No. 22-859

IN THE
Supreme Court of the United States

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

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

BRIEF OF CTIA—THE WIRELESS ASSOCIATION, USTELECOM—THE BROADBAND ASSOCIATION, AND COMPETITIVE CARRIERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

CTIA—The Wireless Association represents the United States wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association's members include wireless carriers, device manufacturers and suppliers, and app producers and content creators. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment.

USTelecom—The Broadband Association represents service providers and suppliers for the telecommunications industry. USTelecom's member companies offer a wide range of services across communications platforms, including broadband, voice, data, and video provisioned over wireline and wireless networks. These companies range from large publicly traded companies to small rural cooperatives, touching every corner of the United States. USTelecom advocates on behalf of the industry before Congress, regulators, and the courts for policies that will enhance the economy and facilitate a robust communications marketplace.

Competitive Carriers Association (CCA) is the nation's leading association for competitive wireless providers and stakeholders across the United States. Members range from small rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers, as well as

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

vendors and suppliers that provide products and services throughout the wireless communications ecosystem.

Amici have an interest in the outcome of this proceeding because their member companies are regulated by federal agencies including Petitioner Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission. Because these agencies hold broad regulatory authority and enforcement power over *amici*'s members, *amici* have an interest in the legal framework applicable to agency enforcement proceedings, including agencies' efforts to seek and impose civil penalties through administrative proceedings rather than Article III courts. *Amici* strongly support the role federal agencies play in enforcing federal statutes and deterring unlawful conduct. But enforcement and civil penalties must follow constitutional rules and respect constitutional protections, including the Seventh Amendment right to trial by jury. *Amici* support Respondents with respect to the first Question Presented for that reason.[2]

SUMMARY OF ARGUMENT

This case concerns whether the U.S. Constitution places any limits on the ability of federal agencies to pursue and impose civil penalties on American citizens and companies in the agency's own tribunals, outside the protections provided by courts and juries. The Constitution's text, its history, and this Court's precedent each make clear the answer is yes. Article

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[2] *Amici* take no position on the second or third Questions Presented by this case.

III, the Due Process Clause, and most relevant here, the Seventh Amendment, require that federal agencies can only deprive Americans of private rights (including the property right to money) in court, subject to the right to a jury trial.

The SEC, however, offers a very different view of the Constitution. In the SEC's telling, there is *no* apparent limit on Congress's ability to permit the government to impose civil penalties outside the judicial trial system and its neutral decisionmakers. This is so, the SEC argues, because of the "public rights" doctrine, which this Court has described as a narrow exception to the right of access to courts and juries. The SEC would treat the public-rights doctrine as license to deprive citizens of property before a federal agency whenever Congress creates "new statutory obligations"—which is to say, whenever Congress so chooses. As long as Congress creates a new cause of action, enforceable by civil penalties, the government can prosecute and adjudicate wrongdoing and impose punishment all by itself, even if the matter concerns contract or tort (in this case, fraud), which would indisputably entitle a defendant to a jury if brought in court. The SEC has it backwards: it is precisely the point of the Seventh Amendment to prevent the adjudication of such claims without the procedural protections afforded by courts and juries.

To support its sweeping position, the SEC leans heavily on this Court's 1970s-era decision in *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977), which purported to balance the government's interest in efficiency against a defendant's constitutional rights. But that decision has since been heavily criticized by scholars and effectively repudiated by this Court. The

balance of this Court's precedent, both before and after *Atlas Roofing*, is "rooted in history and the Constitution," and rejects the notion that Congress may, "whenever it finds that course expedient," "supplant completely our system of adjudication in independent Art[icle] III tribunals." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73–74 (1982) (plurality opinion).

The SEC's approach to executive adjudication creates incentives and opportunity for government overreach in the investigation, prosecution, and punishment of offenses that courts and juries are designed to check. The SEC's incorrect interpretation of the law provides federal agencies like the SEC significant discretion and leverage during their internal adjudications to make sweeping requests for information, secure agreements to toll statutes of limitations, impose enormous fines, and extract onerous behavioral conditions as the price of settlement, all with little to no judicial oversight. And because federal agencies frequently combine the roles of prosecutor, judge, and jury under a single roof, the government almost always wins regardless of the merits of any given case. Aware of the daunting odds and costs of agency adjudications, and then subsequent additional costs to appeal and litigate such adjudications, defendants frequently settle rather than defend their rights. Reaffirming the historic scope of the Seventh Amendment jury right, and rejecting the SEC's ahistorical framework, would help restore constitutional balance to these administrative processes.

Enforcing the Constitution, however, would not prevent federal agencies from pursuing wrongdoers. Because the Seventh Amendment does not apply to

suits in equity, it does not affect federal agencies' ability to issue cease-and-desist orders and seek injunctive relief or other equitable remedies for violations of their rules. Nor does the Seventh Amendment prevent federal agencies from fining lawbreakers—it merely allows defendants the opportunity to request a jury, as the Framers intended. Agencies can even seek waivers of the jury right, and some defendants may find that beneficial in certain cases to avoid the potential costs and publicity associated with federal litigation. But any inefficiency that might result when the defendant does not agree is the price the Constitution requires for ensuring fairness to targets of government enforcement actions.

ARGUMENT

I. THE SEVENTH AMENDMENT JURY-TRIAL RIGHT EXTENDS TO FEDERAL AGENCY CLAIMS SEEKING CIVIL MONETARY PENALTIES

A. The SEC's Approach Conflicts With The Seventh Amendment's Text

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. This Court has interpreted that language to mean what it says: the Seventh Amendment provides a right to "a jury trial on the merits" in "actions that are analogous to 'Suits at common law.'" *Tull v. United States*, 481 U.S. 412, 417 (1987).

It is well settled that actions by the government to collect civil penalties are analogous to "Suits at common law." Both "[p]rior to the enactment of the Seventh Amendment" and "[a]fter the adoption of the Seventh Amendment," Anglo-American courts "treat[ed] the civil penalty suit" as an action in debt "requiring a jury trial." *Id.* at 418; *see also id.* at 418–19, 422. Such claims for "money payments of ascertained and definite amounts" were traditionally decided by courts of law, not courts of equity. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 48–49 (1989).

This Court has recognized that the government has only a "limited" power to "place [causes of action] beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable," such as an administrative agency. *Granfinanciera*, 492 U.S. at 52. Specifically, when a case involves only public rights, Congress may assign adjudication to an administrative tribunal. *Stern v. Marshall*, 564 U.S. 462, 485 (2011). But Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera*, 492 U.S. at 51–52.

The Seventh Amendment analysis, therefore, "moves in two stages." Pet. App. 9a. The first question is whether the cause of action is "legal in nature." *Granfinanciera*, 492 U.S. at 42 n.4. The second question is whether the case "involves a matter of 'private right.'" *Id.* In this case, the SEC does not deny that its claims for civil penalties are legal in nature; the SEC argues only that this case does not involve a matter of private right.

In the SEC's words, the public-rights doctrine applies because Congress may "enact new statutory obligations enforceable through civil penalties and give administrative agencies the power to identify violations and impose those penalties." SEC Br. 23. Under that expansive understanding of "public rights," Congress could require that the same claims for civil penalties that would entail a jury if brought in court be resolved instead without any judicial process if assigned to agency adjudication. *See id.* at 22. The SEC would thus turn the test for Seventh Amendment protections into a "Maginot Line, easily circumvented by the simplest maneuver." *Bank Markazi v. Peterson*, 578 U.S. 212, 247 (2016) (Roberts, C.J., and Sotomayor, J., dissenting).

The SEC is wrong. The distinction between public and private rights has nothing to do with whether the government, in its sole discretion, elects to assign the case to a federal agency. Rather, text, history, tradition, and this Court's precedent all compel the conclusion that private rights broadly encompass the traditional natural rights to life, liberty, and property enshrined in our Constitution and entitled to due process—including, of course, the right to "money" over which one has "actual ownership." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972). By contrast, public rights consist of new entitlements that Congress may by legislation create; they are "creature[s] of statut[ory] law" that "did not exist at common law." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1374 (2018). Applying the proper historical test, the SEC and other agencies cannot deny a jury trial to a person facing civil penalties for fraud or other common-law claims and assign those claims to a home-team ALJ.

B. The SEC's Approach Conflicts With History And Tradition

Founding-era Americans, in the tradition of John Locke, understood private rights as "associated with the natural rights that individuals would enjoy even in the absence of political society." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 567 (2007). William Blackstone identified the private rights to life, liberty, and property as "absolute" rights, *i.e.*, rights that "appertain and belong to particular men . . . merely as individuals." 1 William Blackstone, Commentaries *119. These rights stood "on a special plane"—the protection of absolute rights, according to Blackstone, was "the first and primary end of human laws." Nelson, *supra*, at 567 (quoting Blackstone). Public rights, by contrast, were rights that "public authorities had created" for reasons of public policy and "which had no counterpart in the Lockean state of nature." *Id.*

To protect natural rights and "ensure against . . . tyranny," the Framers "provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *Northern Pipeline*, 458 U.S. at 57. Article III, accordingly, vests the "judicial Power" "of the United States" in the Supreme Court and the lower federal courts. And the core of the judicial power is "the power to bind parties and to authorize the deprivation of private

rights." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513–14 (2020).[3]

Because Article III expressly vests the judicial power in certain enumerated courts, "Congress cannot vest any portion of the judicial power of the United States" in a different tribunal. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330 (1816). That conclusion finds further support in the Due Process Clause, which provides that the federal government may deprive persons of "life, liberty, or property" only with "due process of law." Due process "has always been the insistence that the executive—the branch of government that wields force against the people—deprive persons of rights only in accordance with settled rules independent of executive will, in accordance with a judgment by an independent magistrate." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1681 (2012). "From at least the middle of the fourteenth century" onward, "due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law." *Id.* at 1679.

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[3] *See also* Nelson, *supra*, at 604–05 (historically, only "judicial" power could "authoritatively determine individualized adjudicative facts in a way that bound core private rights"); 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 357 (1803) (the judiciary is "that department of the government to whom the protection of the rights of the individual is by the constitution especially confided").

Federal agencies, by contrast, do not exercise judicial power. While agencies "make rules" and "conduct adjudications" and "have done so since the beginning of the Republic," these activities "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 304 n.4 (2013) (quoting U.S. Const. art. II, § 1, cl. 1).[4]

The distinction between private and public rights tracks this historical distinction between executive and judicial power. It is grounded in a "historically recognized" distinction between matters that "could be conclusively determined by the Executive and Legislative Branches"—*i.e.*, "certain prerogatives . . . reserved to the political Branches"—and matters that "are inherently . . . judicial." *Northern Pipeline*, 458 U.S. at 67–68.[5] Such inherently judicial matters include those that would require the "forfeiture or transfer to another" of the "property or vested rights

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[4] *See also, e.g.*, *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (C.C. Va. 1833) (Marshall, C.J.) (those whose "offices are held at the pleasure of the president . . . are, consequently, incapable of exercising any portion of the judicial power"); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects" nevertheless remains "Executive action").

[5] While the lead *Northern Pipeline* opinion was joined by only a plurality of justices, "a full Court agreed on the [pertinent] points." *Stern*, 564 U.S. at 486 n.5.

of the citizen."[6] The SEC's claims for civil penalties in this case fall squarely within that bucket.

The SEC's assertion that the securities statutes are designed to "remedy harm to the public at large," SEC Br. 24, does not take its claims for civil penalties outside the ambit of the jury right. Historically, the "mere fact that public rights were at stake on [one] side did not open the door to nonjudicial adjudication." Nelson, *supra*, at 604–05. And scholars across the ideological spectrum agree. *See, e.g.*, Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1794–95 (2023) ("Founding Era lawyers would have been shocked to learn that the government could take a person's recognized due-process rights without a trial before an Article III tribunal.").[7]

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[6] *Newland v. Marsh*, 19 Ill. 376, 383 (1857) ("The legislative power . . . . cannot directly reach the property or vested rights of the citizen, by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so, would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 175 (1868) (explaining that only the judicial power was thought capable of disposing of private rights); *Cohen v. Wright*, 22 Cal. 293, 318 (1863) ("The terms 'due process of law' have a distinct legal signification, clearly securing to every person . . . a judicial trial . . . before he can be deprived of life, liberty, or property.").

[7] Professor Gregory Ablavsky recently published an article intended to unsettle the consensus, *Getting Public Rights Wrong*, 74 Stan. L. Rev. 277 (2022), but he actually reinforces it. The article argues that there existed at common law certain "inchoate property right[s] that required some further act of the government to be perfected—that is, to ripen into a complete, legal

C. The SEC's Approach Conflicts With Precedent

This Court's longstanding precedent "clearly establish" that "*only*" controversies in the public-rights category "may be removed from Art[icle] III courts and delegated to legislative courts or administrative agencies for their determination." *Northern Pipeline*, 458 U.S. at 70. And Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera*, 492 U.S. at 51–52.

It is only when Congress "creates" a "statutory *right*"—not an obligation—that Congress may provide that those "seeking to *vindicate that right*" must do so in executive adjudication. *Northern Pipeline*, 458 U.S. at 83 (emphases added); *see also, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985) (Congress may "create" a new public

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title." *Id.* at 316. "[U]ntil these rights had been perfected," he argues, "the formal legal title remained in the United States." *Id.* "While perfect title could be challenged only in court, Congress enjoyed nearly unchecked authority to resolve *imperfect* claims." *Id.* at 317.

At most, Ablavsky demonstrates that the government could deprive individuals of *imperfect* vested property rights—where "formal legal title remained in the United States"—without judicial process. *Id.* at 316. And Ablavsky agrees with every other scholar that perfect and vested property rights "could be challenged only in court." *Id.* at 317; *see also* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 Minn. L. Rev. 735, 763 n.136 (2022) ("the distinction Ablavsky draws . . . tracks [Caleb Nelson's] dichotomy exactly"). Because this case involves claims to money over which the Respondents undoubtedly have full legal title, it raises no question as to imperfect or inchoate rights.

"right"). That is, when "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," Congress can "limit the extent to which a judicial forum [is] available." *Stern*, 564 U.S. at 489 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)); *see also id.* (the "point of *Murray's Lessee*" was "simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all").

At its core, then, a public right is a matter "which arise[s] between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50 (1932).[8] In other words, the "understanding of [this Court's] cases" is that the public-rights doctrine extends "only to matters that historically could have been determined" by "the executive or legislative departments" on their own. *Northern Pipeline*, 458 U.S. at 68. That is why this Court has held, for example, that the Patent Trial and Appeal Board may adjudicate certain patent rights: the rights were created by, and may be revoked by, the political branches. *Oil States*, 138 S. Ct. at 1374 (patent rights do not exist in a state of nature but rather are "take[n] from the public" and "bestow[ed] upon the patentee" through "statute law"); *see also id.* at 1381 (Gorsuch, J., and Roberts, C.J., dissenting) (noting that the majority

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[8] *See also, e.g.*, *Ex Parte Bakelite Corp.*, 279 U.S. 438, 450 (1929) (non-Article III bodies "may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of [A]rticle [III], but are merely in aid of legislative or executive action").

and dissent agreed on the "test" and "part[ed] ways only on its application"). By contrast, the rights to life, liberty, and property are quintessential natural rights. Congress did not "create[]" them, *Northern Pipeline*, 458 U.S. at 83; they existed before Congress existed. Thus, the SEC cannot take those rights away without a jury; those rights do not become "public" merely because a federal statute authorizes their deprivation as punishment.

"Rather than dealing with this precedent," the SEC "virtually ignore[s] it." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1631 (2023). Incredibly, despite their centrality to this Court's public-rights doctrine, the SEC never even mentions *Northern Pipeline* and cites *Stern* only once as a *see also* with no parenthetical. The SEC's "fail[ure] to grapple with [this Court's] precedent" and inability to "make [an] argument that takes [the Court's] cases on their own terms," *id.* at 1630, 1631, underscores the untenability of its position.

To be sure, in a small number of opinions in the 1970s and 80s, this Court drifted somewhat from the historical approach by focusing on "the practical effect" of statutory law and "the concerns that drove Congress" to "depart from the requirements of Article III." *CFTC v. Schor*, 478 U.S. 833, 851 (1986).[9] This

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[9] Despite this dicta, *Schor*'s holding and overall reasoning are consistent with the historical approach. *See* Nelson, *supra*, at 608–09. The same is true of the cases from the turn of the twentieth century cited by the SEC (at 22–23). *See id.* at 604 n.189 ("the nineteenth-century Court drew a sharp 'distinction between [tax] claims and all others'" (quoting *Murray's Lessee*, 59 U.S. at 282)); *id.* (discussing *Oceanic Steam Navigation Co. v.*

subordination of "the requirements of Article III" to judicial perceptions of efficiency and legislative convenience reached its zenith in *Atlas Roofing Co. v. OSHA*, where the Court concluded that Congress need not "choke the already crowded federal courts with new types of litigation," but rather may "commit[] [them] to administrative agencies with special competence in the relevant field." 430 U.S. 442, 455 (1977). The opinion's author believed that "Article III . . . must be balanced against . . . legislative responsibilities." *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting). The Court, accordingly, approved adjudication of OSHA penalties in an executive "tribunal supplying speedy and expert resolutions of the issues involved," *Atlas Roofing*, 430 U.S. at 461, invoking "the practical limitations of a jury trial" and its "functional [in]compatibility" with administrative proceedings, *Tull*, 481 U.S. at 418 n.4 (citing *Atlas Roofing*). But the Court "left the term 'public rights' undefined." *Granfinanciera*, 492 U.S. at 51 n.8 (citing *Atlas Roofing*).

Atlas Roofing has faced severe and sustained scholarly criticism ever since. Martin H. Redish and Daniel J. La Fave, for example, wrote in 1995 that the *Atlas Roofing* Court's approach is "indefensible as a matter of Seventh Amendment construction" and is "inconsistent with the principles of judicial review embodied in Marbury v. Madison." *Seventh Amend-*

Stranahan, 214 U.S. 320 (1909), and immigration laws); *id.* at 580 (discussing *Passavant v. United States*, 148 U.S. 214 (1893), and imported goods); Baude, *supra* at 1545, 1552–53; *Arangure v. Garland*, No. 19-4025, 2022 WL 539224, at *7–8 (6th Cir. Feb. 23, 2022) (Thapar, J., concurring).

ment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407, 408–09 (1995). The Court's "wholly unprincipled judicial abandonment of a constitutional right, for no other reason than the Court's deference to the conclusion of the majoritarian branches that enforcement of that right would be politically or socially difficult or inconvenient," resulted in "convoluted, unpredictable, and virtually Byzantine doctrinal contortions." *Id.* at 409–11. "[N]othing in the text, structure, or history of the Seventh Amendment provides any basis on which to permit reliance on . . . a social balancing process." *Id.* at 411.

Over the past several decades this Court has hewed back toward the historical approach and has "overrule[d] or severely limit[ed]" policy-driven doctrine. *Granfinanciera*, 492 U.S. at 71 n.1 (White, J., dissenting). Dissenting in *Granfinanciera*, the author of *Atlas Roofing* suggested that it "is no longer good law after today's decision." *Id.* at 79. The *Granfinanciera* Court rejected *Atlas Roofing*'s assertion that the Seventh Amendment "does not apply when Congress assigns the adjudication of [certain] rights to specialized tribunals where juries have no place." *Id.* at 81. Since then, this Court has cited *Atlas Roofing*'s discussion of public rights only once and then only for the uncontroversial proposition that the doctrine applies when "the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights," whereas tort, contract, property, and a "vast range" of other cases "are not at all implicated." *Stern*, 564 U.S. at 490 (quoting 430 U.S. at 458).

And the Court's recent public-rights cases consistently look to text and history, not administrative convenience. *See, e.g.*, *Northern Pipeline*, 458 U.S. at 74 (plurality) ("our precedents" are "rooted in history and the Constitution"); *Oil States*, 138 S. Ct. at 1373–74 (examining the history of the patent right); *id.* at 1381–85 (Gorsuch, J., and Roberts, C.J.) (same). This Court should recognize that it "long ago abandoned" *Atlas Roofing*'s mode of analysis in favor of a test rooted in "historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (cleaned). That would continue to align the Court's public-rights doctrine with the rest of its constitutional jurisprudence.[10] *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (unconstitutional statutes are unconstitutional no matter how "efficient, convenient, and useful in facilitating functions of government"); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (a constitutional provision "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design"). The Seventh Amendment should be treated no differently than other provisions, particularly where there is no historical warrant for doing so.

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[10] Even if this Court disagrees that *Atlas Roofing* has been overruled, the decision should now be abandoned or else not extended beyond its facts given the poor "quality of its reasoning," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018), which forthrightly subordinated text, history, and tradition to political expedience, *see Northern Pipeline*, 458 U.S. at 113 (White, J.) (observing that his *Atlas Roofing* opinion advanced the view that "Article III . . . must be balanced against . . . legislative responsibilities").

D. The SEC's Approach Is Unworkable, Proves Too Much, And Is Without Limiting Principle

Despite asking this Court to rest its Seventh Amendment holding on the public-rights doctrine, the SEC has no theory of what the public-rights doctrine actually is. Even though this Court's public-rights precedent "demands a test rooted in the [Constitution's] text, as informed by history," *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2118 (2022), the SEC implores this Court to refrain from "explain[ing] the distinction between public and private rights" at all, SEC Br. 21. The case it almost exclusively relies on, *Atlas Roofing*, "left the term 'public rights' undefined" as well. *Granfinanciera*, 492 U.S. at 51 n.8. And as the panel majority below noted, its dissenting colleague likewise "[could not] define a 'public right' without using the term itself in the definition." Pet. App. 17a; *see also, e.g.*, Ablavsky, *supra*, at 278 (admitting inability to give a "test to distinguish public from private rights"). Defenders of the SEC's approach cannot even say what that approach is. *See* Paul K. Sun, Jr., *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial by Jury*, 1988 Duke L.J. 539, 552–553 (when based on "balancing test[s]" and "pragmatic considerations," the "definition of public rights . . . devolve[s] into near-tautology"). They utterly fail to "offer a theory for rationalizing this body of law." *Brackeen*, 143 S. Ct. at 1631. And if they are right that there is no articulable doctrinal test, the default must be to apply the Constitution's judicial-process norms, not the public-rights "exception." *Stern*, 564 U.S. at 485.

The untheorized rule of decision that the SEC does advance, moreover, cannot be right. The SEC asserts that Congress can override the Constitution's judicial-process protections whenever it creates "new statutory obligations." SEC Br. 21, 23–24; *see also id.* at 32 (new statutory obligations sufficient even when they "overlap" with "preexisting common-law remedies"). But this indisputably proves too much. The creation of new statutory obligations cannot possibly be sufficient to trigger the public-rights doctrine because all agree that "the public-rights doctrine does not extend to any criminal matters." *Northern Pipeline*, 458 U.S. at 70 n.24. No one would argue that judicial process is unnecessary whenever Congress creates new statutory felonies. When it comes to criminal prosecution, everyone recognizes that no matter how salutary the government objective—even "safeguard[ing] markets and protect[ing] the investing public," SEC Br. 32—it is the *deprivation* that matters. And there is no text-based reason to treat the backend of "life, liberty, or property" any different than the front.

If that were not enough, the SEC's approach also has "no limiting principle," *Northern Pipeline*, 458 U.S. at 73, even though the public-rights doctrine is "narrow," *id.* at 64; *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 689 (2015) (Roberts, C.J., dissenting) (same). Under the SEC's approach, Congress can override the Constitution's judicial-process requirements "whenever it finds that course expedient," *Northern Pipeline*, 458 U.S. at 73, by simply enacting new statutory obligations and granting enforcement authority to the Executive, SEC Br. 21. (The SEC acknowledges (at 19) that "[w]holly private" cases cannot be resolved through executive adjudication;

why that is true even when Congress creates new statutory obligations the SEC does not say.) The SEC assures (at 29) that "the Seventh Amendment jury trial right applies when the federal government seeks civil penalties through a suit filed in court," but that only highlights the absence of any limiting principle—as the SEC explains in the next sentence, in its view the political branches can simply shift enforcement to "an administrative forum" to evade the court system and its constitutional guarantees. At bottom, as the court below observed, the SEC's position is that "[w]hen the federal government sues, no jury is required." Pet. App. 17a. That cannot be the law.

This Court should reject the SEC's invitation to backslide to *Atlas Roofing*'s error of unchecked deference to the political branches and reaffirm that the "historical understanding" of public rights controls, not "an ad hoc balancing approach in which Congress can essentially determine for itself" whether the Constitution's judicial-process protections apply. *Northern Pipeline*, 458 U.S. at 70 n.25. As this Court has emphasized time and again, "the political branches [do not] have the power to switch the Constitution on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).[11] Rather, Congress's power is "defined, and

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[11] *See also Bowsher*, 478 U.S. at 727 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); *Wellness Int'l*, 575 U.S. at 688 (Roberts, C.J.) (Article III's "formal protections" trump, however "efficient, convenient, and useful" a procedure may be); *id.* at 696 (crossing constitutional boundaries impermissible even when "very pragmatic"); *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) ("policing the enduring structure

limited," and "the constitution is written" "that those limits may not be mistaken, or forgotten." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). And the doctrine of judicial review "requires [this Court] to enforce the Constitution." *Janus*, 138 S. Ct. at 2486 n.28; *see also NFIB v. Sebelius*, 567 U.S. 519, 538 (2012) ("Our respect for Congress's policy judgments . . . can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed."). This Court should vindicate James Madison's 1789 promise that the country's "independent tribunals of justice will consider themselves in a peculiar manner the guardians" of the liberties secured in the Bill of Rights and that the courts "will be an impenetrable bulwark against every assumption of power in the legislative or executive." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834).

II. SUBORDINATING CONSTITUTIONAL RIGHTS TO ADMINISTRATIVE CONVENIENCE UNDERMINES FUNDAMENTAL FAIRNESS

By affirming that the Seventh Amendment applies to government claims seeking civil penalties against regulated parties—like the SEC claims at issue in this case—this Court would vindicate the correct textual and historical reading of the Constitution. It would also ensure that targets of enforcement action are treated with fundamental fairness, and given the full protections that the Constitution requires, in the myriad contexts where their affairs are regulated by federal agencies.

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of constitutional government when the political branches fail to do so is one of the most vital functions of this Court" (cleaned)).

The authority and reach of the administrative state is "vast." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010); *see also City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (noting "today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities"). Independent agencies in particular "hold enormous power over the economic and social life of the United States" and "pose a significant threat to individual liberty and to the constitutional system of separation of powers." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). That means the cost of "deny[ing] citizens an impartial judicial hearing" has "increased dramatically." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring in the judgment).

Unfortunately, as a former SEC chairman put it, the "protections that our civil justice system affords litigants" to "protect . . . reputation, livelihood, and property" are often "denied to every litigant in an administrative proceeding." Chris Cox, *The Growing Use of SEC Administrative Proceedings* 3–4 (May 13, 2015), tinyurl.com/yyusqwh2. Instead, many "[a]gencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof," *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring in the judgment), and—unsurprisingly given that they judge their own arguments—they virtually never lose. The SEC won 90 percent of contested in-house proceedings from 2010–2015 (compared to only 69 percent in federal court). *Id.* One SEC ALJ "made a practice of warning defendants during settlement discussions that he had '*never* ruled against the agency's enforcement division.'" *Id.*

at 213–14 (emphasis added). Meanwhile, by one estimate "the FTC has not lost an in-house proceeding in 25 years." *Id.* at 216. "Even the 1972 Miami Dolphins would envy that type of record." *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021). The agencies' "stunning win rate" reflects, as a former FTC Commissioner has acknowledged, that their in-house proceedings "unfairly favor" the agencies by "rigg[ing] the rules" such that the agency "emerge[s] as the victor every time." *Id.*

The FCC's procedures often yield similar results. When the FCC suspects a rules violation, it typically issues a public Notice of Apparent Liability (NAL) that contains preliminary findings about purported violations and proposes a remedy. *See* 47 U.S.C. § 503(b)(3)(A). While enforcement targets can contest the facts in an NAL, the FCC frequently issues a forfeiture order that tracks the NAL to a significant extent. *See, e.g.*, *Action for Children's Television v. FCC*, 827 F. Supp. 4, 7 (D.D.C. 1993) (noting in the context of broadcast indecency NALs that the "FCC has never declined to impose liability in its final decision"). Then, the target must either prepay the imposed fine (which can reach tens of millions of dollars) to obtain immediate review in a federal court of appeals, or else await a DOJ enforcement action in federal district court, where the target can finally request a jury trial. *See* 47 U.S.C. § 503(b)(3)–(4). Meanwhile, the defendant must incur the additional costs associated with an administrative proceeding and the damage to reputation and credit from defaulting on a federal administrative order. And then, if it challenges the action in court, the defendant must face the costs of such litigation above and beyond what it already has spent.

The realities of costly agency enforcement proceedings frequently pressure enforcement targets to settle and/or pay fines they feel are unjustified on the merits. "[E]ndless battling" with the United States government "depletes the spirit along with the purse." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). Not surprisingly, very few parties forego the possibility of settlement and force the government to bring a formal enforcement action. *See Axon*, 598 U.S. at 216 (Gorsuch, J.) ("[T]he bulk of agency cases settle."); Luis A. Aguilar, *A Stronger Enforcement Program to Enhance Investor Protection*, SEC (Oct. 25, 2013), tinyurl.com/y2ms5843 ("The SEC currently settles approximately 98% of its Enforcement cases"). "Aware . . . that few can outlast or outspend the federal government," agencies "use this as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon*, 598 U.S. at 216 (Gorsuch, J.).

Statements by SEC officials confirm as much. For example, an SEC enforcement official has boasted that when "we have threatened administrative proceedings," "t[elling] the other side we were going to do [it]," "they settled" in response. Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014), tinyurl.com/y2msouwu. An SEC Deputy General Counsel, when asked whether administrative enforcement "proceedings coerce settlements," answered simply: "Yes they do." Andrew N. Vollmer, *Submission of Comments on Improving and Reforming Regulatory Enforcement and Adjudication at the Securities and Exchange Commission*, OMB-2019-0006, at 4 (Mar. 9, 2020), tinyurl.com/y5qcknzx. That official has admitted that "[m]any SEC cases lack merit, but the defendants settle" anyway. *Id.* And the FTC similarly elicits "cheap

settlements," according to a former Commissioner, based on "the perception that administrative litigation at the FTC is biased strongly in favor of the Commission." Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act,* 21 Geo. Mason L. Rev. 1287, 1307 (2014).

The FCC, for its part, has various tools that it uses to increase the likelihood that regulated parties settle, rather than incur the costs of protracted investigations and enforcement proceedings. For example, the FCC commonly issues sweeping and burdensome letters of inquiry (LOIs) to regulated parties to obtain information and documents in connection with perceived violations of Commission rules, which regulated parties have little recourse to challenge.[12] And the FCC also claims significant discretion to determine the number of statutory violations encompassed

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[12] *See* FCC, *Enforcement Primer* (last visited Oct. 13, 2023), fcc.gov/general/enforcement-primer; *see also In re Chinese Voice of Golden City DKQLS-LP, Las Vegas, Nev.*, Order on Review, 377 FCC Rcd. 6298 (2022) (affirming denial of a motion to quash an LOI). Failure to comply with an LOI can carry significant penalties. *See, e.g., In re Net One Int'l Net One, LLC Farrahtel Int'l, LLC*, Order of Forfeiture, 29 FCC Rcd. 264, 267 (2014) (imposing $25,000 penalty for failure to respond to LOI). The FCC also often uses the pendency of broad LOIs to obtain tolling agreements from parties that substantially extend the applicable statute of limitations. *Compare* 47 U.S.C. § 503(b)(6) (one-year limitations period for FCC enforcement actions), *with, e.g.*, *In re Adma Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd. 838, 843 & n.41 (2009) (two years of tolling).

by a particular target's actions and the per-penalty amount assessed within the statutory range.[13]

Throughout the government, these same gravitational forces often lead enforcement targets to agree to consent decrees that include onerous behavioral remedies, waive any rights to appeal, and impose conditions that the agency likely could not impose lawfully, even through the ordinary rulemaking process. *See* Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 Fed. Commc'ns L.J. 49, 64–67 (2000); Randolph J. May & Seth L. Cooper, *The FCC Threatens the Rule of Law: A Focus on Agency Enforcement and Merger Review Abuses*, 17 Federalist Soc'y Rev. 54, 55–57 (2016); *In re Terracom, Inc. & YourTel Am.*,

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[13] *See, e.g.*, *In re TerraCom, Inc. & YourTel Am., Inc.*, 29 FCC Rcd. 13325, 13350 (2014) (Commissioner Pai, dissenting) (arguing that unprecedented $9 billion base forfeiture calculation bore no relationship to prior consent decrees). As another example, the FCC recently rescinded a former policy of imposing treble damages for certain payment violations, and on the same day, it proposed more than treble damages to an apparent rules violator. *See FCC Proposes More Than $1.4 Million Fine Against PayG for 18 Apparent Payment Violations of Universal Service Fund and Other Federal Fees*, FCC (May 30, 2023), tinyurl.com/b47kr4kf. The FCC also frequently makes use of the "continuing violation" doctrine to assess penalties for violations that would otherwise fall outside the statute of limitations. *See In re VCI Co.*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd. 15933, 15940 (2007) ("changing course" and finding that failing to file a certain form constitutes a "continuing violation"); *In re Purple Commc'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd. 5491, 5506 n.87 (2014) (citing the VCI NAL as the sole support for conclusion that enforcement target's inaccurate submissions constituted a continuing violation).

Inc., Order and Consent Decree, 30 FCC Rcd. 7075, 7079–80 (2015) (imposing fines and conditions on providers based on expansive definition of "proprietary information" proposed for first time in NAL); *Axon*, 598 U.S. at 216 n.4 (Gorsuch, J.) (noting scholarly criticism of this "regulatory extortion"). And the costs of these consent decrees fall disproportionately on good-faith actors who care about their regulatory obligations. Bad actors, meanwhile, often never appear before an agency or even pay a fine when it is assessed by default. The FCC, for example, regularly discounts upwards of 95 percent of its annual enforcement-related fines and penalties as unlikely to be collected. *See* FCC, *Agency Financial Report Fiscal Year 2022*, at 66, tinyurl.com/45fvr3b3.

This Court can help restore constitutional balance to this framework by reaffirming the right to access to an Article III tribunal, and a trial by jury, in cases involving private rights, like suits by the government involving civil monetary penalties. Importantly, enforcing the Constitution would not deprive an agency of enforcement powers but would merely place those powers within their constitutionally intended bounds. In this case, for example, invalidating the SEC's attempt to impose civil penalties through an ALJ proceeding would not prevent the agency from using its statutory authority to pursue those same penalties in court. *See* 15 U.S.C. § 78u(d)(3)(A); *Axon*, 598 U.S. at 180–81 (majority). The same would be true for cases

involving the FTC. *See* 15 U.S.C. § 45(m); *Axon*, 598 U.S. at 180–81.[14]

Many enforcement actions, moreover, do not implicate the Seventh Amendment because they do not seek legal relief. The FCC, for example, commonly takes "a number of . . . enforcement actions that do not include a financial penalty," which "include admonishments, Notices of Violation (NOVs), cease and desist orders, and, in extreme cases, license revocations." FCC, *Enforcement Primer*. The DOJ may also at the FCC's request file an application in federal court seeking an injunction requiring a person to comply with the Communications Act's provisions. 47 U.S.C. § 401(a). And as this Court has recognized, federal agencies play a role in administering any public rights established by Congress.

Nor does the jury right prevent agencies from imposing civil penalties in all administrative proceedings. After all, the jury right is waivable. *See Wellness Int'l*, 575 U.S. at 669 (majority) ("Article III is not violated when the parties knowingly and voluntarily consent to [extrajudicial] adjudication."); *id.* at 697 (Roberts, C.J.) ("a private litigant may consensually relinquish individual constitutional rights" (emphasis omitted)). And many defendants might choose to forego the relative expense and publicity of federal proceedings in favor of an administrative tribunal or

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[14] Both private litigants and state agencies, of course, often have overlapping authority to sue in court for violations of consumer- and investor-protection laws. A victory for Respondents on the first Question Presented would simply place federal agencies on the same footing—all must pursue these aims within the bounds of the Constitution.

in aid of settlement with the agency. When defendants do not waive, however, the Constitution guarantees them the right to judicial process no matter the inconvenience to the government.

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The SEC's position is wrong and unworkable in practice, has no limiting principle, and subordinates constitutional rights to government efficiency. It stands in direct opposition to text, history, and tradition. It has contributed to myriad distortions of the constitutional order. And it is out of step with this Court's longstanding precedent. This Court should reject it and instead adopt the plain and simple test of text and history: when life, liberty, or property is at stake, the political branches must follow due process of law.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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