No. 22-859

IN THE

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

GEORGE R. JARKESY, JR. AND PATRIOT28, L.L.C.,
Respondents.

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

BRIEF FOR DAVID JULIAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

David Julian is the former Chief Auditor of Wells Fargo Corp. and, for a time between June 2013 and June 2015, Wells Fargo Bank, N.A. (Wells Fargo Bank). In October 2013, the *Los Angeles Times* published a series of articles about supposed sales practices misconduct at Wells Fargo Bank branches in the Los Angeles area. Various government investigations ensued, culminating in the announcement of a settlement in September 2016 between Wells Fargo Bank and the Office of the Comptroller of the Currency (OCC), the Consumer Financial Protection Bureau, and the Los Angeles City Attorney.

A political firestorm followed. At a U.S. Senate Banking Committee hearing later that September, the Comptroller appeared personally and endured intense criticism, with senators pressing to know when the OCC examiners were first aware of the issues highlighted in the Wells Fargo Bank settlement. The Comptroller thereafter launched an internal investigation of his staff's performance, which revealed that the examiners were contemporaneously aware of sales practices issues at Wells Fargo yet failed to act.[2] Eager to shift blame, the very same OCC examiners

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

[2] *See* OCC, Office of Enterprise Governance and the Ombudsman, *Lessons Learned Review of Supervision of Sales Practices at Wells Fargo* (Apr. 19, 2017), https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-wells-fargo-supervision-lessons-learned.pdf.

whose conduct was criticized launched an investigation into Mr. Julian and other Wells Fargo Bank executives.

To no one's surprise, in January 2020, the OCC initiated an enforcement action against Mr. Julian (and others) under 12 U.S.C. §1818, alleging that he, as an internal auditor, had recklessly (1) engaged in unsafe and unsound banking practices, and (2) breached his fiduciary duties to Wells Fargo Bank. In such an action, fiduciary "duties are determined by state law rather than federal common law." *Calcutt* v. *FDIC*, 37 F.4th 293, 327 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023); *see also Atherton* v. *FDIC*, 519 U.S. 213, 226 (1997) (holding "[t]hat there is no federal common law that would create a general standard of care" for claims that a bank officer violated his duties to the bank). The Comptroller's notice of charges assessed a $2 million civil monetary penalty and sought a cease-and-desist order against Mr. Julian.[3]

As was his right, Mr. Julian filed an answer contesting both the Comptroller's charges and penalty assessment and demanding a hearing. Mr. Julian also contended that adjudicating the OCC's claims before an administrative law judge (ALJ) violated, among other things, Article III and the Seventh Amendment, which together ensure that charges of this sort will be tried in federal court before a jury.

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[3] *See* Notice of Charges (Jan. 23, 2020), https://www.occ.gov/static/enforcement-actions/eaN20-001.pdf. Unless otherwise specified, all filings cited are from *In re Tolstedt*, OCC Nos. AA-EC-2019-82, AA-ED-2019-81, A-ED-2019-70, AA-ED-2019-71, AA-ED-2019-72. *See* OCC, *Recent Selected Litigated Enforcement Actions*, https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/recent-selected-litigated-enforcement-actions.html.

The administrative proceeding that ensued before the ALJ was nothing short of mind-boggling. After the OCC noticed its intent to call as its primary fact and expert witnesses the very OCC examiners whose work the Senate Banking Committee and the OCC's ensuing internal investigation had found wanting, Mr. Julian sought discovery concerning agency discipline imposed against those examiners based on their supervision of Wells Fargo Bank—evidence relevant to their bias and competence as expert witnesses. *See* Younger, *The Art of Cross-Examination* 2, 10 (1976) (identifying competence and bias as classic bases for cross-examination); *DiCarlo* v. *Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000) ("An expert witness's bias goes to the weight, not the admissibility of the testimony, and should be brought out on cross-examination."); *Moran* v. *Ford Motor Corp.*, 476 F.2d 289, 291 (8th Cir. 1973) ("'[T]he less qualified the expert, the more vigorous will be the cross-examining attack and undoubtedly the less persuasive will be the opinion to the trier of fact.'"). But the ALJ prohibited all such discovery, ruling that the "expertise of the witness '*is established as a matter of law*'" before the hearing even began.[4]

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[4] Order Regarding Enforcement Counsel's Motion to Strike Portions of Respondent Julian's et al. Fourth Request for Production of OCC Documents at 12 (Oct. 28, 2020); *see also* Order Regarding Enforcement Counsel's Motion for Protective Order Regarding Sensitive OCC Personnel Information at 5 (Nov. 2, 2020).

The OCC does not maintain dockets for its administrative proceedings. As a result, links are not available for most filings (including many orders) in the proceedings. However, filings in Mr. Julian's agency adjudication can often be found by searching the OCC's Freedom of Information Act library. *See* OCC, *FOIA Library*, https://foia-pal.occ.gov/app/ReadingRoom.aspx (visited Oct. 18, 2023).

While discovery was ongoing, the President ordered federal agencies to develop rules to disclose in administrative proceedings evidence and information that would constitute *Brady* material in a criminal prosecution. Exec. Order No. 13924, *Executive Order on Regulatory Relief to Support Economic Recovery*, 85 Fed. Reg. 31,353 (May 22, 2020); Office of Mgmt. & Budget, Exec. Office of the President, OMB Memo No. M-20-31, *Implementation of Section 6 of Executive Order 13924* (Aug. 31, 2020). Accordingly, Mr. Julian served discovery requests seeking any *Brady* material in the OCC's possession. The ALJ struck the request, ruling that no controlling precedent had applied *Brady* to administrative proceedings.[5] This reasoning was beside the point, because Mr. Julian was not arguing that the OCC had an affirmative obligation under *Brady*, but that the agency had an obligation to provide such exculpatory information in response to discovery requests. No explanation was provided for why such evidence was not materially relevant, which is the governing standard. 12 C.F.R. §19.24(b).

In September 2021, the case proceeded to a 40-day evidentiary hearing. Before the hearing of evidence even began, the ALJ announced, through various written orders and oral statements on the record, that he had already *sua sponte* made numerous factual findings relevant to the case. Neither party had requested that the ALJ make such findings before a single witness testified.

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[5] Order Regarding Enforcement Counsel's Motion to Strike Portions of Respondent Julian's et al. Fourth Request for Production of OCC Documents at 11 (Oct. 28, 2020).

Because the OCC was relying on its own examiners as its only expert witnesses, Mr. Julian sought to call other agency witnesses who could testify about the Comptroller's internal investigation of those examiners' conduct, in order to challenge their likely bias and competence as experts. The ALJ, however, precluded that testimony, again reasoning that evidence concerning the bias or competence of the OCC's star witnesses was not relevant.[6]

At that hearing itself, not one bank employee, director, auditor, shareholder, or customer said a single negative word about Mr. Julian. More notably, though the OCC alleged that Mr. Julian violated his fiduciary duties to Wells Fargo Bank, no member of any Wells Fargo board of directors testified to that effect. Nor did the OCC offer an expert witness from outside the agency. Instead, the entirety of the OCC's case against Mr. Julian consisted of testimony by OCC bank examiners who—though they had raised no contemporaneous concerns when they supervised Wells Fargo Bank, and were later publicly criticized for it—testified as supposed fact and expert witnesses claiming that Mr. Julian's behavior was improper. When Mr. Julian's counsel attempted to cross-examine those witnesses for lack of competence as experts and for evident bias given the public criticism they had faced for their supervision of Wells Fargo Bank, the ALJ consistently precluded such cross-examination. In the ALJ's view, the

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[6] *See* Order Regarding Enforcement Counsel's Motions to Quash Hearing Subpoenas Directed to Certain OCC Personnel and Strike Them From Respondents' Witness Lists and for Order to Show Cause (Aug. 18, 2021), https://www.ofia.gov/decisions/2021-08-18-occ-aa-ec-2019-82.pdf.

examiners were "experts as a matter of law" and their qualifications and motivations could not be questioned.

In the meantime, a Freedom of Information Act request revealed that the ALJ was engaged in *ex parte* communications with the OCC's trial counsel for nearly two years while the litigation was ongoing. For example, the ALJ foreshadowed one of his pre-trial rulings in an email communication with the OCC's counsel. When Mr. Julian moved to disqualify the ALJ, the ALJ declared, without explanation, that his extensive *ex parte* communications "do not support an order granting relief."[7]

The ALJ ultimately ruled in the OCC's favor and recommended penalties and other remedies against Mr. Julian that the Comptroller's notice of charges had not even sought. Specifically, the ALJ recommended a $7 million civil money penalty (more than three times the penalty originally assessed in the notice of charges) and a permanent bar from the industry (even though the notice of charges sought only a cease-and-desist order). Contrary to the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), the ALJ's 494-page opinion made numerous factual findings without a single citation to supporting evidence, much less any discussion of the contrary evidence.[8]

Mr. Julian's case has yet to reach final resolution. He is confident that he will ultimately be vindicated. In

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[7] Order Regarding Respondents' Motion for Reconsideration and for Leave to File at 4 (July 5, 2022), https://www.ofia.gov/decisions/2022-07-05-occ-aa-ec-2019-82.pdf.

[8] *See* Recommended Decision – David Julian (Dec. 5, 2022), https://www.ofia.gov/decisions/2022-12-05-occ-aa-ec-2019-82-julian.pdf.

the meantime, Mr. Julian files this brief to further inform the Court of the severe unfairness and harm that can result from allowing enforcement actions to proceed before administrative tribunals without the protections of Article III and the Seventh Amendment. Mr. Julian hopes that, by this Court's ruling, citizens facing future agency charges will be able to defend themselves before a federal court and a jury, as the Founders envisioned.

SUMMARY OF ARGUMENT

The U.S. Securities and Exchange Commission (SEC) brought this enforcement action against Respondents George Jarkesy and Patriot28 LLC in an administrative forum, alleging securities fraud in violation of 15 U.S.C. §§77q(a), 78j(b), 80b-6, and seeking civil money penalties under 15 U.S.C. §78u-2 and to bar them from certain securities industry activities. After a hearing before an ALJ, the full Commission—which had authorized the action against Respondents—concluded that Respondents had committed two third-tier violations and imposed a $300,000 penalty.

Agency adjudication of fraud claims and imposition of enormous civil money penalties in an administrative forum, without the benefit of an independent judge and factfinding by a jury, is contrary to the Constitution's assignment of federal judicial power to Article III judges and the Seventh Amendment's guarantee of a jury trial for claims analogous to those for which a jury trial right attached at common law. While public rights may be adjudicated in administrative fora, the government rightly acknowledges that "[p]ublic-rights cases involve matters that 'from their nature do not require judicial determination and yet are susceptible to it." Pet. Br. 18 (quoting *Oil States Energy Servs., LLC* v.

Greene's Energy Grp., LLC, 138 S.Ct. 1365, 1373 (2018)). There is no serious argument that government actions seeking to impose enormous money penalties on a private citizen are a type of action that "do[es] not require judicial determination." Indeed, those are precisely the type of government actions that the Founders designed the federal separation of powers and jury trial right to protect against.

This Court's decision in *Atlas Roofing Co.* v. *OSHA*, 430 U.S. 442 (1977), does not compel a contrary conclusion. The holding in *Atlas Roofing* was expressly premised on the notion that the "remed[y]" of a civil money penalty was "unknown to the common law," *id.* at 461—a proposition this Court later repudiated in *Tull* v. *United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."). What is more, *Atlas Roofing* did not involve a substantive claim with a common law antecedent; the claim at issue there was created by Congress precisely because available common law actions were inadequate. *See* 430 U.S. at 445. And, the Court noted, the $10,000 statutory maximum penalty at issue was below the threshold that triggers the right to a jury trial in a criminal case. *See id.* at 460 n.15 (citing *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975)).

Here, by contrast, Respondents were saddled with money penalties, a type of remedy at common law, many multiples of $10,000 based on fraud, a claim well known to the common law. Whatever the public/private rights distinction means, "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.'" *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011). Certainly, the fraud claims against Respond-

ents and accompanying penalties are, from their nature, matters that would be subject to suit at common law. Consequently, the Court should hold that the Constitution prohibits assigning adjudication of such claims to an administrative agency without a jury.

ARGUMENT

I. CONGRESS MAY NOT ASSIGN A CIVIL MONEY PENALTY PROCEEDING FOR FRAUD TO AN ADMINISTRATIVE FORUM WITHOUT THE BENEFIT OF A JURY TRIAL

A. The Jury Trial Conducted Before An Independent Judiciary Is Central To The Constitution's Design

This Nation was, quite literally, founded on a commitment to the jury trial and an independent judiciary. While people often associate the American Revolution with tea taxes, the colonists were also focused on judicial independence and jury trials. The Declaration of Independence protests that George III "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries" and "depriv[ed] us in many cases, of the benefits of Trial by Jury." The Declaration of Independence paras. 11, 20 (U.S. 1776); *see also* 4 Elliot, *The Debates, in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 154 (2d ed. 1836) ("What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away, and a stamp duty was laid upon them.").

The Founders also thought it essential that "the judiciary remain[] truly distinct from both the legislature and the executive" because "'there is no liberty if

the power of judging be not separated from the legislative and executive powers.'" Federalist No. 78 (Hamilton) (quoting 1 Montesquieu, *The Spirit of Laws* 181). Or as Madison put it, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, ... may justly be pronounced the very definition of tyranny." Federalist No. 47. But while the independent judiciary of Article III could check the executive of Article II, a further mechanism was needed to check the judiciary. *See Colgrove* v. *Battin*, 413 U.S. 149, 156 n.8 (1973) (noting the observation during the constitutional convention concerning the "necessity of Juries to guard (against) corrupt Judges"); *Thomas Jefferson on Democracy* 62 (Padover, ed., 1939) ("[W]e all know that permanent judges ... are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative power[.]").

That check was a jury of the people. *See* 2 *The Works of John Adams* 253 (Adams ed., 1865) ("[S]o as to put a peremptory negative upon every act of the government, it requires that the common people, should have a complete control, as decisive a negative, in every judgment of a court of judicature."); *see also* Thomas, *The Missing Branch of the Jury*, 77 Ohio St. L.J. 1261, 1278-1281 (2016). "One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830). To address this concern, "[a]s soon as the Constitution was adopted, this right was secured by the Seventh Amendment." *Id.*

Hamilton described the independent judiciary and the civil jury as together "a double security": "The temptations to prostitution which the judges might

have to surmount must certainly be much fewer, while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes." Federalist No. 83. Jefferson similarly viewed the jury trial "as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it[s] constitution." Letter from T. Jefferson to T. Paine, July 11, 1789. In short, "[t]he dominant strategy [of the Constitution] to keep agents of the central government under control was to use the populist and local institution of the jury." Amar, *The Bill of Rights: Creation and Reconstruction* 83 (1998).

B. Civil Money Penalty Actions Are In The Nature Of Common Law Claims Concerning A Private Right That Carry A Right To A Jury Trial

The SEC contends that the independent judiciary and jury trial right over which the colonists went to war can be wiped away by the simple expedient of Congress assigning to an administrative tribunal the adjudication of a matter that, at common law, would be tried to a jury. Indeed, the SEC contends that Congress can do this even when the government is the plaintiff seeking monetary penalties in the millions. This is not the law, nor should it be. "[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Blakely* v. *Washington*, 542 U.S. 296, 308 (2004).

1. Money owned by an individual is a private right

As this Court long ago recognized, "there are matters, involving public rights, ... which congress may or

may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856). But "private rights" must be adjudicated in an Article III forum and, in certain instances, with a trial by jury. *See Stern*, 564 U.S. at 488-489; *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-52 (1989) (Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.").

Here, the SEC sought not only to bar Respondents from participation in the securities industry, but also to take their personal property—hundreds of thousands of dollars of their money—in the form of a civil money penalty. Those funds, owned by Respondents and not conferred on them as some sort of federal government benefit, are a quintessential private right of theirs. That fact requires any government enforcement action seeking to strip them of their private property be adjudicated before an Article III court, with any disputed factual issues resolved by a jury.

That an individual's money is private property—and thus a private right for purposes of Article III and the Seventh Amendment—cannot reasonably be disputed. The Fifth Amendment specifically limits the circumstances under which the federal government can take "private property" for "public use." U.S. Const. amend. V. In that context, the Court has recognized that money, and any interest generated by that money, is the owner's private property, regardless of who holds the funds or the account generating the interest. *See Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 163-172 (1998); *see also Village of Norwood* v. *Baker*, 172 U.S. 269, 285 (1898) ("If the sovereign breaks open the strong box of an individual or corporation, and

takes out money, … it looks to me very much like a direct taking of private property for public use.").

Founding-era Americans understood private property to be a core private right, in contrast to public rights such as the government's expenditure of funds, the use of navigable waterways, government employment, tax exemptions, licenses, and permits to use public highways. *See* Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 567, 570-571 (2007). Also among the class of public rights was the right to sue the government on claims ordinarily subject to a sovereign immunity defense. *See Stern*, 564 U.S. at 489 ("The challenge in *Murray's Lessee* ... fell within the 'public rights' category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity."). Those public rights, originating with the federal government, could be extinguished without involvement of the judicial branch. *See id.* But when it comes to private property, the government's attempt affirmatively to deprive an individual of that private right must occur in an Article III court with, as required by the Seventh Amendment, a jury trial. *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 198 (2023) (Thomas, J., concurring) ("'[A]n exercise of the judicial power is required when the government wants to act authoritatively upon core private rights that had vested in a particular individual.'" (brackets in original)).

Nevertheless, over time this Court allowed an erosion of this protection of private property rights through the imposition of civil money penalties in administrative litigation initiated by the federal government. At first, this was permitted in core areas of governmental regulation such as immigration, importation of goods, taxation, and regulation of federal enclaves.

See Helvering v. *Mitchell*, 303 U.S. 391, 401-403 (1938) (taxes); *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 335 (1932) (immigration); *Block* v. *Hirsch*, 256 U.S. 135, 158 (1921) (landlord-tenant dispute in Washington, D.C.); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 331-332, 338-340 (1909) (immigration); *Passavant* v. *United States*, 148 U.S. 214, 220 (1893) (customs). Then, when only Congress's power to regulate interstate commerce was at issue, the Court allowed the government to bend the constitutional rules of adjudication when imposing fines in relatively modest amounts ($5,000 and $600). *See Atlas Roofing*, 430 U.S. at 448. But in doing so, the Court specifically noted that its precedents allowed only for the imposition of "reasonable money penalties" in an administrative forum. *See id.* at 457 (noting that, in *Oceanic*, the Court had permitted Congress to "impose appropriate obligations and sanction their enforcement by reasonable money penalties").

One searches the SEC's brief in vain for any precedent allowing agency adjudication of enforcement actions seeking money penalties of hundreds of thousands of dollars—much less millions of dollars. To the contrary, the Court in *Atlas Roofing* relied in part on the fact that the penalty at issue was less than $10,000, and thus below the threshold for which the Sixth Amendment jury trial right would attach in criminal cases. *See Atlas Roofing*, 430 U.S. at 460 n.15 (citing *Muniz*, 422 U.S. at 477 (holding that criminal jury trial right does not apply to criminal prosecution resulting in a fine of $10,000)). Nor does the SEC explain how hundreds of thousands of dollars owned by an individual could be deemed a "public right." Were that so, then the term—and the Constitution's protection of private property—would lose all meaning.

2. Civil money penalty actions are in the nature of common law claims

Further evidence that this case involves Respondents' private rights is the fact that the SEC's claims—both the substantive claim and the penalty—are in the nature of actions recognized at common law at the time of the Founding.

The Seventh Amendment, by its terms, secures the civil jury trial in "Suits at common law." U.S. Const. amend. VII. Thus, while Congress may assign to an administrative forum the adjudication of wholly new causes of action it creates, *see Atlas Roofing*, 430 U.S. at 450-455, it may not do so with regard to a cause of action of the same nature as a common law cause of action, *see Stern*, 564 U.S. at 484 ("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.'"); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982) (plurality) ("The [public rights] doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and *only to matters that historically could have been determined exclusively by those departments*." (emphasis added; citation omitted)).

Although the Court in *Atlas Roofing* allowed an administrative tribunal, without a jury, to decide the new cause of action created by Congress and accompanied by a modest civil money penalty, the Court did so without analyzing whether a civil money penalty was from its nature the subject of a suit at common law. Instead, the Court's focus was on the fact that the sub-

stantive violation charged by OSHA—i.e., maintenance of an unsafe workplace—was a new creation of Congress. *See Atlas Roofing*, 430 U.S. at 445 (noting that "[t]he Act created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions"); *id.* at 450 ("Congress has often created new statutory obligations."); *id.* at 461 (noting that Congress "created a new cause of action ... unknown to the common law"). And while the Court stated that the "remedies" at issue in that case were "unknown to the common law," *id.* at 461, the opinion does not discuss or support that proposition.

Indeed, this Court repudiated that statement in *Tull*, when the Court first considered whether a suit seeking a civil money penalty was in the nature of a common law action.[9] There, the Court noted that the English common law "treat[ed] the civil penalty suit as a particular type of action in debt," *Tull*, 481 U.S. at 418, and "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law," *id.* at 422. The Court also observed that "Government [actions] to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury." *Id.* at 418-419. Accordingly, the Court concluded that the Seventh Amendment jury trial right attached to the question of liability for such a penalty. *Id.* at 427.

Because a governmental civil penalty action, "from its nature, is the subject of a suit at the common law,"

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[9] This Court had signaled the answer in *Hepner* v. *United States*, 213 U.S. 103, 115 (1909) (noting that "[t]he defendant was, of course, entitled to have a jury summoned in this case" involving a government action seeking to impose a penalty for violation of the Alien Immigration Law).

"Congress may not withdraw [it] from judicial cognizance" consistent with Article III and the Seventh Amendment. *See Stern*, 564 U.S. at 484. Indeed, in *Tull*, this Court emphasized that the jury trial right attaches to a civil money penalty proceeding even if the cause of action giving rise to liability for that penalty was a new creation of Congress that the common law would not have tried by jury. *See Tull*, 481 U.S. at 421 n.6.

The SEC attempts to separate the Article III and Seventh Amendment analyses, citing this Court's statement in *Atlas Roofing* that Congress can assign an action to an administrative forum "'even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law.'" Pet. Br. 22 (quoting *Atlas Roofing*, 430 U.S. at 455). Notably, *Atlas Roofing* cited no authority for that statement. And it cannot be reconciled with this Court's subsequent holding that a penalty proceeding is in the nature of a common law action that could only be enforced in courts of law, *see Tull*, 481 U.S. at 419, 422, and this Court's interpretation of Article III, dating back to *Murray's Lessee*, as precluding assignment to administrative fora of matters in the nature of actions at common law, *see Stern*, 564 U.S. at 484. Nor can the unadorned statement in *Atlas Roofing* be reconciled with the statement by a plurality of this Court only five years later to the effect that the public rights doctrine allows for assignment of an action to an administrative forum "only" when the matter is one "that historically could have been determined exclusively by [the executive or legislative] departments." *Northern Pipeline*, 458 U.S. at 68 (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929), a case involving customs). Money penalty actions—especially those involving fraud claims—

are not matters that could historically be determined exclusively by non-judicial branches. Indeed, they could not historically be determined by non-judicial branches at all. *See Tull*, 481 U.S. at 418.

C. Substantive Claims In The Nature Of Common Law Claims Cannot Be Assigned To Administrative Fora

The constitutional limitations on Congress's ability to assign an action for adjudication before an administrative forum are even more potent where, as here, the statutory violation, in addition to the penalty provision, is analogous to a common law cause of action.

1. Securities fraud is in the nature of a common law claim

There is no doubt that the SEC's securities fraud claims here are analogous to common law fraud claims. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 253 (1988) ("In general, the case law developed in this Court with respect to § 10(b) and Rule 10b–5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit.").[10] The government notes that "'Section 10(b) does not incorporate common-law fraud into federal law.'" Pet. Br. 30 (quoting *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008)). But this Court's point in *Stoneridge* was that securities fraud under Section 10(b) is narrower than the common law fraud action,

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[10] *See also Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 376 (1991) (referring to the "the common-law fraud model underlying most § 10(b) actions"); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005) (referring to the "common-law roots of the securities fraud action").

not that the claims are not analogous. *See Stoneridge*, 552 U.S. at 162 (quoting *SEC* v. *Zandford*, 535 U.S. 813, 820 (2002), for the proposition that "[Section 10(b)] must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation" (brackets in original)). Whatever the minor differences between the statutory and common law actions, "finding a precisely analogous common law cause of action" is not required "in determining whether the Seventh Amendment guarantees a jury trial." *Tull*, 481 U.S. at 421. And "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Granfinanciera*, 492 U.S. at 61.

The SEC contends that, unlike common law fraud claims, its statutory securities fraud claims do not require proof of reliance or evidence of harm. Pet. Br. 24-25, 30. That is incorrect, at least as to this case. To impose third-tier civil monetary penalties like those imposed here, the statute requires the SEC to prove a causal connection between the fraud and monetary loss. *See* 15 U.S.C. §78u-2(b)(3)(B) (authorizing third-tier penalties when, among other things, the violation "resulted in substantial losses ... to other persons"); Martens & Paredes, *The Scope of the Jury Trial Right in SEC Enforcement Actions*, 71 N.Y.U. Ann. Surv. Am. L. 147, 176-177 (2015) (explaining causation element of statutory penalty scheme). Indeed, the Commission, on *de novo* review of the ALJ's decision concerning Respondents, expressly found reliance by investors and resulting losses as the basis for imposing two third-tier penalties. *See* Opinion of the Commission at 25, *In re John Thomas Capital Management Group*, Securities

Act Release No. 10834, Admin. Proc. File No. 3-15255 (Sept. 4, 2020).[11] Thus, to recover a civil money penalty, the SEC was required to prove elements indistinguishable from a common law fraud claim.

Perhaps technical securities law claims created by Congress lacking a common law analogue (e.g., broker registration, securities registration, etc.) and providing for remedies other than civil money penalties could be properly characterized as matters involving "public rights" subject to administrative adjudication. *Cf.* Nelson, *supra*, at 570 (identifying government licenses as "public rights"). But where, as here, the claim at issue has a direct common law analogue, especially one to which a Seventh Amendment jury trial right would attach, and the violation of which results in a money penalty, Congress cannot negate that jury trial right by removing the claim from an Article III court. Simply put, the Constitution does not permit the government to impose potentially crippling financial penalties based on common law claims (or their analogues) in an administrative forum. The American Revolution is not so easily undone.

2. Breach of fiduciary duty is a common law claim

Other federal statutory schemes, such as that to which Mr. Julian has been subjected, even more plainly—and impermissibly—authorize the administrative adjudication of civil money penalty actions based on substantive common law claims. Congress has authorized the OCC and other banking agencies to bring enforcement actions and impose civil money penalties in

[11] https://www.sec.gov/files/litigation/opinions/2020/33-10834.pdf.

an administrative forum for breaches of state law fiduciary duties. *See* 12 U.S.C. §1818(e)(1)(A)(iii), (i)(2)(B)(i)(III), (i)(2)(C)(i)(III); *Calcutt*, 37 F.4th at 327 (holding that, in an action under Section 1818, fiduciary "duties are determined by state law rather than federal common law"). Breach of fiduciary duty is a claim long known to the common law. *See Pegram* v. *Herdrich*, 530 U.S. 211, 224, 231 (2000) (recognizing the obligations imposed on fiduciaries at common law); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255-256, 262 (1993) (recognizing that breach of fiduciary duty claims were well-known at common law). And whatever the differences between common law fraud and federal statutory securities fraud, the breach of fiduciary duty claim at issue in OCC enforcement actions is an exact replica of the relevant state common law claim with a "purely taxonomic change." *Granfinanciera*, 492 U.S. at 61. The right to an adjudication before an Article III court accompanied by a jury trial when a civil money penalty is sought for that supposed violation is all the clearer.

D. Administrative Litigation Is Not Required For Swift Resolution By An Agency With Specialized Expertise

In this Court's seminal decision affirming the constitutionality of administrative litigation—albeit, without a civil money penalty at issue—the Court reasoned that, "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell* v. *Benson*, 285 U.S. 22, 46 (1932). This rationale might hold in the context of relatively simple claims of a sort

to which the jury right did not otherwise apply at common law. For instance, *Crowell* involved claims "governed by the maritime law as established by the Congress and [we]re within the admiralty jurisdiction" and thus "the right to a trial by jury under the Seventh Amendment is unavailing." *Id.* at 45. But the fraud claims at issue here—or the breach of fiduciary duty claim in Mr. Julian's case—are not within the special expertise of an administrative agency.[12] Nor is administrative adjudication of such large-dollar penalty claims "prompt" and "inexpensive."

1. "The 'experts' in the federal system at resolving common law" claims, such as the fraud and civil money penalty claims at issue here, "are the Article III courts." *Stern*, 564 U.S. at 494. While Congress has elected to assign certain aspects of securities oversight exclusively to administrative tribunals, *see* 15 U.S.C. §78*l*(j) (authorizing SEC to suspend or revoke security registration after administrative hearing); *id.* §80b-3(e) (authorizing SEC to suspend or revoke the registration of an investment advisor after administrative hearing), securities fraud claims are not among them. Congress has from the outset provided for the litigation of the SEC's securities fraud enforcement actions in federal district court. *See* Glassman, *Ice Skating Up* Hill, 16 J. Bus. & Sec. L. 47, 50 (2015). Only after the 2010 Dodd-Frank Act could civil-money-penalty claims in SEC enforcement actions go forward in administrative tribu-

[12] Before his appointment as an ALJ for OCC proceedings, the ALJ in Mr. Julian's case was an ALJ for the Social Security Administration and, before that, the Drug Enforcement Administration. *See* Office of Financial Institution Adjudication, Judge Christopher McNeil, https://web.archive.org/web/20210318050430/https:/www.ofia.gov/who-we-are/judge-mcneil.html (visited Oct. 18, 2023).

nals against any person (including those not registered with the SEC). *See id.* at 51-52. But even then, the SEC retains the discretion right to bring those claims in federal court. *See* 15 U.S.C. §§77t, 78u(d), 80b-9. Thus, Congress has never determined, or even suggested, that the securities fraud claims for which the SEC seeks civil money penalties are within the agency's special expertise.

The SEC's enforcement history confirms that federal courts are apt fora for litigating the SEC's claims. Until only recently, federal court was the SEC's venue of choice for enforcement actions. *See* Choi & Pritchard, *The SEC's Shift to Administrative Proceedings*, 34 Yale J. on Reg. 1, 19 (2017) ("[F]rom 2006 to 2013, the number of civil actions against public companies was greater than the number of administrative proceedings."). The SEC's shift to primarily using its administrative proceedings to enforce the securities laws occurred only in the last decade or so. *See id.* (finding an 85% drop in civil actions against public companies from 2010 to 2015, and a 78% increase in administrative actions over that same period). In fact, it was only in 2013 and 2014 that the SEC stated its intent to funnel cases traditionally litigated in federal court into administrative adjudications. *See* Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. Times (Oct. 5, 2013) (SEC Director of Enforcement stating in 2013, "[o]ur expectation is that we will be bringing more administrative proceedings given the recent statutory changes [in the Dodd-Frank Act]");[13] Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014) (SEC Director of En-

[13] http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html.

forcement stating in 2014 that the agency would use administrative proceedings more frequently in cases that traditionally had been brought in federal courts).[14] The shift is not surprising given the SEC's markedly increased likelihood of prevailing in its home forum. *See Axon*, 598 U.S. at 197 n.1 (Thomas, J., concurring) (observing that, "between October 2010 and March 2015, SEC won more than 90% of case brought before its ALJs as compared to 69% of cases brought before federal courts").

2. Moreover, this case and others make clear that agency adjudication is anything but efficient and inexpensive. The litigation here has stretched more than a decade.[15] Indeed, it is not unusual for the Commission itself to allow cases to stagnate on appeal from an ALJ's decision. In one ongoing proceeding, for instance, the Commission has given itself eleven unexplained 90-day extensions to its deadline to issue a decision.[16] This sluggish pace precludes those accused in

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[14] http://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-inhouse.

[15] *See* Order Instituting Administrative and Cease-And-Desist Proceedings, *In re John Thomas Capital Management Group*, Securities Act Release No. 9396, Admin. Proc. File No. 3-15255 (Mar. 22, 2013), https://www.sec.gov/files/litigation/admin/2013/33-9396.pdf.

[16] *See In re Metatron, Inc.*, No. 3-18567, https://www.sec.gov/litigation/apdocuments/3-18567; *see also In re Pierce*, Securities Act Release No. 9555, Admin. Proc. File No. 3-13927 (Mar. 7, 2014), https://www.sec.gov/files/litigation/opinions/2014/33-9555.pdf (after an appeal from a 2011 recommended decision for conduct identified in a 2010 complaint, the SEC inexplicably did not hold oral argument until 2013 or issue a decision until 2014); *In re Flannery*, Securities Act Release No. 9689, Admin. Proc. File No. 3-14081 (Dec. 14, 2014), https://www.sec.gov/files/litigation/

these tribunals from obtaining prompt federal court review as the statutory scheme contemplates. *Cf. Brock* v. *Pierce County*, 476 U.S. 253, 266 (1986) (holding statute's "requirement that the Secretary 'shall' take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time").[17]

OCC proceedings are even worse. In the five most recent contested OCC proceedings, it took more than three years on average from the filing of the notice of charges for the Comptroller to issue a final decision.[18]

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opinions/2014/33-9689.pdf (issuing December 2014 decision after a 2011 appeal from conduct identified in 2010 complaint).

[17] The often-lengthy proceedings in federal court *after* an agency adjudication further undermines any notion that agency processes are more efficient. The respondent in *Lucia* v. *SEC*, 138 S.Ct. 2044 (2018), for example, settled with the SEC eight years after the agency-initiated proceedings against him, a delay caused in part by the necessary federal court review of the agency's flawed decision. *See In re Lucia*, Securities Exchange Act Release No. 89078, 2020 WL 3264213 (June 16, 2020); *see also Axon*, 598 U.S. at 214 (Gorsuch, J., concurring) (decrying that Cochran's "proceedings ha[d] already dragged on for *seven years*").

[18] *See Denaples* v. *OCC*, 706 F.3d 481, 484-485 (D.C. Cir. 2013); Final Decision Terminating Enforcement Action, *In re Akahoshi*, OCC No. AA-EC-2018-20 (Apr. 5, 2023), https://occ.gov/topics/laws-and-regulations/enforcement-actions/comptroller-orders/akahoshi-decision-terminating-ea-04-05-2023.pdf; Order Assessing Civil Money Penalty, *In re Blanton*, OCC No. AA-EC-2015-24 (Mar. 11, 2019), https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/comptroller-orders/blanton-order-assessing-cmp-03-11-19.pdf; Final Decision Terminating Enforcement Action, *In re Adams*, OCC No. AA-EC-2011-50 (Sept. 30, 2014), https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/comptroller-orders/adams-final-decision-09-30-14.pdf; Final Decision and Order, *In re Loumiet*, OCC No. AA-EC-2006-102 (July 27, 2009), https://www.occ.gov/static/enforcement-actions/ea2009-253.pdf. This average was determined based on the OCC's list of published Decisions and Orders. *See* OCC, Comptroller's Decisions

In one of the most egregious examples, the notice of charges was filed on April 16, 2018, and the case was not resolved until almost five years later on April 5, 2023, when the case was dismissed at summary disposition.[19] In another case, the notice of charges was filed on September 25, 2017, and six years later—more than a year after the ALJ issued a recommended decision and roughly 15 years after the alleged misconduct at issue—the Comptroller has yet to issue a final decision.[20]

Each step of the OCC's adjudicative process takes significant time and is costly for litigants. In five recent OCC proceedings with an evidentiary hearing, it took on average of two-and-a-half years from the filing of the notice of charges for the ALJ to issue a recommended decision.[21] And while the statute governing

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and Orders, https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/comptrollers-orders.html (visited Oct. 18, 2023).

[19] Final Decision Terminating Enforcement Action, *In re Akahoshi*, OCC No. AA-EC-2018-20 (Apr. 5, 2023), https://occ.gov/topics/laws-and-regulations/enforcement-actions/comptroller-orders/akahoshi-decision-terminating-ea-04-05-2023.pdf.

[20] *See* Recommended Decision, *In re Ortega*, OCC Nos. AA-EC-2017-44, AA-EC-2017-45 (Sept. 30, 2022), https://www.ofia.gov/decisions/2022-09-30-occ-aa-ec-2017-44.pdf.

[21] *See In re Tolstedt*, OCC Nos. AA-EC-2019-70, AA-EC-2019-71, AA-EC-2019-72, AA-EC-2019-81, AA-EC-2019-82 (Dec. 5, 2022), https://www.ofia.gov/decisions/2022-12-05-occ-aa-ec-2019-82-julian.pdf; *In re Ortega*, OCC Nos. AA-EC-2017-44, AA-EC-2017-45 (Sept. 30, 2022), https://www.ofia.gov/decisions/2022-09-30-occ-aa-ec-2017-44.pdf; *In re Maffettone*, OCC No. AA-EC-2020-38 (Jan. 31, 2022), https://www.ofia.gov/decisions/2022-01-31-occ-aa-ec-2020-38.pdf; *In re Adams*, OCC No. AA-EC-2011-50, 2012 WL 6655887 (Nov. 8, 2012); *In re Loumiet*, OCC No. AA-EC-2006-102, 2008 WL 11398993 (June 17, 2008).

administrative proceedings by banking agencies requires that the agency head render a decision within 90 days of notifying the parties that the case has been submitted for final decision, *see* 12 U.S.C. §1818(h)(1), the Comptroller and other banking agency heads routinely disregard this statutory obligation.[22] Indeed, in Mr. Julian's case, the Comptroller recently granted himself an additional 90 days to render a decision without citing any legal authority for doing so.[23] And the Comptroller has yet to issue a final decision in at least one other proceeding where the ALJ issued a recommended decision in 2022, meaning that the respondents have already been waiting for well over a year to receive a final decision in their case.[24]

Mr. Julian's experience with the OCC provides a powerful example of the lengthy and burdensome character of agency adjudication. The OCC initiated its administrative proceeding against Mr. Julian in January 2020 by filing a 100-page notice of charges against him and his co-respondents. The ALJ presided over nearly two years of prehearing proceedings rife with discovery disputes and other motions practice. The eventual evidentiary hearing was time-intensive, running from September 13, 2021, to January 6, 2022.

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[22] *See, e.g.*, Final Decision and Order, *In re Loumiet*, OCC No. AA-EC-2006-102 (July 27, 2009), https://www.occ.gov/topics/laws-and-regulations/enforcement-actions/comptroller-orders/loumiet-final-decision-and-order-07-27-09.pdf.

[23] Order Regarding Enforcement Counsel's Report and Request That Additional Documents Be Added to the Certified Record and Notice of Submission at 2-3 (July 5, 2023).

[24] Recommended Decision, *In re Ortega*, OCC No. AA-EC-2017-44, AA-EC-2017-45 (Sept. 30, 2022), https://www.ofia.gov/decisions/2022-09-30-occ-aa-ec-2017-44.pdf.

None of the OCC examiners who testified at the hearing had any expertise in internal auditing. The parties' post-trial briefing, spanning hundreds of pages, took more than six months to complete. The recommended decision was followed by exceptions briefing to the Comptroller, which required another four months and resulted in submissions from Mr. Julian totaling over 2,000 pages. Altogether, Mr. Julian's OCC proceeding has already lasted nearly four years at considerable expense, and it is still unclear when the Comptroller will issue a final decision.

In sum, whatever the merits of placing relatively small dollar statutory claims requiring prompt adjudication before an expert agency, that rationale does not apply to the litigation of sophisticated, high-stakes cases involving claims with traditional common law analogues. The Court need not overrule *Crowell* to recognize that its rationale, whatever its merits, warrants no further extension of its holding.

II. THE SEC'S POSITION HAS NO STOPPING POINT

The SEC's request to extend the reasoning of *Crowell* and *Atlas Roofing* to cases of this sort is especially dangerous because the SEC identifies no meaningful limiting principle for Congress's authority to assign matters to administrative tribunals. The SEC concedes that "[p]ublic-rights cases involve matters that 'from their nature do not require judicial determination and yet are susceptible to it.'" Pet. Br. 18 (quoting *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S.Ct. 1365, 1373 (2018)). It would be extraordinary indeed for the SEC to assert that government penalties from their nature "do not require judicial determination." History certainly does not support

that view. Even the SEC cannot bring itself to urge that view expressly.

Instead, the SEC frames its position in more palatable terms, defining an action as one involving "public rights" merely because the claim is brought by the federal government as sovereign. Pet. Br. 18. But the implication is the same: proceedings to impose money penalties—even to the tune of hundreds of thousands or millions of dollars—do not, in the SEC's view, require judicial determination. The SEC offers no limit on its definition of "public rights" other than that the action is initiated by the government as sovereign. *See id.* Indeed, in the SEC's view, the public-rights doctrine "at a minimum allows Congress" to assign governmental actions seeking monetary penalties to administrative fora. *See id.* at 21. In other words, the very types of civil cases that pose the greatest threat to liberty—those brought by the government to punish members of the public—are, in the SEC's view, the very category of case for which neither Article III nor the Seventh Amendment provide any protection. The Founders would be shocked to learn of this upside-down framework they purportedly created.

The SEC nevertheless presses on, arguing that Congress can assign to an administrative forum any government penalty action, even when the claims, like the fraud claim here, have direct common law analogues and notwithstanding that the penalty amounts are many multiples of $10,000 (the threshold this Court found to be important in *Atlas Roofing*, as it triggers the jury trial right in criminal cases, *see* 430 U.S. at 460 n.15). The Court's public rights cases establish nothing of the sort; rather, "the public rights doctrine reflects simply a pragmatic understanding" of when matters may be assigned to agency adjudication. *Thomas* v.

Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985). Maybe that pragmatic approach was correct for penalty actions up to $10,000. But this Court should stop the government's march to unbounded agency-only adjudication of penalty matters and restore the arrangement the Founders enacted when they separated the executive power to enforce the law from the judicial power to adjudicate private rights. Civil money penalty actions, at least when they exceed $10,000 and especially when the substantive claims have common law analogues, belong in federal courts before independent judges where factfinding can be conducted by juries.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted.

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