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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PROFESSORS JOHN M. GOLDEN AND THOMAS H. LEE AS *AMICI CURIAE* IN SUPPORT OF REVERSAL ON THE FIRST QUESTION PRESENTED

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QUESTIONS PRESENTED

1. Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.

2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.

3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae—John M. Golden and Thomas H. Lee—are law professors who teach and write about administrative law and the U.S. judicial system. They are filing this brief in support of reversal on the first question presented to highlight principles and historical aspects of the law relating to adjudication by non-Article III federal officials. *Amici* have no interest in this case or in the parties, except in their capacities as teachers and scholars. This brief represents the individual views of *amici*, not the views of any institution with which they are or have been affiliated.

John M. Golden is the Edward S. Knight Chair in Law, Entrepreneurialism and Innovation at the University of Texas at Austin School of Law. He has taught and written on U.S. administrative law and intellectual property law. He and Professor Lee have written a series of papers on the proper scope of adjudication by non-Article III federal officials and tribunals. See, *e.g.*, John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 Va. L. Rev. 1547 (2022) [hereinafter Golden & Lee, *Private Rights*]; John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 Notre Dame L. Rev. 1113 (2023) [hereinafter Golden & Lee, *Public*

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Rights]; John M. Golden & Thomas H. Lee, *Article III, the Bill of Rights, and Administrative Adjudication*, 91 Fordham L. Rev. (forthcoming 2023), available at https://ssrn.com/abstract_id=4561533 [hereinafter Golden & Lee, *Administrative Adjudication*].

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INTRODUCTION

Congress has constitutional authority to empower federal officials who are not Article III judges to decide whether an individual has violated federal securities antifraud laws and should be assessed civil penalties. There is no Seventh Amendment right to a jury in administrative proceedings before such officials. These two conclusions are compelled by this Court's longstanding public-rights doctrine and associated precedents, irrespective of the resolution of any constitutional issues regarding the appointment and removal of administrative law judges (ALJs) or Securities and Exchange Commission (SEC)

discretion to pursue an enforcement action in SEC proceedings or in an Article III court.

SUMMARY OF THE ARGUMENT

Neither Article III nor the Seventh Amendment bar Congress from authorizing the SEC to bring an action before a duly appointed ALJ to enforce federal laws prohibiting securities fraud in national capital markets. The court below nonetheless reasoned that the SEC's "claims do not concern public rights alone" and are "akin to traditional actions at law to which the jury-trial right attaches." *Jarkesy* v. *SEC*, 34 F.4th 446, 451 (5th Cir. 2022). This reasoning is mistaken. An action brought by an Executive Branch agency to enforce federal securities laws is not the same as an action brought by one individual against another for monetary or injunctive relief of the sort that law courts (with juries) in England or the States have traditionally heard.

Framed in the language of this Court's public-rights doctrine, an SEC enforcement action seeking a civil penalty for violations of federal securities laws is not a matter of private right involving a claim "of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932). Rather, such an enforcement action is a matter of public right suitable for adjudication by non-Article III federal officials, such as members of the Commission and ALJs. Outside the Seventh Amendment, there may be alternative Bill of Rights grounds for challenging the process or result of

administrative adjudication in this case. Further, the SEC's order for creation of a Fair Fund to compensate harmed investors may raise questions under Article III that the ordering of a civil penalty does not raise by itself. But such potential grounds for constitutional challenge do not appear to be properly before the Court at this time.

ARGUMENT

I. THE COURT BELOW MISAPPLIED THE PUBLIC-RIGHTS DOCTRINE AFTER MISCONSTRUING BLACKSTONE AND THIS COURT'S OPINION IN *TULL* V. *UNITED STATES*.

This Court has made clear that Congress has "significant latitude to assign adjudication of ***public rights*** to entities other than Article III courts." *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372–73 (2018) (emphasis added). By contrast, federal adjudication of matters "of ***private right***" must presumptively occur in Article III courts, even though "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact" must be made by Article III judges as opposed to, for example, juries, masters or commissioners.[2] *Crowell*, 285 U.S. at 51 (emphasis added); see also

[2] In matters of private right, parties may also consent to adjudication by non-Article III federal officials "so long as Article III courts retain supervisory authority over the process." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 678 (2015).

Stern v. *Marshall*, 564 U.S. 462, 489 n.6 (2011). The question of whether a matter is one of public right also determines whether that matter may be adjudicated by a federal administrative agency without a jury:

> This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, "the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder."

Oil States, 138 S. Ct. at 1379 (quoting *Granfinanciera, S.A.* v. *Nordberg,* 492 U.S. 33, 53–54 (1989)).

The court below anchored its holding that the SEC enforcement action was not a matter of public right on two key contentions. First, citing Volume III of William Blackstone's treatise, *Commentaries on the Laws of England*, the Fifth Circuit asserted that "[f]raud prosecutions were regularly brought in English courts at common law." *Jarkesy,* 34 F.4th at 453 (citing 3 William Blackstone, *Commentaries on the Laws of England* *42 (1768)); see also *id.* at 455 (citing 3 Blackstone, *supra* at *42). Second, the Fifth Circuit cited this Court's decision in *Tull* v. *United States*, 481 U.S. 412 (1987), for the specific proposition that "actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history" and thus that a "'civil penalty was a type of remedy at common law that could only be enforced in courts of law.'" 34 F.4th at 454 (quoting *Tull*, 481 U.S. at 481); see also *id.* at 455 (citing *Tull*, 481 U.S. at 482). The Fifth Circuit's originalist and precedential lines of reasoning are both wrong.

A. Blackstone distinguished between "Private Wrongs" to be adjudicated by the Court of King's Bench and "Public Wrongs," a category that included offenses adjudicated by commissioners or justices of the peace without a jury.

The Fifth Circuit misconstrued the key passage that it cited from Blackstone, which addressed ***private*** suits against defendants, not ***government*** enforcement actions, much less "fraud prosecutions" in the Fifth Circuit's words, not Blackstone's. In explaining the jurisdiction of the Court of King's Bench in Volume III ("*Of* Private Wrongs") of his *Commentaries*, Blackstone distinguishes between that jurisdiction's "crown side," which he says will be addressed in Volume IV ("*Of* Public Wrongs") of his *Commentaries*, and its "plea-side" or "civil branch." 3 Blackstone, *supra* at *42. As to the civil side, Blackstone writes that King's Bench "hath an original jurisdiction and cognizance of all *trespasses*, and other injuries . . . which, being a breach of the peace, savour of a criminal nature, although the action is brought for a civil remedy; and for which the defendant ought in strictness to pay a fine to the king, as well as damages to the injured party." *Id.* His point is that a private right of action for tort damages to remedy a breach of the king's peace is functionally a quasi-criminal action ("savour of a criminal nature") and, therefore, in principle, could justify a royal fine "as well as damages to the injured party" prayed for in the private suit.

In other words, in the passage cited by the Fifth Circuit, Blackstone is speaking exclusively about a

case "of private right, that is, of the liability of one individual to another under the law as defined," *Crowell*, 285 U.S. at 51. That is no surprise because the point of Volume III is to describe ***private*** rights of action, not ***public*** rights of action for public wrongs, the subject of Volume IV. Earlier in Volume III, Blackstone explained that "private wrongs" "are an infringement or privation of the private or civil rights belonging to individuals," whereas "public wrongs" "are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*." 3 Blackstone, *supra* at *2 (emphasis in original).

Indeed, consistent with this Court's later-articulated public-rights doctrine, in Volume IV's chapter 20 "Of Summary Convictions," Blackstone explicitly observed that commissioners and justices of the peace may, without trial by jury, adjudicate various matters of public right. See 4 William Blackstone, *Commentaries on the Laws of England* *277–78 (1769). Such matters included "all trials of offences and frauds contrary to the laws of the *excise*, and other branches of the *revenue*." *Id.* at 278 (emphasis in original). Blackstone's recognition that the legislature may provide for adjudication of government revenue cases by commissioners and justices of the peace acting without the benefit of a jury foreshadowed this Court's decision in *Murray's Lessee* v. *Hoboken Land Improvement Co.*, 59 U.S. 272 (1856), the foundational private-rights/public-rights precedent in the United States. *Murray's Lessee* involved the execution of a distress warrant "issued by

the solicitor of the treasury" against the property of a former customs collector. *Id.* at 274.

Pertinently for this case, Blackstone further observed the existence of "ANOTHER branch of summary proceedings" through which justices of the peace were empowered to order fines—"divers petty pecuniary mulcts"—"and corporal penalties, denounced by act of parliament for many disorderly offences." 4 Blackstone, *supra* at *278. In short, contrary to the Fifth Circuit's reading, Blackstone's *Commentaries* squarely support the conclusion that government actions against individuals to impose fines or civil penalties are actions in response to "public wrongs"—*i.e.*, actions in response to violations of public rights or duties—that may be adjudicated without a jury. In this Court's parlance, such actions are matters of public, not private, right.

B. This Court's precedents in *Atlas Roofing*, *Tull*, and *Granfinanciera* all support the conclusion that an SEC enforcement action seeking a civil penalty is generally a matter of public right.

The Fifth Circuit's faulty reliance on Blackstone makes its reading of this Court's decision in *Tull* all the more critical to its decision. Here again, however, the Fifth Circuit erred.

Admittedly, Justice Brennan's opinion for the Court in *Tull* is not a model of clarity. In *Tull*, the Department of Justice had filed suit in federal district court alleging violation of the Clean Water Act, as amended, 33 U.S.C. § 251 *et seq.*, by a real estate

developer and seeking civil penalties and injunctive relief. See 481 U.S. at 414. This Court held that the Seventh Amendment required a jury trial to establish liability for a Clean Water Act violation. See *id.* at 426–27. It also held "that the trial court and not the jury should determine the amount of penalty" because "a determination of a civil penalty is not an essential function of a jury trial." *Id.* at 427.

Because the enforcement action in *Tull* was filed in an Article III court, *Tull* did not implicate the constitutionality of a jury-less federal administrative proceeding to decide whether federal laws were violated and a civil fine should be assessed. Indeed, in *Tull*, the Court expressly acknowledged that, in *Atlas Roofing Co.* v. *OSHA*, 430 U.S. 442 (1977), it had "considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that ***the Seventh Amendment is not applicable to administrative proceedings***." 481 U.S. at 418 n.4 (emphasis added) (citing *Atlas Roofing*, 430 U.S. at 454); accord *Oil States*, 138 S. Ct. at 1379.

Two years after issuing *Tull*, the Court in *Granfinanciera* reaffirmed its holding in *Atlas Roofing*. See 492 U.S. at 42 n.4. In another majority opinion by Justice Brennan, the Court observed "that ***Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in . . . the Federal Government in its sovereign capacity***." 492 U.S. at 53 (emphasis added). Thus, all three of these modern precedents—

Tull, *Atlas Roofing*, and *Granfinanciera*—affirm a fundamental distinction, signaled earlier by Blackstone, between an action brought by the federal government in a public sovereign capacity to impose civil penalties for an alleged violation of public law and an action brought by a private individual seeking money damages for an alleged violation of a private right. The federal government enforcement action is, generally speaking, a matter of public right able to be decided by non-Article III federal officials in administrative proceedings in which no Seventh Amendment jury trial right applies. It is a separate question whether such a public-rights action should be considered criminal in nature and thus subject to constitutional criminal procedural protections such as those in the Bill of Rights. See Part III below.

The Fifth Circuit appears to have been misled, however, by the following expansive statement in the Court's opinion in *Tull*: "A civil penalty was a type of remedy at common law that could only be enforced in courts of law." 481 U.S. at 422 (quoted at *Jarkesy*, 34 F.4th at 454). The next sentence in *Tull* suggests that this statement was merely meant to distinguish the powers of "courts of law" from "courts of equity," not to suggest that federal administrative agencies are constitutionally barred from assessing a civil penalty without a jury trial. See *ibid.* ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."). Indeed, as explained above, this Court's precedents, including *Tull*, make clear that, with respect to matters of public right, Congress may give federal administrative agencies the power to find an

individual responsible for a legal violation and to impose a civil penalty for that violation.

Nonetheless, it may be true that, if a person upon whom the federal government has assessed a civil penalty refuses to pay, the government may have to go to an Article III court to secure ***enforcement of the penalty***.[3] As a general matter, Congress has given district courts original jurisdiction, "exclusive of the courts of the States," over "any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade." 28 U.S.C. § 1355(a). Under this or other statutory provisions, federal administrative agencies may sue in Article III courts to collect penalties that the agencies have separately ordered, with courts sometimes finding that the collection action provides the opportunity for a trial *de novo* on the penalty's assessment.[4] In short, although *Tull*'s language

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[3] In *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909), this Court reserved this question while holding that Congress could empower the Secretary of Commerce and Labor to impose a civil monetary penalty on private parties. *Id.* at 334–340, 343. Columbia University law professor Frank Goodnow had previously emphasized the distinction between an administrative authority's power to impose fines and its "ordinar[y]" need to go to a court for enforcement of those fines when payment is refused, a need that "insures the control of the courts over the exercise of the ordinance power." Frank J. Goodnow, *The Principles of the Administrative Law of the United States* 346–47 (1905).

[4] See*, e.g.*, *United States* v. *Howard Elec. Co.*, 798 F.2d 392, 393, 395 (10th Cir. 1986) (holding, in relation to an $8000 penalty assessed by an OSHRC ALJ, that "[t]he district court action

might be taken to comport with the proposition that an Article III court is ordinarily required to order actual ***collection*** of a fine, *Tull* cannot be read to bar an administrative agency's assessment of a civil penalty through a non-Article III administrative proceeding conducted without a jury.

As this Court unanimously made clear in *Atlas Roofing*, "Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court," including under the Seventh Amendment in *Atlas Roofing* itself. 430 U.S. at 450. As the Court reasoned even earlier with respect to assessing taxes, "the determination of the facts upon which [such civil] liability is based may be by an administrative agency instead of a jury." *Helvering* v. *Mitchell*, 303 U.S. 391, 402 (1938). Such language in the Court's on-point precedents is unambiguous.

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provided for in 29 U.S.C. § 666(l) is a collection procedure only, while the determination of violation and penalty is left to the administrative process"); *Nuclear Regulatory Comm'n* v. *Radiation Tech., Inc.*, 519 F. Supp. 1266, 1267, 1285–86 (D.N.J. 1981) (holding that statutory regime entitled licensee to trial *de novo* in action "to collect penalties amounting to $4050 imposed" by the NRC); cf. *San Huan New Materials High Tech, Inc.* v. *Int'l Trade Comm'n*, 161 F.3d 1347, 1350, 1354 (Fed. Cir. 1998) (upholding a civil penalty of $1,550,000 imposed by the ITC and "conclud[ing] that an action brought in the district court under 19 C.F.R. § 210.75(c) . . . is not a trial *de novo* but simply a collection proceeding").

C. The public-rights character of SEC enforcement actions for securities fraud is confirmed by their history and statutory details.

Although aspects of assertions of securities fraud in government enforcement actions may "echo" aspects of claims of common-law fraud in a private suit, *Jarkesy*, 34 F.4th at 455, federal securities antifraud enforcement actions seeking civil penalties differ substantially from traditional private common-law rights of action for money damages for fraud.

Indeed, after the 1929 stock market crash, the federal securities antifraud laws were enacted (and the SEC created to enforce them) to protect investors in light of the perceived inadequacy of private actions under the common law of fraud and deceit and of state enforcement of blue-sky laws.[5] See*, e.g., SEC* v. *Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 194 (1963) (observing that "doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities"). The Securities Act of 1933 (1933 Act), 15 U.S.C. § 77a *et seq.*; the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78a *et seq.*; and the Investment Advisers

[5] Similarly, congressional provision for administrative adjudication of civil penalties for violating agency-promulgated safety standards, which this Court unanimously upheld in *Atlas Roofing*, 430 U.S. at 447–48, reflected Congress's conclusion that "the existing state statutory remedies as well as state common-law actions for negligence and wrongful death [were] inadequate to protect the employee population from death and injury due to unsafe working conditions," *id.* at 444–45.

Act of 1940, 15 U.S.C. 80b-1 *et seq.* (1940 Act) thus contain a web of innovative antifraud provisions.

The most prominent of these antifraud provisions is Section 10(b) of the 1934 Act, which prohibits "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security in interstate commerce. 15 U.S.C. § 78j(b). In 1942, the SEC adopted Rule 10b-5 to enable it to enforce Section 10(b).[6] See 17 C.F.R. § 240.10b-5. As the en banc Second Circuit observed in its landmark insider-trading decision in *SEC* v. *Texas Gulf Sulphur Co.* affirming (and adding) findings of violations of Section 10(b) and Rule 10b-5, "the securities laws should be interpreted as an expansion of the common law both to effectuate the broad remedial design of Congress and to insure uniformity of enforcement." 401 F.2d 833, 854–55 (2d Cir. 1968) (internal citations omitted).

Significantly, however, neither Section 10(b) of the 1934 Act nor Rule 10b-5 explicitly provided for a ***private right*** of action in federal court: it was the Article III courts themselves that inferred these implied private rights of action. In *J.I. Case* v. *Borak*, this Court reasoned that finding a private right of action to be implied under Section 27 of the 1934 Act made policy sense because "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action" given the SEC's limited enforcement resources. 377 U.S. 426, 432 (1964).

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[6] Section 10(b) and Rule 10b-5 are directly implicated in this case, in which the SEC "f[ound] that Respondents violated Exchange Act Section 10(b) and Rule 10b-5(b) thereunder." Pet. App. 76a.

This Court has subsequently and substantially backed off from expanding private rights of action to enforce federal securities antifraud laws. See*, e.g.,* *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). Such decisions cabining implied private rights of action for federal securities fraud—amplified by Congress's passage of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4, to require specific pleading in such private actions—highlight the continued criticality of agency enforcement to protect the public interest in enforcement of federal securities antifraud statutes in relation to new forms of securities and innovative fraudsters.

The public-rights character of enforcement actions pursued through SEC proceedings is highlighted by Congress's explicit requirement under multiple statutory provisions that, before ordering a civil money penalty, the SEC "find[], on the record, after notice and opportunity for hearing, that . . . such penalty is in the public interest." 15 U.S.C. § 77h-1(g)(1); accord *id.* §§ 78u-2(a)(1), 80a-9(d)(1)(A), 80b-3(i)(1)(A). The SEC made such a finding of public interest here, concluding that Respondents' conduct "warrants the imposition of civil money penalties as a deterrent to Respondents and others." Pet. App. 114a.

The bottom line is that this Court has consistently and justifiably treated an action brought by private plaintiffs alleging violation of federal securities antifraud laws—generally a matter of private right—as different from an SEC enforcement action—generally a matter of public right. Under well-settled precedents, Congress may properly authorize the

administrative adjudication of SEC enforcement actions seeking civil penalties.

II. AN ACTION BROUGHT BY THE SEC SEEKING CIVIL PENALTIES FOR ASSERTED VIOLATIONS OF FEDERAL SECURITIES ANTIFRAUD LAWS IS, GENERALLY SPEAKING, NOT A MATTER OF PRIVATE RIGHT BUT INSTEAD A MATTER OF PUBLIC RIGHT.

As noted at the start of Part I above, the Court's public-rights doctrine distinguishes between matters of public right and matters of private right. "This Court has not definitively explained the distinction between public and private rights," but, as in *Oil States*, "this case does not require [the Court] to add to the various formulations of the public-rights doctrine." 138 S. Ct. at 1373 (internal quotation marks omitted). The Court can rely on its long-established formulation from *Crowell*, which distinguishes between "cases within the reach of the public rights exception—those arising 'between the [g]overnment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments'—and those that [a]re instead matters 'of private right, that is, of the liability of one individual to another under the law as defined,' " *Stern*, 564 U.S. at 489 (quoting *Crowell*, 285 U.S. at 50–51); see also *Oil States*, 138 S. Ct. at 1373, 1378 (same).

A. This Court has long defined matters of private right as "the liability of one individual to another under the law as defined."

Crowell involved a suit by a workman against his employer for injuries that he claimed to have suffered on the job. See 285 U.S. at 36–37. The statutory maritime-worker compensation scheme that Congress had enacted allowed a non-Article III federal "deputy commissioner" to determine whether the employer was liable to pay compensation for the injury. *Id.* at 42–43. In evaluating the constitutionality of this scheme, this Court distinguished between "cases of private right" and those of public right and explained that the worker's compensation claim "d[id] not fall within the categories [of matters of public right], ***but is one of private right, that is, of the liability of one individual to another under the law as defined***. *Id.* at 50–51 (emphasis added).

The Court nonetheless found that the provisions for Article III court involvement under that statutory regime were adequate, in part on grounds that "the agency in *Crowell* functioned as a true 'adjunct' of the District Court," *Stern*, 564 U.S. at 489 n.6, and in part because the Court held that the Article III courts retained powers of *de novo* review of all legal issues as well as constitutional and "jurisdictional" fact finding. *Crowell*, 286 U.S. at 62–65. In contrast, the Court has found violations of Article III where Congress has sought to empower non-Article III bankruptcy judges to adjudicate state-law tort and contract claims. See *Stern*, 564 U.S. at 469, 485, 494–95.

To help explain this Court's especially strong solicitude for private-rights claims rooted in state-based common law, we have highlighted that the general requirement of Article III court involvement in adjudication of matters of private right is anchored in foundational principles of constitutional federalism:

> If Congress could limitlessly assign adjudication of private rights cases to federal officials lacking the life tenure and salary protections of Article III judges, the political branches of the federal government would enjoy vastly expanded authority to encroach on state courts' traditional authority to decide common law and equity cases between individuals. . . . [S]uch vast congressional power is inconsistent with the limits on federal authority in a constitutional scheme in which state courts have traditionally dominated the adjudication of ordinary private disputes and in which Congress's power of direct taxation and ability to create lower federal courts were hard-won concessions when the Constitution was adopted.

Golden & Lee, *Private Rights*, 108 Va. L. Rev. at 1547.

Critical to *Crowell*'s definition of a matter of private right was that such a matter concerns the liability of one private party to another private party—an aspect of *Crowell*'s formulation that this Court has consistently maintained. Accordingly, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, a plurality of this Court's judges reasoned that "[a]ppellant Northern's right to recover contract damages to augment its estate is 'one of private right,

that is, of the liability of one individual to another under the law as defined.' " 458 U.S. 50, 71–72 (1982) (quoting *Crowell*, 285 U.S. at 51); see also *Granfinanciera,* 492 U.S. at 51 n.8 (quoting *Crowell*'s definition of private rights). Similarly, in *Stern*, a Court majority recognized *Crowell*'s definition of matters of private right as undergirding multiple Court decisions. 564 U.S. at 489 (quoting *Crowell*, 285 U.S. at 50–51).

B. In *Oil States*, this Court found that even adversarial disputes between private parties are matters of "public right" when they do not concern "the liability of one individual to another under the law as defined."

In *Oil States*—this Court's most recent decision on the public-rights doctrine—the Court used *Crowell*'s definition of matters of private right to explain why the administrative proceeding there was properly viewed as involving a matter of public right. Congress had authorized adjudication by a Patent Trademark and Office (PTO) tribunal of a challenge to the validity of issued patent claims brought by a private party (Greene's Energy) and pursued through adversarial proceedings (inter partes review) involving both the private-party challenger and the patent owner (Oil States), also a private party. Justice Thomas wrote for the *Oil States* Court that "[a]lthough inter partes review includes some of the features of adversarial litigation, it does not make any binding determination regarding 'the liability of [Greene's Energy] to [Oil States] under the law as defined.' " 138 S. Ct. at 1378 (modification in original). Hence, the Court held that,

despite the private character of both Oil States and Greene's Energy, the case concerned a matter of public right, the validity of the PTO's prior grant of patent rights.

C. An action brought by the SEC seeking civil penalties in the public interest does not generally implicate "the liability of one individual against another under the law as defined."

If this were a suit by a private plaintiff against the Respondents seeking compensation for money lost due to alleged fraud, then the Fifth Circuit conclusion that it was a matter of private right would be presumptively correct. But the SEC brought this action to enforce federal securities antifraud laws. The SEC's ultimate orders, including its order of payment of civil penalties, thus tracked *Crowell*'s description of matters of public right as "ar[i]s[ing] between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," 285 U.S. at 50. Likewise, although, as discussed in Part III.A below, the SEC's orders called for the creation of a Fair Fund, those orders otherwise tracked the administrative adjudication in *Oil States* in that they did "not make any binding determination" about the legal liability of the Respondents to one or more private parties, *Oil States*, 138 S. Ct. at 1378.

The Fifth Circuit was nonetheless partly correct in its approach to analyzing whether the SEC's claim for a civil penalty was a matter of public or of private right. The test for determining whether a case involves a matter of private right is in part a

backward-looking test that looks at historical analogues—an aspect of defining private rights not explicit in, *Crowell*. As we have separately written, this Court's precedents indicate a test for matters of private right having two prongs:

> [A] private rights claim is one (1) through which one or more private parties seek personalized relief from one or more other private parties; and (2) that was a sort of claim heard by state courts of law, equity, or admiralty in 1789 or is a modern analogue thereof.

Golden & Lee, *Private Rights*, 108 Va. L. Rev. at 1557–58.

The first prong, on which we focus in Parts II.A and II.B above, follows from the formulation for a private-rights claim advanced in *Crowell*. The second prong, on which the Fifth Circuit's analysis exclusively focused, is reflected in the doctrine's foundational case, *Murray's Lessee,* where this Court asserted that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." 59 U.S. at 284. Both of these prongs comport with the "federalism dimension of Article III" that we have identified: Article III's implicit role in protecting state-court primacy in the adjudication of historically rooted forms of disputes between private parties. Golden & Lee, *Private Rights*, 108 Va. L. Rev. at 1549–50.

In accordance with the second prong of our proposed definition of matters of private right, this Court has repeatedly underscored that the core

constitutional problem with non-Article III federal adjudication is encroachment upon state court adjudication of state-law claims between private parties. For example, in *Atlas Roofing*, this Court specified that "[w]holly private tort, contract, and property cases . . . are not at all implicated" by the public-rights doctrine. 430 U.S. at 458. In *Northern Pipeline*, Justice Brennan's plurality opinion emphasized that what was at issue were contract and misrepresentation claims, *inter alia*, for damages whose basis was "created by *state law*," 458 U.S. at 84 (plurality opinion) (emphasis in original). Justice Rehnquist's opinion concurring in the judgment made the point more bluntly:

> From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law.

458 U.S. at 90 (Rehnquist, J., concurring in judgment). In *Granfinanciera*, the Court stressed the "quintessentially . . . common law" nature of the fraudulent conveyance action there at issue. 492 U.S. at 56. The *Stern* majority followed these opinions by observing that the tort claim at issue there was "one

under state common law between two private parties." 564 U.S. at 493.[7]

The Fifth Circuit followed part of this line of precedents by analyzing whether the subject matter of the SEC's enforcement action resembled the substance of common-law actions for fraud that have traditionally been available for adjudication in state courts under state law. But such analysis, even if performed correctly, is insufficient to establish a matter as one of private right. As *Crowell*'s formulation highlights, a matter of private right must involve a claim of liability between private parties. But Respondents have made no showing that the SEC's orders below resolved such a claim.

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[7] This Court's decision in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), confirms the importance of the second prong of our proffered definition for matters of private right. In *Union Carbide*, the Court characterized the private-rights claim for worker's compensation in *Crowell* as a claim for private liability that "replac[ed a] traditional admiralty negligence action." *Id.* at 584. In contrast, in *Union Carbide*, the Court found the claim for monetary liability between private parties in that case to be only "a seemingly 'private' right that [wa]s so closely integrated into a public regulatory scheme [*i.e.*, a pesticide registration system] as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 593–94. As this Court noted in *Granfinanciera*, *Union Carbide* thereby indicated that *Crowell*'s definition of private rights was incomplete: not all claims of liability between private parties are matters of private right under the public-rights doctrine. See *Granfinanciera*, 492 U.S. at 54–55, 55 n.10 ("We held … that the Federal Government need not be a party for a case to revolve around 'public rights.' ").

D. Public law enforcement actions have long been recognized as matters of public right.

The fact that a government decision has an adverse effect on the liberty or property of a private party does not necessarily make the decision a matter of private right. From the very start of the public-rights doctrine—*i.e.*, from the Court's decision in *Murray's Lessee*—this Court has recognized that matters of public right include public enforcement actions that have significant adverse effects on the property or liberty interests of individuals. Even while arguing that "the Court should clarify that the public rights exception to Article III applies only to discretionary government benefits," current Columbia University law professor Thomas Merrill recognized that, "[i]n the foundational case, *Murray's Lessee*, 'public rights' evidently referred to a right of public officials to act in a way detrimental to particular individuals" and that *Murray's Lessee* was not a case about "discretionary government benefits" as it "involved a government effort to take away property, not to confer it." Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 Geo. Mason L. Rev. 897, 905, 915 (2019).

Unlike Professor Merrill, we believe this Court should follow, rather than resist, *Murray's Lessee*. Hence, in developing a taxonomy of types of cases in which "Article III generally permits Congress to commit noncriminal Article-III-listed 'Cases' and 'Controversies' to final adjudication by a non-Article III federal officer or tribunal," we have followed this Court's precedents (as well as, it turns out,

Blackstone's discussion of summary proceedings for "Public Wrongs," above at Part I.A) in recognizing that matters fit for non-Article III federal adjudication encompass not only (1) cases or controversies "occur[ring] in a physical space beyond the states' control" such as the District of Columbia or a U.S. territory and (2) cases or controversies "occur[ring] in the operational space of the federal government" such as internal-affairs disputes or challenges to government decisions to grant or refuse a benefit, but also (3) cases or controversies "involv[ing] a claim against one or more private parties within the public-interest-focused enforcement space of a federal statutory scheme." Golden & Lee, *Public Rights*, 98 Notre Dame L. Rev. at 1117–18 (emphasis in original omitted).

Although the potential reach of the federal government's "enforcement space" for non-Article III adjudication can inspire qualms, this reach makes sense in a constitutional scheme in which the Executive Branch is entrusted with primary responsibility not only for administering benefits schemes, but also for ensuring compliance with congressionally ordained law. See Art. II, § 3. *Murray's Lessee* is a dramatic example of this truism.

Recognition that execution of the laws brings governments and private interests into conflict is nothing new. The 1905 administrative law treatise by another Columbia University law professor, Frank Goodnow, acknowledges the existence of hosts of "[a]dministrative acts of special application"—"called sometimes orders, sometimes decisions, precepts, or warrants"—by which "the executive authorities

perform most of their duties, and in the performance of [which] they are coming continually into conflict with the individuals over whom they have jurisdiction." Goodnow, *supra* note 3, at 50.

Goodnow did not discount the adverse effects on individuals. Because of them, he said, "[s]ome sort of a control over these [administrative] acts [of special application] is therefore necessary." *Id.* at 50–51. But the already generally accepted response to such concerns was not to declare that executive actors could not adjudicate the relevant administrative matters,[8] but instead to demand that a final decision of an administrative actor on such a matter be subject to judicial review that "may annul it, amend it, interpret it, and prevent the administration from proceeding to execute it." *Id.* at 51.

Such judicial review can be a natural corollary of the arguably "nondefeasible role for Article III courts in policing constitutional constraints" such as those of the Fifth Amendment's Due Process Clause. Golden & Lee, *Public Rights*, 98 Notre Dame L. Rev. at 1177–78. But the demand for judicial review must be distinguished from demands that administrative

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[8] Cf. John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 108–09 (1927) ("No one would insist, for instance, that a finding of the Interstate Commerce Commission . . . as to what is a reasonable rate, or a finding of the Federal Trade Commission as to what amounts to unfair competition, should be subjected to the verdict of a jury on the point."); Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* 1920–1930, 6 (1933) (observing that "the orders of the [Interstate Commerce] commission have been made effective without judicial action").

decision-making either halt or become advisory only. Significant room for administrative adjudication in the enforcement and application of federal law is a natural corollary of Article II's location of primary responsibility for the execution of laws in an Executive Branch headed by the President, U.S. Const. art. II, § 1, cl. 1.

This Court does not need to overrule or dramatically reinterpret *Atlas Roofing*, *Crowell*, or its other public-rights doctrine precedents to ensure that Article III courts can continue to enforce constitutional constraints and protect individual interests in life, liberty, and property from improper government encroachment. Nor should the Court do so. There is fundamental soundness to the notion that there is a broad "enforcement space" for federal "administrative acts of special application" that have sufficient practical and legal finality such that one might call them "adjudications."

III. THERE MAY BE DUE PROCESS AND OTHER ARTICLE III OR BILL OF RIGHTS GROUNDS FOR CHALLENGING THE ADMINISTRATIVE ADJUDICATION HERE, BUT THEY ARE LIKELY WAIVED OR BEYOND THE SCOPE OF THE QUESTIONS PRESENTED.

Parts I and II above have shown why the SEC enforcement proceedings here should be held to involve matters of public right that non-Article III federal officials or tribunals may adjudicate in administrative proceedings to which the Seventh Amendment does not apply. But there may be other constitutional grounds for challenging the SEC

proceedings, and these grounds can, *inter alia*, take into account the severity of the penalties imposed. Our understanding of the record indicates, however, that these grounds are likely waived or not properly before the Court at this time.

A. The Court should reserve any question of whether the SEC's order creating a Fair Fund "for the benefit of investors" meant that its enforcement proceedings effectively resolved matters of private right in a way relevant to the public-rights doctrine.

Language in Parts I and II has at multiple points described SEC enforcement actions seeking civil penalties as "generally" or "presumptively" matters of public right. Such qualifications are necessary because this Court's precedents, including *Oil States* and *Union Carbide*, make clear that whether a matter is one of public or private right is not necessarily determined by whether the government appears in its sovereign capacity on one side or the other of the "v." in a particular case. See *supra* note 12 & Part II.B. We infer that, just as a dispute between private parties can turn on a matter of public right, a case brought by the government might, under particular circumstances, seek to resolve a claim of liability between private parties.

This point brings us to an aspect of the SEC's orders that the Fifth Circuit does not appear to have acknowledged. In addition to the orders of equitable and monetary relief reported in the Fifth Circuit's opinion, see *Jarkesy*, 34 F.4th at 450, the SEC ordered "that the disgorgement, prejudgment interest, and civil

penalty be used to create a Fair Fund for the benefit of investors harmed by Respondents' violations." Pet. App. 153a. The SEC's plan to use money recovered from the Respondents to compensate individual investors raises the question of whether, despite being ***facially*** a matter of public right focused on law enforcement and deterrence, the SEC's orders of monetary payment should be viewed as ***functionally*** operating to resolve matters of private right—claims of liability between private parties equivalent or at least substantially analogous to traditional claims in law, equity, or admiralty. See Golden & Lee, *Public Rights*, 98 Notre Dame L. Rev. at 1174–76; Golden & Lee, *Administrative Adjudication*, https://ssrn.com/abstract_id=4561533.

This Court has previously recognized the possibility for overlaps between relief for private rights of action under federal securities laws and the investor compensation that SEC enforcement actions can produce. See *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165–66 (2008) (citing the SEC's capacity to compensate "injured investors" from recoveries of "disgorgement and penalties" in apparent support of refusal to recognize a broader scope for investors' "private right" of action under § 10(b)). But there seems to have been little prior discussion of whether such potential overlaps raise questions about the extent to which SEC proceedings that generate investor compensation should be viewed as adjudicating matters of private right.

Indeed, based on the Questions Presented and our understanding of prior proceedings in this case, such

questions relating to the order for a Fair Fund do not seem properly before this Court at this time. Hence, to the extent the Court believes that there is any legitimacy to these Fair Fund questions, we believe that the Court can and should reserve them. Under these circumstances, the Court should reject the present jury-rights challenge in accordance with the conclusion that SEC enforcement actions for civil penalties are *presumptively* matters of public right.

B. The Bill of Rights and Article III may provide other limits to administrative adjudication not raised by the Questions Presented.

Even if the Court upholds the SEC adjudication in this case against Article III and Seventh Amendment challenges,[9] the Court may, as in *Oil States*, explicitly reserve questions of whether the SEC adjudication violated other provisions of the Bill of Rights. 138 S. Ct. at 1379. The severity of the monetary and perhaps especially the injunctive orders in this case might raise concerns of punitiveness that implicate provisions of the Sixth and Eighth Amendments, as well as of Article III itself, regarding jury rights in criminal cases and "excessive fines." U.S. Const. art. III, § 2, cl. 3, & amends. VI, VIII; see also Golden & Lee, *Administrative Adjudication*,

[9] Because the Seventh Amendment challenge here is directed only at the order of a civil monetary penalty by the SEC, this challenge presumably does not implicate the other forms of relief ordered by the SEC, which appear equitable in nature. See, *e.g.*, *Liu* v. *SEC*, 140 S. Ct. 1936, 1940 (2020) (holding "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under [15 U.S.C.] § 78u(d)(5)").

https://ssrn.com/abstract_id=4561533. More generally, particularly if the administrative orders here are viewed as inflicting quasi-criminal penalties, Fifth Amendment due process may require a fuller version of Article III process than can result from the combination of administrative adjudication and Article III court review on offer here. See Golden & Lee, *Public Rights*, 98 Notre Dame L. Rev. at 1176–77, 1180–81; Golden & Lee, *Administrative Adjudication*, https://ssrn.com/abstract_id=4561533; cf. *Crowell*, 285 U.S. at 87 (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

In sum, even if a matter is one of public right and the Seventh Amendment does not apply, there are other constitutional provisions and principles that may require Article III court involvement in a case in which administrative adjudication substantially affects an individual's constitutionally protected life, liberty, or property interests. This might be such a case, but arguments based on those provisions and principles are not properly raised by the first Question Presented. What is plain is that Article III's specification of federal judicial power and the Seventh Amendment—as operationalized through this Court's public-rights doctrine—do not generally bar Congress from authorizing administrative adjudication of an SEC enforcement action seeking civil penalties for federal securities antifraud violations.

CONCLUSION

For the reasons set forth above, this Court should reverse and remand with respect to the first Question Presented.

Respectfully submitted,

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