SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF LABOR, ET AL.,)

Petitioners,)

v.) No. 25-966

SUN VALLEY ORCHARDS, LLC,)

Respondent.)

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Washington, D.C.

Tuesday, November 10, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

SARAH M. HARRIS, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

ROBERT E. JOHNSON, ESQUIRE, Shaker Heights, Ohio; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-966, Department of Labor versus Sun Valley Orchards.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONERS

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

When a federal statutory claim resembles common-law actions and remedies, this Court presumes private rights are at stake and that Article III adjudication is required. But, as Jarkesy reaffirmed, that presumption is overcome when the federal claim fits within historical categories of public rights.

Here, two historical public rights categories overlap: sovereign control of immigration and government-granted privileges. The government is exercising its plenary immigration power on the employer's behalf to grant aliens visas and allow them to stay and work for that employer.

In exchange, the employer agrees to

comply with the government's conditions spelled out in 8 U.S.C. 1188 and the implementing regulations. Those ensure that importing particular aliens for particular work won't distort U.S. wages or working conditions for those jobs.

Agencies, not just courts, unquestionably adjudicate violations of those conditions. Even Respondent seemingly agrees that the agency could adjudicate every claim at issue if the remedy was just kicking the employer out of the H-2A program.

Imposing civil penalties and back wages doesn't change the answer. Indeed, Oceanic Steam and Lloyd Sabaudo upheld near identical remedies a century ago in similar circumstances. Respondent instead argues that only courts can adjudicate civil penalties. But Oceanic Steam rejected that very theory.

Respondent is also wrong that the agency is enforcing contracts between employers and aliens. The agency is adjudicating the employer's violations of its regulatory promises to the government. That classic public rights dispute doesn't convert to

private rights just because the government requires employers to embed those federal regulations in their contracts as a further enforcement mechanism. The government requires the same of Medicare program participants, federal contractors, and federal student loan providers.

This Court should not upend those programs based on an ahistorical and artificial objection.

I welcome the Court's questions.

JUSTICE THOMAS: But wouldn't kicking someone out of the program for violations be a clear way of regulating this program, this immigration program?

MS. HARRIS: It would be a clear way of doing so, but it would be -- it would sort of destroy the ability to enforce the privileges that the employer agreed to undertake. If at the point when you've already violated the program you are kicked out of the program, you've already enjoyed the privilege that the government conferred.

JUSTICE THOMAS: So then you can't really rely on immigration as a basis for this?

MS. HARRIS: No, we absolutely can rely on immigration as a basis for this. There are plenty of civil penalties in the immigration context both for the aliens themselves for violating the conditions of admission to the United States, there are civil penalties throughout the INA, and for people like transport carriers in Oceanic Steam or Lloyd Sabaudo, who violate the conditions on transporting aliens to the United States.

CHIEF JUSTICE ROBERTS: Have the -- it's -- the Oceanic Steam had to do very much with entry, a condition of entry, and loathsome diseases. This strikes me as significantly different in terms of you're -- you're trying to leverage an entry several weeks, months, in the -- in the past to the particular condition of work that doesn't seem to have much to do with the actual entry itself other than getting the person there.

MS. HARRIS: So I disagree with that, and here's why. Immigration, if you conceive it in the public rights context, is not just the right to enter the United States. Free and clear, you have a vested right to stay in the

United States.

Immigration and the visas upon which these aliens are entering have a continuing obligation to abide by the terms of that privilege, and the government is putting conditions on the alien and, thus, reciprocal conditions on the employer who enjoys that privilege to not just let someone in but to abide by the conditions the government has placed on continuing to stay. The government can revoke that visa at any moment. It's not a sort of vested right in the person.

CHIEF JUSTICE ROBERTS: Well, but, I mean, again, Oceanic Steam involved a classic condition of entry. You can't even come in because of a loathsome disease, as -- as the law said. The H-2A workers here have been in the country for some time. And it seems to me, again, that you're just trying to leverage what is a significant barrier to entry where you have a lot of deference to the executive branch, including deference that would extend to judicial proceedings later on in which they have broad authority, and it seems to me you're still trying to get -- extend that broad

authority beyond the justification for its application.

MS. HARRIS: I strongly disagree with that, and here's why. Even for the aliens themselves, again, there are countless contexts after entry when you do something in the United States after that initial moment of entry that you might be permitted to do and you become inadmissible. That's adjudicated in -- before immigration judges every day of the week. You commit a crime, you violate the terms of your visa, all of that is you're violating the privilege of coming into the United States.

And for the employer, it's the same thing. It is you're not just getting the initial privilege of having someone to come work for you under a visa that you apply for. It is the government is extending its continued grace and discretion of that privilege by having you continue to get to rely on that visa. It's not revoking the visa. And the employer is agreeing to those conditions at the outset of the program.

I think the -- to -- to superimpose limitations on the scope of the public right of

immigration and the privileges and benefits that the employer is getting from it just based on the fact that Oceanic Steam involved an initial -- an initial port of entry issue would, I believe, significantly misapprehend the scope of the exception and superimpose limitations that just don't exist and would have serious consequences for all sorts of, I think, executive adjudications for aliens.

JUSTICE KAGAN: I -- I mean, Ms. Harris, maybe I'm not understanding something, but isn't there a condition of entry here? In other words, the condition -- they wouldn't be admitted unless the employer had promised certain things relating to these immigrants' wages and working conditions.

MS. HARRIS: Yes, absolutely, and it's a continuing obligation. So it's not just you promise to do so and you get to import the alien, which is absolutely the case. The employer is not even allowed to be part of the program unless it agrees to the terms and conditions in these regulations and -- and the adjudicatory procedures, but, on top of that, the government's continuing to exercise its

grace. The privilege doesn't just begin and end with yes, you can enter and have this alien in your workforce.

JUSTICE ALITO: Ms. Harris, can I ask you a question about the structure of your argument? You offer reasons why you think the Third Circuit's breach-of-contract analogy fails, but then you seem to accept that a presumption in favor of Article III applies.

Why do you take that step? Why don't you rely on your suggestion that the whole breach-of-contract analogy is flawed?

And there are reasons why it's a bit of a stretch, are -- are -- are there not? The aliens have no say. This is not a contract action by the aliens. They have no say in the conduct of this litigation. The -- the government is not seeking -- has not sought just compensation for them but also civil penalties. Are there contract suits between private parties in which one -- some of the relief that is requested is the payment of civil penalties to the government, et cetera?

So why do you structure your argument like that?

MS. HARRIS: We're structuring it simply in recognition of the steps that Jarkesy asked -- our understanding of what Jarkesy requires.

We -- we start with -- I think the case rises and falls on the public rights exception. And because you could -- you could also say the contract analogy fails, but I think we accept the contract analogy fails because there are lots of contexts, including government contracts, which is a classic public right, in which it might look like a contract action in the abstract, but it is, in fact, a public right.

For many of the reasons you said, Justice Alito, that analogy utterly fails in this case. The contracts in -- the contractual terms in this case are completely a creature of the federal regulatory scheme. Every jot and tittle of the contract here, as a factual matter, actually is the federal regulatory scheme itself. And that is this 20 C.F.R. 655.121(a)(4) and 122(q) that spell this out.

When there's no actual contract from the employer, as in this case, it's extra

clear. Federal law is setting these terms and conditions. There could be other state law conditions an employer could set. Those wouldn't be adjudicated by the federal agency.

But what we have here is heartland: You violated conditions to the federal government that you had to embed in contracts. That involves public rights the same way that other contractual suits do.

CHIEF JUSTICE ROBERTS: I -- I think that argument might not help you but instead hurt you. You're saying how comprehensive the list is. And, again, it's based on the fact that, of course, at entry, but, once you get past entry, you're still faced with this broad array of requirements and conditions that make it look more like a condition of employment rather than -- than entry.

MS. HARRIS: So I disagree with that, and the reason is it's all bound up together. As a condition of getting your alien in the entire workforce, the way this program works is you have to agree at the start as the employer, you're going to agree to specific terms and conditions to continue to enjoy that

privilege that relates specifically to accounting for the potential distorting effects on the U.S. labor market of importing those particular aliens in your workforce.

And so that is the whole gist of the program. It's all bound up with: You're getting a special privilege in the immigration context that depends on the federal government's grace and its exercise of disciplinary power.

JUSTICE GORSUCH: So, Ms. -- Ms. Harris, on that -- I'm sorry to interrupt. Go ahead and finish up. Apologies.

MS. HARRIS: And -- and that's why it can't just be conceived of as a mere condition on entry, although entry alone, I think, as Justice Kagan's question suggests, does a lot of work. I mean, you're agreeing to conditions on them.

JUSTICE GORSUCH: So I -- I just want to understand how far this might -- might reach.

Let's suppose the Department of Commerce has a comprehensive -- I think that's your word -- comprehensive regime in which, in

order to import goods to this country, you have to agree to minimum wage laws and things like that and maybe product liability regime, all of which can be adjudicated by the Department of Commerce.

How would that work out?

MS. HARRIS: How would that work out? I would encourage you to first start with conceiving of the nature of the privilege, as the Court did in Oil States. It's --

JUSTICE GORSUCH: The privilege is export/import, which is a public --

MS. HARRIS: The privilege is importing goods. And so I think you can draw lines between what does that specific privilege look like, as the way the Court did in Oil States, patents versus other public --

JUSTICE GORSUCH: Well, but let's say Congress says it's really important to have these wage and -- and liability regimes in order to protect the American worker and prevent a flood of cheap imports.

MS. HARRIS: Right. And so the way I think that works out is, for the foreign commerce privilege, I think you could draw a

different line, which is the foreign commerce privilege, unlike the immigration rights, does, at a certain point, vest in the person -- like, in -- you have to draw a line between --

JUSTICE GORSUCH: So, at some point, it stops, you think?

MS. HARRIS: Because of the difference between foreign commerce and interstate commerce. And I think the Court's Footnote 1 in Jarkesy draws this distinction pretty well. You have to look at --

JUSTICE GORSUCH: So what if it were just the product liability and wages of those who were actually importing from abroad?

MS. HARRIS: So I think the way you could do it that would be on the permissible side of the line is you are banning importation of goods that are defective in some way or that you think don't meet labor standards, the good itself. And that has a long history. The Buttfield case is a good example of that with --

JUSTICE GORSUCH: No, not -- not abroad. I'm talking about wages and product liability issues here in this country.

MS. HARRIS: And you could say at -- at -- for those goods, if you thought that those goods at the moment of importation would have a bad effect on whatever it is in the country, you could say: I'm banning those goods from the country.

JUSTICE GORSUCH: No, no, not banning the goods.

MS. HARRIS: If you try to import them, civil penalties --

JUSTICE GORSUCH: No, we all agree you could -- you could ban these people from participating in the program. I'm talking about setting up -- maybe my question is not clear enough -- setting up a whole product liability regime in this country for goods that are imported and minimum wage laws with respect to people who are involved in -- in -- domestically involved in importing the goods.

MS. HARRIS: Right. And I think --

JUSTICE GORSUCH: It seems to me you either say it's yes, it's part of the comprehensive regime and the Department of Commerce can adjudicate those things without an Article III court involved anywhere -- that's

one option -- or you say, well, no, it's too far removed, which is your other option.

And I'm guessing -- I'm just wondering, which is it?

MS. HARRIS: I think it's too far removed specific to the tradition of foreign commerce and the way that power works, and here's why. The Court has distinguished between the scope of the privilege to control importation of goods for foreign commerce purposes and the point at which you're past the importer, this sort of a private right to the good vests, and you're trying to regulate at the back end --

JUSTICE GORSUCH: If -- if that's true --

MS. HARRIS: -- which is what I think your hypothetical taking --

JUSTICE GORSUCH: -- if that's true, would you also agree the immigration power ends at some point too?

MS. HARRIS: I think immigration power is different, and this Court's cases actually --

JUSTICE GORSUCH: It never ends?

MS. HARRIS: It -- it -- it is always a conditional privilege.

JUSTICE GORSUCH: Always. Okay.

MS. HARRIS: It ends at the point when someone's status changes.

JUSTICE GORSUCH: Okay.

JUSTICE SOTOMAYOR: Well, that begs the question of the other side says that the immigration power stops at the border basically. That stops at the border. But that's not true --

MS. HARRIS: Right.

JUSTICE SOTOMAYOR: -- because we've had plenty of cases, Fong Yue Ting, where an alien was here for years, and we said you can deport him in administrative process, correct?

MS. HARRIS: Exactly. And that's why that -- that public right is different from foreign commerce.

JUSTICE SOTOMAYOR: So -- exactly. But now let's put -- where I think Justice Gorsuch is talking about.

You concede, don't you, that there are some things that would not be sufficiently related to immigration, following conditions of

securities trading, for example?

Do you concede that wouldn't be within the immigration power of the United States to put into administrative proceedings?

MS. HARRIS: Yes, insofar as it's something different from just saying you can't break the law. Like, if it's --

JUSTICE SOTOMAYOR: All right.

MS. HARRIS: -- if it's -- if it's something more than that.

And I think I would also concede there's a lot of other conditions you can't do on employers. You can't say the condition of getting an alien is you have to submit to all of your torts or all of your employment practices in agency adjudications. You can't attach an -- extraneous conditions. There's a germaneness requirement.

JUSTICE SOTOMAYOR: Germaneness. That's your test.

So do you have a way of defining what "germaneness" means? Is it related to the terms and conditions of employment or what -- what --

MS. HARRIS: I think it has to relate

to the -- the public right and the privilege itself. The privilege is, here, a combination of the sovereign power over immigration. So it's relating to the historical tradition of being able to control the terms and conditions under which aliens are allowed to enter and remain in the United States.

And the employer's reciprocal obligations relate to that. It is -- everything in this program is geared towards preventing there being adverse effects from doing that thing, allowing the alien into the country to work for you, the employer, and under specified conditions.

And the employer knows all of those conditions at the outset. That's the whole point of the certification process.

JUSTICE SOTOMAYOR: You gave up on Atlas -- Atlas Roofing in this case, but I looked at the terms and conditions. We keep talking about them as an employment contract almost, but this is the most unusual employment contract I've ever seen, although you do have terms on wages, terms on pest control, not charging people for certain amounts for things

they buy. It's an unusual -- it's not the general employment contract that employees sign with their employers.

MS. HARRIS: That's exactly correct because it's dictated by the -- entirely dictated by the Labor Secretary's findings under the program that these are the conditions necessary to prevent adverse effects on U.S. labor and working conditions.

JUSTICE SOTOMAYOR: When we impose tariffs, we impose it for a lot of reasons, correct?

MS. HARRIS: Yes.

JUSTICE SOTOMAYOR: Not just the -- so the fact that this might have a limitation on immigration, which we want to respect, we can also want to protect American workers, correct?

MS. HARRIS: Yes, because it's sort of a one-to-one. By importing foreign labor, you are trying to prevent a situation in which you have a tradeoff with people who would otherwise be working --

JUSTICE SOTOMAYOR: But I go back to Atlas Roofing. This very much is more like safety and health regulation that really is not

in the common law than it is a contract dispute.

MS. HARRIS: So here is what I would say about Atlas Roofing. The reason we don't think that it's at issue in this case is because this case, unlike Atlas Roofing, involves historical areas of public rights.

And that's sort of what we're resting on. And it doesn't involve traditional contracts in that sense. You can have lots of other areas of public rights that might look like, at the surface level, 40,000-foot level, they involve contracts. That's true of certainly government contracts, like one of the classic areas of public rights. That's true of the Oceanic Steam case obviously involved negligence or sort of contract actions.

Just because you have that threshold resemblance cannot be dispositive. Atlas Roofing was a little different because it did not involve any common law analog at all, but it also didn't involve a historical transition of public rights.

JUSTICE BARRETT: Ms. Harris, can I --

CHIEF JUSTICE ROBERTS: That sounds

like a lot different. You said it's a little different. It sounds like a lot different.

MS. HARRIS: We have not relied on Atlas Roofing.

CHIEF JUSTICE ROBERTS: And I think -- I think -- yeah, I think that's what we said in Jarkesy.

MS. HARRIS: We did not rely on Atlas Roofing because the Court has said it had cast doubt on Atlas Roofing.

JUSTICE BARRETT: Ms. Harris, can I ask you a question about the imposition of files on the aliens themselves? You said there are lots of places where that's permissible, and I wonder if you could tell me a little bit more about that. And maybe I can do it through a hypothetical drawn from the facts of this case.

What if -- I think we -- let's just posit for now I agree that Sun Valley could be kicked out of the program, out of the H-2A program, and I think we agree that the aliens could be removed pursuant to our immigration tradition without an Article III court.

But the fines, I'm wondering if

they're different. So what if there were conditions on the aliens here rather than on the employer, like the alien had to work a certain number of hours, that the alien had to enroll children in school, or the alien, you know, couldn't leave the country or couldn't leave a certain radius, whatever?

Is it the government's position that then fines could be imposed on the alien for breaching those conditions without a jury trial? Let's say it's a $50,000 penalty.

MS. HARRIS: So a couple things. I think the basic answer is yes with some caveats with respect to some of your specific hypothetical. The aliens can face civil penalties for various violations of the conditions of coming into the United States and staying here, and that would be permissible, I think, within the language of Oceanic Steam and the way that these have been conceived of.

JUSTICE BARRETT: Right.

MS. HARRIS: The way, like the INA -- one classic example in the INA itself is for illegal entry. There are civil penalty provisions for illegal entry. So you -- you do

something that you're not allowed to do as a matter of the INA, you may face civil penalties. You violated the conditions.

Some of your conditions, we could talk about whether they're germane to, like, how much -- how much the federal government can control, like, what you're doing in the country.

JUSTICE BARRETT: Right. I mean, I was trying to come up with --

MS. HARRIS: But yeah.

JUSTICE BARRETT: -- conditions that might be sort of mirror images of these, but -- but the point being, I mean, Oceanic Steam also says -- and I know part of this, like in Wong Wing, if you're talking about a misdemeanor -- take criminal law out of it. It also says that if there's going to be a forfeiture of the alien's property, that would be a different thing, that there might need to be an Article III court or that there would need to be an Article III court.

So I'm -- I'm wondering here why that wouldn't be the case for the alien. If the alien violated some sort of condition on the

H-2A visa, why wouldn't the alien be entitled to an Article III court before the alien had to pay that kind of a fine?

MS. HARRIS: Because I think, respectfully, that's not the correct reading of Oceanic Steam or the way the Court treated Oceanic Steam in Jarkesy. The Court there is distinguishing between things that look like criminal punishment or other forms of punishment from that case itself rejecting the proposition that anytime you impose civil penalties, you necessarily have to be in an Article III court with a jury. Like, that was what the respondent was arguing in that case.

And the Court emphatically rejected the proposition that in the -- and said, in the area of immigration, like in tax, like in other areas where civil penalties have been imposed, the nature of the power is special. Congress has the ability to say that there's going to be executive adjudication and that there will be civil penalties.

And I think that has to make sense if you think about just the theoretical framework of public rights in this area and the way other

public rights work. This is an area of combined --

JUSTICE GORSUCH: I'm sorry -- I'm sorry to interrupt here, but just to follow up on this before we lose track of it. I -- I thought Wong Wing said confiscating property goes to an Article III court for -- when you're trying to confiscate property from aliens.

MS. HARRIS: Wong Wing does talk about also confiscating property, but I don't think that can be fairly read to mean any civil penalties are out or you would have to, I think, overrule Oceanic Steam and you would also have problems with, like, Murray's Lessee itself.

If the idea is you can never have, in -- in a non-Article III setting, some sort of consequences for property, then you're not just talking about this --

JUSTICE GORSUCH: So -- so --

MS. HARRIS: -- you know, not just talking about a large part of the INA and other things; you're talking about, you know, utilizing --

JUSTICE GORSUCH: No, I understand

penalties associated with entry, but I'm -- I'm trying to draw on Justice Barrett's hypothetical, and it's a little further afield, right, less immediately about the entry and you're seeking to confiscate the alien's property.

I thought we decided a long time ago that you've got to go to an Article III court. Are -- are you resisting that?

MS. HARRIS: I'm not resisting that. What I'm saying is there's a difference between civil penalties that are being attached to you for violating conditions of coming into the country versus things that I think implicate other rights of, let's say, someone who's been here for a while. You're confiscating their property as punishment. There are limits, we would say, on obviously the kinds of --

JUSTICE GORSUCH: So there is an outer bound then with respect to the alien on how far you can go with this immigration exception? You -- you agree?

MS. HARRIS: Yes. We've identified multiple lines on this. I think germaneness is one. And --

JUSTICE BARRETT: Germaneness is one, and what are the others?

MS. HARRIS: The others are a careful look at the nature of the privilege and public right at the outset, which I think you have to say it has to be immigration. It is relating to the entry and continued presence of the alien, and that does tie into germaneness.

But I think a careful look at the scope of the privilege and -- and right on a right-by-right basis is quite important in this context to distinguish things like foreign commerce or other areas.

And then the third thing I would say is that there are also limits from the Due Process Clause. The Court's always recognized that in any form of adjudication, due process is going to be an important limit. And we think that that is quite important as well.

JUSTICE BARRETT: But that's a limit that doesn't need to be satisfied by an Article III court. So the limits I was asking you about are limits on the need for a jury, the need to go to an Article III court.

MS. HARRIS: Right. And then the

final limit I would just say is I think it is quite important and goes to Justice Alito's question, that the adjudication itself here involves federal enforcement of the conditions vis- -vis the employer in the program, and you're not taking the additional step of saying you're adjudicating essentially two private parties' rights in a final binding and conclusive way, the way you would be doing in, say, Granfinanciera or some of the bankruptcy cases that involved actually conclusively adjudicating a state law common --

JUSTICE JACKSON: So is that really a limit?

MS. HARRIS: -- counterpoint.

JUSTICE JACKSON: Is that really a limit, or is that sort of how you define public rights cases? I mean, I -- zooming way out, our cases require us to distinguish from contexts that are private rights contexts and public rights contexts. And we've subsequently determined that the immigration exception is part of the public rights, but I guess I'm interested in that very first cut.

So what is -- what is the government's

view as -- of the definition of a public rights case?

MS. HARRIS: A public rights case involves rights that are vested in the sovereign for the public at large or privileges that are extended by the sovereign as a matter of grace. And that sounds like it might involve any Article I plenary powers. So I would just give an additional cut on that, which is the Court said in Jarkesy correctly that history and tradition are also -- help you zoom in on the distinctive areas involving governmental prerogatives that historically could have been determined exclusively by the political branches.

JUSTICE JACKSON: And this is distinguished from private rights by?

MS. HARRIS: Yes. Private rights are things that sort of the -- you -- the Court's commonly said the stuff of Westminster, the stuff -- you know, the stuff of traditional actions at common law. I think the best definition is Blackstone. It's the rights of the individual qua the individual versus rights for the public at large.

JUSTICE JACKSON: Now what I find curious is that neither of those definitions really turn on the actual remedy.

Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Sure.

JUSTICE JACKSON: Yeah. So much of what your friend on the other side suggests is that all we have to look at is whether or not monetary penalties are being exacted here or something like that.

Do you accept that that's the way we go about identifying what is a public rights case versus a private rights case?

MS. HARRIS: No, that cannot possibly be right or you would have to overturn Oceanic Steam, where the Court confronted exactly that question and exactly that argument and said that that would be completely incorrect and rejected that argument as magnifying the judicial to the detriment of all other departments of the government, disregarding many previous adjudications of this Court, and ignoring practices often manifested and hitherto deemed to be free from any possible constitutional question.

So that's pretty emphatic over a century ago saying absolutely not, it's not a bright-line rule. Civil penalties equals Article III courts. And, otherwise, you know, have at it.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

JUSTICE SOTOMAYOR: Could you talk a little bit about how disruptive a ruling in favor of Respondent would be on the statutes and programs run by the government? Would it affect the government's ability to fine employers who hire illegal aliens?

MS. HARRIS: Yes. So let me just talk about the different ways of disruption. One, if the Court were to say civil penalties always have to be in Article III courts, that's kind of the nuclear option. Civil penalties are imposed by the government in all kinds of contracts. We've been relying on Oceanic Steam and this long tradition of public rights in all sorts of areas, in -- in all sorts of areas

that are modern benefits programs like Medicare and all sorts of historical programs that stem from immigration, just across the board. There are tons of civil penalty programs that we think are very justifiable even post-Jarkesy.

Now, if the Court were to instead say there's something wrong with the contractual setup, it too much looks like a contract, that too would be quite disruptive for the government. If that's the breaking point, the point at which these cases have to be adjudicated in an Article III court, that imperils the way we do Medicare and Medicaid penalties, the way federal contracts work, because we often require federal contractors to embed in their contracts with subcontractors these same regulatory requirements as a method of enforcement. The federal student loan program also does that. So those are big deals to us.

Now, if the option is immigration is something that only ends at the border, I think that would have highly disruptive consequences for immigration law. Like, we would be quite troubled by that result because -- not just

because there are a lot of penalty programs that involve imposing penalties on aliens for overstaying -- for staying too long, for not voluntarily departing, for violating the terms -- sort of being -- for illegal entry or other things, but, for these H-2A and H-2B programs, they're really important mechanisms of making sure the government, when it's bargaining and giving a condition for employers to do certain things, has to live by them.

JUSTICE SOTOMAYOR: So what's the best way for you to lose? What's the most narrow way for you to lose if you --

(Laughter.)

JUSTICE SOTOMAYOR: And that's not to suggest that you will.

MS. HARRIS: No, understood.

JUSTICE SOTOMAYOR: No, no, no, no. I'm not -- I don't intend to make that suggestion at all.

But, if you were to lose, what would be the most narrow way not to affect all of these other things?

MS. HARRIS: Then I would say take the statutory path, which we haven't talked about.

Say that -- say that for this particular statutory scheme, if we could not impose -- we could not impose penalties in a non-Article III adjudication because you don't think the statute is clear enough or something and leave open to us being able to seek penalties in court. I think that would be the narrowest.

It would be fairly unsatisfying for the government, though, because I think the other thing I want to highlight is we really don't -- we don't want to lose, but what we want even less is a lack of clarity on the scope of public versus private rights in this context. We have, as I just told you, a lot of different schemes involving civil penalties, and clarity is quite important to us.

JUSTICE SOTOMAYOR: We have schemes where agencies determine the penalty or have an administrative proc- -- process -- process for penalties but then go to court, and the factual issues are decided de novo.

MS. HARRIS: Yes.

JUSTICE SOTOMAYOR: Would that satisfy you? But this statute's not created that way.

MS. HARRIS: This statute's not

created that way. You could -- you could leave open that that was a reading -- sort of a severability-type reading as one way of doing it. Again, don't love that for this program, but if I had to pick a -- a particular poison, that would definitely be on the menu.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: I guess, Ms. Harris, one question that this raises is, I mean, you've talked about a lot of programs that you have that are at stake here, a lot of contexts in which the government uses administrative adjudication, but at -- if you, like, step back 10 feet and somebody said to you, well, why do we need any of those, why not just go to court always, what would the government's response be to that?

MS. HARRIS: The government's response would be twofold.

One is part of Article II prerogatives do involve when it's permissible to use agency adjudication. We do care deeply about exercising that means of enforcing the law. That has traditionally been a means of exercising executive power that we care about

that.

But two is, why do we care about this as a practical matter? Because there are hundreds of enforcement proceedings in a given year for just this program, and for -- across the government for these kinds of programs, the numbers, you know, keep adding zeros.

And the idea that the Department of Justice would be having to then pursue every single one of these in federal court would be a choice that -- would be a choice that would raise massive concerns about underenforcement of the law just given resource constraints.

JUSTICE KAGAN: And -- and how would that work in the immigration context particularly?

MS. HARRIS: I mean, how would it work in the immigration context if the proposition were that the only types of things that could be in executive adjudication are things that happen at the border? I think it would be catastrophic. I mean, just the volume of -- of immigration-related cases for the aliens themselves for things that make you inadmissible after you enter the country, like,

huge, enormous numbers.

And that's why I think the everything-stops-at-the-border theory is utterly untenable, not to mention completely contrary to the way the Court has conceived of this power in its cases, so you have a stare decisis problem on top of that.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: I looked at your seven examples in the immigration statutes, and they all seemed a lot closer to the core of admission, expulsion, or deportion -- deportation than this one. Thoughts?

MS. HARRIS: Thoughts? I think this statute is still quite close to that because what we're talk --

JUSTICE GORSUCH: Would you agree the others are closer?

MS. HARRIS: Would I agree the other statutes are closer?

JUSTICE GORSUCH: And, certainly, wouldn't you take that position going forward?

MS. HARRIS: I'm sorry.

JUSTICE GORSUCH: And, certainly, wouldn't you take that position if you were to lose in this case?

MS. HARRIS: Would I try to distinguish those statutes going forward if we were to lose this case? I mean, I think it depends on how. It seems to be the proposition of the immigration power stopping at the border would --

JUSTICE GORSUCH: I didn't say that. I said those were closer to the core immigration powers. Would you agree with that?

MS. HARRIS: I don't think I would. I mean, I think even Respondents agree that things that are closely related would include things like employer verification or other things that relate to the alien's ability to stay in -- in the country and the conditions under which you're allowed to have someone, and that's what this program is.

JUSTICE GORSUCH: I would have thought employer verification is a lot closer. You have to verify that you can bring somebody in.

MS. HARRIS: But you're also then enjoying -- like, then you're also then

employing them. And here, on top of that, the -- unlike the employer verification setting, you're an employer who's expressly getting a privilege from the government at the outset.

You are agreeing: I promise I will comply with all these regulatory commissions -- conditions. I get this special sovereign benefit. No one else gets to bring an alien in and continue to have them here at the government's grace.

JUSTICE GORSUCH: And you just mentioned consent. Why isn't that another way through this problem?

MS. HARRIS: You could look at it as a way through the problem. We haven't relied on it in the way that Respondents are suggesting because we're not suggesting in this case, if this case were to involve --

JUSTICE GORSUCH: You don't have consent here, but what if you sought it --

MS. HARRIS: We think there is consent here.

JUSTICE GORSUCH: Well, you didn't argue that.

MS. HARRIS: Correct. We're not presenting this as a case about consent.

JUSTICE GORSUCH: So -- so, in the next case involving all of these others, that would be available too, right?

MS. HARRIS: I think it depends on what the Court says because, if the proposition is this case involves private rights, then the question would be: Can you consent to non-Article III adjudication of these things? And I think the issue here is consent, I think, first of all, is clear because the employer is agreeing as a condition of program -- the program to do all this stuff. But --

JUSTICE GORSUCH: Well, if it was so clear, why didn't you argue it?

At any rate, on the statutory grounds, the statute says that the Department may take such actions, including imposing sanctions and seeking injunctive relief, as may be necessary to assure employer compliance.

The one thing it says is you've got to go to court to get an injunction. Everybody knows that. Do you agree?

MS. HARRIS: Yes.

JUSTICE GORSUCH: Then it says you can impose penalties. Very similar language we had last year in FCC/AT&T case.

Why -- why should we read that to actually allow you to set up a whole court system and -- and -- and finally adjudicate penalties here where we didn't there?

We said it just amounted to the right to assign a penalty that could then be subject to enforcement in court. Why isn't that the more natural reading of the statute?

MS. HARRIS: Because the statute there expressly provided for recovery only in de novo circuit -- in de novo civil suits. So the statutory language, as the Court did say in FCC v. AT&T, is context-specific. And the context here is different from the statutory context there because, again, there, there is an express mention of the de novo civil suits.

JUSTICE GORSUCH: Okay. Well, if -- how is it necessary to set up a court system to do it as opposed to go to court when you have to go to court to get the injunction?

MS. HARRIS: I think it would strain the natural contrast in the two phrases because

it says the Secretary is authorized to take such actions, including imposing civil penalties and seeking appropriate injunctive relief.

There's a contrast between those two things. Imposing is something the Secretary can do, and seeking is something that you have to do through the expedience of a court.

If you want to read in at the back end that you have some sort of de novo civil suit, I think it's -- it -- it's actually an inference that you would not make. When Congress wants to have that setup, it does so, like in the FCC v. AT&T case.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: On the question of civil penalties and this Court's precedent, in Tull, we said at 422 -- and this is 40 years ago -- a civil penalty was a type of remedy at common law that could only be enforced in courts of law.

And, of course, the Third Circuit quoted that sentence here, and in Jarkesy, in

multiple places, we referred to that statement from Tull, including kind of in the wrap-up on 134: They provide civil penalties of punitive remedy that we've recognized can only be enforced in courts of law.

That's a fairly definitive statement in our precedent. What are we supposed to do with that?

MS. HARRIS: I think Tull is easily reconcilable with the rest of what Jarkesy did, including quoting the part of Oceanic Steam about civil penalties in the immigration context, because Tull is a case that says you're basically in step one of Jarkesy. Presumptively, if you have civil penalties involved, it's a common-law action.

Tull also did not involve any countervailing arguments with respect to the public rights exception. So I think Tull fairly squarely stands for the idea, if you have something that involves civil penalties that you could analogize to an action in debt, if you don't have something that fits in the public rights exception, it may well, under Jarkesy and Tull, be game over.

But that's not what we have here. Otherwise, you would be throwing overboard not only Oceanic Steam, which, of course, did involve civil penalties, not only threatening other cases involving civil penalties in the tariffs context --

JUSTICE KAVANAUGH: Well, Atlas Roofing it threatens, but you're not even relying on Atlas Roofing.

MS. HARRIS: I'm not relying on Atlas Roofing, but what I'm saying is there are plenty of cases that involve public rights, historic categories of public rights, unlike Atlas Roofing, historic categories of public rights that involve civil penalties that the Court endorsed in Jarkesy, Oceanic Steam being obviously one of them, but the tariffs cases also being others.

They involve the equivalent of civil penalties, additionally -- additional tariffs on your items at the border.

And I don't know where you stop with that theory either. If you say it's civil penalties are an action in debt, also actions in debt, like the -- the facts of Murray's

Lessee, action in debt, distress warrant.

So, if the line is you can't have property encroached on or seized or something else in -- in a non-Article III forum in executive adjudication, then I think the chopping block doesn't just stop with Oceanic Steam. I think you have to think about what's the basis for Murray's Lessee at all.

JUSTICE KAVANAUGH: And then, in terms of disruption, I mean, there's already judicial review of penalties that are imposed in these kinds of actions if -- if the subject of it wants to -- wants to obtain judicial review. The only question that will be different is what's the standard of review in court now versus the system that the Respondents are seeking, correct?

MS. HARRIS: No. That's from the vantage of the court, but that's not from the vantage of the burdens of the scheme at the outset, I think.

JUSTICE KAVANAUGH: Well, let's talk about the court part. The court part, the -- the difference will be the standard of review, correct?

MS. HARRIS: That's sort of correct. I think it depends on exactly how much of it has to be in court, right? If you have to start off with the enforcement in court if you're not doing -- it depends on which method, right? If the agency is only presumptively allowed to impose penalties, you are essentially guaranteeing that not only are there -- is there a different standard of -- of review for the court, but there is absolutely going to be many more court suits to -- that have to be brought.

JUSTICE KAVANAUGH: Fact witnesses. Fact witnesses maybe.

MS. HARRIS: No, no, not just fact witnesses. Just think about the volume for courts and --

JUSTICE KAVANAUGH: Yeah. I --

MS. HARRIS: -- thinking about the effect on enforcing law.

JUSTICE KAVANAUGH: -- I agree --

MS. HARRIS: That's a huge deal.

JUSTICE KAVANAUGH: I agree the volume for courts will be significantly higher. I get that. So then talk about the other end of it.

MS. HARRIS: Sorry, the other end of it being the volume for courts? Yeah.

JUSTICE KAVANAUGH: No. The -- you said before the courts and the executive branch.

MS. HARRIS: Yes, before the courts and the executive branch. I mean, again, you're essentially shifting what has previously been -- and, again, I -- I'm not sure what the premise of the question is as to how broad this would cut, but if you're outsourcing basically and transferring virtually everything that has been in agencies in certain contexts to federal courts, the breaking point is going to be first as a just very practical matter, like, first of all, resource constraints. If we're talking about the Medicare program, for instance, like, that's a pretty enormous transfer of things that are adjudicated in an agency, even at initial steps, versus things that always have to go to court, always have to be pursued by the Department of Justice, always then have to be adjudicated by courts to have any bite with respect to the penalties.

And so that is a massive transfer that

I think the Court should carefully consider.

JUSTICE KAVANAUGH: But can't all those already go to court? That's what I'm -- no?

MS. HARRIS: They can already go to court. I think the question is how many of them go to court and whether the Department of Justice would have to be enforcing all of them in the first instance depending on this case.

JUSTICE KAVANAUGH: The question's not whether they can go to court. They already can go to court.

MS. HARRIS: They can go to court to seek review. The question is, can -- the question is, can the penalties be final in any sense beforehand? So, again, it's the enforcement effect. Can the federal government have enforcement of federal laws within the agency context, or is it entirely at the mercy of sort of the tail end of the court process before the penalties are imposed? Of course, there's judicial review at the back end. That's a due process principle.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Barrett?

JUSTICE BARRETT: So I think your Oceanic Steam argument depends on understanding the fee or the exaction, as the case calls it, as a freestanding fine or a penalty or a civil penalty.

But I'm wondering if the case has to be read that way or even if it's the best reading of the case because one other way to read the case is that the money that the ship had to pay was itself in exchange for a public benefit, the outgoing clearance papers.

So, in Oceanic Steam, the Court says this: "The power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition and the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement."

So it seems that the Court regarded the tie between the clearance papers and the fine as important to permitting this to be part of an administrative rather than an Article III scheme. What's your reaction to that?

MS. HARRIS: I disagree with that.

That portion of the opinion is about how the statutory scheme works that's absent from the Article III discussion, which is at, like, page -- I think -- the Article III discussion later on in Oceanic Steam, and, most importantly, the way Oceanic Steam has been understood, including in Jarkesy.

The portion of Oceanic Steam that everyone understands as, I think, the holding is that -- the sort of broad language on page 339, that because of the -- the fact that there's -- over no conceivable subject is a legislative power of Congress so vast as in immigration and sort of foreign commerce space, if Congress deems it necessary to impose particular restrictions and to sanction them with penalties, that's fine.

So it's weird if there were this implied limitation on the penalties in Oceanic Steam no one has noticed, including when describing them in Jarkesy.

And then second point on this. It's completely strange to think that there's, like, a last clear chance obligation for these kinds of -- if for, like, that you would -- that you

would apply trans-substantively, like, across all sorts of contexts.

That enforcement regime was, first of all, like, incredibly coercive but made a lot of sense with respect to that scheme simply because it was -- you are violating the conditions before the privilege is given and exercised.

If you try to impose it on other programs like here, where the -- where the person is violating the conditions on which they have been enjoying the privilege, you'd essentially be rewarding them, like giving them, like, a free violation. And only at the point -- after you -- you do your one free violation can you decide I didn't like this program after all, I'm not reapplying for it.

JUSTICE BARRETT: Okay. But that language that you read, which I grant is the best language in the opinion for you, can't be taken for all it's worth because you said to Justice Sotomayor and others that there were limits to that, for example, germaneness, et cetera because, if that sentence really were just the standard, there would be no limit to

what the government could do just by hinging it to immigration, if it was related to immigration in some way.

MS. HARRIS: Well, I think they are completely consistent because I'm saying -- talking about the scope of that power, the scope of Congress's power, and the conditions that kind of flow relating to the plenary power over immigration.

And that's what I'm talking about. So that's why I think it's perfectly consistent. I think it would be even stranger, though, to think that a case that people have -- like, the whole case was litigated on the proposition that it was about, yes or no, can you have civil penalties? It was not litigated as a case about, like -- the -- the briefing or anything else was not about, like, is there some sort of special thing about the clearance mechanism?

And, again, that was, like, the nuclear option of the case. It -- the Court recognized at the outset that they had the ships at their mercy, they were, like, about to disrupt all of the contracts and put them out

of business. So it would be a particularly strange mechanism to say the kind of penalties that are okay are ones that essentially, like, threaten you with going out of business to pay up the civil penalties in escrow before you get access to, like, any adjudication.

JUSTICE BARRETT: Well, if the civil penalties imposed outside that context were high enough, they could pose the same threat.

One last question. One thing that I find challenging about the analytical framework in this case is it has a mix-and-match flavor, like, yes, this is immigration, but, oh, look over here at Customs because the fines come from Customs and think about it as a public benefit.

Do you have to pick a bucket? When you're talking about public rights, you're talking about these historically recognized exceptions. And, yes, I agree it's confusing, and having taught federal courts, I think it's very confusing. It's always confusing for students. It's not a clear area of the law. But it seems like we've identified discrete areas that qualify for that exception.

So why can you kind of mix and match and pull -- sometimes you're talking about it as this is because of the government's plenary power over immigration, and other times you're talking about it like a public benefit, like -- like we might think of, like, welfare-type payments. Like, why -- why don't you have to pick?

MS. HARRIS: I don't think you have to -- I -- I think you could -- the reason to blend them is because it shows, I think, why this is an easier case. The fact that they overlap allows you to avoid -- I think, if you didn't want to sketch out the outer contours of either of those buckets, I think the fact that they intersect makes it an easier case in certain ways.

But, if you wanted to just focus on even the immigration exception, I think you could get there for the reasons we've talked about. But it seems strange to think that when a case implicates two overlapping lines of public rights cases, it would somehow be further away from the public rights doctrine as opposed to this case helpfully illustrates they

can overlap, as they do in a lot of different contexts.

I mean, there's obviously a lot of cases that I think even Respondent would concede that would implicate both government-granted privileges, which are their own category with a historic pedigree, and happen to involve immigration.

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: I guess I think what troubles me a bit about all of this is that the Third Circuit's analysis and Respondent's arguments appear to be asking for a new way of evaluating public rights versus private rights.

I mean, the public rights doctrine is centuries old, and this idea of just looking at whether or not there were common law claims or common law remedies is not how I think it was done in all these cases. And maybe that implicates your exchange with Justice Kavanaugh.

But are they asking for a new thing? I mean, is -- or does this follow from what

we've done? Don't all those other cases come out differently if we apply the Third Circuit's analysis?

MS. HARRIS: Yes, I think they would, especially the -- I mean especially the proposition I talked about with Justice Kavanaugh. If you start saying civil penalties, like, full stop, are private rights, absolutely, you're upending a lot of public rights categories.

JUSTICE JACKSON: I mean, we have Oceanic Steam, Lloyd Sabaudo, Helvering, Allman, McGrath, Origet. All these cases had monetary liability being imposed by the government, and we found the public rights exception applied.

MS. HARRIS: Yes.

JUSTICE JACKSON: So, if that is the metric, I don't understand how we sustain those cases.

MS. HARRIS: That's right. And I think the other lines that the Third Circuit drew were equally problematic. So, if you take the line that they're drawing of: Seems like a contract, thus a problem, similar problems,

like, government contract as being Exhibit A, but other cases like Lloyd Sabaudo and Oceanic Transport you could easily also analogize to common-law actions.

Jarkesy has two steps. You look at the public rights exception. Murray's Lessee itself, again, is like you're taking someone's property as -- because they did not give you the tax revenues to the government. Like, that's property, classic sort of situation there. So I think the lines that Respondent's trying to draw are a real problem.

The other thing that they're doing that I think would upend a lot of the Court's cases is they're saying, if you can't pinpoint an exact, like, mirror image of something that the executive branch actually has adjudicated in the past, it's game over.

That is not the test the Court has applied in this context, or Oil States would have come out differently.

As the Court recognized in Oil States, patent invalidity was something that federal courts have been adjudicating since the founding, but because Congress can choose

Article III court or executive branch agencies, you can't -- you can't say that the -- the lack of a specific example of exactly adjudicating this thing is dispositive.

You look to the categories of how the founding generation understood public and private rights.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Johnson.

ORAL ARGUMENT OF ROBERT E. JOHNSON

ON BEHALF OF THE RESPONDENT

MR. JOHNSON: Mr. Chief Justice, and may it please the Court:

This Court in Jarkesy made clear that the public rights exception is an atextual exception to Article III that must be applied carefully and with close attention to history, yet the government here identifies no history extending the immigration adjudication tradition to the types of claims and remedies at issue here.

The government invokes the idea of immigration, but it points to no history

extending the immigration adjudication doctrine to the imposition of what amounts to a judgment imposing penalties and back wages on a breach-of-contract theory or involving labor issues more generally.

Oceanic Steam, the government's key case, involves penalties that were imposed based on a finding that aliens were ineligible for admission and that were collected as an exaction upon the defendant recrossing the border.

In other words, both the claim and the remedy involved the exercise of the executive's power to control who could or could not cross the border into the country. That is a far cry from a case about labor issues at a farm in New Jersey with a mix of foreign and domestic workers.

The government also invokes history from a range of disparate contexts, including tax, malicious service, and the jurisdiction of the Court of Claims.

But that blunderbuss approach to history is the opposite of the close analysis that Jarkesy requires, and given the broad

range of privileges and benefits that are controlled by the executive, it threatens to badly erode Article III.

Indeed, even the government says in its brief that it can adjudicate penalties imposed as a condition of access to the mail. Under such a theory, little would be left of this Court's decision in Jarkesy.

Separately, the government points to no statutory language authorizing the penalties here. To be sure, the statute contemplates penalties, but it says nothing about where those penalties should be adjudicated.

I welcome the Court's questions.

JUSTICE THOMAS: The government points out that it did not -- it did not bring a breach-of-contract claim. It rather -- its claim is that you violated the regulations that required certain obligations of you.

How would you respond to that?

MR. JOHNSON: So I think that's inconsistent with the statute, with the regulations, with the characterization of the claim before the agency by the enforcement staff, by the ALJ, by the ARB, and I think it's

also inconsistent with the nature of the allegations.

So starting with the contract, the contract speaks in terms of contractual obligations, which it equates with the terms and conditions of employment.

The regulation, 29 C.F.R. 501.0, that creates this entire regulatory scheme says: "This is a scheme for the enforcement of all contractual obligations." That's a quote. So, if the government didn't view this as enforcing a contract, they would not be able to proceed under this regulation.

The ALJ opinion uses -- describes this in contractual terms throughout, which I think is consistent with that scheme.

And then, if you look at the -- at the -- the nature of the allegations, what we have here, so in order to participate in the H-2A program, you have to circulate a job order, and it's not circulated internationally; it's circulated domestically, intrastate and interstate, through the federal job order system that dates back to the 1930s, the Wagner-Peyser system, and that has been

understood to create a common law -- to create a contract at common law. It's circulated to -- to workers. Workers can then accept the contract by showing up for the job.

And before the H-2A program was created, it was understood that a job order that was circulated through that employment system gave rise to a contract that could be enforced through a breach-of-contract action at common law, which is why, even today, that you still have cases -- you know, there's a case we cited in the briefs -- there's cases too numerous to count that hold that workers can bring breach-of-contract actions for these same obligations.

So, for instance, the three quarters --

JUSTICE KAGAN: Well, Mr. Johnson, I mean, I -- I take your point that the regulatory requirements are repeated in the job order, which functions as a contract. But, if you look at these opinions from the ALJ, from the ARB, that they see the underlying source of liability as the regulations. It's almost happenstance that those regulations are

repeated in the job order.

And, indeed, if you -- you know, if the agency tomorrow took away that regulation that insists upon their being repeated, they wouldn't have to be repeated. It's not a statutory requirement in any way.

So what the real source of liability here is -- and I think that this is what the ALJ and ARB understood -- is the regulations. It's -- it's fortuitous that those regulations are mimicked in the job order.

MR. JOHNSON: So I disagree with that. And, you know, again, I think, if you look at the regulation itself, this is a scheme for the enforcement of contracts that's -- that's in the agency's own regulation.

I also think, if you look at the nature --

JUSTICE KAGAN: It's a scheme. I mean, the entire reason that this scheme was developed is to try to protect domestic workers from being undercut by immigrant workers, and that's what it's a scheme to do.

It's a scheme that -- that -- that sets up this parity requirement, that also sets

up minimum requirements, all in order to protect domestic workers from being undercut by -- by foreigners. And -- and -- and -- and that's what the scheme is about. It's not a scheme about enforcing contract rights.

It happens to be that all the elements of this scheme and all the requirements in this scheme are repeated in the contract by virtue of the Department's own regulations. But it's a scheme that has nothing to do with protecting contract rights. It's a scheme that has to do with setting up minimum -- minimum standards and setting up a parity requirement in order to protect domestic workers.

MR. JOHNSON: So, again, I disagree with that, and I think the reason that that's not right is that the -- the job order, which is what is being enforced, the terms of the job order, is circulated -- the -- the way that the government determines whether there are enough domestic workers for this position, the -- the main way they determine this is they require that you circulate the job order through this system of employment offices, and it is circulated intrastate and then it is circulated

interstate. And if domestic workers want to take the job, then they take the job on the terms of the job order.

And so what the government is doing here is they're making sure that the terms of the job are actually the terms of the job order because that is how they are determining whether there are or not enough domestic workers.

JUSTICE SOTOMAYOR: If you thought this scheme was simply -- if the scheme was simply: If you want farm workers, you circulate a job order that says I want a hundred farm -- people to work on my farm, do you think that, administratively, keep the scheme the way it is or the regulations that say, if you don't do this, we're going to put fines on you? Meaning, if you put them to work in a factory rather than on the farm, we're going to put a fine on you. Would that be okay? Is that a public right that you're protecting?

MR. JOHNSON: So I think, in that instance, if I understand the hypothetical correctly, they'd be offering one job and then

providing a different job. And the terms of the job that were offered would not match the terms of the --

JUSTICE SOTOMAYOR: No terms. Just the program is: You bring people into the United States to work on a farm, but, instead, you put them to work in a factory. Could the government administratively impose a fine?

MR. JOHNSON: So I would think, no, Your Honor, because I think -- not administratively.

JUSTICE SOTOMAYOR: So how is that any different than the ship coming to port in Oceanic and you saying I'm bringing healthy people in but instead you're not? You're saying I'm bringing people in to be farm workers, but I'm going to -- I'm really not; I'm going to put them in a factory.

MR. JOHNSON: Well, so I -- I take your point. I think the difference is that the -- that the conduct that is at issue is occurring -- for one thing is occurring after the entry into the country. And the other thing that is at -- the -- the collection mechanism --

JUSTICE SOTOMAYOR: So now we're back at the border. Let's say that we don't accept that because we can -- we accept in administrative proceedings that people who have violate -- violated terms can be deported, even though they're here, not at the border.

MR. JOHNSON: So I think there's a key difference between deportation, which is a remedy that goes --

JUSTICE SOTOMAYOR: I don't want to go past my example too far. All right? Let's stay on my example, which is if you concede -- and you're finding it hard to answer me because it makes no sense, does it?

MR. JOHNSON: No, and --

JUSTICE SOTOMAYOR: I agree to bring someone in to work at a factory -- to work on a farm, but yet I'm really putting them in a factory. And you're seriously suggesting that that could not be administratively adjudicated?

MR. JOHNSON: So maybe -- I -- I think it might be helpful to distinguish between what I would view as sort of my broad position here, which would be that any -- any significant deviation from the tradition in Oceanic Steam

would take it outside the immigration adjudication tradition, which I think under that view --

JUSTICE SOTOMAYOR: So you're back at the border.

MR. JOHNSON: Yeah, so -- but I also think there are narrower ways through this case, that the Court certainly does not need to go as far as I might go. I think, you know, my view would be that -- that Oceanic Steam --

JUSTICE SOTOMAYOR: If -- if -- if -- if I don't accept at the border, assume that just for the sake of assumption, that this public right can't be limited just to the border, if I assume that and I assume that the terms -- a breach of the terms of entry, like I'm going to put them on a farm as opposed to a factory, could be administratively adjudicated.

How are these terms and conditions any different?

MR. JOHNSON: So I think there's --

JUSTICE SOTOMAYOR: You're making a promise to treat people in a certain way, to have them do a certain job in a certain way, and instead you're just doing something else.

MR. JOHNSON: So I think there's a few differences. One is, you know, I think on your hypothetical, that it sounds like you could adjudicate that at the border in the sense that, you know, they -- they are -- or --

JUSTICE SOTOMAYOR: Well, most of the --

MR. JOHNSON: -- at least you could adjudicate it --

JUSTICE SOTOMAYOR: -- time, you know, you bring them in, the person is going to sneak them off to a factory.

MR. JOHNSON: Right. I guess the --

JUSTICE SOTOMAYOR: They're not going to tell you at the border I'm sneaking them to a factory.

MR. JOHNSON: I guess what I mean is that I think that what you're suggesting as a hypothetical where the statements would be false at the time they were made and the person was brought into the country under false pretenses, I don't think that's what the government is --

JUSTICE KAGAN: Well, why isn't it, Mr. Johnson?

MR. JOHNSON: Well --

JUSTICE KAGAN: I mean, essentially, this is a kind of visa fraud or immigration fraud. The -- the employer says I'm -- I'm certifying a set of things in order to get a set of foreign workers, and in exchange for that, I'm going to treat them a certain way, treat them the way that will not undercut domestic workers. And then, allegedly, the employer does the exact opposite, treats them in ways that do undercut domestic workers.

So that's a kind of immigration fraud at the -- at the outset.

MR. JOHNSON: So I think that it might help to look at the nature of the allegations to see why that's not the case.

So, for instance, almost half the liability, a large chunk of the liability, is the three-quarters guarantee issue. And -- and what that consists of is essentially, I -- the workers were promised a certain period of employment, and the government's allegation is they were fired before that period of employment was over because there were -- there were disputes between the workers and the --

the farm.

The employment, you know, didn't work out, and they were let go. And the government says that they -- they were let go without sufficient cause. And there's a factual dispute about that.

JUSTICE KAGAN: Yeah, but --

MR. JOHNSON: It's not --

JUSTICE KAGAN: -- that's a very narrow way to understand what we're talking about here. I mean, what the government is essentially saying is we have the power to adjudicate in our own administrative procedures whether, in fact, an employer has violated the conditions that the employer agreed to in bringing a set of employees in.

And, essentially, the -- the -- the government is saying we -- we -- we -- we -- we enabled -- we -- we allowed these people to be brought in on a certain set of conditions that have now been violated. Therefore, we're -- our administrative processes should come into play.

Border/not border, it's a condition of admission. And the condition of admission has

been violated, regardless whether you do so right there at the port or whether you do so 100 miles away at the farm.

MR. JOHNSON: Well, so my point, though, is that I think there is a meaningful distinction. The Court could find a distinction between bringing someone into the country under false pretenses and something like the three-quarters guarantee where what happened was -- you know, I don't think there is any allegation that they didn't intend to employ -- employ the workers for the full -- full employment period --

JUSTICE JACKSON: Right, but the question is why does that matter? Yes, the Court could find a distinction about a lot of things. But I think your job is to explain why those two different scenarios come out differently with respect to the immigration exception.

MR. JOHNSON: Right. And so, you know, my view would be the best view of the immigration exception would focus on the -- what are the nature of the claims and the remedies. And the question would be, are the

claims -- do the claims involve a question of whether to admit, exclude, or deny, as in Oceanic they did, and in Oceanic the remedy was -- was an exaction-type remedy --

JUSTICE JACKSON: No, you're just repeating -- you're just repeating what you think the rule should be. What I'm asking you is why.

MR. JOHNSON: So I think that should be the rule because --

JUSTICE JACKSON: Because? Because what happened here is not suitable for the immigration exception why?

MR. JOHNSON: So it does not involve the -- the claims do not involve the question of whether to allow someone across the border but instead involve things that have been --

JUSTICE JACKSON: But they do involve immigration-related claims, as Justice Kagan has been exploring with you. Why shouldn't those as well be a part of what we understand the immigration exception to cover?

MR. JOHNSON: So I -- you know, I -- I understand immigration is in -- is in the backdrop here in the sense that it's -- that

this arises in the context of an immigration program, and some, although I will -- to be clear, only -- over a third of the employees are domestic workers. So not all the workers are foreign workers.

JUSTICE JACKSON: Yes, but they answer the job description, but the job description was put out there in order to ensure there wasn't this undercutting of farm workers.

I mean, it seems like you're just sort of fighting the reality of the nature of this program, what its purposes were, what Congress was trying to do, and what the administration is trying to do in ensuring that we don't have farm workers coming in and undercutting domestic workers.

Do you -- do you dispute that that's really at the core of this? You don't think that has -- that's not central for your argument?

MR. JOHNSON: Well, so, Your Honor, nobody -- the government also does not take the position that this turns on the purpose of what's going on here. And -- but I -- you know, I think if the question -- to your

question, to answer it directly, I -- I -- you know, it's hard to know what the purpose is here, but I think that a large purpose here is worker protection.

I think it's hard not to look at this and see that part of what is going on here, sure, is immigration, but part of what is going on here is worker protection.

JUSTICE JACKSON: All right. What about the --

JUSTICE ALITO: Could you just say -- could you just say succinctly how far you think the immigration exception extends in -- in this situation where an alien is eligible for admission to the country on certain conditions? Is it your position that it stops at the point where the alien is either refused admission or granted admission based on the satisfaction at that time of the relevant conditions? Does it stop there or can it extend further to subsequent violations of the conditions and at what point later does it end?

MR. JOHNSON: So it can extend further if the remedy at issue is the revocation of permission to be in the country. And I think

the -- I think the reason for that is essentially this Court -- if you look at what is the -- the difference between public and private rights, I think for the most part the difference between public and private rights is that public rights involves the grant or denial of a benefit, which would include permission to be in the country. Private rights involve things that impose -- that deal with life, liberty, and property.

At the margins, the Court has recognized that there are areas where public rights can involve taking money, like tax liability, tariffs, things like that, that I think complicate the line, but what the Court has said is that in those areas at the margins, that's where we look to history. And so --

JUSTICE ALITO: Can -- can I ask you this? Suppose I disagree with you that there is an analogy here to a contract. What -- can you win the case?

MR. JOHNSON: Yes. And --

JUSTICE ALITO: Explain how that is.

MR. JOHNSON: So I think we can still win the case on that ground because it's still

penalties.

And so the Court, in -- in Tull, as Justice Kavanaugh was suggesting, said that penalties were always a traditional remedy at common law.

And I think back wages also are a traditional common law -- or even if not -- I think there's a dispute between the parties: Are they legal or equitable? You know, we think they are legal.

But, even if they're --

JUSTICE KAGAN: So just to make sure I understand, Mr. Johnson, you're saying that as a backup to your contract argument, assuming your contract argument is off the table, is rejected, you're saying your backup argument is just these involve penalties; therefore, there cannot be administrative adjudication. Is that correct?

MR. JOHNSON: That's correct. Again, I don't --

JUSTICE KAGAN: But that's not what Jarkesy said. Jarkesy, you know, could have said that, but it didn't say that. It said: We understand that there are various kinds of

historic exceptions. One of them is immigration; another might be customs; another might be taxation. The one we're talking about here is immigration.

But Jarkesy was very clear. It could have gone further. It did not go further. It said that there are these historic places where there's a different kind of analysis.

MR. JOHNSON: Yeah, and so I don't dispute that there are historical areas where liability can be imposed outside the Article III courts, but I think that with those areas that there has to be a careful attention to history and to what was going on in those -- in those cases.

And I think, if you look at Oceanic Steam, you know, Justice Barrett mentioned the -- the quote from Oceanic Steam that I think, you know, I had picked out as well, to my mind, as the most important line in that opinion.

The other line that I think is critical in that opinion is the final line of the opinion, which says that the Court is not deciding questions that would decide if -- that

would arise, excuse me, if the government were to endow administrative officers with the power to enforce a lawful exaction by methods which were not within the competency of administrative duties because they require the exercise of judicial power.

And I think that is exactly the distinction that the Court was drawing there, that the -- that the -- the factual determination that was made in that case was a factual determination about whether to allow the aliens into the border or not, which was within the core of the executive's immigration power, and then the collection of the -- of the penalty was a exaction upon permission to recross the border, so also involved an exercise of --

JUSTICE BARRETT: Mr. Johnson --

JUSTICE KAGAN: I mean, I don't --

JUSTICE BARRETT: Oh, please.

JUSTICE KAGAN: No, please.

JUSTICE BARRETT: So is it your position that in the historic exception buckets that Justice Kagan identified, you simply can't have civil penalties?

Like, so, for example, here, you agree it's not really that you're drawing a line at the border for immigration because you agree that someone could be removed from the country in an executive proceeding, right?

MR. JOHNSON: That's correct.

JUSTICE BARRETT: Okay. So it's really about what the government is seeking to do here, and that's the imposition of a civil penalty.

So your position is that in the immigration context, even though that is a public rights exception for some purposes, civil penalties are not okay within that context, is that right?

MR. JOHNSON: That is, although, again, I don't think the Court needs to go that far because --

JUSTICE BARRETT: Is that true in every one of the historical -- I mean, how broad is your argument? Is that true for all of the public rights exceptions?

MR. JOHNSON: I'm not making an argument about other exceptions that aren't at issue here because my reading of Jarkesy is

that each of those exceptions has to be taken on its own terms.

So, for instance, the tax exception, you know, rests on a very different ground where taxes could be collected by the -- the tax inspector in the first instance. So I think you might have an instance where, you know, a tax penalty would be viewed differently. I don't know.

I think what -- the way I read Jarkesy is there are no kind of overarch -- the overarching principle here is Article III and that the exceptions are exceptions that have to be --

JUSTICE BARRETT: But, if it's okay in some of these categories -- and this was -- you know, I asked Ms. Harris whether there was a mix and match -- whether it was okay to mix and match a little bit. Say, like, well, this is an immigration bucket, but it also bears a resemblance to public benefits, and so we can look that this kind of thing would be okay there, so it's okay here too.

Why, once we're in a public rights exception like immigration, can't we say, like,

okay, it's all on the table for administrative adjudication?

MR. JOHNSON: Because I think that's the kinds of reasoning that, you know, if you take -- well, this was okay over here in the tax context and this was over -- okay over here in the tariff context and then you kind of put them all together, that's how I think the courts arrived --

JUSTICE BARRETT: So it's isolated? They're islands? You have to look at each one and decide: In which bucket would you put this? Would you put this in government benefits or would you put this in immigration?

MR. JOHNSON: So I would put this in neither. But I think that the relevant -- I don't think there is a public benefits -- well, there's a public benefits exception in the sense of, you know, awarding --

JUSTICE BARRETT: Yeah.

MR. JOHNSON: -- benefits or not. But I don't know that there's sort of like a government privileges exception, like the -- the government suggests there is. I don't know that that exception even exists.

So I think the exception that we would be construing here would be the immigration exception.

JUSTICE KAVANAUGH: And you're -- so you're not arguing, just so I'm clear, that, as Justice Kagan points out, Jarkesy didn't go this far. You're not arguing that in this case we should say all civil penalties must be in Article III?

MR. JOHNSON: No. I don't think that it --

JUSTICE KAVANAUGH: Okay. So you recognize the exceptions. And immigration -- assume immigration's the relevant exception.

And then you're saying we have to -- what's the rule for civil penalties in the immigration context?

MR. JOHNSON: So I think the Court should look --

JUSTICE KAVANAUGH: Because I think you said, well, in that context, all civil penalties must be Article III.

Did you say that?

MR. JOHNSON: So -- and here I think is where I would --

JUSTICE KAVANAUGH: Is that just -- can I just get an answer to that?

MR. JOHNSON: Yeah. Could I just distinguish between the rule that I would advocate and then how I think --

JUSTICE BARRETT: Can you say yes or no to him? Because I thought I heard you say that too.

JUSTICE KAVANAUGH: Yeah, that was --

MR. JOHNSON: So --

JUSTICE KAVANAUGH: Can you just answer that yes or no? In the immigration context, are you arguing that all civil penalties must be Article III?

MR. JOHNSON: Yes, but I don't think the Court should go that far in this case. So what I'm saying is that my view --

JUSTICE KAVANAUGH: Now you can explain that.

(Laughter.)

MR. JOHNSON: Okay. So my view is that the Court indicated that the exceptions have to be applied with careful attention to history, so I think -- I look at, you know, if you look at the history here, so I take the

Alien Friends Act, which I think is the key precedent for understanding the scope of the -- the immigration adjudication doctrine, and the Alien Friends Act from 1798 drew a very clear distinction where the President could deport, but Section 4 said that -- that offenses against the Act would be prosecuted in the Article III courts, and Section 5 said that nothing the President did when deporting an alien would have any impact on the alien's property rights in the United States.

And so I think the Alien Friends Act, 1798, draws a fairly clear distinction between the executive's power to deport and then actions that affect property.

JUSTICE KAVANAUGH: One -- one problem or concern, I guess, is a better way to say it about what you just said -- and Ms. Harris alluded to this -- is, if we're looking for clarity, what you're proposing there is really at war with clarity. There's going to be a lot of guesswork about where exactly within, let's say, the immigration exception or within the other exceptions the line's drawn. And I think that's not great systemically going forward.

So can you answer that concern?

MR. JOHNSON: So I see, really, two key distinctions. I take Oceanic Steam to be the high-water mark of the immigration adjudication doctrine when it comes to penalties.

And I see two key distinctions between this case and Oceanic. This Court could emphasize both in its opinion, or it could emphasize either with different implications for other penalties, other immigration penalties.

So the Court could emphasize the fact that the -- the nature of the claims was focused on crossing the border or not crossing the border, or it could emphasize that the nature of the remedy was an exaction at the border, or it could emphasize both.

I think the best reading is to emphasize both because I think that both were salient features of -- of Oceanic.

However, I think, if the Court were, for instance, to emphasize the nature of the claims, then that would have different downstream effects than if the Court was to

emphasize the nature of the remedies.

JUSTICE ALITO: What you're outlining is kind of a hodgepodge opinion, and, you know, maybe sometimes courts write that sort of thing. But, to follow the --

(Laughter.)

JUSTICE KAGAN: Not ever us.

JUSTICE ALITO: -- to follow the train of this -- of your recent colloquy, so you say that it is not true or at least it is not necessary for us to true that civil penalties always require adjudication in an Article III court.

And then you say and, in fact, it's not true or it's not necessary for us to say that this is always necessary in the immigration context.

But, in the immigration context, there's a limit beyond which -- that cannot be exceeded, and that is set by the Alien Friends Act. So it has to be just like the Alien Friends Act? No.

MR. JOHNSON: No.

JUSTICE ALITO: By his -- by the relevant history?

MR. JOHNSON: Yeah. So I guess what I'm saying is I -- I think that the -- if you chart the history from the Alien Friends Act up to Oceanic, I take Oceanic to be the high-water mark.

JUSTICE ALITO: And why is it the high-water mark? I know you don't want us to go any further, but why is it the high-water mark? What -- what is it about the rationale of Oceanic Steam that makes it the high-water mark?

MR. JOHNSON: Well, so I take the test to be history. And I think, you know, Oceanic, to my mind, is already pretty late in the historical game, but it's -- this Court in Jarkesy identified it as relevant history in this context.

So I -- I think the tradition in Oceanic, you know, is something the Court has accepted. But I don't -- I don't think the doctrine of immigration adjudication -- if there are salient differences between what was going on there in terms of the claims and the remedies.

But, like I said, I think the Court

could write an opinion that is -- that is much more narrow than that and that --

JUSTICE SOTOMAYOR: The problem is I don't know what the relevant history is for you. Oceanic was at a time when immigration was totally different. If you finally put your foot on U.S. soil, you were here. And deportation was a very different process, if at all, I mean, because we didn't have all the problems we've had.

But almost as soon as immigration began to be a problem -- in this case, these regulations have been around since 19 -- 1986, I think. It's a long time. There have been administrative processes that have imposed fines for employers who have lied about bringing people in.

MR. JOHNSON: So, you know, actually, I don't think that's the history that -- that -- you know, the -- the first immigration-related penalties that we're aware of that are -- you know, that -- where there were prohibitions on bringing certain types of people into the country is the Foran Act in 1875, and it provided for judicial --

judicial --

JUSTICE SOTOMAYOR: Yes, because that's what was going on.

JUSTICE JACKSON: Can I just ask you another species of a question? Because I -- I guess I'm not sure how you are employing history. What is the work of it?

Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Briefly.

JUSTICE JACKSON: In the context of your analysis. On the one hand, from your opening, it suggested -- and maybe even here it suggested that you're looking for a -- an historical analog to what is actually going on here, and the government can't enforce in ways that we don't find historically. That's one way.

But then there's another way, I guess, which is we're looking at history for the criteria that one should apply when determining whether or not this is a public or private benefit. So which -- which are you doing?

MR. JOHNSON: So I think you have to look at each exception on its own terms, and then I think you're looking at the exception to

see essentially what is the -- the rationale. And I do think you -- it can't just be --

JUSTICE JACKSON: So it's the rationale. It's not that you're saying that Oceanic Steam -- that we have to have a -- an enforcement scheme that looks exactly like Oceanic Steam in order to fit into this exception?

MR. JOHNSON: I'm not saying that Oceanic Steam involves steamships. What I'm saying is that it involved -- both the claim and the remedy involved the exercise of the executive's power to control who could come over the border or not.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Your friend, Ms. Harris, put a lot of chips on the table when she finished saying this would be quite destructive for the government if she lost.

One, I want to make sure you've said everything you can, with response particularly to Justice Kavanaugh, about why, from your perspective, you don't think that would be such a big deal but then also to get your thoughts

on how destructive it would be for the individual rights involved if you did not prevail.

MR. JOHNSON: Okay. So, you know, in terms of the impact of this, maybe, first, I could focus on immigration. So I think there are -- you know, for the most part, immigration adjudication involves the question of whether to admit, exclude, or deport. And that includes deportate -- deporting something based on things that happened after they enter the country.

I don't think any of that is problematic because none of it involves -- it all involves classic public -- public rights, whether to allow someone into or out of the country.

When it comes to immigration penalties, I think that the effect -- the sweep of the Court's decision depends on whether the Court focuses on the nature of the -- you know, as I suggest, the nature of the claims and the remedies in Oceanic or if you just focus on the nature of the claims.

If the Court were to just focus on the

nature of the claims, then I think that would leave -- for instance, the 1324(a), (b), and (c) penalties for employing unlawful immigrants would be undisturbed, for instance, because the nature of the claim there turns on the -- the employment -- whether the person is in the country lawfully or not. So I think those don't necessarily rise or fall with what the Court would do in this case.

I think, similarly, like, penalties for a false statement in -- in an immigration application could be meaningfully distinct. So I don't think all of that has to rise and fall with this case.

I think, you know, beyond that, the government -- a lot of the penalties the government points to are reasonably distinct for a lot of different reasons. Many of them are withholding money. So the government may -- has a contract with somebody and they withhold money that they owe under the contract as a penalty. I think that's just a completely distinct sort of situation.

You know, the government talks about tax. I think tax is just a completely distinct

area of the law that rests on a different historical foundation.

So I -- I think that -- I don't think that the decision here is going to decide all of that.

In terms of the -- the impact of the government's theory, I think especially when it comes to the sort of government's broader theory that anytime there's a condition or a benefit, we can just attach privileges -- or, excuse me, conditions to that and then leverage the -- the fact of the condition to require non-Article III adjudication, that's going to just have all kinds of consequences.

I think the fact that the government in their brief says that access to the mail, I think, really puts a point on -- that access to the mail is a privilege really puts a point on it. If you think of all the criminal laws that penalize using the mail to do various things and how broad that criminal jurisdiction sweeps, the government seems to be suggesting they could do the same thing with penalties outside of Article III, that if you send something through the mail, there's all these

conditions on it, and then we can -- we can penalize that through outside the Article III courts.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

JUSTICE THOMAS: Putting aside penalties, if the government simply decertified you, would you have the same arguments?

MR. JOHNSON: No.

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: If you signed a contract saying the government could impose penalties, would you have the same argument?

MR. JOHNSON: So I think that's a great question, and I think that it would turn on the unconstitutional conditions doctrine.

JUSTICE SOTOMAYOR: Mm-hmm.

MR. JOHNSON: And I think it would be -- you know, there -- it would --

JUSTICE SOTOMAYOR: So you -- you're an employer who wants to treat these workers as badly as he or she can, so just sign the contract because you'll have to rely on the

Justice Department having enough lawyers to get to everybody who does that?

MR. JOHNSON: Well, so I just think the -- you know, whether the -- the government could require this as a -- as a condition --

JUSTICE SOTOMAYOR: All right. Can I ask one final question?

MR. JOHNSON: Yes.

JUSTICE SOTOMAYOR: The -- you seem to be suggesting that we have to write this to let some of the penalties in the statute survive but not this one? Is that correct? You said there are some of the penalties in the statute that would be okay under your theory but others would not.

MR. JOHNSON: I was referring to the -- they're not at issue in this case. I was referring to the -- there's a series of penalties that are adjudicated administratively under 8 U.S.C. 1324(a), (b), (c) that I think are --

JUSTICE SOTOMAYOR: Okay. So Justice Kavanaugh was right, we're going to have to write very carefully to win -- to let you win.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: I have to tell you, Mr. Johnson, I'm still struggling with the argument a little bit. You said the difference between this case and Oceanic is the nature of the claims and the nature of the remedies.

The nature of the claims, you said, well, Oceanic was an admissions case. Of course, the government has complete authority to use administrative adjudications with respect to admissions.

Well, this is an admissions case. An employer has gone to the government and said: We're going to make various certifications so that you allow us to bring in a boatload of foreign workers. Those -- and -- and -- and what the government is now saying is those admissions requirements that we put on the admission of these workers has been violated. And just the same way that the admissions requirement in Oceanic has been violated, so too here, and so the same penalties can apply.

You said it's the remedies question. The remedy there was civil fines. The remedy here is civil fines.

So, you know, we -- we -- we -- we

have the -- the -- the factual difference that this is occurring not at the border itself, but this is essentially the government saying you have violated admissions pledges that you've made to us, without which we would not have allowed these people in because we would think that these people would undercut the economic status of domestic workers. You violated that admissions criterion, so you pay the price.

MR. JOHNSON: So, you know, I -- I think that that's wrong for a few reasons. And maybe one way to see, I think, that illustrates that it's wrong is that not all these workers are even immigrant workers, that over a third of them are domestic workers.

You know, another way I think that illustrates that that's not the right way to think about it is that if you -- you know, here, if you have the inspection that finds these violations, it doesn't result in deporting the workers. You know, the workers can -- can stay. They can continue to work. It's just that the -- the -- they found a violation of the working conditions. It's not -- you know, it's not like --

JUSTICE KAGAN: Because we think that once you pay the penalty, you -- you know, you will no longer violate the admissions criteria.

MR. JOHNSON: Well, whether that's true or not, my point is that this is not a -- it's not a deportable offense. And even if the government was to say oh, this is so bad that we're going to terminate the contract, the H-2A laws allow a worker to -- to transfer from one employer to another employer, so these workers could still stay in the country working for a different employer.

JUSTICE KAGAN: I feel at the base of your argument, Mr. Johnson, you're trying to get us to think that the H-2A program is not an immigration program but it is an immigration program.

It's all about when do we allow the admission of foreign workers, given the fact that we're concerned that foreign workers will undercut the economic status of domestic workers. That's the program. It's about the admission of foreign workers.

MR. JOHNSON: So, you know, I don't disagree that immigration is part of what's

going on here, but I think under that theory or under that sort of description, that the claims at issue in Stern would have been bankruptcy claims, you know?

I don't think that it's a sort of subject matter test. I think that you need to look closely at what's the nature of the claim, what's the nature of the remedy, what's actually going on in this case? And what's going on in this case is not about the executives exercise of the power over the immigration of the country.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Let's see if I got it. The government wants to expel or prevent admission of somebody, no problem.

MR. JOHNSON: Correct.

JUSTICE GORSUCH: If they want to put in a penalty because you violated a term of entry or whatnot, like in Oceanic, as an alternative for that, that's fine too?

MR. JOHNSON: So, again, this is where it goes to whether, I think, you focus on the

nature of the claim or the collection remedy.

JUSTICE GORSUCH: Yeah, I understand that.

MR. JOHNSON: Yeah.

JUSTICE GORSUCH: But it could be okay?

MR. JOHNSON: Yes. Yes.

JUSTICE GORSUCH: Okay. And the problem here is we're adjudicating a contract or something that looks an awful lot like a contract between an employer and an employee?

MR. JOHNSON: Correct.

JUSTICE GORSUCH: And some of those employees are American citizens?

MR. JOHNSON: Correct.

JUSTICE GORSUCH: And it doesn't wind up -- however -- whatever happens as a result of this adjudication, nobody will be admitted or deported?

MR. JOHNSON: Correct.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: In terms of the difference between you and the government on

how this would operate, I just want to make sure I have this clear, you agree that even under the government's approach, you can get judicial review. The differences are who initiates, I suppose, the court proceedings and then whether the standard of review will be de novo or deferential, once you get to court, correct?

MR. JOHNSON: Yes. So I think under this Court's decision in FCC, there is no question that an agency can have proceedings to decide whether to initiate enforcement action in court, and I -- and I don't think we contest that.

The problem here is that you don't -- don't -- you don't then get a de novo proceeding.

JUSTICE KAVANAUGH: Right. So you get judicial review. The question about standard of review is really what it -- is going to be the key difference in practical operation, depending on which side wins here, correct?

MR. JOHNSON: Correct.

JUSTICE KAVANAUGH: Okay. And then I just want to make sure I have this straight.

You said we can rule for you and at the same time hold or suggest or indicate that penalties on employers for -- under 1324 for employing people unlawfully in the country or not verifying their status could still be done by administrative adjudication without an Article III court, correct?

MR. JOHNSON: Yeah. So, again, it's -- in my view, that is not the correct way to decide the case, but I think it is an available way to decide the case. And then --

JUSTICE KAVANAUGH: And then the principle, if we did say that, would be?

MR. JOHNSON: Would be that -- that you look at the nature of the claim and ask whether the nature of the claim is about immigration status, whether someone is lawfully in the country or not or can lawfully be -- be in the country.

And so that was the nature of the claim in Oceanic. I think in a case about -- you know, if the allegation is that the -- the worker was unlawfully employed, fundamentally the allegation is this worker was not lawfully in the country.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Based on your answers just now to Justice Kavanaugh and earlier to Justice Gorsuch, now I'm starting to think there's really not that much difference between the solicitor general or the government's position about germaneness and your argument because what I kind of hear you saying along the way as you are distinguishing with Justice Kagan and you're talking to Justice Kavanaugh is, well, this just seems pretty far removed from the heartland of telling someone they either can't get in or they have to be removed from the country.

So is there much of a difference in your position now between this germaneness line the government would draw?

MR. JOHNSON: So to be clear, I think my position of what the best reading here is that I would focus both on the nature of the claim and the remedy, because I do think when you're only looking at the claim, that is -- there is a certain risk that it gets a little

bit indeterminate.

So, you know, I think if you look at the nature of the remedy, that that's -- that really -- the fact that Oceanic wasn't --

JUSTICE BARRETT: So, wait, let me just clarify. Let's make sure I understand what you're saying.

You're saying if you look at the remedy, like your first-line position would be, listen, civil penalties, even in the context of immigration, are just always out. They always have to go to Article III.

If you lose that, however, your position seems awfully like the government's germaneness test.

MR. JOHNSON: So I do think it's different. I think that my view would be the question is, is it -- is the claim about whether somebody is lawfully in the country or not or is it otherwise about sort of the process of determining whether someone is lawfully in the country or not?

I think that's different from germaneness, which I take to be kind of more of like a, what is the degree of separation,

which, you know, I -- I don't think is an administrable standard because I don't know, you know, is that a rationale basis test? Is it some sort of more tight test? I don't know what germaneness really means.

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So are foreign workers who are brought into the country pursuant to a set of conditions that are subsequently violated lawfully in the country?

MR. JOHNSON: So they would be, yes. So an H-2A --

JUSTICE JACKSON: They would be?

MR. JOHNSON: So an H-2A worker, if they come into the country, under --

JUSTICE JACKSON: Pursuant to a set of conditions that allows for their entry that are subsequently violated --

MR. JOHNSON: So --

JUSTICE JACKSON: -- they are lawfully in the country?

MR. JOHNSON: Well, so, you know, I guess maybe I'm not understanding the question

right. If your question is --

JUSTICE JACKSON: No, I think you understand the question. I think it just really highlights why lawfully in the country can't be the right line for --

MR. JOHNSON: So --

JUSTICE JACKSON: -- determining whether or not this is an immigration case.

MR. JOHNSON: If an H-2A worker is working at a farm that has violated these terms and conditions, the H-2A worker is not in the country unlawfully. The H-2A worker could, you know, if -- if the government is -- the government has a choice, to -- to debar someone from the program --

JUSTICE JACKSON: I thought the government could expel them. They -- if you agree the government could expel them, it would be because the conditions are violated and, therefore, they are not in the country lawfully, right?

MR. JOHNSON: Under the statute, to expel someone for these types of violations, the government has to prove that they are substantial.

JUSTICE JACKSON: Okay.

MR. JOHNSON: So if the government can't prove that the violations are substantial, the -- the employment contract would not end.

JUSTICE JACKSON: Let me ask you another question. I hear you setting up a test for identifying public rights that turns on the nature or the claim -- of the claim or the remedies. You've said it many times. That's like how we should tell courts to go about doing this.

What I don't understand is where those particular criteria come from? Because in the historical cases, those were not the metric.

You just seem to be looking at the historical cases and picking out certain facts and telling us that today we should have a new test that relates to those facts, but we have many, many cases in which public route -- rights were applied and found by this Court, even though the government imposed monetary liability.

So it was not tied to the remedy as to whether or not you would find a public right.

We have many cases that resembled common law claims, and the Court still found that there were public rights involved.

So help me to understand whether you are asking us to just fashion a new test based on some facts that you see in the historical cases? Surely this is not what we were doing traditionally, because those cases would have come out differently.

MR. JOHNSON: So I think that there are -- that most of the cases that you're referencing arise in a distinct historical tradition buckets, you might say.

JUSTICE JACKSON: Right. But they don't turn on the factors that you're now saying we should apply. That's my -- I'm trying to help the courts that Justice Kavanaugh says are going to be confused.

So I want to have a rule, like, what do you look for to determine whether or not this is a public rights case or a private rights case? And you have offered us one. You say: Look at the nature of the claim and the type of remedy.

And I say: Ha, that rule's not going

to work consistent with all the public rights cases that we have traditionally had because those cases wouldn't be public rights if your test is -- is -- is the right test. So I guess I'm just trying to understand what you're asking us to do and isn't it novel?

MR. JOHNSON: So I don't think it's novel. I think if you actually look at those historical cases, they do turn on distinct considerations.

So, for instance, just to pick one, the government cites McElrath, which is a case about the dispute between the government and a government employee and whether the Court of Claims could adjudicate counterclaims. And it's about -- the case is about the importance of the government's sovereign immunity, that, you know, there's particular considerations --

JUSTICE JACKSON: Right, but you're --

MR. JOHNSON: -- involving government employees --

JUSTICE JACKSON: -- not asking us to look at those considerations. I'm just trying to figure out where you're getting your test from. But I think I have the answer. Thank

you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Ms. Harris?

REBUTTAL ARGUMENT OF SARAH M. HARRIS
ON BEHALF OF THE PETITIONERS

MS. HARRIS: Thank you, Mr. Chief Justice.

Three points. One is a 40,000-foot point. It would be a big deal for the government to lose, but an even bigger deal would be to have a mess, to have no clarity as to what the scope of public rights looks like, no sense of what's left of Atlas Roofing, how it fits into things, no sense of what -- what part of history, what the historical test looks like to even define otherwise accepted categories of public rights. The government cannot live like that. We have too many schemes involving civil penalties, involving things that historically have analogized to public rights, to live under uncertainty because we have an accumulating number of cases that could be subject years from now to complete wipeout if we don't have additional

certainty.

So it is quite important to us. Please, give additional certainty on the high-level score along the lines Justice Jackson was just talking about.

Second, how should you rule in this case? I think there's a pretty clear contrast at this point. We have -- we have attempted to articulate a fairly clear rule. You look at the historical categories of public rights. There are two that everyone agrees are implicated here. One is immigration. Everyone agrees that it includes admission and exclusion of aliens. I don't think there is any way to conceive of that right that would not also include the fact that once someone is admitted, they can also be removed or be ineligible to remain based on conditions that the government prescribes. That's a very clear, very well-established body of cases. It's the zenith of Article I and II powers together.

The second line is public privileges and benefits. I think the two working together makes this an easier case, rather than a harder one. When you are piggybacking on a -- on a

quintessential public right, when you are using the government's power over immigration to allow someone not just into the country but to remain on a visa only so long as they are doing the work at your farm during the growing season, that you have promised to comply with various conditions, the Court has accepted the -- that you have to take the bitter with the sweet. Once you get that privilege, you've agreed to adjudicate violations of that, and you are subject to the conditions in executive adjudication. That's Oceanic Steam but a whole body of cases that Oceanic Steam is built from that establish that. I think that's all you need to say to resolve the case.

The other side of this is a true hodgepodge. I'm not quite sure what the lines would look like. I think Respondent has now given up on no civil penalties at all in executive adjudications. That would be overturning all sorts of precedents where they've been allowed.

I -- I'm not sure where Respondent has landed on when civil penalties are fine. If they're fine in the immigration context, if so,

when? If there's a test for looking exactly like Oceanic Steam, if there's certain criteria in Oceanic Steam beyond not looking like a steamship that would be material, I'm not sure why that would be. That's certainly not the way the Court has ever interpreted Oceanic Steam ever since then.

But that gets us to the situation of a mess. If the government, every time it wants to adjudicate civil penalties or invoke things that are historically part of the public rights doctrine, has to look through cases and try to guess which factual distinction is going to be -- become the basis for this is a bridge too far, we have no predictability for what we're supposed to do. We need to be able to structure our operations on this stuff because it affects so many cases, so many resources, the power of the executive branch, and our relationship with the courts and how courts' resources are impacted.

So, please, clear lines. That's what I'm asking for here.

Finally, a word on remedies. I don't like the prospect of losing. I think that's

very obvious. I hope we don't lose this case because of the consequences. But if you were looking to, you know, which poison is the least bad, I agree that the poison that's a least bad is at least saying that we can impose penalties initially in adjudications and then have de novo review in Article III courts.

I will just tell you, though, that could work in certain contexts, but it's not a real fix across the board. There are very hard questions for a lot of other statutory regimes that could also be on the cutting-room floor, for executive adjudication where we would have to go to Congress.

And that -- that's a -- you know, please tell us now if we -- if we need to get Legislative Affairs on it right now, because this will snowball. Please reverse.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:47 a.m., the case was submitted.)

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