy*, No. 22-859 (Aug. 28, 2023) ("SEC Brief").

achieve that purpose, including the ability to enforce the law through administrative proceedings.

In *Atlas Roofing*, this Court held that, under the "public rights" doctrine, "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact" may be adjudicated in an administrative forum without violating the Seventh Amendment. 430 U.S. at 450. In that case, Congress had identified an important public problem, found that existing legal remedies were inadequate to protect the public, and created new causes of action to be pursued by the government that were distinct from the common law.

Like *Atlas Roofing*, the securities laws are designed to redress public, not private, harm. Congress enacted the federal securities laws to confront and eliminate the fraudulent, manipulative, and otherwise abusive practices that contributed to the 1929 stock market crash and the Great Depression. The antifraud provisions serve an important preventive function, and the federal civil liability provisions are calculated to compel compliance through an *in terrorem* effect. Both this Court and Congress have also made clear that regulators and law enforcement authorities have a unique and distinct role in enforcing the securities laws that is both different from and broader than that afforded to private litigants. Regulators enforce the securities laws not as representatives of harmed investors, but as representatives of the public interest. They seek to protect investors and the

markets generally by deterring and preventing conduct that has been deemed unacceptable by the government on behalf of the public.

Like *Atlas Roofing*, government securities regulation is necessary because the common law affords insufficient protection from securities fraud and is unsuited for policing the securities markets. For private plaintiffs, the common law prior to the Securities Act was not well-suited to dealing with securities misconduct. Contract law was of limited use unless the defendant had breached an express covenant, and theories such as warranty and rescission were similarly lacking. The tort theories of deceit and general fraud had developed in the context of other sorts of transactions and therefore did not lend themselves to the peculiarities of securities transactions. These causes of action generally did not permit recovery for statements that were unintentionally false, or statements that were technically true, but nonetheless misleading. Other requirements, such as privity and reliance, greatly limited the utility of these theories to transactions conducted on securities exchanges. Even in 1933, it was understood that the cost of litigation would prove to be prohibitive for many individual plaintiffs.

Like *Atlas Roofing*, state and federal legislatures responded to these inadequacies by creating new causes of action that were distinct from the common law, and empowering regulators to deter, prevent, and punish securities fraud and other violations. The most readily apparent difference between the securities antifraud statutes and the

common law is that the former apply to "any person," not only a seller in a particular transaction. Additionally, the securities antifraud statutes provide an avenue to relief for misleading half-truths. Regulators also are generally not required to prove that a wrongdoer acted with scienter, that any investor relied on any alleged false or misleading statement, or that alleged misconduct resulted in investor harm.

Like *Atlas Roofing*, Congress authorized the SEC to pursue enforcement of the federal securities laws administratively, without a jury. And as was the case in *Atlas Roofing*, the Seventh Amendment does not prohibit Congress from doing so. In holding to the contrary, the court of appeals relied on three additional factors: (1) whether requiring jury trials would "dismantle the statutory scheme," (2) whether it would "impede swift resolution of the statutory claims," and (3) whether securities fraud actions "are uniquely suited for agency adjudication." The first two factors are inapplicable to this case because they were articulated by this Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), to determine whether the public rights doctrine applies to claims *between private parties*. As the SEC explains regarding the third factor, there is no legal basis for such a limitation.

Even so, the court of appeals' analysis of these factors was flawed. The court of appeals' decision would surely go far to "dismantle the statutory scheme" by preventing the SEC from using the tools that Congress provided for the purposes for which

Congress provided them. It would also likely "impede swift resolution" of the SEC's enforcement actions because the agency would be forced to pile additional complex cases on already-crowded district court dockets, or else forego meritorious enforcement claims to the public's detriment. Finally, contrary to the efforts of the court of appeals to distinguish the federal securities laws from the statutory scheme in *Atlas Roofing*, the two statutory schemes are analogous in terms of their relationship to the common law.

For all of the foregoing reasons, this Court should reverse the court of appeals' decision and hold that the Seventh Amendment permits the SEC to seek penalties in an administrative forum for violations of the federal securities laws.

ARGUMENT

I. STATE AND FEDERAL SECURITIES LAWS PROVIDE REGULATORS WITH A FLEXIBLE ARRAY OF TOOLS TO POLICE THE MARKETS AND PREVENT FRAUD.

Our Nation's capital markets function and prosper in large part due to investors' trust in the fairness and efficiency of those markets. Maintaining that trust is essential to the continued primacy of the U.S. markets in an ever-increasingly competitive global marketplace. Effective regulation, including the work that state and federal regulators do to investigate suspected fraud and, where warranted, pursue enforcement actions, is integral to maintaining investor trust. Effective enforcement of

the securities laws serves to protect investors and the businesses that rely on markets to raise capital.

The federal securities laws – including, as relevant here, the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77a *et seq*., the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq*., and the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. § 80b-1 *et seq*. – are designed to confront and eliminate the various forms of fraud, manipulation, and other abuses that contributed to the 1929 stock market crash and the Great Depression. *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). As the SEC explains, the SEC was established to enforce these laws in order to protect investors, to maintain fair, orderly, and efficient markets, and to facilitate capital formation. *See* SEC Brief at 2-4.

In addition to the federal regulatory framework, every state has its own set of securities laws – commonly referred to as "Blue Sky Laws" – that are designed to protect investors against fraudulent and otherwise abusive practices involving securities and investment advice. *Cf. Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550 (1917) (original Ohio Blue Sky Law designed "to protect the public against the imposition of unsubstantial schemes and the securities based upon them"). Pursuant to these laws, state securities regulators have protected investors for over 100 years, longer than any other securities regulator. While certain provisions vary from state to state, most Blue Sky Laws require companies making securities offerings to register their offerings before

they can be sold in a particular state (unless an exemption is available), require firms and individuals involved in selling securities or providing investment advice to register with the state (unless an exemption is available), and grant state securities regulators broad authority to investigate and pursue enforcement actions where fraud or other misconduct occurs within their states.

This interlocking system of state and federal securities laws was purposefully designed "to root out all manner of fraud in the securities industry" and "meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits" by providing regulators with "the tools to accomplish that job." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1103, 1104 (2019).

Administrative enforcement is an essential tool to allow regulators to efficiently deter, prevent, and punish fraud and other regulatory violations. State and federal securities regulators routinely rely on administrative proceedings to protect investors from fraud and other abuses. *See* SEC, Addendum to Division of Enforcement Press Release, Fiscal Year 2022, 1 (Nov. 15, 2022), https://bit.ly/3qU0ka1 (SEC brought equal numbers of civil actions and standalone administrative proceedings in fiscal year 2022); Xin Zheng, *A Tale of Two Enforcement Venues: Determinants and Consequences of the SEC's Choice of Enforcement Venue After the Dodd-Frank Act*, 3, 15-16, (May 15, 2021), *available at* https://bit.ly/3syCYr4 (finding that the SEC was able to bring more cases post-Dodd-Frank Act and that the boost in

enforcement can be attributed to broader administrative enforcement powers); NASAA 2022 Enforcement Report, 3-4 (Sept. 2022), https://bit.ly/47RbtJs (based on reported data, state securities regulators pursued approximately 77% of enforcement actions administratively during 2021). These data show that administrative proceedings are an invaluable regulatory tool for regulators in carrying out their responsibilities under the securities laws.

II. SECURITIES ANTIFRAUD STATUTES VINDICATE PUBLIC RIGHTS AND CAN BE ENTRUSTED TO AN ADMINISTRATIVE FORUM WITHOUT VIOLATING THE SEVENTH AMENDMENT.

In *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, this Court held that, under the "public rights" doctrine, "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact" may be adjudicated in an administrative forum without violating the Seventh Amendment. 430 U.S. 442, 450 (1977); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68 (1989) (Scalia, J., concurring in part and concurring in the judgment) ("It is clear that what we meant by public rights were...rights *of the public* – that is, rights pertaining to claims brought by or against the United States.") (emphasis original). The *Atlas Roofing* Court explained that the Seventh Amendment did not "render[] Congress powerless when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to

regulate to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law such as an administrative agency in which facts are not found by juries." *Atlas Roofing*, 430 U.S. at 460.

The court of appeals erroneously held that the SEC's enforcement action seeking penalties for Jarkesy's violations of the federal securities laws "is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine." *Jarkesy v. SEC* ("*Jarkesy I*"), 34 F.4th 446, 455 (5th Cir. 2022). In reaching that conclusion, the court of appeals incorrectly determined that regulatory antifraud enforcement actions "are quintessentially about the redress of private harms," failed to meaningfully consider the relationship between the securities antifraud statutes and the common law, and relied heavily on additional factors that are inapplicable to the question at hand. *Id*. at 455-57. Viewed in full, the federal securities laws are on all fours with the facts that led this Court to uphold the statutory scheme in *Atlas Roofing*, and SEC enforcement actions can be entrusted to administrative adjudication without violating the Seventh Amendment.

A. The securities laws are designed to redress public, not private, harm.

The court of appeals incorrectly concluded that regulatory actions to "root out...fraud" involving securities, *Lorenzo*, 139 S. Ct. at 1104, "are quintessentially about the redress of private harms."

Jarkesy I, 34 F.4th at 458. But securities fraud does not only harm the individuals defrauded. Securities fraud undermines the integrity and fairness of the markets themselves, harming all who rely on those markets. This Court long ago recognized that the harms addressed by the securities laws are harms inflicted "upon the community," notwithstanding that "[t]he first incidence of any evil from a business or conduct is upon some individual." *Merrick v. N.W. Halsey & Co. et al.*, 242 U.S. 568, 585 (1917). Accordingly, Congress enacted the securities laws to regulate the markets not to provide a remedy to individual aggrieved investors, but to protect the Nation's markets and economy as a whole. *See* 15 U.S.C. § 78b;[3] H.R. Rep. No. 73-85, 2-3 (1933) (noting "the wastage that this irresponsible selling of securities has caused to industry" and the "wanton misdirection of the capital resources of the Nation"); H.R. Rep. No. 73-1383, 3 (1934) (discussing the need

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[3] The Exchange Act explains the necessity for regulation as follows:

> transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto...in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions[.]

to "change the practices of exchanges and the relationships between listed corporations and the investing public to fit modern conditions, for the very purpose that they may endure as essential elements of our economic system"); S. Rep. No. 73-792, 3 (1934) ("There can be little question that stock-market speculation is among the most potent of the factors which have contributed to the prolonged depression."); S. Rep. No. 76-1775, 12 (1940) ("[T]his legislation will tend to prevent those abuses which have been a stigma upon and impaired the usefulness of the investment trust industry as a whole.").

The antifraud provisions serve an important preventive function. *See* Louis Loss & Edward M. Cowett, Blue Sky Law, 21 (Little, Brown and Co., 1958) ("The simplest type of preventive provision, and within certain limits the most effective, is that which applies irrespective of any registration or licensing scheme."). Even the civil liability provisions of the securities laws are "calculated to be largely preventive rather than redressive," with the *in terrorem* effect of both the extent of potential liability and the simplification of the elements required for liability serving to compel compliance with the law. *See* Harry Shulman, *Civil Liability and the Securities Act* (hereinafter cited as "*Civil Liability*"), 43 Yale L. J. 227, 227, 242-53 (1933); H.R. Rep. No. 73-85, at 9-10 ("The responsibility imposed is no more nor less than that of a trust. It is a responsibility that no honest banker and no honest business man should seek to avoid or fear. To impose a lesser responsibility would nullify the purposes of this legislation.").

Both this Court and Congress have made clear that regulators and law enforcement authorities have a unique and distinct role in enforcing the securities laws that is both different from and broader than that afforded to private litigants. *See*, *e.g.*, *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979) (declining to recognize a private right of action under both Section 17(a) of the Securities Act, and Section 206 of the Advisers Act); *Central Bank, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (declining to recognize a private right of action to bring claims for aiding and abetting under Section 10(b) of the Exchange Act);[4] *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (same, because investors did not rely on their statements or representations); [5] *Morrison v. National Australia*

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[4] As the Court explained in *Stoneridge*:

> In § 10(b), Congress prohibited manipulative or deceptive acts in connection with the purchase or sale of securities. It envisioned that the SEC would enforce the statutory prohibition through administrative and injunctive actions. Of course, a private plaintiff now may bring suit against violators of § 10(b). But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b).

See also Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 143 (2011) (explaining that, under *Central Bank*, only the SEC may bring suit against aiders and abettors, not private plaintiffs).

[5] The Court expressed concern that extending the cause of action to private plaintiffs would lead to increased private litigation and undermine "Congress' specific response to

Bank, 561 U.S. 247 (2010) (holding that Section 10(b) of the Exchange Act did not provide a private cause of action for misconduct in connection with securities traded on foreign exchanges).[6]

Regulators thus enforce the securities laws not as representatives of harmed investors, but as representatives of the public interest. For example, the SEC's mission is not to compensate every investor who has lost money to fraud, but "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." SEC.gov, "About the SEC," https://www.sec.gov/strategic-plan/about. The SEC thus seeks to serve a broad and multifaceted constituency by "promot[ing] capital markets that inspire public confidence and provide a diverse array

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Central Bank in § 104 of the [Private Securities Litigation Reform Act]." *Id.* at 162. "Congress amended the securities laws to provide for limited coverage of aiders and abettors. Aiding and abetting liability is authorized in actions brought by the SEC but not by private parties." *Id.*

[6] Following *Morrison*, Congress distinguished between the SEC and private plaintiffs. In Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Congress confirmed the SEC's authority to enforce Section 10(b) of the Exchange Act in cases involving transactions outside the United States. Pub. L. No. 111-203, 124 Stat. 1864–65 (codified at 15 U.S.C. §§ 77v(c) & 78aa(b)). For private rights, Congress simply required the SEC to solicit public comment, conduct a study, and report to Congress as to whether, and the extent to which, such rights should extend to private plaintiffs. Dodd-Frank Act § 929Y, 124 Stat. 1871. *See also* Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934, SEC (2012), https://bit.ly/3OVwDgY.

of financial opportunities to *retail and institutional investors, entrepreneurs, public companies, and other market participants*." *Id.* (emphasis added).

Indeed, some harms can only be redressed effectively by the government on behalf of the public. One example is insider trading. Although "[a] significant purpose of the Exchange Act was to eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office," *see Dirks v. SEC*, 463 U.S. 646, 652 n.10 (1983), in most cases it will be difficult for an individual investor to discover the fraud or nondisclosure, let alone frame the injury. How does a private plaintiff adequately allege that they were harmed by an insider's use of or failure to disclose material nonpublic information if, for example, they did not purchase a security but allegedly would have done so if they had possessed the information?

When regulators take enforcement action, they do not directly represent the particular transactional or pecuniary interests of any one investor or group of investors. There is no guarantee that any successful enforcement action will result in compensation for harmed investors, nor are regulators obligated to do so if a different remedy more adequately protects the public's right to fair, transparent, and orderly markets. Remedies like industry bars, fines, and injunctions against violative conduct do not "redress private harms." *Jarkesy I*, 34 F.4th at 458. These remedies are exclusively government prerogatives, intended to protect investors and the markets generally by deterring and preventing conduct that

has been deemed unacceptable by the government on behalf of the public. Although state and federal securities regulators can generally order violators of securities laws to disgorge ill-gotten profits, levy fines, and impose other remedies that provide pecuniary relief to investors where these remedies are legally authorized,[7] the goal of government enforcement is to deter and punish conduct that harms the markets and all market participants collectively. The curtailment of governmental means of protecting public interests could harm our markets and leave investors more vulnerable. *See Aaron v. SEC*, 446 U.S. 680, 704 (1980) (Blackmun, J., concurring in part and dissenting in part) ("If the Commission is denied the ability effectively to nip in the bud the misrepresentations and deceptions that its investigations have revealed, honest investors will be the ones who suffer. Often they may find themselves stripped of their investments through reliance on information that the Commission knew was misleading but lacked the power to stop or contain.").

Even remedies that compensate investors also serve as a powerful deterrent. As this Court has explained in the context of criminal prosecutions, restitution is effective because it "forces the defendant to confront, in concrete terms, the harm his actions

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[7] *See*, *e.g.*, 15 U.S.C. §§ 77h-1, 77t, 78u-2, 7246; Uniform Securities Act (1956), § 408(b), https://bit.ly/3P4WSme (authorizing rescission, restitution, and disgorgement in civil enforcement action); Uniform Securities Act (2002), §§ 603 (authorizing pecuniary remedies in civil enforcement action), 604 (same, in administrative enforcement action), https://bit.ly/44hWNQr.

have caused." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986); *Paroline v. U.S.*, 572 U.S. 434, 456 (2014) (noting that criminal restitution "serves punitive purposes"). In many cases, the deterrent effect of restitution will mean that compensating harmed investors will serve the public interest. However, in some cases – for example, a crumbling Ponzi scheme in which there are insufficient assets to fully compensate all victims – the public interest may be better served by ordering less than full restitution to the individual victims, despite each victim having a strong individual interest in full compensation for their losses. In other cases, regulators may determine that requiring a wrongdoer to take internal remedial steps to assure future compliance will better protect investors and the markets overall than would directing a firm's financial resources solely toward compensating individual investors. Thus, regulators may seek restitution when investors have suffered financial harm, but they are not required to do so. If an enforcement action includes restitution, the victim generally cannot enforce a right to receive payment of restitution ordered, nor does the victim control the decision to award restitution or the amount of restitution awarded.

In sum, regulators have many tools to enforce the law, but they do so to protect the rights of the public to fair, orderly, and efficient markets. Conduct that harms these interests therefore harms the public in a manner that is distinct from the harm done to individual market participants.

B. Government securities regulation is necessary because the common law affords the public insufficient protection from securities fraud and is unsuited for policing the securities markets.

The enduring need for state and federal regulation of securities is rooted in the inadequacy of preexisting legal remedies to address the problems that led to their enactment. This Court recognized as much in the context of the Blue Sky Laws, stating that Ohio's Blue Sky law was "made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures." *Hall*, 242 U.S. at 550.[8]

The common law prior to the Securities Act "was not consciously and especially moulded for the

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[8] Although most states had enacted Blue Sky Laws well before Congress enacted the federal securities laws, Congress recognized the interstate nature of securities transactions, especially transactions conducted on exchanges, and thus concluded that *federal* regulation was necessary to fully address the problems identified. *See* H.R. Rep. No. 73-1383, at *6 (explaining that the factors making the Exchange Act necessary included "the use of the security markets as interstate markets in which ownership passes from residents of one State to those of another; the constant use of the postal facilities for the conduct of these markets; the abundant use of the credit facilities of national banks and of member banks of the Federal Reserve System; [and] the effect of security prices upon transactions in interstate commerce, upon bank loans, upon taxes and upon credit available for trade, transportation, and industry").

flotation of securities." *Civil Liability*, 43 Yale L. J. at 227. The utility of contract law "was severely limited because recovery was unavailable unless the defendant had breached some express covenant with the plaintiff." Roy L. Brooks, *Rule 10b-5 in the Balance: An Analysis of the Supreme Court's Policy Perspective* (hereinafter cited as "*10b-5 in the Balance*"), 32 Hastings L. J. 403, 406 (1980). Further, the law of warranty, "[t]he greatest adaptation in the shift of risks of purchase away from the buyer," was a poor fit because securities were bought and sold differently from other products. *Civil Liability*, 43 Yale L. J. at 229-30. In cases of fraud, "[t]here is no 'same security minus the defect' with which to make comparison" to determine the plaintiff's loss. *Id.* at 230. The law of rescission was similarly lacking because it could only be invoked against the immediate seller, meaning that "the investor who buys a security in the market, either directly on the strength of representations in a prospectus or circular or at a price in which such representations were obviously factors, cannot invoke this remedy either against his seller or the issuers of the prospectus or circular." *Id.* at 231; *see generally id.* at 231-33.

As a result, plaintiffs were forced to rely on the tort theories of deceit and general fraud, which had developed in the context of a variety of transactions and did not lend themselves to the peculiarities of securities transactions. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744-45 (1975) ("[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light

years away from the world of commercial transactions to which Rule 10b-5 is applicable."); *Civil Liability*, 43 Yale L. J. at 233-42; *10b-5 in the Balance*, 32 Hastings L. J. at 405-10. These actions were limited in several ways that made it difficult for plaintiffs to recover for securities fraud. In other words, the securities laws were needed to allow the government to address circumstances that common law causes of action could not.

For instance, common law causes of action generally did not permit recovery for statements that were unintentionally false, or statements that were technically true, but nonetheless misleading. *See Civil Liability*, 43 Yale L. J. at 233-34, 238; *10b-5 in the Balance*, 32 Hastings L. J. at 406-07 ("In cases of omission, there was no general common law duty to disclose material, nonpublic information" except where there was "some confidential or fiduciary relationship."). Consequently, issuers could easily insulate themselves from liability by couching their statements as being "made on the authority of others and in terms of opinion, belief or prediction," *Civil Liability*, 43 Yale L. J. at 238, without disclosing other information that might change a reasonable person's interpretation of those statements or the weight given to them. Plaintiffs also generally had to prove privity between themselves and the defendant (*i.e.*, a direct buyer-seller relationship) and reliance. *See id.* at 238-39. Plaintiffs who had bought securities on an exchange or another secondary transaction generally could not prevail in a suit based on false statements in a prospectus. The privity requirement also meant

that buyers generally could not sue third parties who were involved in preparing a false prospectus (such as accountants, lawyers, appraisers, and others) or inactive directors in the company that issued the false statement. *See id.* at 239-40.

Reliance on the common law to police the securities markets was also untenable because it required individual investors, who necessarily would have already lost money to some "fly-by-night concern," *Hall*, 242 U.S. at 550, to cover the cost of enforcement. Even in 1933, it was understood that "litigation in America is too expensive" and "[i]f experience is any kind of a teacher, we can confidently expect that most investors will not bring suit." *Civil Liability*, 43 Yale L. J. at 251. Further, well-heeled defendants generally have two built-in advantages over individual investors: first, they typically have far more money than the investors they have harmed and, second, they generally possess most of the relevant documents and information that are essential to the success of the claims brought by those injured investors. *See* Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. 655, 672 (2016). As a result of this information asymmetry and their superior resources, leverage, and the size of potential liability, large defendants have an incentive to engage in "tactics of attrition designed to fend off claims by making them too costly to pursue[.]" *See* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 4 (2011).

Although, in theory, issuers and sellers "lived under great risks of liability [under the common

law]...the reality was not so harsh": investors rarely sued, courts "made many allowances for the practices of the time," and liability could be avoided "by omitting mention of a variety of matters and confining circular and prospectus to truthful description of the show window without taking the investor through the store behind it." *Civil Liability*, 43 Yale L. J. at 242. Thus, state and federal legislatures found it necessary to create a strong framework for government regulation of matters involving securities and investment advice.

C. State and federal legislatures created new causes of action, distinct from the common law, and empowered regulators to deter, prevent, and punish securities fraud and other violations.

Before the federal securities laws, the federal government had no direct way to deal with securities fraud other than criminal prosecution under the mail fraud statute. *See* Louis Loss, Securities Regulation, 806-07 (Little, Brown and Co., 1951). In the federal securities laws, Congress created new causes of action that inhere in the SEC, to empower the agency to deter, prevent, and punish fraud.[9] The general antifraud provisions under the Securities Act, § 17(a),[10] Exchange Act, § 10(b) and Rule 10b-5

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[9] *See* Loss & Cowett, Blue Sky Law at 19-20 (explaining that strong antifraud provisions generally support the registration, licensing, and other provisions of the securities laws).

[10] 15 U.S.C. § 77q(a).

thereunder,[11] and the Advisers Act, §§ 206(1) and (2)[12] differ substantially from the common law of fraud and deceit as it was understood at the time.[13]

The most readily apparent difference is the scope of conduct that these provisions cover. In the first instance, Securities Act, § 17(a), Exchange Act, § 10(b), and Rule 10b-5 apply to "any person," not merely the seller of a particular security. Securities Act, § 17(a) and Rule 10b-5 follow the same pattern, generally prohibiting:

(1) "any device, scheme, or artifice to defraud";

(2) an "untrue statement of a material fact *or any omission to state a material fact* necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading" (emphasis added); and

(3) certain conduct "which operates or would operate as a fraud or deceit" on other market participants.[14]

Accord Uniform Securities Act (1956), §§ 101, 102; Uniform Securities Act (2002), §§ 501, 502.

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[11] 15 U.S.C. § 78j(b); 17 CFR 240.10b-5.

[12] 15 U.S.C. §§ 80b-6(1) and (2).

[13] *See generally Civil Liability*, *supra*.

[14] Securities Act, § 17(a) uses the formulation "upon the purchaser," while Rule 10b-5 uses the formulation "upon any person."

The second clause above differs from the common law by providing an avenue to relief for misleading half-truths.[15] The third clause deviates even further, as it provides a remedy regardless of "whether or not an [investor] is actually [defrauded or harmed] as a result of the [conduct at issue]...." *Atlas Roofing*, 430 U.S. at 445.[16] Advisers Act, §§ 206 (1) and (2) are modeled on and prohibit essentially the same conduct as the first and third clauses, respectively, of Securities Act, § 17(a) and Rule 10b-5 under the Exchange Act. *See, e.g.,* Loss, Securities Regulation at 873-74.

Another key difference is that the SEC generally does not need to prove scienter unless it alleges a manipulative or deceptive device, scheme, or artifice. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (scienter required under Rule 10b-5 because of the language of § 10(b)); *Aaron*, 446 U.S. at 695-96 (scienter required under Securities Act, § 17(a)(1), but not subparagraphs (2) or (3)); *SEC v. World Tree Financial, LLC*, 43 F.4th 448, 460 (5th Cir. 2022) (scienter required under Advisers Act, § 206(1),

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15 *See Civil Liability*, 43 Yale L. J. at 242 (noting that the Securities Act "requires a picture not simply of the show window, but of the entire store").

16 The court of appeals appears to have overlooked or ignored this aspect of the SEC's antifraud authority in distinguishing SEC antifraud actions from the causes of action at issue in *Atlas Roofing*. *See Jarkesy I*, 34 F.4th at 458-59.

but not subparagraph (2)).[17] Nor does the SEC need to prove reliance or loss causation. *See SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (holding that "unlike private litigants," the SEC "is not required to prove

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[17] State securities laws reflect a similar departure from the common law with respect to the elements required in a regulatory enforcement action under the antifraud provisions. The general antifraud provisions in the Uniform Securities Acts do not require scienter. *See*, *e.g.*, Uniform Securities Act (1956), § 101, Official Comment .01 ("This section is substantially [SEC Rule 10b-5], which in turn was modeled upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)...."); Uniform Securities Act (2002), § 501, Official Comment 6 ("The culpability required to be pled or proved under Section 501 is addressed in the relevant enforcement context," including "civil and administrative enforcement actions [by a securities regulator], where no culpability is required to be pled or proven."). Further, courts have frequently declined to find a loss causation requirement under state securities laws. *See*, *e.g.*, *Hirsch v. Arizona Corp. Comm'n*, 352 P.3d 925, 931-32 (Ariz. Ct. App. 2015) (concluding that the Arizona Corporation Commission need not prove loss causation); *Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 55 F. Supp. 3d 235, 245 (D. Mass. 2014) (holding that loss causation is not an affirmative defense under the Massachusetts Uniform Securities Act); *FHFA v. HSBC N. Am. Holdings Inc.*, 988 F. Supp. 2d 363, 367-68 (S.D.N.Y. 2013) (same, under the Virginia and District of Columbia securities laws); *Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.*, No. 13-6705, 2014 WL 1673351 (S.D.N.Y. Apr. 28, 2014) (same, under the Texas and Illinois securities laws).

New York's Martin Act, N.Y. Gen. Bus. Law § 352, is of particular note. *See People v. Federated Radio Corp.*, 244 N.Y. 33, 38 (1926) (explaining that "fraud" and "fraudulent practice" are substantially and intentionally broader than the common law). *See also* Loss, Securities Regulation at 82 (noting that "the Securities Act is essentially a combination of the [English] Companies Act and the Martin Act, with important modifications").

that...the misrepresentations caused any investor to lose money"); *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963) (holding that the SEC need not prove loss causation because the "[SEC's] duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused loss or injury").

Although not subject to adjudication in the SEC's administrative forum, the antifraud civil liability provisions of the Securities Act further reflect the departure of the securities laws from the common law. As one court of appeals explained:

> [t]he purpose of the civil liability provisions of the [Securities] Act was to broaden the law of deceit. In that branch of the law of torts there had raged one of those controversies that delight lawyers and disgust laymen. It had its inception in the famous case of *Derry v. Peek*, and stemmed from a 19th Century English Court's conservative reluctance to believe ill of the tycoons of its day.

Rosenberg v. Hano, 121 F.2d 818, 819 (3d Cir. 1941). Consistent with that purpose, Securities Act, §§ 11 and 12, 15 U.S.C. §§ 77k, 77*l*, impose broad antifraud liabilities on issuers and sellers of securities to a plaintiff who purchased the security.

Under § 11, an issuer of registered securities is liable to the buyer for false statements or misleading omissions in the issuer's registration statements.

Under § 12(a)(2), a buyer is entitled to rescission or damages from "any person who...offers or sells a security [to the buyer]...by means of a prospectus or oral communication, which includes [a false statement or misleading omission]...." As this Court noted recently, § 11 imposes strict liability on issuers. *See Slack Technologies, LLC v. Pirani*, 598 U.S. 759, 762 (2023). Although § 12(a)(2) includes a similar privity requirement to the common law, *see Pinter v. Dahl*, 486 U.S. 622, 642 (1988), neither of these actions requires a plaintiff to prove scienter, reliance, or loss causation.

Accordingly, SEC actions to enforce the antifraud provisions differ greatly from the common law and the court of appeals overstates the extent to which they are similar in order to reach its holding.

D. The Seventh Amendment permits the SEC to seek penalties in an administrative forum for violations of the federal securities laws.

As discussed above, the federal securities laws are on all fours with the facts that led this Court to uphold the statutory scheme at issue in *Atlas Roofing*.

Like *Atlas Roofing*, the securities laws were enacted to address an important public problem; namely, fraud, manipulation, and other abuses that had recently contributed to the 1929 stock market crash and severely damaged the Nation's economy. Like *Atlas Roofing*, the securities laws were necessary because preexisting common-law and statutory

remedies were inadequate to protect the public from certain harms. Like *Atlas Roofing*, Congress created new causes of action to protect the public and the markets from securities fraud, including causes of action that inhere in the government and remedies that are only available to the government. Like *Atlas Roofing*, Congress entrusted the factfinding function and initial adjudication of these new "public rights" to an administrative forum. And like *Atlas Roofing*, the Seventh Amendment does not prohibit Congress from doing so.

In reaching its conclusion that SEC antifraud enforcement actions may not be entrusted to agency adjudication, the court of appeals also states that "jury trials would not 'go far to dismantle the statutory scheme' or 'impede swift resolution' of the statutory claims." *Jarkesy I*, 34 F.4th at 455 (quoting *Granfinanciera*, 492 U.S. at 60-63). However, as the dissent cogently explains, these considerations are inapplicable to this case because "*Granfinanciera*'s analysis is solely concerned with whether the action was one of the 'seemingly "private" right[s]' that are within the reach of the public-rights doctrine." *Id*. at 471 (Davis, J., dissenting). Unlike the statutory scheme at issue in *Atlas Roofing* and the federal securities laws, the statutes at issue in *Granfinanciera* did not create new causes of action. Congress simply took an existing cause of action between bankruptcy trustees and adverse claimants, typically heard in federal district courts, and placed it within the jurisdiction of the bankruptcy courts without further modification. *Granfinanciera*, 492

U.S. at 49-51. Thus, the factors employed by this Court in determining whether those "seemingly 'private' rights" could be assigned to non-jury adjudication under the public rights doctrine are inapplicable to this case.

Even so, the court of appeals' analysis of these additional factors was flawed. The federal securities "statutory scheme" was purposefully designed to provide the SEC with "the tools" necessary to "root out…fraud[.]" *Lorenzo*, 139 S. Ct. at 1104. In 2010, Congress strengthened the SEC's ability to obtain monetary penalties in administrative proceedings – an important regulatory tool. *See* Dodd-Frank Act, § 929P(a), 124 Stat. 1862-64 (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i)(1)). The SEC's ability to choose the most appropriate forum is the point. The court of appeals' decision would surely go far to "dismantle the statutory scheme" by preventing the SEC from using the tools that Congress provided for the purposes for which Congress provided them.

The court of appeals also erroneously concluded that its holding would not impede swift resolution of SEC enforcement actions because "the SEC took seven years to dispose of [Jarkesy's] case and makes no argument that proceedings with a jury trial would have been less efficient." *Jarkesy I*, 34 F.4th at 456. But the court's analysis misses the forest for this one particular tree. If adopted by this Court, the court of appeals' holding would apply throughout the SEC's

enforcement program.[18] But its reasoning is deficient because it fails to acknowledge, let alone consider, the aggregate impact of requiring the SEC to pursue those claims in federal district court. This would likely force the SEC to pile more complex cases on top of perennially crowded district court dockets and hinder the agency's ability to quickly respond to stop harmful conduct.

Finally, the court of appeals concluded that "securities fraud actions are not the sort that are uniquely suited for agency adjudication." *Id*. at 456. As the SEC explains in its brief, "[t]hat limitation has no basis in the Constitution or this Court's precedents." *See* SEC Brief at 32-33. The court of appeals' analysis on this point also fails as a factual matter. The court states that "[t]he statutes in [*Atlas Roofing*] were new and somewhat unusual" in that "they provided elaborate enforcement mechanisms for the sorts of claims that likely could not have been brought in legal actions before that point." *Jarkesy I*, 34 F.4th at 456. As explained above, the securities laws function in the same way. Thus, this limitation, if valid, *supports* the application of the public rights doctrine to the SEC's enforcement actions.

As such, the SEC's enforcement action is precisely the sort that may be properly entrusted to agency adjudication under *Atlas Roofing*. It is critical

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[18] Indeed, such a holding from this Court could also impede state enforcement actions, as respondents in state proceedings would undoubtedly use this Court's ruling to thwart state efforts to address violations of state law.

that the SEC retain its authority to do so in order to efficiently deter, prevent, and punish fraud that harms investors and undermines the integrity of the markets.

CONCLUSION

For all of the foregoing reasons, *amicus* North American Securities Administrators Association respectfully submits that this Court should reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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