No. 22-859

In the Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

GEORGE R. JARKESY, JR., ET AL.

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

BRIEF OF TOTALENERGIES GAS & POWER NORTH AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Constitutional Provisions:

Statutes:

Regulations:

Administrative Materials: **Page(s)**

Other Authorities:

Other Authorities—Continued: **Page(s)**

Other Authorities—Continued: **Page(s)**

INTEREST OF *AMICUS CURIAE*[1]

Amicus TotalEnergies Gas & Power North America, Inc. is a subsidiary of TotalEnergies SE (TotalEnergies), a French oil and gas company. *Amicus* trades and markets TotalEnergies' production assets in North America and trades physical and financial products in the North American natural gas market.

This case is critically important to *amicus* because the Federal Energy Regulatory Commission (FERC) is currently subjecting it (and certain individuals) to an unconstitutional in-house proceeding that suffers from the same separation-of-powers flaws as the Securities and Exchange Commission (SEC) adjudication at issue here. FERC seeks to impose nearly a quarter-billion dollars in civil penalties against *amicus* for alleged market manipulation, pursuant to statutory and regulatory provisions that closely parallel (indeed, are explicitly modeled on) the antifraud standards under the Securities Exchange Act (Exchange Act) and its implementing regulations. FERC seeks to impose these enormous civil penalties through an in-house adjudication before a FERC administrative law judge (ALJ), without any right to a jury trial. When *amicus* asserted its constitutional right to have the claims against it adjudicated in Ar-

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ticle III court with its Seventh Amendment jury-trial rights intact (among other constitutional objections), FERC brushed those concerns aside. *Amicus* then brought suit in federal court, seeking declaratory and injunctive relief to halt FERC's unconstitutional proceedings, relying (among other things) on the Fifth Circuit's decision in *Jarkesy*, under review here. That litigation remains pending, but a federal district court has already entered a 5 U.S.C. § 705 stay of FERC's enforcement proceedings.

Amicus accordingly has a strong interest in the outcome of this case. *Amicus* presents this brief not only to explain how the separation-of-powers concerns raised in this case arise in other agency enforcement programs, including FERC's, but to provide further doctrinal and historical support for the Fifth Circuit's Seventh Amendment holding—which, if affirmed, will allow Respondents in this case, *amicus*, and countless other parties nationwide who face similar federal-agency overreach, to vindicate their constitutionally protected jury-trial rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case presents the question whether the SEC may constitutionally choose to adjudicate securities-fraud claims and impose civil penalties through juryless, in-house proceedings before ALJs who enjoy two layers of for-cause removal protection. As the Fifth Circuit held, the answer is "no," for numerous independent reasons. The proceedings at issue here violated Article III and the Seventh Amendment, Article I and the nondelegation doctrine, and the Presi-

dent's Article II Take Care authority. While this case arises out of an SEC enforcement action, there is nothing SEC-specific about the multiple, grave constitutional violations that occurred here. The same separation-of-powers concerns also arise in FERC's Natural Gas Act enforcement regime. FERC claims to enjoy the same in-house enforcement authority as the SEC—a claim *amicus* and other enforcement targets sharply dispute. On that basis, FERC adjudicates cases implicating core private rights in agency proceedings that (among other constitutional flaws) deprive litigants of Article III's and the Seventh Amendment's bedrock protections.

2. While Congress cannot confer the federal judicial power on non-Article III entities (such as administrative agencies), this Court has held that "public rights," in contradistinction to "private rights," may be adjudicated by agencies, without Seventh Amendment jury rights. The government, seeking to extend this principle beyond any doctrinally or historically credible limits, argues that there is no constitutional bar to Congress authorizing—essentially without limit—the adjudication of statutory enforcement claims brought by the government against private parties in juryless administrative forums. This sweeping bid to relegate the Seventh Amendment (and, to a significant extent, Article III itself) to the dustbin of history must be rejected. The government's argument disregards the Seventh Amendment's original purpose: to assuage fears of government oppression via juryless tribunals. Moreover, the government's stance is particularly intolerable given the ever-growing use of civil sanctions to pun-

ish asserted wrongdoing and enforce the government's will, without need to resort to criminal prosecutions.

3. Under a proper, historically informed understanding, the "public rights" doctrine does not cover actions that take private property via civil penalties. The right of private property is among the few core private rights recognized in the Anglo-American constitutional tradition; civil penalty actions seek to extinguish such core private rights. On the correct understanding of the public rights doctrine, supported by traditional understandings and practices, civil-penalty actions fall squarely on the "private rights" side of the dividing line. While this Court reached a different conclusion in *Atlas Roofing Co.* v. *Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), that decision—which this Court's cases have, in any event, subsequently limited in ways that render it inapplicable here—should be extended no further, given its deviation from a proper understanding of the public rights doctrine.

4. An Article III forum is also required here because securities-fraud claims are close analogues of common-law causes of action that have been adjudicated in courts of law for centuries. The government attempts to distinguish the SEC's claims against Respondents from common-law fraud claims on the basis that the SEC was not required to find reliance or individual injury. But the government's fine-toothed distinctions do not change the demonstrable reality that the claims at issue here are "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," and thus belong in

Article III court. *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011) (internal quotation marks omitted).

The Court should affirm the court of appeals' judgment.

ARGUMENT

I. The Separation-of-Powers Concerns Raised Here Are Not Limited to the SEC, but Arise in the Enforcement Programs of Other Agencies, Including FERC.

This case arises out of an SEC proceeding, but the serious separation-of-powers problems that afflict the SEC's in-house civil-penalty adjudications are by no means limited to that agency. FERC provides a prime example. An independent regulatory commission within the Department of Energy, FERC has authority over, among other things, interstate natural gas transportation and sales under the Natural Gas Act, 15 U.S.C. § 717 *et seq*. In addition to its regulatory duties (such as approving new interstate natural gas pipelines and regulating rates), FERC enforces compliance with a broad array of statutory and regulatory obligations under the threat of civil penalties, disgorgement, restitution, and other remedies. FERC's in-house enforcement arm subjects targets to years-long investigations and in-house agency adjudications for a range of offenses with deep roots in the common law, including charges under anti-manipulation rules directly modeled on the SEC's Rule 10b-5. Compare 18 C.F.R. § 1c.1 (FERC anti-manipulation rule), with 17 C.F.R. § 240.10b-5 (SEC Rule 10b-5); see also 15 U.S.C. § 717c-1 (Natural Gas Act market-manipulation prohibition expressly cross-

referencing Exchange Act Section 10(b), 15 U.S.C. § 78j(b)); accord Order No. 670, *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047, P 7 (2006). Targets of FERC enforcement proceedings face the threat of crippling civil liability and a range of other legal and equitable sanctions. See 15 U.S.C. § 717t-1(a) (authorizing civil penalties of up to $1 million per day per violation, adjusted for inflation).

FERC's in-house enforcement and adjudication process stacks the deck against targets at every turn. Most pertinently for purposes of this brief, FERC—like the SEC—does not give enforcement targets any opportunity for a jury trial. Rather, on FERC's interpretation of the Natural Gas Act (which *amicus* disputes), it has authority to adjudicate liability for civil penalties through a trial before an ALJ, who renders a decision that automatically "becomes a final Commission decision" unless exceptions are filed or the Commission chooses to review it *sua sponte*. See 18 C.F.R. § 385.708(d). The Commission "affords deference to the ALJ's credibility determinations and the amount of weight to be given to particular testimony or documentary evidence." *Brian Hunter*, 135 FERC ¶ 61,054, P 31 (2011), pet. for review granted on other grounds, *Hunter* v. *FERC*, 711 F.3d 155 (D.C. Cir. 2013). While parties can eventually petition for review in a court of appeals, see 15 U.S.C. § 717r(b), the appellate court applies highly deferential standards of review. Indeed, by statute, the agency's findings of fact (typically made by the ALJ and adopted wholesale by the Commission) are "conclusive" if "supported by substantial evidence." *Ibid.*

FERC's in-house investigation and adjudication process is unfair in other ways, departing sharply from the protections that defendants would receive in federal district court. For example, FERC allows enforcement staff (*i.e.*, agency prosecutors) to engage in unrestricted and unrecorded *ex parte* communications with the ultimate agency decisionmakers (*i.e.*, the Commissioners and their staff) throughout many stages of a case—inevitably poisoning the well and inviting prejudgment. See *Total Gas & Power N. Am., Inc.*, 176 FERC ¶ 61,026, P 224 (2021) ("Prior to the issuance of [a] Commission[] Order to Show Cause, [Office of Enforcement] Staff who conduct[] the investigation are not prohibited from speaking with decision makers or their advisors."). And ALJs are not bound by the Federal Rules of Evidence, such as normal rules against the use of hearsay. See *id.* P 227.

The Commission insists that these in-house adjudicatory processes are fair and afford due process. But actions speak louder than words. Much like other federal agencies who try their own enforcement claims in-house, FERC has racked up a success rate that "[e]ven the 1972 Miami Dolphins would envy." *Axon Enter., Inc.* v. *FTC*, 143 S. Ct. 890, 907 n.1 (2023) (Thomas, J., concurring) (citation omitted). In every NGA civil penalty proceeding that a FERC ALJ has adjudicated since 2005, save one, the assigned ALJ has imposed the Commission's proposed penalties, and the Commissioners have approved the as-

sessment.[2] And, as in other agency contexts, most enforcement targets—facing long odds and risking true bet-the-company levels of civil penalties if they choose to litigate—settle before the matter is ever decided by an ALJ. Cf. *Axon*, 143 S. Ct. at 918 (Gorsuch, J., concurring in judgment) (offering similar observations with regard to SEC settlements). The only way to level this tilted playing field is to enforce the Constitution as it was written and intended—starting with Article III and the Seventh Amendment.

II. The Government's Expansive Interpretation of the Public Rights Doctrine Would Undermine the Seventh Amendment's Basic Purpose and Strip Private Parties of Critical Protections.

1. "Article III vests the judicial power of the United States 'in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'" *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018) (quoting U.S. Const. Art. III, § 1). This Court has thus long held that "Congress cannot 'confer the Government's "judicial Power" on entities outside Article III.'" *Oil States*, 138 S. Ct. at 1372-1373 (quot-

[2] In the only counterexample, an ALJ agreed to summary disposition of most of enforcement staff's allegations in respondents' favor after enforcement staff conceded key factual issues, and the case settled before the Commission adjudicated enforcement staff's appeal. See *Oasis Pipeline, L.P.*, 126 FERC ¶ 61,188 (2009).

ing *Stern*, 564 U.S. at 484). Article III's protections dovetail with the Sixth and Seventh Amendments, enshrining the right to jury trials in both criminal prosecutions and civil suits at common law, thereby ensuring that jury rights are protected "in almost all exercises of judicial power, whether civil or criminal." Philip Hamburger, *Is Administrative Law Unlawful?*, at 154 (2014); see U.S. Const. Art. III, § 2, cl. 3; *id.* amends. VI, VII.

Although "Article III * * * strongly implies that neither Congress nor entities within the executive branch can exercise the judicial Power of the United States," Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565 (2007) (Nelson, *Adjudication*) (internal quotation marks omitted), this Court has recognized that there are certain types of adjudicatory tasks which can lawfully be conducted without the involvement of Article III courts—including in administrative forums where, this Court has said, the Seventh Amendment "is not applicable." *Tull* v. *United States*, 481 U.S. 412, 418 n.4 (1987).

In deciding whether a particular proceeding involves an exercise of Article III judicial power, this Court has distinguished between "public rights" and "private rights." *Oil States*, 138 S. Ct. at 1373. Much turns on the distinction. This Court has stated that Congress has "significant latitude to assign adjudication of public rights to entities other than Article III courts." *Ibid.* However, federal adjudication of private rights remains the exclusive domain of the Article III judiciary; Congress thus "lacks the power to strip parties contesting matters of private right of

their constitutional right to a trial by jury." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-52 (1989).

This Court has not "definitively explained" the distinction between public and private rights, and its precedents in this area have "not been entirely consistent." *Oil States*, 138 S. Ct. at 1373 (citations omitted). But this Court's decisions, as informed by the Constitution's original meaning and historical practice, provide certain key principles to guide the analysis. Applying those principles, this is an easy case: Article III forbids adjudication of the fraud-based civil-penalty claims at issue here via in-house, juryless agency proceedings.

2. Before explaining the multiple reasons for that conclusion, it bears emphasizing the sweeping and untenable nature of the government's position in this case. Reduced to its essence, the Solicitor General asserts that Congress may choose, essentially without limitation, to authorize the government to bring statutory enforcement claims against a private party in a juryless administrative forum—even if those claims closely track common-law causes of action historically adjudicated in courts of law, for which the Seventh Amendment would guarantee a jury trial in federal court, and even if the private respondent stands to face crushing monetary penalties or other severe sanctions. This approach—which puts the fox in charge of the constitutional hen-house—cannot be, and is not, the law.

If the government's view prevailed, there would be no constitutional constraint on Congress's ability to create statutory causes of action and route them to agency courts, allowing the government free rein to

impose massive punitive sanctions based on executive officials' findings, rather than those of an Article III judge and jury. *See* SEC Br. 23, 29. This suggestion is both untenable and chilling, particularly given that the Seventh Amendment was motivated mainly by a fear of *government* oppression—not a fear of bench trials in "private tort, contract, and property cases" between individuals. *Id.* at 19 (citation omitted). "[E]ighteenth-century Americans viewed civil juries as a critical check on government power. The people wanted juries because they perceived the judiciary as an arm of the government, and the people distrusted government." Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013, 1017 (1994).

Americans were well aware of the potential for government abuses when cases, civil or criminal, could be brought by the government against private parties in juryless venues—such as the notorious Star Chamber, an English conciliar court that "the law officers of the Crown found * * * convenient" (particularly for "prosecuting offenders who opposed unpopular policies") because of its summary and juryless procedures. Sir John Baker, *An Introduction to English Legal History* 128 (5th ed. 2019). The Star Chamber's noxious "association with political prosecutions and vindictive punishments" led to its "eventual undoing" in 1641, *ibid.*, but its memory was alive and well in the late eighteenth century. For example, Eldridge Gerry, in explaining his refusal to sign the Constitution at the conclusion of the Convention of 1787, stated among his reasons that the "rights of the

Citizens were * * * rendered insecure * * * by the general power of the Legislature * * * to establish a tribunal without juries, which will be a Star-chamber as to Civil cases." 2 *The Records of the Federal Convention of 1787*, at 633 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

Americans also "had their own experiences under prerogative or administrative tribunals without juries—most notoriously when Parliament in 1765 passed the Stamp Act," which called for enforcement by juryless admiralty courts, leading to widespread and vehement objection. Hamburger 150-151. "[T]he extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial" became a "deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England," and the "right to trial by jury was probably the only one universally secured by the first American state constitutions." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654-655 (1973) (citation omitted). Ultimately, of course, this right was secured under the federal Constitution as well upon the Seventh Amendment's ratification in 1791. Accord Resp. Br. 16-23.

The government's position in this case—apparently, that there is no meaningful constitutional barrier to juryless agency adjudication of any statutory cause of action pursued by the government—thus goes directly against the primary rationale for the Seventh Amendment, *i.e.*, to protect private parties from government overreach. In effect, the government proposes to bring about precisely the out-

come that Luther Martin memorably inveighed against in 1787: that the right to "jury trials, * * * the surest barrier against arbitrary power," would be "taken away in those very cases, where, of all others, it is most essential for our liberty to have it sacredly guarded and preserved," namely cases "between government and its officers on the one part, and the subject or citizen on the other," brought "under" or in "execution" of "the laws of the United States." Luther Martin, *Genuine Information (December 28, 1787)*, Constitutional Sources Project, https://tinyurl.com/3keh4aar (last visited Oct. 11, 2023) (emphasis omitted).

The government's effort to undermine the Seventh Amendment is, moreover, all the more alarming because the real-world concerns that motivated the Seventh Amendment—and the procedural protections it provides—are as important today as they were in 1791, if not *more so*. "Ours is a world filled with more and more civil laws bearing more and more extravagant punishments," often "far more severe than those found in many criminal statutes." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). That includes "rapidly expanding" "punitive civil sanctions" that impose "confiscatory rather than compensatory fines"—such as the nearly *quarter billion* dollars of penalties FERC seeks to impose on *amicus*. *Ibid.* (quoting Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1798 (1992)). Because "[p]unitive civil sanctions are replacing a significant part of the criminal law in critical areas of law en-

forcement," Mann, 101 Yale L.J. at 1798, the Seventh Amendment's (and Article III's) protections are more important than ever. And they make a difference: for example, "[f]rom 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court." *Axon*, 143 S. Ct. at 917 (Gorsuch, J., concurring in judgment); see also Resp. Br. 5-6 & n.8.

3. This Court has squarely held that "[a]ctions by the Government to recover civil penalties under statutory provisions * * * historically have been viewed as one type of action in debt requiring trial by jury," and thus fall within the scope of the jury-trial rights secured by the Seventh Amendment. *Tull*, 481 U.S. at 418-419. Accordingly, the government appears not to (nor could it) dispute that if the claims at issue here were brought in federal court, Respondents would be entitled to a jury trial. Cf. SEC Br. 28-29. Rather, the government's rationale for stripping parties of their constitutionally enshrined jury-trial protections rests entirely on the "public rights" doctrine, which traces its origins to language in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

But as the Fifth Circuit correctly held, that doctrine is not applicable to the civil-penalty claims against Respondents. First, whatever the ultimate scope of "public rights" that can be adjudicated in juryless non-Article III forums, that category should not be construed to reach actions that take private property via civil penalties—or, at the very least, it should be construed exceedingly narrowly in the civil-penalties context. See generally *infra* Part III. Sec-

ond, this Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law * * * .'" *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284). Thus, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction," the case must proceed in Article III court. *Ibid.* (citation omitted) (quoting *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)). That includes the claims at issue here. Modern securities-fraud claims closely resemble causes of action adjudicated in courts under the common law of the late eighteenth century. See generally *infra* Part IV. The SEC's juryless in-house adjudication of its claims against Respondents thus violated Article III and the Seventh Amendment.

III. On a Proper Understanding of the Public Rights Doctrine, Actions for Civil Penalties Must Be Brought in Article III Court.

1. History and first principles support the Fifth Circuit's conclusion that the public rights doctrine does not apply here. Consistent with the analysis employed in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 138 S. Ct. 1365, this Court's first point of focus should be the nature of the private interest at stake. In *Oil States*, which presented the question whether inter partes patent review violated Article III, this Court turned first to the fact that the rights being adjudicated and potentially extinguished "did not exist at common law" but ra-

ther were "public franchises" granted by congressional largesse. *Id.* at 1373-1374 (citations omitted). Thus, in *Oil States*, the nature of the private interest supported the constitutionality of non-Article III adjudication. Here, however, the opposite conclusion follows. Unlike revocation of a patent, civil penalties implicate the "core private right to property" in one of its most traditional and straightforward forms—money. *Axon*, 143 S. Ct. at 911 (Thomas, J., concurring). Civil-penalty actions accordingly "must be adjudicated by Article III courts and juries." *Ibid.*

The right of private property is among the three major categories of "core private rights" recognized in the foundational documents of British law, along with personal security and liberty. Nelson, *Adjudication*, 107 Colum. L. Rev. at 567; see 1 William Blackstone, *Commentaries* *117-136. In civil-penalty actions, such core private property rights are at stake; indeed, adjudicating whether a private party must surrender private property in one of its most "traditional forms" (money) is the whole point of a civil-penalty action. Nelson, *Adjudication*, 107 Colum. L. Rev. at 626-627. If that is not sufficient to make a case about "private rights," it is hard to imagine what would be.

This conclusion is supported by long historical tradition. In American jurisprudential thought as it developed up through the nineteenth century, it was understood that, "[i]n general, neither 'legislative' nor 'executive' power was capable of acting directly upon vested [private] rights and legally divesting them." Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. Pa. L. Rev. 1429, 1434

(2021) (Nelson, *Vested Rights*). So "only a court—a body with 'judicial' power—could validly adjudge someone guilty of a crime and sentence him to pay a fine, to serve a term in prison, or to be executed." *Ibid.*; accord William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1542 (2020) (similar); Ilan Wurman, *Constitutional Administration*, 69 Stan. L. Rev. 359, 418 (2017) (similar).

Under this traditional framework, the key question was whether a private party stood to be *deprived* of vested rights (which generally required Article III adjudication), as opposed to merely being *granted* new rights, or denied the benefits of some government-conferred *privilege* (which the executive could do without judicial involvement). See Baude, 133 Harv. L. Rev. at 1541. For example, "Congress could" (and did) "authorize 'land offices' in the executive branch to surrender the public's rights in land owned by the federal government, and to determine which private claimants met the statutory criteria for purchasing or being given this land." Nelson, *Vested Rights*, 169 U. Pa. L. Rev. at 1435. But "[o]nce private individuals could claim vested rights in the land * * * , the executive branch's authority to act conclusively ran out": if it wanted to cancel a "'patent' evidencing the conveyance of federal land to a private individual" as, for example, "obtained by fraud," "the government had to go to court to establish the grounds for cancellation." Nelson, *Adjudication*, 107 Colum. L. Rev. at 578.

This traditional understanding is not only supported by a long line of theory and practice, see Nelson, *Adjudication*, 107 Colum. L. Rev. at 565-593, but

also makes intuitive and doctrinal sense of the distinction between "public rights" and "private rights." As Professor Gary Lawson has observed, "[a]lthough it is difficult to identify those activities that are strictly judicial in the constitutional sense" and thus require Article III adjudication,

> at least some modern administrative adjudication undoubtedly falls squarely on the judicial side. Most notably, the imposition of a civil penalty or fine is very hard to distinguish from the imposition of a criminal sentence (especially when the criminal sentence is itself a fine). If the latter is judicial, it is difficult to see why the former is not as well.

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1247 (1994).

To be sure, even on this traditional understanding of the public rights doctrine, difficult questions can arise. Historical practice reveals certain subject-matter-specific exceptions to the general rule, such as territorial courts, military tribunals, temporary pre-adjudication deprivations, and possibly tax collection—the jurisprudential rationales for which may, in some instances, be debatable. See Nelson, *Adjudication*, 107 Colum. L. Rev. at 575-577, 586-590; Baude, 133 Harv. L. Rev. at 1548-1553. And reasonable minds may differ, in some instances, as to whether the legal interests at stake in a particular adjudication (such as revocation of a patent) constitute vested property rights or merely a qualified government benefit or franchise. Compare *Oil States*, 138 S. Ct. at 1374-1376 (majority opinion), with *id.* at 1381-

1386 (Gorsuch, J., dissenting); see generally Nelson, *Vested Rights*, 169 U. Pa. L. Rev. at 1484-1544.

Civil-penalty actions, however, do not implicate such complexities. The right to keep one's own money is not a mere government privilege or "public franchise," nor is that right a novel "creature of statute" that "did not exist at common law." *Oil States*, 138 S. Ct. at 1373-1374 (citations omitted). Nor do civil-penalty actions fall into any of the well-pedigreed historical exceptions described above (*e.g.*, involving territorial or military courts). Under anything resembling the historical understanding, this case presents as archetypical an example of "private rights" adjudication as one could ask for.

2. In arguing to the contrary, the government relies heavily on *Atlas Roofing*, which upheld juryless civil-penalty adjudications under the Occupational Health and Safety Act (OSHA). See SEC Br. 13, 21-25, 29, 31-32. That case is distinguishable and inapplicable here for reasons the Fifth Circuit, following this Court's post-*Atlas Roofing* precedents, articulated in its decision below. See *infra* Part IV.2. This Court accordingly need not revisit *Atlas Roofing*'s validity here. Nonetheless, given the flaws in *Atlas Roofing*'s reasoning, that decision should at minimum be construed narrowly, and not extended to new and distinguishable contexts.

Atlas Roofing deviates starkly from the historical understandings described above, and has been sharply criticized for its untenably narrow understanding of Article III and the Seventh Amendment. See, *e.g.*, Wurman, 69 Stan. L. Rev. at 413 (describing *Atlas Roofing* as "[p]erhaps the greatest encroachment on

Article III" in the history of this Court's agency-adjudication cases); Nelson, *Adjudication*, 107 Colum. L. Rev. at 604 & n.189 (lamenting the "significant inroads upon the traditional framework" wrought by *Atlas Roofing*, and criticizing that decision for "misus[ing]" inapposite precedents); Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. Pa. L. Rev. 1281, 1282-1283, 1338 (1978) (describing *Atlas Roofing* as a "forthright attack on the seventh amendment" that made "no attempt to follow the classic doctrine that the scope of the seventh amendment is determined by reference to the common law of 1791").

Atlas Roofing's understanding of the public rights doctrine is also deeply flawed by its own terms. To be sure, the public has an *interest* in OSHA (or SEC or FERC) civil-penalty proceedings, in the sense that the statutes being enforced were enacted for public purposes. But neither the government's nor the public's *rights* are what stand to be extinguished in such actions. Rather, "private property rights" are what ultimately are "at stake," *i.e.*, threatened with deprivation. Nelson, *Vested Rights*, 169 U. Pa. L. Rev. at 1437. Indeed, "criminal cases," which "have always been treated as 'private rights' cases," "have the same structure as the dispute in *Atlas Roofing*." *Ibid.* (citation omitted). In both instances, the government "sues in its sovereign capacity," accuses a party of violating "statutory obligations," and seeks to deprive that party of core vested private rights (life, liberty, or property) by imposing congressionally approved "penalties." *Atlas Roofing*, 430 U.S. at 450. There is

no rationale for "arbitrar[ily]" describing "this structure" as a "public rights case" in the civil-penalty context, but a "private rights case" in the criminal context. Nelson, *Vested Rights*, 169 U. Pa. L. Rev. at 1437; accord Lawson, 107 Harv. L. Rev. at 1247 (similar).

Moreover, the authority that *Atlas Roofing* approved in the OSHA context—*i.e.*, to adjudicate civil penalties in juryless in-house agency proceedings—"is not crucial," nor need it be extended to novel and distinguishable contexts, for "the modern administrative state" to function. Nelson, *Adjudication*, 107 Colum. L. Rev. at 627. Courts have heard civil penalty suits for centuries, and routinely still do so. Indeed, "[h]istorically, administrative agencies were not routinely authorized to impose money penalties." Mann, 101 Yale L.J. at 1850. "As the Administrative Conference of the United States noted" in 1972, "most money penalty statutes" required—even at that relatively contemporary point in the Nation's history—"de novo adjudication in federal district court" before the penalty could be imposed. Nelson, *Vested Rights*, 169 U. Pa. L. Rev. at 1436 (citation omitted).[3] Both

[3] To be clear, the constitutionality of in-house agency adjudication does not hinge on whether Congress statutorily provided a pathway for the agency to pursue civil penalties in court—though Congress in fact did so for the SEC, see SEC Br. 3, and also (in *amicus*' view) for FERC. See 15 U.S.C. § 717u; accord William Scherman et al., *The New FERC Enforcement: Due Process Issues in the Post-EPAct 2005 Enforcement Cases*, 31 Energy L.J. 55, 63-67 (2010). Congress cannot loosen Article III's requirements by neglecting to authorize a federal-court pathway for imposing civil penalties. The point, rather, is that

legal and practical reasons thus support cabining *Atlas Roofing*'s errors, not extending them.

IV. An Article III Forum Is Also Required for Fraud-Based Claims Analogous to Common-Law Fraud.

1. As noted, this Court's public-rights cases have given weight to whether a cause of action falls within the traditional province of courts—in particular, whether it "possess[es] a long line of common-law forebears"—or is instead uniquely suited to agency adjudication because it involves new statutory claims alien to the common-law tradition. *Granfinanciera*, 492 U.S. at 52; see also *Stern*, 564 U.S. at 484 (similar). Here, such historical considerations decisively favor Respondents—not just because civil-penalty suits were traditionally heard by courts of law (and still routinely are), see *supra* Part III.2, but also because the *subject matter* of the claims at issue lies within the traditional domain of common-law courts.

Here, Respondents were "charged with willful violations of the antifraud provisions of the Securities, Exchange, and Advisers Acts—Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder—which prohibit essentially the same

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Congress *can* and *routinely does* authorize agencies to bring civil-penalty actions in a constitutionally proper (*i.e.*, in federal court). And the sky will not fall if Congress must amend some statutes to comply with the Constitution.

type of conduct." Pet. App. 202a. The SEC concluded that Respondents committed violations "by making material misstatements and omissions with scienter to * * * investors in marketing materials, financial statements, and monthly account statements." *Id.* at 76a. Courts of law have heard claims of this type, and of the type brought by FERC under its anti-manipulation rule (which is nearly identical to, and was modeled on, Rule 10b-5, see *supra* Part I), for centuries. Blackstone observed that the Court of King's Bench—the "supreme court of common law in the kingdom"[4]—"hath an original jurisdiction and cognizance" of

> all actions of trespass, or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, *deceit*, and actions on the case *which allege any falsity or fraud*: all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.

3 William Blackstone, *Commentaries* *41-42 (fifth and subsequent editions) (emphasis added).[5] The

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[4] The Court of King's Bench, like the Court of Common Pleas, was a court of law. See generally 3 William Blackstone, *Commentaries* *37-43. On the equity courts (within the Exchequer and Chancery), see *id.* at *43-55. For a modern historical overview, see Baker, 44-59, 105-125.

[5] This text first appeared in the fifth (1773) edition of the *Commentaries*. The relevant varia are set out in the 2016 Oxford critical edition. *See* 3 William Blackstone,

referenced action of deceit (also within the jurisdiction of the Court of King's Bench at Blackstone's time) had existed in one form or another since the early thirteenth century, see Theodore F. T. Plucknett, *A Concise History of the Common Law* 640 (5th ed. 1956), and by no later than the end of the fourteenth century was being used for claims that would subsequently, and today, be recognizable as actions for breach of warranty:

Commentaries on the Laws of England at xxi-xxii, 28, 324 (Wilfrid Prest general ed., Oxford ed. 2016). One *amicus* supporting the government's stance incorrectly asserts that the Fifth Circuit "[m]isquote[d]" Blackstone—a criticism that ignores the *Commentaries*' revision history. Br. of *Amicus Curiae* Forum of U.S. Administrative Law Judges 6-8. For clarity, Book III went through several editions during Blackstone's lifetime. Thomas P. Gallanis, *Editor's Introduction* to 3 William Blackstone, *Commentaries on the Laws of England* at vii, vii (Wilfrid Prest general ed., Oxford ed. 2016). "In updating Book III, Blackstone * * * clarified his text; he added or deleted references to the occasional case, statute, or treatise; and he added internal cross-references * * * ." *Id.* at xiv-xv (footnotes omitted).

The same *amicus* brief also errs by selectively quoting other portions of Blackstone. Notably, it quotes Blackstone's statement that "it hath been said, that *fraud*, *accident*, and *trust* are the proper and peculiar objects of a court of equity." 3 Blackstone, *Commentaries* *431 (footnote omitted). But in the passage in question, Blackstone was explaining that this generalization (*i.e.*, what "hath been said" by others) was *wrong*. As Blackstone went on to state: "But every kind of *fraud* is equally cognizable, and equally adverted to, in a court of law: and some frauds are only cognizable there, as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined." *Id.*

> In 1387 a writ alleged that the plaintiff "had bargained with [the defendant] at Canterbury to buy a certain horse from him, [the defendant] knowing it to be subject to a certain infirmity, warranting it to be sound and suitable, falsely and fraudulently sold [it] there to [the plaintiff] for a great sum of money to [the plaintiff's] damage." The Register lists writs of this type under the heading of "trespass," and such actions are often referred to in the Yearbooks by that name or as "trespass on the case." But such actions are also called "deceit" or "deceit on the case." [Anthony] Fitzherbert [1470-1538], following nomenclature of the Yearbook reports, speaks of trespass on the case for breach of warranty in the sale of a horse or wine, and of a writ of deceit for a sale of fabrics, while Blackstone says that deceit and case are alternative remedies for breach of warranty. In fact, the form of writ was the same whether the reporter chose to call the action deceit, trespass, or case.

William M. McGovern, Jr., *The Enforcement of Informal Contracts in the Later Middle Ages*, 59 Calif. L. Rev. 1145, 1152-1153 (1971) (footnotes omitted); see also Plucknett 641 ("Late in the fourteenth century [the writ of deceit] entered upon a useful career by enforcing express warranties * * * ."); Baker 352 (describing the emergent "action for deceitful contract-making," such as for the fraudulent sale of a blind horse, beginning in "the second half of the fourteenth century").

Over time, the action of deceit was extended to "giv[e] in a general way relief to those who have suffered by placing faith in a lie." 2 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at *534 (2d ed. 1898). "By the end of the eighteenth century, the law of fraud (or, as it was more commonly called, deceit) in sales transactions was established in a form that would be familiar to lawyers today"; a plaintiff was required to "plead and prove a misrepresentation (or, in some cases, a suppression) of a material fact that was made knowingly and with intent to defraud and that was relied upon by the plaintiff to his damage." Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 Am. J. Legal Hist. 405, 407-08 (1995) (footnote omitted). Of course, that description should ring quite familiar to practitioners involved in modern securities-fraud cases.

Consider the well-known 1789 King's Bench decision in *Pasley* v. *Freeman*—a case this Court has relied upon several times. See, *e.g.*, *Russell* v. *Clark's Ex'rs*, 11 U.S. (7 Cranch) 69, 94 (1812) (Marshall, C.J.) (relying on *Pasley*). The plaintiff alleged that the defendant, "intending to deceive and defraud," had "encourage[d] and persuade[d]" the plaintiff to "sell and deliver * * * divers * * * goods, wares, and merchandizes" to a third individual (not a party to the case) by falsely and fraudulently "assert[ing] and affirm[ing]" to the plaintiff that the buyer "was a person safely to be trusted and given credit to in that respect." *Pasley* v. *Freeman*, 100 Eng. Rep. 450, 450 (K.B. 1789). The court held that a deceit action

would lie. See generally Dalley, 39 Am. J. Legal Hist. at 435.

In addition to deceit actions, market-manipulation claims and other prosecutions for "offences against public trade" were also familiar to common-law courts. 4 Blackstone, *Commentaries* *154. For example, as Blackstone explained, "[t]he offence of *forestalling* the market," *i.e.*, buying goods on the way to market, "dissuading" others from bringing their goods to market, or "persuading them to enhance the price"—practices by which speculators could profit, but which "ma[de] the market dearer to the fair trader"—was "an offence at common law." *Id.* at *158; see *id.* at *158-159 (describing the related offenses of regrating and engrossing). "[T]he [English] courts continued to punish engrossing, forestalling, and regrating under the common law" until an 1844 statute expressly prohibited such prosecutions. Edward A. Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 Harv. L. Rev. 246, 258 (1917); see generally William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 368-373 (1954). Parties could also be "indicted * * * at common law" for various "frauds" in trade. 4 Blackstone, *Commentaries* *157-158.[6]

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[6] Blackstone describes these claims under the header of "public wrongs" (Book IV), *i.e.* "*crimes* and *misdemesnors*" that could be prosecuted by the government. 4 Blackstone, *Commentaries* *1-2. In their *amicus* brief, Professors John M. Golden and Thomas H. Lee criticize the Fifth Circuit for relying on Blackstone's discussion of fraud and deceit actions in Book III (which is dedicated to "private wrongs"), noting that

In short, the contours of a claim with elements closely akin to those of a modern Rule 10b-5 or similar securities-fraud claim would have been familiar to lawyers—and courts of common law—at the time of the Founding. And while the precise elements of such actions naturally evolved over the centuries, analogues can be traced back to the late Middle Ages. The notion that such causes of action are novel mat-

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Blackstone elsewhere observed that some criminal offenses could be tried by summary, juryless proceedings in eighteenth-century England. Br. of Professors John M. Golden and Thomas H. Lee as *Amici Curiae* 6-8. But it is unclear why these observations would support the government's view of the public rights doctrine. To the extent eighteenth-century *criminal* offenses can provide useful analogues of the claims at issue here, that would only appear to further support the view that such claims must be adjudicated in Article III court. See, *e.g.*, Lawson, 107 Harv. L. Rev. at 1246-1247; Hamburger 228-231. The fact that the English parliament authorized certain categories of offenses (such as "offences and frauds contrary to the laws of the *excise*" and "disorderly offences" like "common swearing" and "drunkenness") to be tried by summary proceedings—to which, Blackstone noted, "the common law [was] a stranger," and the extension of which he described with unconcealed alarm, 4 Blackstone, *Commentaries* *277-279; accord 1 Blackstone, *Commentaries* *308; cf. Hamburger 206-208—does not change the reality that "[t]he court of *king's bench* * * * on the crown side, or crown office, * * * [took] cognizance of all criminal causes, from high treason down to the most trivial misdemesnor or breach of the peace," 4 Blackstone, *Commentaries* *262 (footnote omitted); criminal causes involving fraud in trade and market manipulation, too, were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Stern*, 564 U.S. at 484 (citation omitted).

ters of "public right" that the Founders would have countenanced being adjudicated by agency officials rather than Article III judges—thus depriving defendants of, among other critical rights and protections, their right to a jury in "Suits at common law," U.S. Const. Amend. VII—simply is not credible on any fair account of the historical record.

2. The government evidently does not dispute any of this history. Rather, the government argues that securities-fraud claims are meaningfully distinct from common-law fraud, because the statutory claims do not (where brought by the SEC, as opposed to a private plaintiff) require a finding of reliance or injury to an individual, as would be required at common law. See SEC Br. 24-25.

Once again, it is worth pausing at the outset to appreciate the perversity of the government's stance. As explained, the Seventh Amendment was included in the Bill of Rights because Americans, familiar with the long history of government using juryless adjudications to enforce unpopular laws and target its political foes, sought to protect private parties from such overreach. See *supra* Part II.2. Yet on the government's view, Congress can circumvent those protections by simply making it *easier* to impose crushing civil liability on private parties (*i.e.*, through the creation of statutory causes of action that closely match common-law causes of action, but eliminate some elements that a plaintiff would otherwise and traditionally be required to prove). This theory makes a mockery of Article III and the Seventh Amendment's specific and well-established purpose to protect citizens from government overreach.

It also makes a mockery of this Court's cases. While "'the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time'"; rather, "that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." *Pernell* v. *Southall Realty*, 416 U.S. 363, 374-375 (1974) (quoting *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974)). As discussed, that includes the securities-fraud claims at issue in this case and the similar claims asserted by FERC under its market-manipulation regulation.

This Court should reject the government's argument for what it is: an attempt to overread and significantly broaden *Atlas Roofing*. For starters, that case is, at best, in deep tension with a proper understanding of the public rights doctrine. See generally *supra* Part III.2. By all rights, the proper approach would be to cabin *Atlas Roofing* to its facts. But it is unnecessary for this Court to take that step here. *Atlas Roofing*'s own author acknowledged that this Court subsequently "overrul[ed] or severely limit[ed]" that decision. *Granfinanciera*, 492 U.S. at 71 n.1 (White, J., dissenting). And as the Fifth Circuit correctly held, this Court has already articulated the critical principles that delimit *Atlas Roofing*'s scope, under which that decision is inapplicable here.

Contrary to the government's expansive reading of *Atlas Roofing*, "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by

relabeling the cause of action to which it attaches" (or, as the government now prefers it, watering down that cause of action by making it easier to prove) "and placing exclusive jurisdiction in an administrative agency * * * ." *Granfinanciera*, 492 U.S. at 61 (majority opinion). Critically, this Court has never required perfect unity of elements between a statutory and common-law cause of action in conducting a "public rights" analysis under Article III. Here, as in *Granfinanciera*, it is "decisive" that Congress did not "create a new cause of action, and remedies therefor, unknown to the common law, because traditional rights and remedies were inadequate to cope with a manifest public problem." *Id.* at 60 (internal quotation marks and alterations omitted).

There is a material (and outcome-determinative) difference between marginally adapting a common-law claim, as for the securities-fraud claims here and parallel offenses enforced by FERC, and authorizing a novel regime of workplace-safety regulations, as Congress did with OSHA, whereby it "created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions" and empowered the Secretary of Labor to "promulgate health and safety standards," which this Court described as "unknown to the common law," *Atlas Roofing*, 430 U.S. at 445, 461, and lacking "a long line of common-law forebears," *Granfinanciera*, 492 U.S. at 52; see also Resp. Br. 37-38. The government makes no effort to show that there are centuries-old common-law analogues of OSHA standards—as, by contrast, can readily be demonstrated with regard to securities fraud.

CONCLUSION

The Fifth Circuit's judgment should be affirmed.

Respectfully submitted.

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