

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 SECURITIES AND EXCHANGE COMMISSION,)
4 Petitioner,)
5 v.) No. 22-859
6 GEORGE R. JARKESY, JR., ET AL.,)
7 Respondents.)
8 - - - - -

9
10 Washington, D.C.
11 Wednesday, November 29, 2023

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:05 a.m.

16
17 APPEARANCES:
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20 of the Petitioner.
21 S. MICHAEL McCOLLOCH, ESQUIRE, Dallas, Texas; on
22 behalf of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-859, the Securities and Exchange Commission versus Jarkesy.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER
ON BEHALF OF THE PETITIONER

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

Throughout our nation's history, Congress has authorized the agencies charged with enforcing federal statutes to conduct adjudications, find facts, and impose civil penalties and other consequences prescribed by law. More than a century ago, this Court described the validity of those statutes as settled beyond any possible constitutional question, and since the enactment of the APA, those and other administrative adjudications have often been conducted by officers specially appointed for the purpose and removable only for cause.

This Court should reject all three of

1 the Fifth Circuit's reasons for upsetting that
2 longstanding and entrenched practice.

3 First, this Court's decision in Atlas
4 Roofing considered many of the same arguments
5 presented today and reaffirmed that Congress
6 does not violate the Seventh Amendment when it
7 authorizes an agency to impose civil penalties
8 in administrative proceedings to enforce a
9 federal statute. Respondents have not asked
10 this Court to overrule Atlas or the long line of
11 precedents on which it rested, and they also
12 haven't identified any relevant distinction
13 between that case and this one.

14 Second, Congress does not violate the
15 nondelegation doctrine when it gives an agency
16 the choice of pursuing administrative or
17 judicial proceedings. The decision whether and
18 how to pursue enforcement action is a
19 quintessentially executive power, and Congress
20 doesn't violate the Constitution when it leaves
21 that decision to executive discretion, as it has
22 traditionally done.

23 Finally, the APA's limited removal
24 protection for ALJs is entirely consistent with
25 this Court's decision in Free Enterprise Fund.

1 There, the Court confronted an unprecedented
2 agency, a powerful law enforcement board, that
3 was insulated from removal because -- by an
4 unusually stringent provision and that was not
5 subject to the SEC's control.

6 Here, in contrast, ALJs are purely
7 adjudicative officers who are subject to the
8 Commission's plenary control and review of their
9 decisions, and the APA's modest for-cause
10 removal standard gives the Commission ample
11 authority to remove those ALJs if they fail to
12 accept supervision.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: But you do agree, Mr.
15 Fletcher, that it depends on the type of right
16 involved?

17 MR. FLETCHER: We do. We take this
18 Court's statement of the public rights doctrine
19 from Atlas Roofing and other cases, and the
20 argument we're making here is limited to the
21 particular strand of the public rights doctrine
22 that the Court has described in Atlas and other
23 cases.

24 JUSTICE THOMAS: And how would you
25 define public rights?

1 MR. FLETCHER: So I acknowledge, I
2 think the Court has acknowledged most recently
3 in Oil States, that the public rights concept is
4 -- is contested. The Court has never fully
5 plumbed its outer perimeters. I think what I'd
6 say is the strand of the doctrine that's
7 relevant here is the same one from Atlas, which
8 is, when the federal government, an agency, is
9 enforcing a federal statute in exercise of its
10 sovereign powers, that's a matter involving
11 public rights.

12 JUSTICE THOMAS: If I don't agree with
13 you that we're talking about public rights here,
14 that -- that private rights are involved, would
15 you then think that it is required that it be
16 adjudicated before an -- an Article III court?

17 MR. FLETCHER: So we haven't made an
18 argument -- you know, there are some
19 circumstances, cases like Schor and Thomas,
20 where the Court has said in some circumstances
21 it may be permissible to assign initial
22 adjudication even involving private rights to
23 non-Article III tribunals.

24 We're not making an argument like that
25 here. We're resting on the argument that this

1 is a classic public rights case within this
2 Court's precedents and also we think properly
3 viewed as a matter of first principles.

4 JUSTICE SOTOMAYOR: Mr. Fletcher,
5 could you go directly to Justice Thomas's
6 question? He's already written on this issue,
7 and he thinks that a private right is any right
8 that involves property, life, or liberty
9 basically.

10 MR. FLETCHER: Yeah.

11 JUSTICE SOTOMAYOR: Could you address
12 that part of -- of the Justice's stated views?

13 MR. FLETCHER: I -- I'm happy to.
14 Justice Thomas, you have addressed this at
15 length in Axon and in other writings. You know,
16 we -- the place where I think we would depart
17 from you is we think that the Court's cases
18 going back all the way to Murray's Lessee stand
19 for the proposition that it can be a matter of
20 public rights within -- for purposes of Article
21 III even if private property was involved.
22 Murray's Lessee, after all, was taking someone's
23 property in order to satisfy a debt to the
24 government. Same thing in Stranahan. The same
25 thing in Atlas Roofing.

1 What we think makes it a matter of
2 public rights and means that it does not offend
3 the separation of powers to assign its
4 enforcement and initial adjudication to
5 executive branch officials is that it's a
6 classic exercise of executive power to enforce
7 federal law by applying the law to the facts in
8 a particular case and by imposing the
9 consequences that are specified by law.

10 CHIEF JUSTICE ROBERTS: Could -- could
11 I ask you just a couple of examples and see
12 where it falls under your definition?

13 The federal government, in association
14 with the states, built the interstate highway
15 system, an enormous benefit to members of the
16 public. Could the government decide that
17 accidents interfere with what they were trying
18 to accomplish in the highway system and create
19 an agency to hear and adjudicate who's liable,
20 responsible, and how much for accidents on the
21 highway system? No court, no jury?

22 MR. FLETCHER: No, Mr. Chief Justice,
23 not under the strand of cases that we're relying
24 on here. I take the hypothetical to be could
25 Congress replace the tort system that would

1 adjudicate liability between individuals, the
2 party involved in a crash, take that --

3 CHIEF JUSTICE ROBERTS: Well, only --
4 only on a system where they gave the benefit
5 which those people that have the accidents are
6 taking advantage of. I understood that to be
7 part of the aspect of the public rights
8 doctrine.

9 MR. FLETCHER: I think there are
10 strands of the Court's public rights cases that
11 talk about government benefits. I think usually
12 the sense in which that's relevant and the only
13 sense it would be relevant to the argument we're
14 making here is when it's the government itself.
15 It's -- public rights are matters between the
16 government and the public. Sometimes that's --

17 CHIEF JUSTICE ROBERTS: So -- so what
18 about healthcare? The government's involved in
19 the healthcare sector. Could the -- an agency
20 determine that the cost of medical malpractice
21 claims throughout healthcare, not just the
22 particular aspect which the government's
23 participating in, interferes with what they're
24 trying to accomplish in the healthcare system,
25 and so the subject of medical malpractice will

1 be handled by a government agency, an expert
2 agency, to reduce the costs of the benefit of
3 healthcare that the government provides? No
4 court, no jury?

5 MR. FLETCHER: Not if we're talking
6 about adjudicating matters of private rights.
7 In Crowell's terms, the liability of one person
8 --

9 CHIEF JUSTICE ROBERTS: Well, that's
10 --

11 MR. FLETCHER: -- to another under the
12 law is defined.

13 CHIEF JUSTICE ROBERTS: Yeah.

14 MR. FLETCHER: Potentially yes if
15 we're talking about taking an area of law,
16 concluding that common law remedies aren't
17 sufficient, erecting a structure of federal
18 regulations, and empowering an agency to enforce
19 it. That's the OSH Act in Atlas Roofing.
20 That's the securities laws at issue here.

21 CHIEF JUSTICE ROBERTS: Well, if I
22 could just interrupt because you said no because
23 it involves private rights. Well, what is the
24 intersection or distinction? I mean, I could
25 see -- it seems to me that it involves public

1 benefits as well, I mean, the -- the provision
2 of healthcare and people take advantage of it,
3 and this is a government decision that they want
4 that public benefit to be available more
5 economically, more efficiently. Yes, it has
6 private rights in it. The people who are
7 injured have a right, I guess, to pursue the
8 people who injured them. But it's also a public
9 right.

10 And -- and how are we supposed to
11 decide which of those two parameters prevails?

12 MR. FLETCHER: So I think you can
13 acknowledge, as the Court has done before, that
14 there are fuzzy boundaries at the outer edges of
15 some parts of the public rights doctrine. But I
16 think the difference between those cases and
17 this one is that in this case, we're talking
18 about what we had in Atlas, which is a federal
19 agency that's charged with enforcing rights
20 enacted for the benefit of the public, in
21 Justice Scalia's words in *Granfinanciera*, rights
22 held by the public, and that --

23 CHIEF JUSTICE ROBERTS: Well, but, on
24 the private side, I guess they would be normal
25 fraud claims, right? I mean, the -- the

1 securities claims regulated by the SEC look a
2 lot like claims that could be brought in private
3 -- in court before a jury for fraud.

4 MR. FLETCHER: So there's some analogy
5 there. There was also some analogy in Atlas
6 Roofing, you know, the OSH Act. The claims that
7 were brought there looked in some ways like
8 negligence or wrongful death claims for
9 workplace hazards that had long been brought in
10 common law.

11 The difference is that there and here,
12 Congress has enacted a federal regulatory regime
13 that doesn't just federalize securities fraud or
14 federalize negligence in workplaces the way some
15 of Your Honor's hypotheticals were positing, but
16 it erects a comprehensive federal scheme that
17 goes well beyond common law fraud, and it
18 differs in sort of every particular. It's --

19 JUSTICE KAVANAUGH: Let's --

20 JUSTICE JACKSON: And it's not even
21 purporting to be common law fraud. I mean, I --
22 I understood that the Seventh -- the -- the
23 Seventh Amendment protects private rights of
24 action that the common law has created and is
25 given to private parties to enforce.

1 And when you have that situation, when
2 you have a common law fraud claim -- that's what
3 you're trying to bring -- you have the right
4 under the Seventh Amendment to bring that in an
5 Article III court with all of the protections
6 that exist, including a jury trial.

7 But, when Congress has created a new
8 right, a new duty, you know, the -- the duty
9 that exists under the Securities and Exchange
10 Act that -- that is created by law, I thought
11 Atlas Roofing was saying you're not worried
12 about stealing a common law claim and putting it
13 into a non-Article III tribunal, that that's
14 really the issue.

15 So, when we're looking for, you know,
16 this circumstance, we're trying to ask at the
17 beginning, is there a common law claim or right
18 that is being implicated here?

19 MR. FLETCHER: So I think that's -- I
20 mostly agree with that. I would supplement it a
21 little bit. I think it's not just the presence
22 of a statute that's important. But, if we're
23 talking about a case in court between private
24 parties, the Seventh Amendment can apply to a
25 case involving legal claims even if they arise

1 under a statute rather than under the common
2 law.

3 The critical point is that the Seventh
4 Amendment right to trial by jury has always
5 depended on the nature of the forum and the
6 nature of the cause of action. By its terms, it
7 applies to suits at common law.

8 JUSTICE GORSUCH: And, Mr. Fletcher --

9 JUSTICE KAVANAUGH: So your whole --

10 JUSTICE GORSUCH: -- we -- oh, I'm
11 sorry. Please.

12 JUSTICE KAVANAUGH: Go ahead.

13 JUSTICE GORSUCH: Well, we'd agree
14 that the right to trial by jury, whether it's
15 criminal or civil, is a very important
16 foundational freedom in -- in American society
17 and a check on all branches of government,
18 wouldn't we?

19 MR. FLETCHER: We do.

20 JUSTICE GORSUCH: Okay. And we'd
21 agree that if the government sought the same
22 penalties in a criminal proceeding, a jury trial
23 right would attach?

24 MR. FLETCHER: I -- I think that
25 depends, Justice Gorsuch. I think, on fines,

1 this is a point that Atlas made. Actually,
2 there, government can seek fines and it doesn't
3 trigger the Sixth Amendment jury trial right.

4 JUSTICE GORSUCH: Penalties?
5 Penalties?

6 MR. FLETCHER: Criminal fines.

7 JUSTICE GORSUCH: Criminal penalties,
8 you -- you think a jury trial right would
9 attach? A felony, you know, this is a felony
10 fraud and the guy can go to jail and he can get
11 penalties, you think no jury?

12 MR. FLETCHER: I -- I -- I'm not
13 saying that there's no limits on that. I'm just
14 saying a point that the Court made in Atlas was
15 that for small fines, those pick up --

16 JUSTICE GORSUCH: Oh, small fines?

17 MR. FLETCHER: Yes.

18 JUSTICE GORSUCH: Okay. All right.
19 But -- but, here, we're not talking about a
20 small fine, though.

21 MR. FLETCHER: Yeah, so -- and, again,
22 I don't want to fight too much on this. I agree
23 --

24 JUSTICE GORSUCH: So we'd agree --

25 MR. FLETCHER: -- there would be a

1 jury required in a criminal case.

2 JUSTICE GORSUCH: -- we --

3 MR. FLETCHER: Yes.

4 JUSTICE GORSUCH: In -- in this
5 criminal -- if this were a criminal case, it
6 would have a jury, right?

7 MR. FLETCHER: I -- I think that's
8 very -- I don't know honestly where the line
9 would fall, but I -- I'm not going to disagree
10 that criminal cases involve juries, and if this
11 were civilly brought in a court, it would
12 require a jury. I concede that as well.

13 JUSTICE GORSUCH: Okay. And -- well,
14 let's -- let's come to that in a second. So
15 returning to the Chief Justice's questions about
16 administrative regimes, I've got another one for
17 you.

18 Let's say the government revived the
19 Sedition Act and decided that, you know, it's
20 really important to have a federal agency who
21 could bring penalties for defamation against the
22 government.

23 Jury trial, no jury trial?

24 MR. FLETCHER: Unconstitutional on
25 First Amendment grounds for sure.

1 (Laughter.)

2 JUSTICE GORSUCH: Forget about the
3 First Amendment. You -- too easy. We're
4 talking about the Seventh Amendment and the
5 right to a jury trial, and that -- that is an
6 important and ancient right too.

7 MR. FLETCHER: Yeah. And I'm -- I'm
8 -- what I'm saying and the reason I responded
9 that, I realize that's not the point of the
10 question, but I think the included force --

11 JUSTICE GORSUCH: Then -- then -- then
12 let's answer the question.

13 MR. FLETCHER: Yeah. So, if it's a --

14 JUSTICE GORSUCH: Seventh Amendment
15 right or no Seventh Amendment?

16 MR. FLETCHER: -- otherwise valid
17 federal regulatory statute --

18 JUSTICE GORSUCH: Yep.

19 MR. FLETCHER: -- being enforced by
20 the government --

21 JUSTICE GORSUCH: Yep.

22 MR. FLETCHER: -- pursuant to its
23 sovereign powers, that's Atlas Roofing in this
24 case.

25 JUSTICE GORSUCH: No --

1 MR. FLETCHER: Lots of other
2 constitutional problems.

3 JUSTICE GORSUCH: -- no jury trial
4 right. I think that has to be the implication
5 of your argument.

6 I want to talk to you for just a
7 minute about how you deal with Tull and
8 Granfinanciera. We agree that Tull found that
9 some civil penalties under the Clean Water Act
10 imposed by the government do trigger the Seventh
11 Amendment, right?

12 MR. FLETCHER: When heard in court.

13 JUSTICE GORSUCH: When heard in court.
14 And that's the key distinction as far as you're
15 concerned?

16 MR. FLETCHER: Yes.

17 JUSTICE GORSUCH: What if the
18 government tomorrow decided, well, we don't like
19 those jury trial that come with that, we're --
20 we're going to -- we're going to effectively
21 overrule Tull by moving those to administrative
22 proceedings?

23 Then the Seventh Amendment would
24 disappear on your account, wouldn't it?

25 MR. FLETCHER: Yes, but that's Atlas

1 too. And the Court recognized and looked at all
2 of the history and the importance of the Seventh
3 Amendment but said it's always been tied to the
4 nature of the forum. There have always been
5 circumstances where important rights get
6 adjudicated without a jury in admiralty record
7 --

8 JUSTICE GORSUCH: I -- I understand
9 that.

10 MR. FLETCHER: -- proceedings.

11 JUSTICE GORSUCH: I think the key --

12 MR. FLETCHER: And this is just that.

13 JUSTICE GORSUCH: -- the key part of
14 that answer is yes, that that would overrule the
15 preexisting Seventh Amendment right this Court
16 recognized in Tull.

17 MR. FLETCHER: I disagree that it
18 would overrule that right respectfully, Justice
19 Gorsuch. I think the right in Tull --

20 JUSTICE GORSUCH: It would evaporate
21 it?

22 MR. FLETCHER: No, not --

23 JUSTICE GORSUCH: It would dissipate
24 it? What verb would you prefer?

25 MR. FLETCHER: No. The Seventh

1 Amendment right that the Court recognized in
2 Tull is the one in the Seventh Amendment, which
3 is a right in suits at common law.

4 JUSTICE GORSUCH: Okay.

5 MR. FLETCHER: If it's an
6 administrative proceeding. It's not a suit at
7 common law.

8 JUSTICE GORSUCH: Okay. So let's talk
9 about Granfinanciera, which applied Tull's test
10 in a non-Article III tribunal, right?

11 MR. FLETCHER: Yes.

12 JUSTICE GORSUCH: Okay. And it said
13 the Seventh Amendment applied there in a
14 non-Article III tribunal.

15 MR. FLETCHER: Yes.

16 JUSTICE GORSUCH: Okay. I understand
17 that your distinction there is that it happened
18 to be between two private parties.

19 MR. FLETCHER: Not just our
20 distinction, the Court's distinction in
21 Granfinanciera repeatedly.

22 JUSTICE GORSUCH: No, no, but between
23 this -- your argument between this case and that
24 case is that's the distinction. The relevant
25 distinction is private parties, right?

1 MR. FLETCHER: Which was core to
2 Granfinanciera's reasoning --

3 JUSTICE GORSUCH: Oh, sure that's --
4 fine.

5 MR. FLETCHER: -- is what I want to
6 say.

7 JUSTICE GORSUCH: Now let's say that
8 -- that the government brought a fraudulent
9 conveyance argument instead of a private party.
10 Then the Seventh Amendment right would again on
11 your account, I think, dissipate, disappear,
12 whatever verb you want to use?

13 MR. FLETCHER: So I -- I'm not as sure
14 about that, Justice Gorsuch. I think the
15 principle in Atlas Roofing and the one we're
16 relying on here is government enforcement in its
17 sovereign capacity.

18 If you're talking about government in
19 its proprietary capacity bringing a fraudulent
20 conveyance claim as an ordinary participant in
21 bankruptcy --

22 JUSTICE GORSUCH: No, it creates some
23 statute much like the one we have here that
24 looks a lot like fraud but a little bit
25 different in sovereign capacity.

1 MR. FLETCHER: Yeah. So there are a
2 lot of statutes that say that in those
3 circumstances, the government can proceed in
4 administrative proceedings without a jury trial
5 right, yes.

6 JUSTICE GORSUCH: Thank you.

7 JUSTICE SOTOMAYOR: Can we go --

8 JUSTICE KAVANAUGH: What -- what --

9 JUSTICE SOTOMAYOR: -- to that
10 question? Justice Gorsuch called it small
11 differences. There are big differences between
12 a common law fraud claim and a claim under the
13 SEC, correct?

14 MR. FLETCHER: Yes.

15 JUSTICE SOTOMAYOR: Would you just
16 break them down?

17 MR. FLETCHER: Sure. So the critical
18 one for purposes of separation of powers is that
19 when the Securities and Exchange Commission
20 finds facts, conducts adjudications, imposes the
21 consequences required by law, it is executing
22 the laws in a classic Article II sense.

23 Murray's Lessee, City of Arlington,
24 this Court has long recognized that it's
25 executive power to apply the law to the facts

1 and impose consequences prescribed by law in
2 particular cases.

3 So, from the question of asking has
4 Congress tried to assign an Article III power to
5 some entity that's not an Article III, we think
6 it hasn't done that when it's authorized an
7 agency to find facts and impose consequences in
8 enforcing the law.

9 As to specific distinctions on
10 securities, so it's not just it's a different
11 enforcer, it's also that the requirements look
12 different. Congress didn't just federalize the
13 law of fraud. It adopted a comprehensive
14 regulatory regime with lots of prophylactic
15 registration, disclosure, and other requirements
16 totally unknown to the common law, provided for
17 enforcement by the public, not by private
18 parties, and provided different remedies,
19 including not just things like disgorgement or
20 damages but bars on participation in the
21 industry, deregistration of securities, civil
22 penalties. None of that was found in the common
23 law.

24 JUSTICE KAVANAUGH: Mr. Fletcher --

25 JUSTICE SOTOMAYOR: The remedies --

1 JUSTICE KAGAN: Aren't there also
2 different elements --

3 JUSTICE SOTOMAYOR: I'm sorry. If I
4 may finish.

5 The remedies were different, but so
6 are the -- the elements of the fraud.

7 MR. FLETCHER: The elements are
8 different as well, exactly. Even if you're --

9 JUSTICE SOTOMAYOR: It's actually not
10 even fraud in all circumstances.

11 MR. FLETCHER: That's the point I was
12 trying to make when I said that it's not just
13 fraud cases. It's also prophylactic disclosure
14 and other requirements that don't look anything
15 like fraud.

16 And then, Justice Kagan, I think this
17 is where you were going, even if we're talking
18 about the subset of SEC cases that do look more
19 like common law fraud, the elements are
20 different precisely because it's not trying to
21 right a private wrong. We're trying to
22 vindicate the public's right to fair and honest
23 markets.

24 And so we don't require a showing of
25 reliance. We don't require a showing of damage

1 to private parties. As this Court said in
2 Kokesh, what we're looking for --

3 JUSTICE ALITO: Well, what if the
4 statute did require that? Would your argument
5 be different?

6 MR. FLETCHER: So I don't -- parts of
7 my argument, I think I wouldn't be able to rely
8 on those distinctions. I think my fundamental
9 argument would not change because we view the
10 critical distinction as -- and the one relevant
11 to separation of powers as being that
12 enforcement by the executive.

13 JUSTICE ALITO: Well, as to the
14 elements of -- of reliance, does it make sense
15 to say that the Seventh Amendment provides
16 stronger protection when it is easier for the --
17 the -- the -- the prosecuting party to prove a
18 claim than otherwise?

19 MR. FLETCHER: I don't think that's a
20 relevant difference for Seventh Amendment
21 purposes. I think the relevant --

22 JUSTICE ALITO: I thought you were
23 saying that that was a difference.

24 MR. FLETCHER: No, I'm saying that --

25 JUSTICE ALITO: There are elements of

1 common law fraud that are omitted under this --
2 under these circumstances.

3 MR. FLETCHER: I took the question,
4 the thrust of the question, to be are we
5 concerned that there's something, some sort of
6 circumvention going on. Has Congress taken
7 common law fraud and handed it from the courts
8 to an agency.

9 The -- I think the constitutionally
10 relevant distinction in our view is that this is
11 something that has been assigned to a federal
12 agency to enforce --

13 JUSTICE KAVANAUGH: Mr. Fletcher,
14 your -- your whole argument on this civil
15 penalties point seems to depend on Atlas
16 Roofing. You've mentioned it already probably
17 10 times.

18 Atlas Roofing, the other side says,
19 has been severely undermined by later cases,
20 such as Tull and Granfinanciera. Justice White,
21 as you know, suggested parts of Atlas Roofing
22 had been overruled in his dissent in the latter
23 case.

24 And it does seem odd from a
25 constitutional perspective to say that a private

1 suit triggers the Article III right to a federal
2 court and a jury, a private suit against you for
3 money, but a government suit against you for
4 money is somehow exempt from those Article III
5 and Seventh Amendment and due process
6 requirements simply because the government
7 attaches a different label, the public rights
8 label to it.

9 So I think that's a strong argument on
10 the other side. I wanted you to respond to
11 that.

12 MR. FLETCHER: Yeah. There were
13 several things packed in there. I'll see if I
14 can get to all of them.

15 So, first of all, on the notion that
16 we're relying solely on Atlas, Atlas obviously
17 squarely considered this question, considered a
18 lot of the same historical evidence, and
19 couldn't have been clearer about what it was
20 holding, but I don't want to suggest that that's
21 all that we have.

22 You know, Atlas itself is relying on a
23 line of decisions that go back to Helvering
24 versus Mitchell, to the two Elting cases, to
25 Stranahan from 1909, and -- and even before

1 that, all of which stand for the same
2 proposition that civil penalties in government
3 enforcement actions are permissible, consistent
4 with Article III and the Seventh Amendment.

5 So, as to the question whether the
6 Court has backed away from that, I think exactly
7 the opposite is true. So Tull is about
8 government proceedings in court, and it makes
9 clear that its holding applies in court and
10 doesn't extend to administrative proceedings.

11 Granfinanciera and other cases have
12 addressed a sort of different and much more
13 contested question about when we're dealing with
14 liability between two private parties, a
15 fraudulent conveyance action there, how -- when
16 can Congress take that and assign that to
17 non-Article III tribunals.

18 JUSTICE KAVANAUGH: And what sense
19 does it make to say the full constitutional
20 protections apply when a private party is suing
21 you, but we're going to discard those core
22 constitutional historic protections when the
23 government comes at you for the same money?

24 MR. FLETCHER: Yeah. So the plurality
25 in Northern Pipeline, which I think, you know,

1 also recognized exactly this issue, sort of
2 acknowledged that concern and said the reason is
3 that the Article III question is grounded in the
4 separation of powers. We're asking, are we
5 concerned about Congress taking away the
6 judiciary's power? And that's not -- that is a
7 concern when you have disputes between private
8 parties here today.

9 JUSTICE KAVANAUGH: Well, what about
10 individual liberty? The purpose of the
11 separation of powers is to protect individual
12 liberty. And your individual liberty, it would
13 seem, is even more or at least equally affected
14 when the government is coming after you than
15 another private party.

16 MR. FLETCHER: So I agree with that,
17 Justice Kavanaugh. And I think the Due Process
18 Clause certainly has something to say here. In
19 cases like Atlas Roofing and more recently in
20 Oil States, the Court has emphasized that
21 judicial review of agency action may well be
22 required.

23 I think our point is just that as a
24 separation-of-powers matter, as a historical
25 matter, it's permissible for Congress to give

1 adjudications to executive officials, that can
2 be executive power, and that Congress has a lot
3 of flexibility in deciding how to provide
4 judicial review.

5 JUSTICE JACKSON: And isn't that what
6 causes --

7 JUSTICE BARRETT: Mr. Fletcher, I have
8 a question about Atlas Roofing, and maybe you
9 can help me because I'm having a hard time
10 figuring out the logic of it.

11 So Atlas Roofing says this: The
12 government can commit the enforcement of
13 statutes and the imposition of collection -- and
14 collection of fines to the judiciary, in which
15 case a jury trial would be required. But the
16 United States can also validly opt for
17 administrative enforcement without jury trials.

18 So I take that to mean that it's
19 completely up to the forum, so the right to a
20 jury trial would --

21 MR. FLETCHER: Right.

22 JUSTICE BARRETT: -- depend on the
23 forum --

24 MR. FLETCHER: Right.

25 JUSTICE BARRETT: -- rather than the

1 nature of the action, whether the action is a
2 private right or a public right.

3 How can that be?

4 MR. FLETCHER: So I -- I -- I think
5 the answer to that is that the Seventh Amendment
6 depends on the forum. That's the text and
7 tradition of the Seventh Amendment. It's suits
8 at common law. So it never applied in equity.
9 We also don't think it applies in administrative
10 proceedings.

11 But there's an important check on when
12 Congress can assign matters to administrative
13 proceedings, and that's the public rights/
14 private rights distinction. That comes from
15 Article III.

16 JUSTICE BARRETT: But it seems to me
17 that what Atlas Roofing is saying here is that
18 the public rights/private rights, just this part
19 of it, because it seems to me --

20 MR. FLETCHER: Yeah.

21 JUSTICE BARRETT: -- that part of your
22 argument depends on reading Atlas Roofing for
23 all -- all that it's worth. And I agree Atlas
24 Roofing is a good case for you. But it seems to
25 me that that part that I read and part of the

1 premise of Atlas Roofing really doesn't depend
2 on the private rights/public rights; it really
3 kind of depends on the forum.

4 And it's obviously true, right, that
5 if you're in front of an agency, you're not
6 entitled to a jury trial. So that's -- that's
7 the whole question.

8 MR. FLETCHER: Yeah. It --

9 JUSTICE BARRETT: So it seems to me,
10 if you have an entitlement to a jury if you're
11 in federal court, I don't understand then how
12 you not have that right, how it can go to an
13 agency.

14 MR. FLETCHER: So we look at the
15 question the way the Court did most recently in
16 Oil States, which is consistent with Atlas
17 Roofing. We think the first question is, is
18 this a matter that can be assigned to an agency?
19 And that's governed by the public rights --

20 JUSTICE BARRETT: Public rights.

21 MR. FLETCHER: -- question under
22 Article III, right? And if the answer to that
23 question is yes, then the Seventh Amendment
24 doesn't impose additional constraints because,
25 by its terms and by tradition, the Seventh

1 Amendment doesn't apply.

2 JUSTICE BARRETT: Then why would you
3 have those rights if it's -- if it -- if the
4 government chooses to bring the action in the
5 court, why would you have those rights? Because
6 I take it what Atlas Roofing is there -- what
7 Atlas Roofing is saying there is that if you
8 have the exact same action, and let's assume
9 it's public rights, that you could somehow have
10 a right to a jury trial if it's in a court.

11 MR. FLETCHER: Right. And I think the
12 difference is, if it's in a court, the Seventh
13 Amendment applies by its terms. If it's in --
14 permissibly assigned to an administrative
15 agency, the Seventh Amendment doesn't apply.

16 JUSTICE BARRETT: But why? It doesn't
17 apply to everything.

18 JUSTICE KAGAN: Is that because the
19 Seventh Amendment says suits? Is that why?

20 MR. FLETCHER: That -- that's part of
21 it. I mean, I think that's very strong textual
22 evidence. That's also the longstanding
23 historical understanding and the way the Court
24 has always approached it.

25 JUSTICE KAGAN: I mean, it's -- it's a

1 really interesting question that Justice Barrett
2 raises because I think it appeals to this
3 intuition, like, we know jury rights are very
4 important, and everybody agrees with that. And
5 the idea that you would have it in one place and
6 not have it in another place, well, why is that?

7 But I'm taking you to say that we've
8 said that many times over, that the only
9 relevant question here is the Article III
10 question, that once the Article III question is
11 decided in favor of allowing the proceeding to
12 go forward in an agency, there is no independent
13 Seventh Amendment question.

14 And I guess the question is, well, why
15 shouldn't there be? Were we right to have said
16 that --

17 MR. FLETCHER: Yeah.

18 JUSTICE KAGAN: -- I think four or
19 five times?

20 MR. FLETCHER: At least.

21 JUSTICE BARRETT: But that's actually
22 not quite my question because, in Atlas Roofing,
23 it seemed to say -- I mean, I -- I -- I agree
24 that the Seventh Amendment and then the
25 separation of powers under the Article III line

1 of cases reinforce each other in this respect,
2 but then why in Atlas Roofing is it assuming
3 that the exact same suit would trigger a right
4 to a jury trial in a court but not -- but could
5 simultaneously be assigned to an agency?
6 Because I take that to be the exact same thing.

7 I mean, I take the Court really to
8 kind of be saying there if the OSH Act -- if --
9 if -- if the agency had decided to bring it in a
10 court, that it would have been triggered.

11 MR. FLETCHER: Yeah.

12 JUSTICE BARRETT: And, obviously, it's
13 not true that everything that's brought in a
14 court triggers the right to a jury trial. It's
15 only those that were suits at common law.

16 MR. FLETCHER: Right. Yeah.

17 JUSTICE BARRETT: Right? So I -- I --
18 I guess I just don't understand the logic here
19 but for a different reason than Justice Kagan's
20 saying at least I -- I think.

21 MR. FLETCHER: So I apologize, Justice
22 Barrett. I may -- I may not be completely
23 following. I think it's that only if it is in
24 court do you ask the Seventh Amendment question,
25 which, as you say, sometimes the answer is yes,

1 you have a jury trial right; sometimes the
2 answer is no, you don't have a jury trial right.

3 Our view is that the text of the
4 Seventh Amendment tells you, you don't even ask
5 that question if you're in front of a different
6 tribunal, like an administrative agency --

7 JUSTICE JACKSON: But, Mr. Fletcher, I
8 don't understand, like Justice Barrett, why the
9 forum is leading this issue when -- I know your
10 time is up.

11 Mr. Chief Justice, do you want me to
12 wait until --

13 CHIEF JUSTICE ROBERTS: Why don't you
14 finish your question and then --

15 JUSTICE JACKSON: Okay.

16 CHIEF JUSTICE ROBERTS: -- we'll move
17 on to --

18 JUSTICE JACKSON: I -- I don't
19 understand why the forum is the first question.
20 I thought that the first question was, what is
21 the nature of the claim? In other words, is
22 this a common law action?

23 The concern that you mentioned many
24 times was is the law of fraud being federalized.
25 And when the law of fraud is being federalized,

1 the Seventh Amendment is implicated because what
2 the Seventh Amendment is doing is protecting the
3 right of a person who has a common law fraud
4 claim to bring it in federal court and not have
5 it directed into some forum where they don't get
6 a jury trial.

7 So it seems to me that the initial
8 question is, what is the right or the duty or
9 whatever that is being established? And so
10 Atlas Roofing begins by acknowledging that the
11 Act created a new statutory duty, right? So,
12 when we have this new statutory duty, it's not a
13 common law duty, the question is, can this new
14 duty be directed to an administrative tribunal
15 without Seventh Amendment protections or not?

16 And Atlas Roofing says of course
17 because it's a new duty. It's not -- we're not
18 worried that they are stealing the common law
19 claims and putting it into this situation. So,
20 for me, the answer is not starting with, where
21 is this taking place? It's starting with, what
22 is the claim or the duty at issue? And if it's
23 a new statutory duty, says Atlas Roofing, we've
24 held forever that Congress can assign it to the
25 court, Congress can assign it to the

1 administrative agency. The Seventh Amendment
2 isn't implicated because we're not talking about
3 a common law suit.

4 MR. FLETCHER: Justice Barrett --

5 CHIEF JUSTICE ROBERTS: Briefly,
6 counsel.

7 MR. FLETCHER: -- Justice Jackson, I
8 think the reason why the Court has looked at it
9 differently is that Article III actually
10 provides more protection. It's not just
11 concerned about protecting people's access to
12 the courts in common law cases where there's a
13 right to trial by jury. It also protects the
14 right to go to an Article III court if you have
15 an equitable action between two parties.

16 JUSTICE JACKSON: Right. But what
17 about the Seventh Amendment?

18 MR. FLETCHER: Right.

19 JUSTICE JACKSON: Aren't we asking
20 what the Seventh Amendment protects?

21 MR. FLETCHER: And -- and the point
22 that I'm making is the point from Oil States and
23 the Court's other cases, which is the Seventh
24 Amendment is essentially downstream from Article
25 III. It applies -- it's a forum-dependent right

1 by its terms, suits at common law. If you have
2 something permissibly assigned to an
3 administrative agency, you don't have a suit
4 assigned at common law. And so, as the Court
5 said at the end of its opinion in Oil States, if
6 you've answered the Article III question first
7 and it's permissibly in an agency, that resolves
8 the Seventh Amendment question too.

9 I'm sorry, Chief Justice.

10 CHIEF JUSTICE ROBERTS: Thank -- thank
11 you, counsel.

12 Just a couple of questions. Justice
13 Kagan pointed out that what the Constitution
14 says were suits at common law. And -- and I
15 think that may be a better focus than a -- a --
16 a concept that we've had a great deal of trouble
17 with anyway of public -- public rights. And
18 it's also what we said in -- in Stern, that the
19 one thing you -- you can't take away from the
20 court, you know, suits made of the stuff of the
21 traditional actions at common law tried by the
22 courts at -- at West -- at Westminster.

23 But it can't be the case that it's a
24 suit -- would be a suit at common law, it would
25 have been tried at Westminster, but the

1 government calls it something different, but
2 it's the same thing?

3 I mean, that -- suits at common law
4 would seem to be a significant constraint on
5 what the government can take away from the
6 courts and arrogate to its own employees as
7 hearing examiners.

8 MR. FLETCHER: So, Mr. Chief Justice,
9 I think those constraints exist, but I think the
10 Court has located them correctly in Article III
11 and the Due Process Clause, not just in the
12 Seventh Amendment.

13 And I think part of that is because
14 those provisions actually provide more
15 protection and more access to courts than the
16 Seventh Amendment would because the Seventh
17 Amendment is limited to suits at common law.

18 CHIEF JUSTICE ROBERTS: Thank you.
19 And just one more question.

20 Atlas Roofing is 50 -- 50 years old.
21 And the extent of impact of government agencies
22 on daily life today is enormously more
23 significant than it was 50 years ago. I mean,
24 does that have any -- should that be a concern
25 for us or a consideration when we're trying to

1 consider what power the government has to take
2 away the jury trial right or, as an antecedent
3 to that, to take away the right to go into
4 court?

5 I mean, the government is much more
6 likely to affect you and proceed against you
7 before one of its own agencies than in court,
8 and that concern and that threat is far greater
9 today than when Atlas Roofing was set up.

10 And -- and as a general matter, it
11 does seem to me to be curious that and unlike
12 most constitutional rights that you have that
13 right until the government decides that they
14 don't want you to have it. That doesn't seem to
15 me the way the Constitution normally works.

16 MR. FLETCHER: So let me start with
17 the first question about changes since Atlas
18 Roofing. I think it's true there are more
19 agencies now than there were then. I don't
20 think that changes the relevant constitutional
21 principles. I think the one thing that it does
22 highlight is the extent to which Congress has
23 relied on Atlas Roofing.

24 You know, at that time, Congress said
25 -- the Court said these are already very common

1 practices. They have only become more so ever
2 since as Congress has relied extensively on this
3 Court's holding that this is a permissible way
4 to provide for the government to enforce the
5 rights held by the public.

6 Now I take your point about questions
7 of fairness and about the rights of individuals.
8 Those are important considerations. I think
9 the -- the only place I would differ from you is
10 that we think those are best answered by the Due
11 Process Clause, which speaks to the requirement
12 of judicial review and by the provision of
13 judicial review of the agency's actions at the
14 back end.

15 And, finally, you asked about the sort
16 of question about the forum and isn't it a
17 little odd to think of a constitutional right
18 that applies in some places and not in others.

19 And the point that I was trying to get
20 at in response to Justice Barrett earlier is
21 that that's always been a feature of the Seventh
22 Amendment. At the founding, you could have had
23 exactly the same sort of --

24 CHIEF JUSTICE ROBERTS: Well, that's
25 right, but that wasn't my point that it could be

1 in one place or another.

2 My point was more it could be in one
3 place we have the protections of Article III
4 against the government, or the government can
5 decide we think we'll be better off deciding
6 that in our own agency before our own employees.

7 That's not just one place or another.
8 It seems to me that undermines the whole point
9 of the constitutional protection in the first
10 place.

11 MR. FLETCHER: So I -- I disagree, Mr.
12 Chief Justice. I think that's something that
13 Congress has long done, has provided for
14 administrative adjudications first and judicial
15 review later.

16 I think that's obviously subject to
17 due process constraints, but when it is
18 consistent with those constraints, and there's
19 no challenge here that this scheme is not, then
20 it is consistent with our tradition and -- and
21 not just since Atlas Roofing, but, really, you
22 know, this was an established practice for more
23 than a century before that as well.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 JUSTICE THOMAS: Mr. Fletcher, would
2 you give us a brief definition, your definition
3 of public rights?

4 MR. FLETCHER: Sure. I think the --
5 I'm not going to try to do it comprehensively
6 because I think that there are some sort of
7 contested questions that are not at issue in
8 this case.

9 For purposes of this case, we would
10 just ask the Court to say what it said in Atlas
11 Roofing, which is, when the government in its
12 sovereign capacity is enforcing a federal
13 statute, then it is enforcing public rights.

14 JUSTICE THOMAS: So it's the nature of
15 the government's enforcement?

16 MR. FLETCHER: Right. It is -- it is.
17 I think I would put it maybe the way Justice
18 Scalia did in Gran -- his Granfinanciera
19 concurrence where he said it's are we enforcing
20 rights held by the public. That's the meaning
21 of public rights.

22 JUSTICE THOMAS: So how would you --
23 how would property rights fit in that? Those
24 are usually considered private.

25 MR. FLETCHER: Right. And I

1 understand the intuition that you have written
2 about and that some scholarship has written
3 about that says the -- the public rights/private
4 rights question should be are there private
5 rights like property or liberty at stake on one
6 side of the ledger.

7 And the reason why I think that can't
8 be the way to ask the question is that in all of
9 -- many of the Court's public rights cases going
10 back to Murray's Lessee, there have been private
11 property interests that would be affected.

12 There are administrative adjudications
13 that happen all the time that affect property,
14 that affect liberty in the immigration context,
15 that affect very important interests of
16 individuals that we still conceive of as public
17 rights matters that can go to agencies in the
18 first instance.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: I wanted to follow up
22 on a question asked by the Chief Justice and
23 then a question asked by Justice Kavanaugh.

24 So the -- the question asked by the
25 Chief Justice concerns the textual argument that

1 the Seventh Amendment doesn't apply here because
2 it's not a suit.

3 Why is it not a suit?

4 MR. FLETCHER: I think because a suit
5 is traditionally understood to be a proceeding
6 in court.

7 JUSTICE ALITO: So, if something -- if
8 a -- a claim at common law for which a party
9 would have the right to a jury trial is simply
10 transferred to some other tribunal, that makes
11 it not a suit?

12 MR. FLETCHER: When it's assigned to
13 executive officers to find the facts and apply
14 the law, that's not a suit. And that's
15 something that's been happening since the
16 founding, often very informally, and I think our
17 point here is that Congress can provide
18 trial-type procedures to make sure that that's
19 more fair to parties and more accurate, but when
20 it does that, it doesn't change the nature of
21 the power.

22 JUSTICE ALITO: Doesn't that seem
23 like --

24 MR. FLETCHER: It's still executive --

25 JUSTICE ALITO: -- doesn't that seem

1 like a pretty patent evasion of the Seventh
2 Amendment to say this protection which was
3 regarded at the time of the adoption of the Bill
4 of Rights as sufficiently important to merit
5 inclusion in the Constitution can be nullified
6 simply by changing the label that is attached to
7 a tribunal?

8 MR. FLETCHER: And the difference,
9 Justice Alito, is that I don't think it's just
10 changing the label. It is changing the nature
11 of the power being exercised.

12 And I want to underscore again that I
13 think it very well may be the case that there
14 are constitutional rights that require some
15 amount of judicial process. Our point is just
16 that we think those are found in the Due Process
17 Clause and not in the Seventh Amendment.

18 JUSTICE ALITO: What if the -- what if
19 the -- the suit is not the -- the -- the
20 adjudication, the -- the dispute is not between
21 the government and a private party but between
22 two private parties, but it's before an agency.

23 Would you say that is still not a
24 suit?

25 MR. FLETCHER: I think that is still

1 not a suit, but Article III would have much more
2 to say about that, and it there imposes much
3 greater constraints on Congress's ability to
4 assign that sort of dispute between private
5 parties to an agency in the first place.

6 JUSTICE ALITO: Well, I -- I don't
7 understand why you keep shifting to Article III.
8 I mean, the question before us is the Seventh
9 Amendment, which speaks directly to the question
10 of suits at common law and to a private right
11 and to the right of a jury trial. Or I'll --
12 I'll take out the private right part.

13 MR. FLETCHER: Yeah.

14 JUSTICE ALITO: It speaks to suits at
15 common law and -- and the right to a jury trial.

16 MR. FLETCHER: Right. So the reason
17 I'm focused on Article III is that because the
18 first answer to the Seventh Amendment is it's
19 suits at common law. Proceedings in an agency
20 aren't suits.

21 I take the force of your response,
22 which is it seems odd to say that we can just
23 take something away from a court and hand it to
24 an agency, and I'm trying to respond to that by
25 saying there is a constraint on that and an

1 important one. It's Article III and the Due
2 Process Clause, just not the setting.

3 JUSTICE ALITO: Yeah. Well, Article
4 III was in the Constitution in 1787, but when
5 Congress and the states put the Seventh
6 Amendment into the Constitution, they apparently
7 thought that Article III wasn't going to provide
8 sufficient protection.

9 Can we not infer that?

10 MR. FLETCHER: I -- I think you
11 absolutely can. But we think you should
12 continue to, as you have before, read the
13 Seventh Amendment's protection by its terms,
14 which is to be focused on suits in court, suits
15 at common law.

16 JUSTICE ALITO: All right. The -- the
17 other question was one that Justice Kavanaugh
18 asked, and I want you to go back to it.

19 And -- and I want to -- I want you to
20 talk about the theory behind the Seventh
21 Amendment. You have -- you have arguments based
22 on precedent. You have your -- your textual
23 argument about suit. But I just want you to
24 talk about the theory of the Seventh Amendment.

25 Isn't the theory of the Seventh

1 Amendment that people in this country should
2 have protection against having their liberty or
3 property taken away by officials who are
4 answerable to a powerful executive, that the
5 jury should be set up as a buffer between what
6 the -- in that situation?

7 Isn't that the theory of it?

8 MR. FLETCHER: I -- I don't think,
9 respectfully, Justice Alito, that's the primary
10 theory behind the Seventh Amendment. That's --
11 that's part of it sometimes.

12 But, as we explained, you know, the --
13 the proponents of the Seventh Amendment
14 identified a lot of concerns about checking
15 judges, about providing protection in private
16 suits, and, really, I think the most telling
17 evidence that it wasn't concerned about
18 government enforcement is that in five of the
19 seven state ratifying conventions that proposed
20 something like the Seventh Amendment, they
21 limited it to suits between private parties or
22 involving real property. So they would have
23 excluded the government altogether.

24 JUSTICE ALITO: Well, I'm talking
25 about the Seventh Amendment to the Constitution

1 of the United States. Justice Kavanaugh's
2 question was what sense does it make to say you
3 have this protection when you're being sued by a
4 private party, whose resources are certainly
5 going to be more limited than the resources of
6 the federal government, but when the same thing
7 happens to you and the party that's against you
8 is the federal government, well, this right to a
9 jury trial simply goes out the window.

10 Does that make sense?

11 MR. FLETCHER: I -- I think it does
12 because I don't think it's the same thing that
13 happens. If it's truly the same thing, if the
14 government is proceeding against you in court on
15 the same basis as a private party, then that's
16 Tull, and the jury trial right does attach.

17 But what is different about an
18 administrative proceeding is that then we're in
19 the world of Congress permissibly, in a way that
20 it is permitted to do under the Constitution,
21 assigning to executive officials the
22 responsibility for finding facts and imposing
23 consequences, which happens all the time every
24 day.

25 JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Let's go back to
4 that distinction you were drawing earlier. You
5 said that Justice Thomas and I think Justice
6 Alito are concentrating on the Respondents'
7 interests. But I think that we haven't really
8 concentrated on what -- how the difference
9 between a private right and a public right
10 exist. I understood a public right to be a
11 right possessed by the sovereign.

12 MR. FLETCHER: Exactly.

13 JUSTICE SOTOMAYOR: And it's an
14 interest that's not -- that's possessed by the
15 sovereign, correct?

16 MR. FLETCHER: Exactly, yes.

17 JUSTICE SOTOMAYOR: And that's why
18 that interest in this case is to protect the --

19 MR. FLETCHER: Integrity of the
20 securities markets, yes.

21 JUSTICE SOTOMAYOR: And that would
22 include actions that have nothing to do with
23 fraud, like a failure to disclose, registration
24 requirements, et cetera, et cetera. If you
25 violate those, you pay a penalty for it.

1 MR. FLETCHER: Exactly right. And I
2 think that also points up why it would be very
3 difficult if the Court were to try to go down my
4 friend's road and to say that the Seventh
5 Amendment or Article III depended on how closely
6 analogous the agency's enforcement action was to
7 some suit at common law or to common law fraud.
8 I think that would require having to parse on
9 almost a provision-by-provision of the
10 securities or other laws or even on a
11 case-by-case basis, and there's no real
12 principled yardstick for asking how analogous is
13 too analogous for those purposes.

14 JUSTICE SOTOMAYOR: Well, I mean,
15 there's -- and you're absolutely right, from
16 Murray's Lease down to our INA case to
17 everything else, we've permitted the public
18 interest to be protected in an administrative
19 proceeding, correct?

20 MR. FLETCHER: Correct. Yes.

21 JUSTICE SOTOMAYOR: Now I'm going to
22 pose what I consider the hardest question. I
23 see the remedies here as remedies that are not
24 generally available in common law, whether it's
25 being barred or -- from practice or from -- or

1 other things like that.

2 Penalties seem similar, but how about
3 if it included restitution, meaning now we're
4 going to pay the money to a private party?
5 Would that pose a problem?

6 MR. FLETCHER: I don't think it would.
7 You know, first of all, in this case, there's a
8 disgorgement remedy, and the SEC -- the money
9 goes to the SEC in the first instance, but then
10 the SEC has to --

11 JUSTICE SOTOMAYOR: And -- and I think
12 disgorgement is always very different because
13 that's more like a fine or -- or --

14 MR. FLETCHER: Yeah. So our view is
15 that even if part of the remedy that the
16 government is securing for the public, for the
17 sovereign in the name of vindicating the public
18 interest then is later paid over to private
19 parties, that's still a matter of public rights.

20 And that's not new here. The two
21 Elting cases from 1932 that we describe, the
22 penalties were not just a civil monetary penalty
23 enforced by administrative officials. Those
24 were immigration cases about unlawfully bringing
25 non-citizens to the country. And administrative

1 officials also made people who violated those
2 laws refund the non-citizens' fare for the
3 passage to the country.

4 So this idea that administrative
5 penalties and -- permissibly enforced through --
6 in a public rights way includes providing some
7 relief to private individuals dates back at
8 least that far.

9 JUSTICE SOTOMAYOR: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: So, Mr. Fletcher, I --
12 I think one of the oddities of this case is, if
13 you look at the question presented and then you
14 read Atlas Roofing, you wonder why this case is
15 here, in other words, that Atlas Roofing simply
16 resolves the issue.

17 But you suggested that Atlas Roofing
18 was not a one-off in the sense that it had a
19 real historical grounding. You said that in
20 your introduction. And I wanted to give you an
21 opportunity to explain how that's true.

22 But I also want you to go forward from
23 Atlas Roofing because, of course, there are
24 precedents that we have that have been eroded
25 over time, that have been changed, that -- that

1 don't get a hundred percent of their value 50
2 years later as they do the moment they were
3 issued.

4 And I think some of the questions that
5 you've been asked here, you know, are to the
6 effect of, well, might that be true with Atlas
7 Roofing either because we have some idea of
8 first principles, true or constructed, or
9 because we have some idea that subsequent
10 precedents in some sense narrowed or weakened
11 Atlas Roofing.

12 So go backwards for me. Go forwards
13 for me.

14 MR. FLETCHER: And so let me start
15 with backwards and then forwards.

16 Going backwards, Atlas Roofing
17 grounded its decision in a long line of prior
18 cases. I think the best one to look at if you
19 were just going to pick one is Oceanic Steam
20 Navigation versus Stranahan. It's an
21 immigration case from 1909. Many of the same
22 arguments are presented. A party was subject to
23 a fine by administrative officials, and they
24 came to court and they said, if you're going to
25 impose a civil monetary penalty on me, you've

1 got to go to an Article III court with all of
2 the protections that that entails. And the
3 Court said in the line that I quoted in my
4 introduction the understanding from the
5 beginning has been that Congress can legislate,
6 impose civil penalties, and have executive
7 officials impose those penalties in the first
8 instance.

9 That same thing is reflected in
10 Passavant, which is a case from the -- 1893, in
11 the Elting cases from 1932, in Helvering versus
12 Mitchell, and those aren't just, you know,
13 pinpoints in the landscape. All of them are
14 saying this is a thing that Congress has long
15 done. It is a thing that commonly happens. So
16 it's not just precedent. I think it's also
17 practice of the government that this Court has
18 often looked to as being very important in the
19 separation of powers.

20 So, going forward both to what the
21 Court has done so far and what some of the
22 questions suggest that the Court might do, I
23 don't think there's any way to read the Court's
24 subsequent cases as retreating from Atlas
25 Roofing. All of them that my friend relies on

1 dealt with the sort of more contested fringes of
2 the public rights doctrine when you're talking
3 about the liability between two private parties.
4 That's Granfinanciera, Thomas, Schor, Stern
5 versus Marshall. All of them are careful to
6 carve out and say we're talking about this
7 special zone of liability between two private
8 parties --

9 JUSTICE KAGAN: Indeed, if I might
10 just interrupt, I mean, when you started in your
11 introduction and you said what the Court has
12 often said, that this is a very complicated,
13 difficult area, but the Court has often said
14 that when it's faced cases involving two private
15 parties in which their dispute is embedded in a
16 federal statutory scheme, and those are the
17 cases that we found complicated and difficult.

18 MR. FLETCHER: Exactly, and you have
19 Justice Scalia, you know, in Granfinanciera
20 saying I would limit the public rights doctrine
21 to cases involving the government because he
22 disagrees with where the Court had gone on cases
23 involving private parties. But this piece, the
24 strand that I'm relying on here, is really a
25 through line that the Court has never

1 questioned.

2 And when -- I think one of the
3 questions suggested Justice White, who was in
4 dissent in *Granfinanciera*, said the Court has
5 overruled *Atlas Roofing*, that was because he
6 read *Atlas Roofing* to speak to the private
7 parties cases, which we don't think it did, and
8 the Court didn't agree.

9 JUSTICE KAGAN: He read *Atlas Roofing*
10 to impose a ceiling, which the Court had said,
11 no, it doesn't where also -- there are also
12 public rights involved in some private/private
13 cases.

14 MR. FLETCHER: Right. Exactly. And
15 -- and so then, if I could, let me just -- you
16 asked about going forward and some of the
17 questions that have been raised about first
18 principles. We don't think for the reasons that
19 I described that there's anything wrong with
20 *Atlas Roofing* as a matter of first principles.
21 You know, quite to the contrary, we think this
22 is a separation-of-powers matter, and this
23 strand of the public rights doctrine is a
24 reflection of it being a core exercise of
25 executive power sometimes to adjudicate matters

1 and apply the law to the facts and impose
2 consequences. It's immigration, it's seizing
3 goods, it's taxes, it's customs all throughout
4 our history. It happens all the time.

5 And -- and I think the concern that I
6 have about trying to reexamine all of that at
7 this late date is really the consequences it
8 would have both jurisprudentially and
9 practically. So, as a jurisprudential matter,
10 you know, some of the scholarship that Justice
11 Thomas has relied on in his very thoughtful
12 separate writings on this question very much
13 acknowledged that they are saying that
14 administrative law has taken a wrong turn a
15 hundred years ago and needs to be fundamentally
16 re-imagined.

17 I think that's a heavy task for the
18 Court to take on, and I think, if you -- the --
19 you were inclined to do it, you certainly
20 shouldn't do it in a case like this one, where I
21 don't understand my friends to have asked you to
22 overrule even *Atlas*, much less all of the other
23 cases, much less tried to make the showing that
24 really grapples with all of the consequences.

25 JUSTICE KAGAN: And when the Chief

1 Justice made the point that it's been 50 years
2 and things have changed and that administrative
3 agencies are more powerful, well, so too in
4 those a hundred years, I mean, our problems have
5 only gotten more complicated and difficult.

6 And it's usually Congress that decides
7 how to solve those problems and whether
8 administrative agencies with the kind of
9 expertise that they have are the appropriate way
10 to solve those problems, not this Court, which
11 decides, oh, well, we really only need common
12 law suits to deal with securities regulation.

13 MR. FLETCHER: Exactly, Justice Kagan.
14 And I think the growth of civil penalties in
15 administrative proceedings in particular, a lot
16 of that is traceable to a report from the
17 Administrative Conference of the United States
18 in the 1970s that said this is a practice that
19 is, you know, on sound constitutional footing.
20 Some agencies have long had it, but we think
21 there would be real salutary benefits both to
22 the regulated parties and to the agencies of
23 giving them the authority to do this because it
24 can be done more efficiently in administrative
25 proceedings because often administrative

1 penalties are a lesser sanction than some of the
2 penalties that were at stake there, like
3 permanent debarment from an industry or
4 revocation of a license or something like that.

5 And Congress has taken that ball,
6 blessed by this Court in Atlas Roofing, and
7 really run with it in a lot of other statutes
8 since.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: So, Mr. Fletcher,
13 with respect to your argument that Congress can
14 move something from courts into agencies and the
15 Seventh Amendment doesn't speak to that because
16 it's not a suit, I think Noel Webster described
17 a suit as any action or process for the recovery
18 of a right or a claim before any tribunal, which
19 would seem to be a problem. That's a pretty
20 contemporaneous definition.

21 And then Justice Brennan in
22 Granfinanciera I think addressed your argument
23 pretty squarely when he said "Congress cannot
24 eliminate a party's Seventh Amendment right to a
25 jury trial merely by relabeling the cause of

1 action [...] and placing [...] jurisdiction in
2 an administrative agency."

3 Thoughts?

4 MR. FLETCHER: Yeah. So I -- I guess
5 I think that's still inconsistent with what the
6 Court has said in *Granfinanciera*.

7 JUSTICE GORSUCH: I just quoted from
8 *Granfinanciera*.

9 MR. FLETCHER: I -- I'm sorry. I -- I
10 misspoke. I -- I don't think that's what the
11 Court held in *Granfinanciera*. It's inconsistent
12 with what the Court said.

13 JUSTICE GORSUCH: Are you saying I
14 misread it, Mr. Fletcher?

15 MR. FLETCHER: No, Justice Gorsuch.
16 I'm saying --

17 JUSTICE GORSUCH: You said -- you said
18 that that's a purely taxonomic change.

19 MR. FLETCHER: Yes.

20 JUSTICE GORSUCH: And that that's not
21 enough to render it no longer a suit for
22 purposes of the Seventh Amendment, right?

23 MR. FLETCHER: Yes. I think, in
24 context, *Granfinanciera* is talking about a
25 proceeding that was in a bankruptcy court in the

1 Article III setting. I think the Court's
2 subsequent cases, including Oil States, have
3 said, if you're permissibly in an Article III
4 tribunal, then the Seventh Amendment doesn't
5 have independent work to do.

6 I apologize for misidentifying the
7 case I was relying on.

8 JUSTICE GORSUCH: All right. But
9 it -- it would seem strange. And we don't
10 usually say the -- the government can avoid a
11 constitutional mandate merely by relabeling or
12 moving things around. It's -- it's as much a
13 violation to do something indirectly as it is
14 directly we usually say, right?

15 MR. FLETCHER: In some cases, but,
16 again, the Seventh Amendment has always been
17 forum-dependent. And, Justice Gorsuch, I just
18 think it would also be odd to say, if executive
19 officials impose penalties or other consequences
20 very informally in ways that don't look at all
21 like a tribunal because it's just the Customs
22 officer saying you owe this much duties, then
23 that's --

24 JUSTICE GORSUCH: I'll get to -- I'll
25 get to Customs in a second, but with respect to

1 the growth that the Chief Justice and Justice
2 Kagan were talking about, this SE -- this is not
3 your grandfather's SEC, right?

4 Penalties were not something that were
5 part of Jim Landis's original design against
6 private parties, let alone against all private
7 persons, right?

8 MR. FLETCHER: That's right.

9 JUSTICE GORSUCH: That came in the 19
10 -- started in 1984 and was limited to insider
11 trading claims, and then it was expanded, and
12 what is at issue before us is a 2010 amendment
13 to the law, right?

14 MR. FLETCHER: Not quite. Both 2010
15 and the 1990 --

16 JUSTICE GORSUCH: 1990.

17 MR. FLETCHER: -- amendment as well,
18 but yes.

19 JUSTICE GORSUCH: The 1990 and the
20 2010.

21 MR. FLETCHER: Yes.

22 JUSTICE GORSUCH: Yeah. So it's a
23 relatively new thing, right?

24 MR. FLETCHER: For the SEC, yes, not
25 for agencies writ large.

1 JUSTICE GORSUCH: I -- I understand.
2 And as I -- I went back and looked just to see,
3 you know, what's the scope of -- of the problem
4 here, you know, and I came up with -- my law
5 clerk found that the ALJs in the SEC, there are
6 a total of five of them. Is that about right?

7 MR. FLETCHER: I -- I think it may be
8 three now, yes.

9 JUSTICE GORSUCH: May be three?

10 MR. FLETCHER: Yes.

11 JUSTICE GORSUCH: So we're not talking
12 about a huge number of cases.

13 MR. FLETCHER: Again, for the SEC,
14 yes. For the administrative -- the
15 administration writ large, it's a huge number.

16 JUSTICE GORSUCH: Most -- most of the
17 ALJs in -- work for places like the Social
18 Security Administration, right, which give
19 benefits and we're not talking about penalties.

20 MR. FLETCHER: About 80 percent of
21 them are at SSA.

22 JUSTICE GORSUCH: Okay.

23 MR. FLETCHER: The rest of them are at
24 other agencies, yes.

25 JUSTICE GORSUCH: Okay. And -- and

1 then, with respect to history, your best
2 examples I think are on page 23 of your brief.

3 MR. FLETCHER: Twenty-two to 23, yeah.

4 JUSTICE GORSUCH: The Customs, right?

5 MR. FLETCHER: Yeah.

6 JUSTICE GORSUCH: Tax and immigration?

7 MR. FLETCHER: Yes.

8 JUSTICE GORSUCH: Okay. Those are the
9 three areas you'd have us point to. Any others?

10 MR. FLETCHER: I mean, Atlas Roofing
11 as well.

12 JUSTICE GORSUCH: Obviously.

13 MR. FLETCHER: Right. Couldn't leave
14 it out. But, you know, I think also the
15 reasoning of those cases is not tied to those
16 particular exercises of power, and, in fact, to
17 the contrary, in Stranahan, the challenger in
18 that case said this is a power that only exists
19 in tax and customs cases. It shouldn't extend
20 here. And the Court rejected that and said it's
21 not that limited, it applies here too.

22 And then, in Atlas Roofing, the
23 challenger said it's just customs and tax and
24 immigration, and again the Court said it's not
25 so limited.

1 JUSTICE GORSUCH: Okay. Then, with
2 respect to Tull and Granfinanciera and their
3 impact, Justice White, for whom I have great
4 fondness, thought that they were overruled,
5 didn't he?

6 MR. FLETCHER: He did in part, but
7 that was based on a different understanding of
8 -- of the Atlas Roofing decision than the one
9 the majority had.

10 JUSTICE GORSUCH: And then you
11 referenced Justice Scalia and his -- his belief
12 that there had to be the government involved in
13 the case to render it a public right. He made
14 clear he thought that was a minimum.

15 MR. FLETCHER: Yes.

16 JUSTICE GORSUCH: Right? That was not
17 the test writ large, correct?

18 MR. FLETCHER: Yes. And it's not our
19 test writ large either.

20 JUSTICE GORSUCH: And then we all
21 agree Congress has a lot more problems on its
22 plate today than it -- than it did a hundred
23 years ago or even 50 years ago. But that
24 doesn't mean that the constraints of the
25 Constitution somehow evaporate, do they?

1 MR. FLETCHER: I agree.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: You've been
6 resisting talking about the Seventh Amendment,
7 saying that doesn't apply because it's not a --
8 it only applies to suits in court and said we
9 should talk about Article III and the Due
10 Process Clause. So I'm going to take you up on
11 that.

12 MR. FLETCHER: Great.

13 JUSTICE KAVANAUGH: On the public
14 rights definition, because that seems to be the
15 key line for Article III, do you agree?

16 MR. FLETCHER: Yes.

17 JUSTICE KAVANAUGH: Okay. And in
18 Stern, the Chief Justice's opinion said that
19 public rights extended, quoting Northern
20 Pipeline's plurality, only to matters arising
21 between individuals and the government in
22 connection with the performance of the
23 constitutional functions of the executive or
24 legislative departments that historically could
25 have been determined exclusively by those

1 branches, which suggests a line that may track
2 the Due Process Clause between benefits and
3 penalties.

4 And I want you to respond. Is that
5 incorrect, that statement, or is -- what --
6 what's -- what's the -- your response to that
7 line from *Stern v. Marshall*?

8 MR. FLETCHER: Yeah. So the -- the
9 Court has said that a couple times. I want to
10 say what I think it means, and then I hope to
11 say why I think, if you read it the other way,
12 as you're suggesting, that might have some
13 really troubling implications.

14 JUSTICE KAVANAUGH: Sure. Go ahead.

15 MR. FLETCHER: So, on what I think it
16 means, I think the Court is talking about
17 matters that could be determined exclusively by
18 the other branches insofar as Article III is
19 concerned. I don't take it to be saying things
20 that you could assign to the executive branch
21 and foreclose all judicial review altogether.

22 I think that's true of a lot of the
23 things that we think of as being classic public
24 rights-type cases. And I think the reason why I
25 would warn you away from reading it differently

1 is that if you read it that way, as -- as some
2 of the scholarship has done, then I think
3 Congress really and this Court has only two
4 choices.

5 Option one is Congress can assign
6 something to the initial adjudication by an
7 administrator, but if that can happen, then the
8 implication is it can also bar judicial review
9 altogether.

10 And option two is it has to go to an
11 Article III court in the first instance, and
12 that would be a sea change for all sorts of
13 things that are not benefits, but I'm talking
14 about, you know, the assessment and collection
15 of taxes and penalties, customs and penalties,
16 the immigration laws, the detention and removal
17 of non-citizens. All of those things are things
18 that are done in the first instance and have
19 long been done in the first instance by
20 administrative officers.

21 And if you adopt the rule that it's
22 only things that we can say can be done
23 exclusively by the administrative officers
24 without any judicial review at all, then I think
25 you're in a really untenable choice in those

1 areas and lots of others too.

2 JUSTICE KAVANAUGH: Right. But the
3 flip side, I guess -- and you've said this --
4 you know, this started with Atlas Roofing -- you
5 know, I know you have your cases it relies on,
6 1972 ACUS report that you properly mentioned,
7 and it seemed like a small matter then
8 potentially, but, as others have pointed out, it
9 expands to other agencies.

10 And I think the logic of your position
11 is that you could go all the way in the other
12 direction from what you were just saying and the
13 Congress could assign all federal government
14 civil penalty suits to be housed at in-house
15 executive agencies.

16 Is that your position?

17 MR. FLETCHER: Potentially, yes, you
18 know, again, if it fits all the criteria.

19 JUSTICE KAVANAUGH: What's the
20 potentially?

21 MR. FLETCHER: I -- I -- I think the
22 questions that you'd want to ask are, you know,
23 there are constraints about is this the sort of
24 federal regulatory scheme that you're talking
25 about in Atlas Roofing and here that's always

1 been a feature of these. We're not just trying
2 to have -- federalize, you know, tort law or
3 something like that.

4 JUSTICE KAVANAUGH: Right.

5 MR. FLETCHER: Right? Also, there are
6 constraints on what can be done through civil
7 means rather than criminal means in terms of the
8 severity of the sanctions that can be imposed.

9 JUSTICE KAVANAUGH: But assuming those
10 things away, yes, the logic of your position is
11 that --

12 MR. FLETCHER: Yeah. Yeah.

13 JUSTICE KAVANAUGH: -- that -- well,
14 and on the Due Process Clause, because you've
15 said let's talk not about the Seventh Amendment
16 but the Due Process Clause --

17 MR. FLETCHER: Yeah.

18 JUSTICE KAVANAUGH: -- that seems
19 problematic to say the government can deprive
20 you of your property, your money, substantial
21 sums, in a tribunal that is at least perceived
22 as not being impartial in the sense that it's an
23 in-house executive agency where the
24 commissioners start the enforcement process,
25 oversee the enforcers, and then appoint the --

1 the adjudicators and review the adjudication.

2 That doesn't seem like a neutral process.

3 So your response to that is Atlas
4 Roofing?

5 MR. FLETCHER: Well, a -- a couple. I
6 mean, first of all, you know, we haven't talked
7 at all about the removal issue yet. I guess I
8 --

9 JUSTICE KAVANAUGH: I'm going to get
10 to that.

11 MR. FLETCHER: Then I'll -- then I'll
12 save it for that.

13 (Laughter.)

14 MR. FLETCHER: I -- I was just going
15 to say that to the extent that those are
16 concerns, the remedy that my friends are asking
17 for on the removal question goes in exactly the
18 opposite direction.

19 JUSTICE KAVANAUGH: Right, would
20 exacerbate it, yeah. Okay.

21 MR. FLETCHER: It -- it -- exactly.
22 So -- but -- but saving that for removal and
23 focusing just on the -- the Seventh Amendment
24 and -- and that question, you know, I -- I think
25 the takeaway that I would give you from the

1 unappealing dichotomy that the sort of really
2 strict understanding of trying to locate this
3 rule in Article III and saying only if it could
4 be exclusively assigned to an administrative
5 agency with no judicial review at all can it
6 ever be assigned to them on the one hand or
7 everything's got to go to the district court in
8 the first instance, you know, I think that's
9 untenable as a practical matter. It's
10 overturning a huge swath of law.

11 I think, if you have concerns about
12 that -- and, again, this wouldn't be the case to
13 explore them -- but, if you did, I think the Due
14 Process Clause is a better tool because it
15 provides the ability to draw finer distinctions
16 than the sort of blunderbuss ones that I think
17 you would be forced into if you adopted the
18 public rights Article III inquiry as the
19 solution to -- to any problem you perceive
20 there.

21 JUSTICE KAVANAUGH: One of the
22 oddities of this statutory scheme is that the
23 SEC is authorized to and, in fact, does bring
24 suits in federal court. Why?

25 MR. FLETCHER: I think that's part of

1 the chronology really. You know, the suits in
2 federal court, by and large, came first in terms
3 of when penalties could be sought, and Congress
4 later came along and added them to the
5 administrative proceedings as well. You know, I
6 think that's different. Congress is making
7 judgments at different times.

8 JUSTICE KAVANAUGH: But why would the
9 SEC bring suits in federal court?

10 MR. FLETCHER: I'm -- I'm sorry, I
11 thought you were talking about the --

12 JUSTICE KAVANAUGH: No, I -- I was.
13 You answered the correct question, but a
14 follow-on question is, why would -- would the
15 SEC bring suits in federal court?

16 MR. FLETCHER: Yeah. So it makes that
17 judgment on a case-by-case basis depending on
18 the case. And it might depend on what remedies
19 are available in the two forums. You know,
20 here, penalties are available in both, but there
21 are certain other remedies that differ, and they
22 might make a judgment about that.

23 They might also make a judgment about
24 which one is likely to be faster under the
25 circumstances of the case. There are some

1 circumstances where -- especially where they've
2 settled a case or where it's a sort of follow-on
3 proceeding that's going to be very simple that
4 they choose to file those administratively
5 rather than burdening the courts with those.

6 And there are other circumstances
7 where they have a very technical regulatory
8 issue that they're looking to achieve consistent
9 treatment across a bunch of cases, and they
10 conclude that that can more easily be done
11 administratively than in court.

12 JUSTICE KAVANAUGH: But, in terms of
13 the repercussions if we went down the civil
14 penalty line, for the SEC at least, they could
15 bring all -- all the civil penalty suits in
16 federal court. If benefits were the other side
17 of the line, that excludes Social Security and
18 those kinds of agencies. Why don't you talk
19 about, because I think you were talking about
20 this with Justice Gorsuch, the ramifications if
21 the line were civil penalty in terms of other
22 agencies?

23 MR. FLETCHER: Yeah. So I -- I think
24 they are large. You know, already in Atlas
25 Roofing, the Court said that these are common.

1 They've become only more so since the 1992 ACUS
2 report that we cite says that that --

3 JUSTICE KAVANAUGH: But the -- a small
4 interruption. They -- they could always just
5 bring the suit in federal court, though.
6 They're filing everything in the in-house
7 tribunal. They could just file the same kinds
8 of things in federal court.

9 MR. FLETCHER: The SEC, yeah -- yes,
10 but I thought we were shifting over to other --

11 JUSTICE KAVANAUGH: Yes.

12 MR. FLETCHER: -- agencies as well.

13 JUSTICE KAVANAUGH: Some of them can
14 and some --

15 MR. FLETCHER: Some --

16 JUSTICE KAVANAUGH: -- would need new
17 statutes.

18 MR. FLETCHER: Some can; many cannot.
19 And to bring all of those cases that are now
20 proceeding administratively into the courts
21 would be a huge imposition on the courts. Just
22 in terms of the numbers, you know, the 1992 ACUS
23 report that we cite counted more than 200
24 statutes at that point. And we very quickly got
25 to two dozen agencies that have the authority to

1 impose penalties in administrative proceedings
2 now. So it -- it really would be -- I don't
3 want you to think that it's just about the SEC
4 and it can just go to court --

5 JUSTICE KAVANAUGH: Yeah.

6 MR. FLETCHER: -- because it could
7 really have wide repercussions.

8 JUSTICE KAVANAUGH: No, I know FTC and
9 -- and others. I'm aware of that.

10 MR. FLETCHER: EPA, Agriculture. I
11 mean, it's -- it's really all over.

12 JUSTICE KAVANAUGH: FERC. We have a
13 FERC amicus brief.

14 Okay. On the Article II issue
15 quickly, one question there, that this seems
16 problematic under Free Enterprise Fund.

17 MR. FLETCHER: So, Justice Kavanaugh,
18 I actually disagree. You know, of course, in
19 Footnote 10, Free Enterprise Fund reserved this
20 question. And I understand there are some times
21 where the Court technically reserves a question,
22 but the logic of the prior decision effectively
23 answers it. And I just think this is exactly
24 the opposite. So the Court said here we have
25 something that's novel, it's completely

1 unprecedented, and it effectively insulates a
2 law enforcement and policymaking board from the
3 SEC's control.

4 And, here, none of those things are
5 true. This isn't novel. It goes back to a
6 carefully negotiated compromise in the APA
7 itself, adopted with the support and after study
8 by the executive branch and Congress. It's been
9 the law for more than three-quarters of a
10 century.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: My questions are
15 just clarifying just to make sure I understand
16 exactly where you're going here.

17 Okay. So this is public rights, not
18 private rights, because it doesn't map on
19 exactly to common law fraud. You don't have to
20 show as much. You don't have to show damages.

21 MR. FLETCHER: Principally, our view
22 is it's public rights, not private rights,
23 because it's enforcement by the government of
24 rights that are held in the public to vindicate
25 a public interest in the securities markets.

1 We think also, in addition, there's no
2 concern that Congress is circumventing the laws
3 of fraud by just replicating or federalizing the
4 common law fraud because the elements are very
5 different. But that's not the principal
6 distinction we're relying on.

7 JUSTICE BARRETT: Not the principal
8 distinction. Okay. If the SEC pursued Jarkesy
9 in federal district court, he's entitled to a
10 jury?

11 MR. FLETCHER: Yes.

12 JUSTICE BARRETT: And that's because
13 it's a suit because the judge is the
14 fact-finder?

15 MR. FLETCHER: That's because it's a
16 suit.

17 JUSTICE BARRETT: Well, and the --

18 MR. FLETCHER: And -- and -- and under
19 this --

20 JUSTICE BARRETT: Yes. Suits --

21 MR. FLETCHER: -- Court's analysis in
22 Tull --

23 JUSTICE BARRETT: Yes. Qualify --

24 MR. FLETCHER: -- it would qualify as
25 triggering a Seventh Amendment right.

1 JUSTICE BARRETT: -- judicial
2 proceedings.

3 MR. FLETCHER: Exactly. Yes.

4 JUSTICE BARRETT: But, when it's
5 brought in front of the ALJ, exact same
6 proceeding, but it's executive action there
7 because the ALJ and the agency is the one
8 finding the facts?

9 MR. FLETCHER: It -- exactly. It
10 looks like a trial. It has trial-type
11 procedures, but that's an exercise of executive
12 power. The jury trial right has always been
13 thought of as an adjunct to the exercises of the
14 judicial power in the courts. And the lesson
15 from all of this Court's cases -- City of
16 Arlington, Murray's Lessee -- is that even when
17 the executive branch conducts an adjudication
18 and applies the law to the facts, even if it
19 looks like trial-type procedures to enhance
20 fairness, that's not the sort of suit that
21 requires an exercise of the judicial power or
22 comes with --

23 JUSTICE BARRETT: Because it's
24 forum-dependent?

25 MR. FLETCHER: Exactly.

1 JUSTICE BARRETT: Okay. And then I
2 just want to clarify, Justice Kavanaugh asked
3 you what's the limiting principle because
4 Congress always, we hope, is acting in the
5 public interest.

6 MR. FLETCHER: Yeah.

7 JUSTICE BARRETT: So what is the limit
8 on Congress's ability to shift these kind of
9 adjudications for civil penalties to
10 administrative agencies?

11 MR. FLETCHER: Yeah. So, again, it
12 has to be a federal regulatory scheme. It has
13 to be enforced by the government. That's the
14 critical public rights distinction. We're not
15 displacing the courts from adjudicating disputes
16 between private parties and raising that set of
17 separation-of-powers concerns.

18 In -- in addition, I think you could
19 say we don't have any concerns about just
20 federalizing the law of fraud or something like
21 that. This is very different. It's a
22 comprehensive regulatory scheme like the one the
23 Court had in the OSH Act. And then, in
24 addition, you have the sort of constraints on
25 when Congress can assign something to an

1 administrative agency in the Due Process Clause
2 in the civil/criminal --

3 JUSTICE BARRETT: But just to
4 interrupt for one second, but, you know, we are
5 talking here about securities law, but Congress
6 can enact such a scheme and has enacted such
7 schemes in many, many, many different areas.
8 The Chief Justice began by pointing some of
9 those out. So, in all of these areas,
10 healthcare, highway management, what have you --

11 MR. FLETCHER: Exactly. And --

12 JUSTICE BARRETT: -- it could happen.

13 MR. FLETCHER: -- so I -- I
14 acknowledge that the rule that I'm giving you is
15 broad. That's in part because Congress has done
16 this in many, many different circumstances. We
17 think validly so. But the breadth of the rule
18 is consistent with our historical practice and
19 with this Court's decisions, you know, not just
20 Atlas but before that too.

21 JUSTICE BARRETT: Okay. So we've
22 talked some about fallout. So, here, what the
23 SEC got from Jarkesy in disgorgement was more
24 than civil penalties.

25 MR. FLETCHER: Correct.

1 JUSTICE BARRETT: Right. And the SEC
2 also got other kinds of injunctive relief.

3 MR. FLETCHER: Correct.

4 JUSTICE BARRETT: Right. So why isn't
5 -- why do you need civil penalties? Because,
6 you know, Jarkesy's not disputing that you can
7 get those kinds of things in administrative
8 proceedings. So why civil penalties too?

9 MR. FLETCHER: So can I just quibble
10 with the premise? Because this is one of the
11 things that concerns us about this case.

12 JUSTICE BARRETT: Okay.

13 MR. FLETCHER: He is focused on civil
14 penalties, but disgorgement also affects the
15 private right to property. And so some of his
16 arguments, I think the implication of them is
17 those things also couldn't happen in
18 administrative proceedings. I'm a little
19 unclear about that because the argument moves
20 back and forth from Article III to the Seventh
21 Amendment, but I think the potential
22 implications of cutting back on the Atlas
23 Roofing understanding of public rights doesn't
24 just apply to penalties. It's also cases
25 involving disgorgement or other such remedies.

1 JUSTICE BARRETT: Even if they were
2 considered traditionally equitable remedies?

3 MR. FLETCHER: So, again, if -- if you
4 -- there's a couple ways that you could depart
5 from Atlas Roofing. One would be to say we're
6 decoupling the Seventh Amendment from the
7 Article III inquiry, and we're going to
8 recognize a new class of suits where Article III
9 would let you give it to an agency, but the
10 Seventh Amendment still requires a trial by
11 jury. There, I think such a rule might be
12 limited to civil penalties because the other
13 remedies are equitable.

14 But, if you go in the other direction,
15 which some of my friends have suggested and some
16 of the questions have suggested, and say anytime
17 you have an administrative action that affects
18 private property or liberty or anything else,
19 that's public rights, that means that under
20 Article III it can't go to the agency to begin
21 with.

22 JUSTICE BARRETT: Yeah, I agree with
23 you there. Okay. Thank you, Mr. Fletcher.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: So I agree that
2 Atlas Roofing resolves this case, but like many
3 of my colleagues, I guess I don't understand
4 your reading of Atlas Roofing as suggesting
5 there's no Seventh Amendment issue at all if the
6 fact-finding function is assigned to the agency.

7 I mean, the case begins, sentence one,
8 the issue in this case -- in -- in these cases
9 is whether, consistent with the Seventh
10 Amendment, Congress may create a new cause of
11 action in the government for civil penalties
12 enforceable in an administrative agency where
13 there is no jury trial.

14 You seem to say, well, it depends on
15 whether Congress has assigned resolution of this
16 to the agency. But that seems totally
17 conclusory and circular to me. And I think the
18 question is, when does the Seventh Amendment
19 prohibit Congress from assigning it to the
20 agency as opposed to giving it to an Article III
21 court?

22 You say that's forum-dependent, but --
23 but the -- the question is, when can they give
24 it to one forum versus the other? And in my
25 view, the Seventh Amendment and what Atlas

1 Roofing is saying is that it's -- it's
2 claim-dependent. It's the part of your argument
3 where you talk about is this a situation in
4 which Congress is taking a common law duty,
5 right, action, or whatever and moving it into
6 the administrative process?

7 And so the Seventh Amendment says you
8 can't do that. If a person has a common law
9 right of fraud, right, the common law creates
10 duties like the duty not to make a
11 representation that people rely on to their
12 detriment. And it's established a right of
13 action in private parties to enforce that duty.
14 They can come to court.

15 And the Seventh Circuit -- the Seventh
16 Amendment says, when you have such a right to
17 enforce that duty, you are -- by the
18 Constitution, you have -- you -- you have the
19 ability to come to court. The government can't
20 make you go to some administrative tribunal and
21 have no jury. All right?

22 But there are also other duties in the
23 world. Those duties can be created by statute,
24 right? They're not common law duties. And when
25 you have a new duty -- Atlas Roofing many, many

1 times talks about this being a new statutory
2 duty that has been created. When you have a new
3 duty, the Seventh Amendment isn't implicated.

4 MR. FLETCHER: Justice Jackson, that's
5 just not right. If it's a new duty --

6 JUSTICE JACKSON: Okay.

7 MR. FLETCHER: -- that's enforced in
8 court, even statutory rights enforced in court
9 can trigger Seventh Amendment rights.

10 JUSTICE JACKSON: No, I understand,
11 but the -- but Atlas Roofing also speaks to
12 that. It says Congress can choose to allow you
13 to enforce or allow the government to enforce
14 this new duty in court versus the administrative
15 proceeding, and when it chooses court, then you
16 have the Seventh Amendment right.

17 MR. FLETCHER: Right.

18 JUSTICE JACKSON: But, if it chooses
19 -- I think your choice comes later in the
20 analysis. If it chooses administrative action,
21 it is enforcing a statutory duty. The Seventh
22 Amendment isn't implicated. And there we are.

23 MR. FLETCHER: So I think we're saying
24 the same thing. And I -- the only place I might
25 differ is that in that, if the -- if Congress

1 chooses the administrative forum instead, we
2 think there's an Article III inquiry there where
3 you have to ask does Article III let Congress
4 choose the administrative inquiry.

5 JUSTICE JACKSON: That's fine. But
6 Atlas -- I couldn't find Article III in Atlas
7 Roofing. It's not talking about that aspect of
8 the analysis. It's, I thought, talking about
9 when Congress at the beginning creates a new
10 statutory duty, and in this case, it's the duty
11 not to, what, employ any device, scheme, or
12 artifice to defraud in the context of securities
13 transactions.

14 There's a new statute, you've got this
15 new duty, Congress says there it is, and we're
16 giving it to the government to enforce this for
17 the benefit of the public. All right? That's
18 the beginning.

19 MR. FLETCHER: Mm-hmm.

20 JUSTICE JACKSON: In that situation,
21 does the Seventh Amendment kick in? I think
22 Atlas Roofing says no, because we're not talking
23 about a situation in which Congress has
24 alternatively said any common law fraud claim
25 out there in the world concerning securities has

1 to now be brought in this administrative action.

2 If you're relying on the common law
3 and you're bringing this kind of claim, you
4 don't get a jury trial anymore. You have to
5 come before the SEC. That's a Seventh Amendment
6 problem because we're steal -- do you understand
7 what I'm saying?

8 MR. FLETCHER: Mm-hmm.

9 JUSTICE JACKSON: The -- it's -- so
10 it's a suit at common law because you have the
11 common law claim that is now implicating the
12 Seventh Amendment right. But it's not a suit at
13 common law when Congress creates a new duty and
14 gives it to the SEC or some agency to enforce.

15 MR. FLETCHER: Through administrative
16 proceedings.

17 JUSTICE JACKSON: Through
18 administrative proceedings.

19 MR. FLETCHER: Yes. Yes. Then we're
20 landing in exactly the same place, yes. And I
21 think I may just be baking in some additional
22 hoops that Congress has to jump through, but I
23 -- I'm not disagreeing with your bottom line.

24 JUSTICE JACKSON: All right. And --
25 and I think the problem then is that if I'm

1 right about this, then I think it solves a lot
2 of the concerns that my colleagues have about
3 Congress shifting into, you know, a -- you know,
4 certain things into administrative proceedings
5 because, really, the Seventh Amendment is only
6 implicated if they're shifting into
7 administrative proceedings things that were
8 suits at common law, meaning claims at common
9 law.

10 They're -- they're stealing from the
11 private person who's protected by the
12 Constitution that right, right?

13 MR. FLETCHER: Yes.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. McColloch.

18 ORAL ARGUMENT OF S. MICHAEL MCCOLLOCH

19 ON BEHALF OF THE RESPONDENTS

20 MR. MCCOLLOCH: Mr. Chief Justice, and
21 may it please the Court:

22 Congress has steadily expanded the
23 SEC's authority over the past several decades
24 and now, like a house that's been added onto too
25 many times, it's -- it's crushing the original

1 foundation.

2 For the Seventh Amendment, that
3 foundation was set in 1791. The founders
4 thought that they had enshrined this right for
5 government claims against citizens' property
6 rights, still stinging from the Stamp Act and
7 the abuses of the vice admiralty courts.

8 My friend's really radical position is
9 antithetical, totally antithetical, to the
10 founders' intent. The jury trial right should
11 apply especially when the government is coming
12 after a citizen for penalties on a common law
13 claim.

14 The SEC's position really fares no
15 better under the public rights doctrine. The
16 basic claims -- these basic fraud claims are
17 litigated privately among private parties every
18 day, same claims, same statutes, and they've
19 been litigated -- the same basic claims have
20 been litigated for centuries.

21 These underlying claims do not
22 suddenly morph into public rights claims just
23 because the government happens to stand in as
24 the -- as the proxy plaintiff.

25 You'd be surprised to hear this from

1 our briefing, but we don't think you need to
2 overrule Atlas Roofing. Atlas Roofing actually,
3 as modified by subsequent decisions, provides a
4 useful template for analyzing at least the
5 public/private rights analysis and leads to the
6 same conclusion that Mr. Jarquesy was entitled to
7 -- to a jury for these claims. And, by the way,
8 it's pronounced Jarquesy, not -- not a number of
9 other ways that it -- that it's been pronounced
10 by -- by many.

11 The -- the bottom line is these claims
12 can't be considered peculiarly suited, uniquely
13 suited, for summary agency adjudication when the
14 SEC's been trying these same claims in real
15 federal -- Article III federal courts for
16 decades. It doesn't make any sense.

17 And even if they could, the Article I
18 assignment was not -- was not the SEC's to make.
19 It's a quintessential legislative power, as this
20 Court has -- has held, and it doesn't convert
21 into executive power just because it's exercised
22 by the executive, which is essentially their
23 argument.

24 And, finally, the -- the structural
25 error of the Take Care Clause is a -- is a -- is

1 a clear violation. We all agree that the ALJs
2 at the SEC are constitutional officers, and we
3 all agree that they're protected by at least two
4 layers of for-cause tenure protection. Mr.
5 Jarquesy's entitled to vacatur.

6 Be happy to take your questions.

7 JUSTICE THOMAS: You seem to read
8 Atlas different from the government, and it
9 seems as though you have a polar opposite
10 position from the government.

11 Would you spend some time on what the
12 differences are in your view of Atlas?

13 MR. MCCOLLOCH: Yes -- yes, Your
14 Honor.

15 So, you know, if you read Atlas
16 Roofing carefully, it -- it -- I could give you
17 a list of several things that were, I think,
18 very wrong about it, most of which have been
19 addressed and more or less corrected by -- by
20 subsequent decisions.

21 But, in Atlas Roofing, it's -- it's
22 helpful to realize that the Court right before
23 it discussed the -- how -- how the OSHA claims
24 are new and how different they are, the Court
25 discussed a decision seven years earlier, Ross

1 v. Bernhard, where the Court held that a
2 shareholder derivative action against directors
3 and third parties under one of the securities
4 acts, the Investment Company Act, which
5 prevented larceny, embezzlement,
6 misrepresentations, the same exact claims that
7 are alleged in this -- in this case here against
8 Mr. Jarkesy, back then, under the common law, a
9 shareholder derivative action had to be in a
10 court of equity. So you don't get a jury in a
11 court of equity. We'll get to the -- the -- the
12 forum impact later. We'll address that in a few
13 minutes.

14 But the Court held that because the
15 real plaintiff in a shareholder derivative
16 action is the corporation, the corporation, if
17 it took these claims to court, it was I think
18 against Lehman Brothers for fraud, if they took
19 these claims to court, then the corporation
20 would be entitled to a jury.

21 And so, therefore, because the
22 underlying claim belongs to the corporation, the
23 underlying claim is a private one. The
24 underlying claim -- the real victim was the
25 company, so they're entitled to a jury. So the

1 -- the Court juxtaposes that. You look at the
2 nature of the claim versus the elements of these
3 OSHA claims.

4 Now the OSHA -- and this gets really
5 right to the heart of what the problem here is.
6 OSHA created a number of brand -- brand new --
7 the Court used the word "new," I think, 11 times
8 in that decision -- used that to describe these
9 -- these regular -- very -- a lot of minutiae,
10 very precise regulatory requirements, such as
11 what Atlas Roofing got penalized for, I think,
12 \$600 for improper placement of a roof or a
13 ceiling cover.

14 So these were not claims that ever
15 existed at common law. And those claims --

16 JUSTICE KAGAN: But, Mr. McColloch --

17 MR. MCCOLLOCH: Yes.

18 JUSTICE KAGAN: -- if I could
19 interrupt you for a second. I mean, I have to
20 say you're sort of describing a case that I
21 don't recognize. Atlas Roofing says numerous
22 times, it could not have been clearer, the
23 Seventh Amendment is no bar to the creation of
24 new rights or to their enforcement outside the
25 regular courts of law. That's one statement.

1 Congress is not required by the
2 Seventh Amendment to choke the already crowded
3 federal courts with new types of litigation or
4 prevent it from committing some new types of
5 litigation to administrative agencies with
6 special confidence. That's another.

7 There's another. There's another.
8 There's another. I agree with you it says "new
9 claims." We can talk about what "new claims"
10 is. But it could not have been clearer that --
11 that what they were saying is that the Seventh
12 Amendment was no bar to Congress making a
13 decision that certain kinds of claims were best
14 adjudicated in administrative agencies.

15 MR. MCCOLLOCH: Yes, Your Honor, and
16 -- and I think we're -- we're pretty close
17 actually. So maybe the -- the -- the dispute is
18 over what "new" is.

19 JUSTICE KAGAN: If we're pretty close,
20 because I think that just resolves the case.

21 MR. MCCOLLOCH: No.

22 JUSTICE KAGAN: That's the issue.

23 (Laughter.)

24 JUSTICE KAGAN: I mean, that's the
25 issue. That's the result.

1 MR. McCOLLOCH: Well --

2 JUSTICE KAGAN: Seventh Amendment is
3 no bar.

4 MR. McCOLLOCH: Well, and -- and,
5 respectfully, Your Honor, for several reasons,
6 that -- that's where we very much part -- part
7 ways, so --

8 (Laughter.)

9 JUSTICE KAGAN: I thought that that
10 was going to be true.

11 (Laughter.)

12 MR. McCOLLOCH: -- that -- that and
13 the -- the reason is these -- these -- these --
14 the -- the Court left aside traditional wrongful
15 death and negligent claims, which is -- which
16 the Congress had found that was -- those -- that
17 litigation was insufficient to protect factory
18 workers and other people in the workplace. And
19 so Congress said we're going to create these new
20 regulations --

21 JUSTICE KAGAN: Now we are close.

22 MR. McCOLLOCH: -- all -- all these
23 new duties.

24 JUSTICE KAGAN: I think that that's
25 exactly right. I think that the OSH Act was --

1 I mean, it -- it didn't -- the holding was not
2 dependent on this necessarily, but -- but OSH
3 Act says, look, there were ways to proceed
4 against these kinds of employers in federal
5 court. You could bring a negligence suit. You
6 could bring a wrongful death suit. But, the
7 Court says, Congress thought that wasn't enough.
8 Congress thought you shouldn't have to wait
9 until the injury happens. And so Congress gave
10 power to OSHA under the OSH Act in order to
11 bring claims for all kinds of workplace safety
12 issues before a death took place, before an
13 injury occurred.

14 And that's exactly what the securities
15 laws do. It says we don't need an injury. We
16 don't need reliance. We're constructing a
17 prophylactic scheme, and we're constructing it
18 because we understand that the securities
19 markets need to be honest and fair and people
20 need to be able to rely on them. And so it
21 takes a common law suit and says we're going to
22 throw out some of these elements and we're going
23 to create a prophylactic way to make the
24 securities markets fair and put it in an
25 administrative agency. Exactly what OSH Act

1 did.

2 MR. McCOLLOCH: Okay. Your Honor, the
3 -- the -- okay. So the -- the word
4 "prophylactic" is -- is a useful one, as -- as
5 my friend --

6 JUSTICE KAGAN: It's a big word. I
7 mean nothing by it other than we're not going to
8 wait for the harm to occur.

9 MR. McCOLLOCH: Correct. And those --
10 we have -- we have no problem with those being
11 declared public rights, those being tried in
12 administrative forums where -- where -- without
13 -- without the right to a trial by jury. Those
14 prophylactic claims were never recognized in the
15 courts of England in the late 18th Century.

16 So what -- what the Court in Atlas
17 Roofing did, after contrasting from Ross v.
18 Bernhard what a true private claim is, what a
19 private rights claim is, the Court in Atlas
20 Roofing said we'll leave these -- this -- this
21 traditional litigation aside, we're going to
22 create the prophylactics, the prophylactics can
23 go to an Article I forum just -- and -- and they
24 didn't destroy or eliminate the wrongful death
25 and negligent actions. Those -- those are still

1 there. They're still there today.

2 JUSTICE KAGAN: And Atlas Roofing says
3 that is perfectly fine to do. It is perfectly
4 fine. You have these -- these suits that can go
5 forward in federal court, but that's not enough
6 to solve the problem, Congress thought.

7 And -- and -- and -- and Atlas Roofing
8 says we respect Congress's decision that that's
9 not enough for wrongful death suits to go
10 forward in federal court. We're going to set up
11 an agency. We're going to empower the agency,
12 Congress says, to do things even when there is
13 no harm, to do things that -- you -- to -- to
14 adjudicate disputes that you couldn't adjudicate
15 in a federal court. And Atlas Roofing says the
16 Seventh Amendment poses no barrier to that. The
17 end of this case.

18 MR. McCOLLOCH: And I think -- and the
19 reason, Your Honor, respectfully, it's -- it's
20 not the end of this case is -- is -- is twofold.
21 Number one, the -- the -- the -- the charges
22 against Mr. Jarquesy were for traditional fraud
23 with harm, with damages, which is what he was
24 penalized for, what Patriot28 was -- was ordered
25 disgorgement for.

1 So the -- the -- the charges, the
2 allegations in the order instituting proceedings
3 and -- and -- and in the final order of the
4 Commission were traditional fraud claims --

5 JUSTICE JACKSON: No, I'm sorry. By
6 -- by -- by nature or were the -- was that the
7 actual cause of action? Because, for me, that
8 matters. Was the government coming in and
9 saying the cause of action here is traditional
10 fraud? Is the -- is -- we're relying on the
11 common law cause of action to be bringing this
12 claim against Mr. Jarkey?

13 MR. McCOLLOCH: They brought it under
14 the 10b-5 statutory provisions that --

15 JUSTICE JACKSON: Right. So they were
16 bringing the cause of action under the statute
17 that they had -- that Congress had created,
18 right?

19 MR. McCOLLOCH: Yes, Your Honor, but
20 -- but with actual harm alleged.

21 JUSTICE JACKSON: No, no, no, I
22 understand. The allegations may overlap with a
23 fraud claim. They could have chosen the common
24 law as the cause of action and brought a common
25 law claim, but I think, if they had done that,

1 the Seventh Amendment would say you have to do
2 that in the -- you know, a regular court. But,
3 instead, what they said is we're going to do the
4 cause of action that exists under the federal
5 statute that creates this new right, and per
6 Atlas Roofing, the Court says there's no Seventh
7 Amendment barrier to them bringing that claim in
8 an administrative agency rather than the court.

9 MR. McCOLLOCH: And what this Court
10 has held repeatedly is that that is not a new
11 right. If you -- and -- and I come back to
12 Granfinanciera, probably the -- the best
13 explanation of this. This Court rejected the
14 taxonomic change, taking a common law right,
15 putting it into a statute -- statutory scheme,
16 mixing it in with a bunch of public rights, and
17 it's maybe changed a little bit, but what this
18 --

19 JUSTICE JACKSON: But wasn't it --

20 JUSTICE BARRETT: Yes --

21 JUSTICE JACKSON: Go ahead.

22 MR. McCOLLOCH: -- this Court --

23 JUSTICE BARRETT: I --

24 MR. McCOLLOCH: Yes, Your Honor.

25 JUSTICE BARRETT: Sorry. I was just

1 going to say, but Justice Jackson's asking an
2 important question here because we pointed out
3 in our discussions with Mr. Fletcher that our
4 cases have not been very clear about how to
5 distinguish public from private rights.

6 And if I understand you correctly and
7 if I understood your brief correctly, you're
8 really saying that the distinction depends on
9 whether this was a right at common law, and,
10 here, this bears a lot of resemblance to a right
11 at common law, the -- the fraud.

12 MR. MCCOLLOCH: Yes, Your Honor.

13 JUSTICE BARRETT: Am I right? Okay.
14 So -- but I think part of what your colloquy
15 with Justice Jackson is showing is that this
16 isn't exactly fraud, and it can be kind of
17 difficult to say is this just like -- I mean, it
18 doesn't have to be an exact match, but how close
19 is this to the common law tort of fraud?

20 So what kind of a test would you
21 propose for deciding whether something
22 represented that common law right? I mean, Mr.
23 Fletcher's test has the virtue -- it -- it's
24 very broad, but it has the virtue of being a
25 pretty bright line.

1 MR. McCOLLOCH: Yes. So this Court
2 has held that a -- a -- a claim that serves the
3 same essential function as a traditional common
4 law right is -- is -- is a private right.

5 JUSTICE BARRETT: Does that solve
6 Justice Kagan's problems? Because couldn't you
7 say that the OSHA Act did that? You know,
8 protected -- served kind of the same functions
9 as -- as negligence and wrongful death suits?

10 MR. McCOLLOCH: It does not serve the
11 same function. It's -- it's more -- it's --
12 it's addressing more --

13 JUSTICE BARRETT: It's prophylactic.

14 MR. McCOLLOCH: -- prophylactic and
15 inchoate conduct that leads up to actual harm.
16 So they're -- they're really addressing two
17 different things. And just like in the -- in
18 the securities acts with what Mr. Jarkesy was
19 charged with, the -- 95 percent of what's in the
20 securities acts are not traditional common law
21 claims. The things that the SEC enforces every
22 day, almost all of it is public rights --

23 JUSTICE BARRETT: So insider trading,
24 can that go to the administrative agency, or
25 does that have to go --

1 MR. McCOLLOCH: Insider trading is --
2 is prosecuted under the traditional fraud
3 claims. Again, the -- the fraud sections in
4 10b-5 are -- and -- and they -- they were taken
5 out of -- as -- as our -- our brief explains,
6 they -- they were drawn largely from what was --
7 what -- what -- what common law fraud, how it
8 was litigated at the time in the 1930s.

9 And it was always a scheme, artifice,
10 fraud, or misrepresentations, and that is --
11 those are the sections under which insider
12 trading cases are -- are -- are prosecuted.

13 CHIEF JUSTICE ROBERTS: How broad --

14 JUSTICE SOTOMAYOR: Could -- would --
15 I'm sorry.

16 CHIEF JUSTICE ROBERTS: I was just
17 going to ask how broadly your theory reaches
18 beyond the SEC. I mean, does it cover tax
19 deficiency proceedings?

20 MR. McCOLLOCH: No, Your Honor. So,
21 the -- you know, there are certain things we --
22 again, we get into this definition, and part of
23 why we have a problem with or we've -- we've
24 pointed out to the Court our concerns about
25 joining at the hip the public rights doctrine

1 with -- with Seventh Amendment rights. But, you
2 know, the -- you get into what's the definition
3 of -- of public rights versus private rights,
4 and, first of all, by -- by default, claims are
5 private rights.

6 The public rights is -- is called, as
7 this Court has called it, the public rights
8 exception. But things -- things that are --
9 are -- are or of or belong to the government,
10 there are claims that are between an individual
11 and the government only.

12 So customs, immigration, benefits,
13 franchises, permissions, debts to the
14 government, I would put taxes under debts to the
15 government, and so there are things that were
16 traditionally, like customs, were always handled
17 even back 240 years ago, were handled outside
18 of -- of Article III, out of -- out of --
19 outside of courts.

20 So there is -- there's that -- that
21 limited universe of things that are between an
22 individual and the government, but just, again,
23 Granfinanciera I think resolved this and took a
24 big bite out of Atlas Roofing when it rejected
25 taxonomic changes, taking a common law claim,

1 throwing it into a statutory scheme like a
2 tossed salad with a bunch of -- a bunch of
3 public rights inserted, most of them
4 prophylactic, and -- and then claiming, well, as
5 to that private -- as to that private rights
6 claim, it was private right, now it's public.

7 And maybe we've reworded it a little
8 bit. Maybe we've added a section here or there.
9 We've got --

10 JUSTICE KAVANAUGH: Mr. Fletcher says
11 that that's only as to cases between private
12 parties, however. So how do you respond to
13 that?

14 MR. McCOLLOCH: Okay. And -- and --
15 and so this Court or -- this Court has not yet
16 -- this is a matter of first impression in this
17 precise context. Atlas Roofing was the last
18 case that kind of dealt with this issue where
19 it's an enforcement action by -- by the
20 government.

21 But the Court has made crystal-clear
22 that it does not matter who the -- the -- the --
23 the parties are. The Seventh Amendment right is
24 based on -- or back -- back up.

25 Private rights are based on the

1 underlying -- the nature of the underlying
2 claim, not the forum that the case happens to be
3 filed in or adjudicated in and not who the
4 parties are.

5 JUSTICE KAGAN: See, Mr. McColloch, I
6 think that that's not a -- a right reading of
7 our precedent. I mean, what has happened since
8 Atlas Roofing -- we've actually never had since
9 Atlas Roofing another, if you will,
10 public/public case, where -- public/private
11 case, where there's a government entity on one
12 side of the "v," and the reason that we've not
13 had those in 50 or 60 years is because those
14 have been thought the easy cases.

15 What have been thought the hard cases
16 -- Northern Pipeline, Schor, Granfinanciera,
17 Stern, Oil States -- these are all private
18 people on both sides of the V, and, nonetheless,
19 we've held that public rights might be involved
20 because their disputes are embedded in federal
21 statutory schemes.

22 So those are the hard cases. But
23 we've never suggested that in a case where
24 Congress has given an agency the power to
25 enforce something and the agency is -- is

1 bringing the charge, if you will, that --
2 that -- that -- you know, that that's just not
3 -- it's -- that's settled.

4 MR. McCOLLOCH: Well, it -- it -- it's
5 settled only to the extent no one's brought it
6 up and forced this issue since Atlas Roofing in
7 this --

8 JUSTICE KAGAN: I agree.

9 MR. McCOLLOCH: -- in this context.

10 JUSTICE KAGAN: Nobody has had the,
11 you know,chutzpah --

12 (Laughter.)

13 JUSTICE KAGAN: -- to quote my people,
14 to bring it up since Atlas Roofing.

15 MR. McCOLLOCH: And -- and -- and,
16 here, again, I want to come back to -- to the
17 Seventh Amendment for a minute because we -- we
18 do get bogged down in public rights/private
19 rights Article III, as my friend -- friend
20 has -- has said that -- that the -- the Seventh
21 Amendment is subservient to -- to Article III
22 considerations and -- and congressional -- the
23 vagaries of congressional decisions to assign
24 something to Article I or Article -- Article
25 III, which they can only do for -- for -- for

1 public rights.

2 But the -- you can't read many of
3 the -- through the archives of the -- of the
4 founders and the federalist and the
5 anti-federalist writings and not come away with
6 the conclusion that their concern -- one of
7 their -- arguably, the primary concern certainly
8 of the anti-federalists, who won the debate over
9 the Seventh Amendment, was to protect from
10 jury-less courts adjudicating matters that
11 existed at common law for penalties against
12 citizens.

13 JUSTICE JACKSON: Exactly, Mr.
14 McColloch. And so I'm asking, why isn't the
15 reason that the private/private cases are hard
16 because the Court is concerned that what might
17 be happening is Congress is shifting things that
18 were traditionally common law claims adjudicated
19 between private people into this administrative
20 process and not people -- giving people trials
21 by juries?

22 Like, what makes it hard is when a
23 statutory scheme looks like it could be
24 displacing the normal common law private-to-
25 private enforcement of a fraud claim.

1 But I think what Justice Kagan is
2 saying is that the reason why these cases, the
3 ones in which the statute is giving the
4 enforcement authority to the government for the
5 benefit of the public, is -- are not hard and
6 why people haven't continued to bring these is
7 because it doesn't look anything like the common
8 law scenario where we've had two private parties
9 fighting over fraud and they brought it to
10 court.

11 Instead, Congress has created a new
12 thing to supplement that private scenario or
13 maybe it's brand new in any event, but it
14 doesn't -- it's not a common-law-rooted kind of
15 thing that is being brought in court -- I mean,
16 sorry, brought in the administrative agency with
17 all the concerns that many of my colleagues have
18 raised.

19 MR. McCOLLOCH: Okay. Well, there are
20 several issues there. I'll -- I'll try to
21 remember them and -- and address them -- them
22 all. And -- and all -- all good points, but
23 keep in mind that the common law claims that --
24 that were incorporated into the securities acts
25 are, in fact, litigated privately.

1 JUSTICE JACKSON: No, they're just --
2 there -- there -- there's a parallel claim.
3 There's the world that existed before, so a
4 person who's injured by this kind of
5 misrepresentation in their securities portfolio
6 or whatever still has the common law scenario,
7 they can go to court, bringing a fraud claim,
8 right?

9 I think this actually hurts you and
10 your analysis. The fact that those still exist
11 mean that Congress was not trying to take those
12 over, shift those away. Congress created a new
13 right, a new opportunity for the government to
14 come in and for the benefit of the public make,
15 yes, admittedly, a similar kind of claim, but I
16 think you have to admit this is a new cause of
17 action, right?

18 MR. McCOLLOCH: Well, I do not agree
19 with that.

20 JUSTICE JACKSON: Okay. All right.
21 So that's where we diverge.

22 MR. McCOLLOCH: If you go back -- if
23 you -- if you -- if you -- if you look at fraud
24 claims as litigated in the 1800s and early 1900s
25 and even today, basic fraud cases, they -- they

1 cite -- they -- they use the scheme or artifice
2 to defraud, misrepresentations, violation of --
3 all of -- all of -- all of these issues that are
4 litigated just in state courts today for fraud
5 are litigated --

6 JUSTICE KAGAN: But, in state courts,
7 there's always -- sorry, I'm over here.

8 (Laughter.)

9 JUSTICE KAGAN: There's always a
10 requirement of reliance, there's always a
11 requirement of injury, there's always a
12 requirement of scienter. Some of these
13 securities acts do not require scienter. Some
14 of them do not require reliance or injury.

15 These are different kinds of causes of
16 actions put in a different place with a
17 different party on the other side of the "v."

18 MR. McCOLLOCH: And the mere fact that
19 they've been modified a bit is --

20 JUSTICE KAGAN: A bit? No scienter?
21 No reliance? No injury?

22 MR. McCOLLOCH: Well, in -- in this
23 case, he was alleged to have had scienter. He
24 was alleged to have committed all of the terms
25 of common law fraud that -- that -- in -- in

1 this case. And our argument from the beginning
2 has been that the -- the actual claims made
3 against Jarkesy in this case are common law
4 claims that -- that required a right to trial by
5 jury under the Seventh Amendment.

6 JUSTICE SOTOMAYOR: But that wasn't
7 what the government had to prove. Over here,
8 counsel. To -- right here, counsel.

9 MR. MCCOLLOCH: Yes.

10 JUSTICE SOTOMAYOR: I have the mask
11 on.

12 Can I back up a second? Mr. Fletcher
13 pointed out that civil penalties were more
14 recently added to the administrative process.
15 If this law had been -- if this case had been
16 heard previously, the SEC could have sought
17 simply a cease-and-desist letter from doing
18 whatever they were doing, an injunction, asked
19 for disgorgement, which Justice Barrett pointed
20 out was always a -- not a jury trial matter, and
21 an injunction from doing certain things -- other
22 things in the securities industry.

23 If that had been the -- the
24 administrative process and the only thing the
25 SEC had asked for, would your argument be

1 identical, that that -- they had to go to court
2 to ask for those things? If this is a common
3 law fraud claim, but the only remedies they're
4 seeking are common law remedies that don't
5 require -- never required a jury, are you taking
6 the position they had to go to a court
7 nevertheless?

8 MR. MCCOLLOCH: And -- and, Your
9 Honor, your -- I think your question is -- is
10 asking both under Article III and under Seventh
11 Amendment. Seventh Amendment, no. We would not
12 be arguing there's a Seventh Amendment right for
13 equitable relief. Remember, the -- the -- the
14 -- the test is was it a common law -- was it a
15 claim recognized in the courts of England in
16 1791? And, number two, was it seeking legal as
17 opposed to other relief, mainly equity or
18 admiralty? And so a -- a claim for just
19 disgorgement at least under the law as it
20 existed until 2021, as this Court held in the
21 Liu case three years ago, disgorgement is an
22 equitable remedy, and this Court went back to
23 look at the law pre-future equity --

24 JUSTICE SOTOMAYOR: So you're saying
25 they didn't require a jury trial, but that

1 doesn't answer my first question. Would Article
2 III have required --

3 MR. McCOLLOCH: Article III.

4 JUSTICE SOTOMAYOR: -- judicial
5 adjudication?

6 MR. McCOLLOCH: And I believe Article
7 III would require that. The Seventh Amendment,
8 though, would not.

9 JUSTICE SOTOMAYOR: All right. So
10 you're basically going to that broader point
11 that -- you're actually asking for that
12 fundamental change that Mr. Fletcher talked
13 about. You're saying any action has to go to
14 federal court if it has an analogue in federal
15 -- in common law.

16 MR. McCOLLOCH: Yes, Your Honor. Yes.

17 JUSTICE SOTOMAYOR: Quite dramatic.

18 MR. McCOLLOCH: And we believe that's
19 --

20 JUSTICE SOTOMAYOR: I -- I'm not quite
21 sure why that holding, which at common law
22 included things -- like your own brief goes on
23 and on about this, that if it was a deprivation
24 of life, property, or -- life and property, you
25 had to go to court.

1 I don't know why immigrant --
2 immigration issues don't have to go to court
3 under that theory, why customs duties don't have
4 to go to court, why any of the other things that
5 you're exempting out wouldn't have gone to
6 court. They all involve money.

7 MR. McCOLLOCH: They all involve
8 money, but there are certain things that have
9 been traditionally litigated or -- or
10 adjudicated or assessed outside of the court
11 process even back at the time of the founding.
12 And so those -- those -- those are just this
13 unique --

14 JUSTICE SOTOMAYOR: That's a very --
15 that's a very amorphous line. I'm --

16 JUSTICE BARRETT: Well, and -- I'm
17 sorry.

18 JUSTICE SOTOMAYOR: I'm sorry, just
19 one last question.

20 JUSTICE BARRETT: Yeah.

21 JUSTICE SOTOMAYOR: I'm assuming, when
22 we're being asked to change laws, we usually
23 have a section saying stare decisis shouldn't
24 apply here. The dramatic change that you're
25 proposing in our approach and jurisdiction is

1 going to have consequences across the board.
2 We're going to have to decide questions like the
3 one you assume, that that long list is exempt,
4 but we're going to have to decide whether that's
5 true, and we have a series of other agencies
6 with very big responsibilities, start with the
7 EPA, start with the -- the Commodities
8 Commission, the Postal Service, that can assess
9 penalties for transporting hazardous materials
10 in interstate traffic. All of those agencies
11 will have to -- will have to go to court,
12 correct?

13 MR. McCOLLOCH: Well, Your -- Your
14 Honor, I -- I think we're --

15 JUSTICE SOTOMAYOR: All of their
16 proceedings are now nullified under your theory?

17 MR. McCOLLOCH: I -- I think that we
18 -- we are not arguing for a big change in the
19 law. We -- we --

20 JUSTICE SOTOMAYOR: I -- you've just
21 said any -- any suit that seeks civil penalties
22 that has an analogue and not an exact duplicate
23 but an analogue in common law has to go to
24 federal court.

25 MR. McCOLLOCH: Well, that's what this

1 Court has held many times going back 200 years,
2 and so --

3 JUSTICE SOTOMAYOR: For private -- for
4 suits.

5 MR. McCOLLOCH: But there are certain
6 things that have been deemed exempt from that
7 under, again, another long strain of cases, such
8 as immigration, tax, et cetera, that -- and --
9 and Social Security is like the easiest example.

10 The Chief Justice asked a little more
11 difficult question about, you know, public
12 health benefits, but there's a long tradition of
13 Social Security. That's a government benefit.
14 You know, what the government giveth, it could
15 taketh away. It can -- and it can -- it can
16 adjudicate. And so those are just different.

17 This -- the argument we're making
18 affects a tiny percentage of the total things
19 that are handled -- that are -- today are
20 adjudicated administratively.

21 JUSTICE SOTOMAYOR: Should we take --

22 MR. McCOLLOCH: We're only --

23 CHIEF JUSTICE ROBERTS: Thank you.

24 JUSTICE SOTOMAYOR: -- do we take you
25 at your word, or should we have asked for

1 briefing on the consequences?

2 MR. McCOLLOCH: Well --

3 JUSTICE SOTOMAYOR: You didn't brief
4 it. Some amici tried to, but it wasn't briefed.

5 MR. McCOLLOCH: Well, and -- and --
6 well, and --

7 JUSTICE SOTOMAYOR: It wasn't briefed
8 by the government. It wasn't briefed by you.

9 MR. McCOLLOCH: And -- and if -- if
10 the Court wants supplemental briefing, we'd be
11 happy to -- to offer a supplemental briefing.
12 You know, we would, first of all, strongly
13 prefer that the Court deem the public/private
14 rights doctrine more or less irrelevant to -- to
15 -- to the assessment of or evaluation of the
16 applicability of the Seventh Amendment. We
17 believe that the subsequent cases have done that
18 and -- and not just Granfinanciera.

19 This -- this Court was very helpful in
20 -- in -- in Stern v. Marshall in laying out
21 descriptors of things, what -- what are really
22 private rights. You know --

23 CHIEF JUSTICE ROBERTS: Thank --

24 MR. McCOLLOCH: -- this is an Article
25 III case.

1 CHIEF JUSTICE ROBERTS: Yeah, thank
2 you, counsel. I'd -- we've just been talking
3 about areas that aren't covered, and you've
4 mentioned a couple here and there. I wanted to
5 know if you can give us -- I realize it may not
6 be completely, I'm not holding you to this --
7 but a list of the areas that you think would not
8 fall within the arguments that you're making
9 today.

10 You've mentioned taxes. You've
11 mentioned duties, Social Security benefits. Are
12 there others that you would like to add, or
13 maybe you can refer us to some place where you
14 have a full list?

15 MR. MCCOLLOCH: You know, immigration.
16 There -- there are a number of areas. And it
17 would probably be a -- a pretty long list of
18 things that wouldn't be affected. Things --
19 again, the -- the best example is the OSHA
20 regulations. Proper placement of -- of ceiling
21 covers, you know, those -- those kinds of things
22 that are subject to sort of traffic-ticket-level
23 fines just are not things that were ever
24 recognized at common law.

25 And most of the things that the

1 Article I courts throughout the federal
2 government do are, in fact, new claims that are
3 regulatory issues, that don't have an analogue
4 in 18th Century English practice.

5 And so we're only talking about a tiny
6 percentage. And -- and, really, here, we're
7 just talking about fraud claims, traditional
8 fraud claims, and at least where they've been
9 charged as traditional fraud claims, that -- and
10 -- and I know it's kind of -- the Court's going
11 to be a little concerned, do we have to do
12 case-by-case-by-case-by-case analysis of this?
13 Well, unfortunately, for most things, you have
14 to do a case-by-case analysis.

15 The -- the whole public/private rights
16 doctrine is frankly a mess. It's not the
17 Court's fault. It's because it's so -- it's a
18 very difficult, vexing issue. And -- and this
19 Court has declined actually to specifically
20 define it itself. And maybe that's what you're
21 asking us.

22 And so I don't mean to punt on the
23 question, other than to say we're not asking for
24 a big change in the law. And, you know, may --
25 maybe the -- we're -- we're a little bit talking

1 past each other. We're just saying when a --
2 when a -- a -- a common law claim or something
3 approximating the -- the same purposes of a
4 common law claim that existed 200 years ago in
5 England, that is -- is thrown into a statutory
6 scheme, that that still requires the right to
7 trial by jury, just like in *Granfinanciera*. It
8 was in an Article I bankruptcy court, and the
9 Court held even -- they left -- this Court left
10 alone whether or not that Article I assignment
11 was okay. They left that alone and just sort
12 of, okay, let's assume it is. We're still going
13 to say for this fraudulent transfer claim that
14 was a core proceeding incorporated into the
15 statutory scheme, we're saying you've got a
16 right to trial by jury for that.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 Justice Alito?

21 JUSTICE ALITO: Excuse me. Could you
22 complete this sentence for me? A statutory
23 claim is sufficiently close to a common law
24 action for Seventh Amendment purposes when it?

25 MR. McCOLLOCH: Serves the same

1 essential function as a common law action
2 recognized in the courts of England in 1791.

3 JUSTICE ALITO: Serves the same
4 essential function?

5 MR. McCOLLOCH: Essential function.

6 JUSTICE ALITO: And why would that not
7 be true here?

8 MR. McCOLLOCH: Well, it -- these
9 fraud claims do serve the same essential -- in
10 the securities acts, under 10b-5, do -- do serve
11 the same essential function.

12 JUSTICE ALITO: I'm sorry. Why -- why
13 is that the same here?

14 MR. McCOLLOCH: Why is it the same?

15 JUSTICE ALITO: Yeah. I'm -- the --

16 MR. McCOLLOCH: Because it has all of
17 the elements --

18 JUSTICE ALITO: There was an erroneous
19 "not" in there. Why is it the same?

20 MR. McCOLLOCH: Why isn't it?

21 JUSTICE ALITO: Why is it?

22 MR. McCOLLOCH: It is. It's the same
23 -- it's -- it's -- it's the same because it has
24 all the same elements. There -- there were --
25 there were cases back in 18th Century England

1 that were securities-type cases, fraud cases.
2 There was one case that we cite in our brief
3 that was rendered King v. Cawood in 1790, the
4 year before the Seventh Amendment was enacted,
5 where the government civilly prosecuted for
6 penalties Mr. Cawood for violation of a
7 financial fraud -- a financial statute.

8 So this -- this is a fraud claim.
9 They allege misrepresentations. They allege --
10 they allege reliance. They allege materiality.
11 And they allege damages.

12 JUSTICE ALITO: Well, were they
13 required to allege all those things?

14 MR. McCOLLOCH: They were not
15 necessarily required to, but they did, and they
16 usually do.

17 JUSTICE ALITO: Do -- could we decide
18 this case on the narrow ground that the
19 statutory securities fraud claims are
20 sufficiently close to a common law fraud action
21 because the elements of the statutory claim are
22 a logical subset of the latter?

23 MR. McCOLLOCH: Yes, Your Honor.

24 JUSTICE ALITO: I know you think the
25 public rights/private rights distinction is

1 fuzzy, but do you think it's a difficult
2 question whether customs duties are public
3 rights or private rights -- involve public
4 rights or private rights? Same thing for
5 immigration. Same things for taxation. Same
6 thing for Social Security. Same thing for the
7 Postal Service.

8 Do you think that's a tough question?

9 MR. McCOLLOCH: No, Your Honor.

10 JUSTICE ALITO: Then why is it
11 necessary for us to jettison that inquiry?

12 MR. McCOLLOCH: Well, I don't think
13 you need to. I mean, I -- I think -- I think
14 that inquiry -- that -- that's been well
15 settled. Plenty of cases allowing immigration,
16 customs, all of those areas to be -- to be
17 adjudicated administratively by the executive
18 branch and, again, were -- were done back in the
19 -- most of those done back in the -- in the
20 1800s --

21 JUSTICE ALITO: Okay. Thank you.

22 MR. McCOLLOCH: -- that way.

23 JUSTICE ALITO: Thank you.

24 MR. McCOLLOCH: So it's a long
25 tradition.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: So explain your
4 dividing line again. Serves the same essential
5 functions as a common law right in suit? Can
6 the government sue you without a statute for not
7 paying your taxes?

8 MR. McCOLLOCH: Without a statute?

9 JUSTICE SOTOMAYOR: Yes.

10 MR. McCOLLOCH: No.

11 JUSTICE SOTOMAYOR: Can the government
12 sue you for fraud under -- under the common law
13 if you didn't have materiality, reliance -- and
14 reliance?

15 MR. McCOLLOCH: No.

16 JUSTICE SOTOMAYOR: Could they sue you
17 in common law for fraud?

18 MR. McCOLLOCH: If you defrauded the
19 government.

20 JUSTICE SOTOMAYOR: Exactly. But
21 they're not charging you here with defrauding
22 the government. They're not claiming injury to
23 the individual -- to other individuals. They're
24 claiming that the injury is to them.

25 MR. McCOLLOCH: The -- the SEC --

1 JUSTICE SOTOMAYOR: To the government
2 but not in terms of money.

3 MR. McCOLLOCH: The SEC alleged in the
4 -- the -- does allege in these cases in
5 general and alleged here --

6 JUSTICE SOTOMAYOR: When you go into a
7 private suit, other than a qui tam action where
8 the government is letting you sue in their name,
9 is the private individual recovering penalties
10 for the government and its injuries to the
11 securities market, or is it -- is it recovering
12 penalties for the individual's own injury?

13 MR. McCOLLOCH: In this case --

14 JUSTICE SOTOMAYOR: I didn't say this
15 case. I'm asking you if a private citizen goes
16 into court and seeks recovery under the SEC for
17 a securities fraud, can they collect penalties
18 on behalf of the government?

19 MR. McCOLLOCH: No. In this case --

20 JUSTICE SOTOMAYOR: So what's the
21 essential function that's the same in an action
22 by the government and an individual?

23 MR. McCOLLOCH: This -- the --

24 JUSTICE SOTOMAYOR: The elements are
25 not the same. The remedies go to one party, not

1 the other. I -- I'm -- I'm at a loss.

2 MR. McCOLLOCH: Okay, Your Honor. The
3 -- the substantive elements are the same, which
4 I think is the end of the inquiry, but to take
5 it further, the SEC takes those penalties,
6 according to them, they take most of the
7 penalties and most of the disgorgement money
8 that they take in and return it to the victims.

9 JUSTICE SOTOMAYOR: You know --

10 MR. McCOLLOCH: And so --

11 JUSTICE SOTOMAYOR: -- that's --
12 that's very generous of the government, but it's
13 not -- you know, I can give my money to charity,
14 but it's not the Court's right to -- the Court
15 doing that. It's the SEC choosing to do that.

16 MR. McCOLLOCH: The SEC --

17 JUSTICE SOTOMAYOR: Just like the
18 victim could choose and probably does give the
19 government some of the money in taxation. I'm
20 not sure if penalties are exempt or not.

21 MR. McCOLLOCH: Well, and -- and
22 sometimes courts frequently in these SEC fraud
23 cases appoint receivers who are ordered by the
24 court to collect money and return it to the --
25 to the investors. So -- but the SEC largely --

1 JUSTICE SOTOMAYOR: Thank you,
2 counsel.

3 MR. McCOLLOCH: -- acts today --

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: Mr. McColloch, if you
8 look at the history of the securities
9 legislation in this country, a lot of it came
10 into effect, of course, after the Great
11 Depression, and then there were -- would have
12 been two more recent tranches. One came after
13 the savings and loan crisis, and the other came
14 after the 2008 Great Recession, if you want to
15 call it that.

16 And each time Congress thought, you
17 know, something is going terribly wrong here and
18 people are being defrauded and people are being
19 harmed. And these common law suits that you're
20 talking about were not solving the problem.

21 And Congress said: We have to give
22 the SEC responsibilities. We have to give them
23 powers. We have to give them greater
24 authorities. And I guess what I'm wondering is
25 when you say, well, we should go back to the

1 common law suits that were brought 200 years ago
2 in the courts of Westminster, I mean, is
3 Congress's judgment after the depression, after
4 the savings and loan crisis, after the Great
5 Recession, is Congress's judgment that more
6 powers were needed within an administrative
7 agency entitled to no respect?

8 MR. McCOLLOCH: No, it's entitled to
9 lots of respect. And, again, everything that
10 the -- that the securities acts do and
11 everything the SEC does we support. And it
12 doesn't have -- it's -- it's not a matter of not
13 respecting Congress.

14 Congress acted appropriately, except
15 insofar as they eventually in 1990 and then in
16 19 -- in 1990, when they allowed the SEC to sue
17 people outside of -- of the regulatory universe,
18 people that were regulated and registered, they
19 gave them the authority to -- to come after any
20 person and then, in Dodd-Frank in 2010, allowed
21 them to get penalties against any person. They
22 didn't really use that power against any person
23 when they couldn't get penalties. And so, as
24 soon as they got the penalty authority, that's
25 when they could go after any person for

1 securities fraud.

2 And our argument is, has been, and --
3 and I believe the Fifth Circuit's holding is
4 that basic securities fraud allegations, whether
5 they're inside or outside of a statutory scheme,
6 the nature of the claim is private. The nature
7 of the claim, it's just exactly the same. It's
8 -- it's analogous enough to common law claims
9 that existed in 1791 in England --

10 JUSTICE KAGAN: Thank you.

11 MR. McCOLLOCH: -- and, therefore, the
12 Seventh Amendment applies, period.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: I just wanted to
16 clarify a few things that I -- I found
17 confusing.

18 Under 10b-5, in addition to proving a
19 material misrepresentation, I thought scienter
20 was required statutorily, correct?

21 MR. McCOLLOCH: Yes, yes, Your Honor.

22 JUSTICE GORSUCH: Okay. And then I
23 had thought that, as well, that for -- when they
24 -- when the SEC seeks civil monetary penalties,
25 it has to prove causation between the

1 defendant's conduct and a loss to persons.

2 MR. McCOLLOCH: Yes, yes, Your Honor.

3 JUSTICE GORSUCH: That's statutorily
4 required?

5 MR. McCOLLOCH: That's in the statute.

6 JUSTICE GORSUCH: Okay. So those
7 elements all match up?

8 MR. McCOLLOCH: They match up very
9 neatly, yes.

10 JUSTICE GORSUCH: Okay. And I thought
11 in Tull Justice Brennan made the point that
12 there doesn't have to be a perfect common law
13 analogue.

14 MR. McCOLLOCH: The -- the common law
15 analogue is a very low bar.

16 JUSTICE GORSUCH: Okay. And I thought
17 he said that the more important thing were the
18 penalties sought, that you look at the common
19 law analogue of the cause of action and -- and
20 -- and the relief sought and where those -- and
21 -- and he placed special emphasis on the second
22 part.

23 MR. McCOLLOCH: Correct, Your Honor.
24 And that the main issue, the more important of
25 the two elements was not the 1791 guidepost but

1 was -- was actually the -- whether or not the
2 government's seeking penalties.

3 JUSTICE GORSUCH: Thank you.

4 MR. McCOLLOCH: And so it's all about,
5 you know, if the government's seeking penalties,
6 the -- the government is required to take the
7 case, again, under all of the other elements
8 we've talked about, it's required to take the
9 case in front of a jury if the -- if -- if their
10 target wants a jury trial.

11 JUSTICE GORSUCH: And Congress is free
12 to prescribe that and extend that and expand it
13 any way it wants.

14 MR. McCOLLOCH: Yeah.

15 JUSTICE GORSUCH: It just can't take
16 away a person's right to be heard before his
17 peers.

18 MR. McCOLLOCH: Correct. And for that
19 matter, the SEC could fix this problem by itself
20 this afternoon by giving people the option. The
21 problem here is that it's mandatory. It's
22 coercive. Most of the other cases, situations
23 at other agencies, people have an opt-out or
24 they can choose which -- which forum they go in.

25 The problem here is that it's

1 coercive. And so the SEC gets to -- gets to
2 unilaterally strip your Seventh Amendment and a
3 number of other rights away. By choosing that
4 forum --

5 JUSTICE GORSUCH: Thank you.

6 MR. McCOLLOCH: -- the SEC could fix
7 that in a heartbeat.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: Yeah. Two
12 questions. For those cases that are covered by
13 your rule, whatever the scope of that is,
14 agencies, I think, under your -- your approach
15 could still bring those same suits in federal
16 court, so there would still be full enforcement
17 of all the regulatory statutes, environmental,
18 securities, what have you.

19 But Mr. -- so I think I understand
20 your point on that. But Mr. Fletcher says
21 that's still a big problem because Congress
22 would have to enact statutes that allowed
23 agencies that don't have the authority to go to
24 federal court to do so, and he says that would
25 be a burden on federal courts.

1 And I just want to get any response
2 you might have to that.

3 MR. McCOLLOCH: If -- if -- if there's
4 a -- if there's a common law claim for penalties
5 embedded in some of those statutes, then the
6 answer is yes.

7 JUSTICE KAVANAUGH: Well, that's not
8 the question. The question is what's -- what --
9 what about the burden on federal courts that Mr.
10 Fletcher raised, respond to that, and then the
11 burden on agency enforcement for those agencies
12 that don't have the authority to seek federal
13 civil penalties in federal court now.

14 MR. McCOLLOCH: I could -- I could
15 speak most authoritatively to -- to -- to the
16 SEC and what effect it would have there. The
17 SEC, seeing the handwriting on the wall, has
18 already, I believe, withdrawn or returned its --
19 its securities fraud cases back to federal
20 court. So this whole notion of choking the
21 federal courts with lots and lots of cases is --
22 it didn't happen because they've already been
23 returned to the federal courts. Soon after they
24 got this authority in 2010, it went way up, and
25 then these constitutional challenges started

1 getting filed and it went back down.

2 And so I don't think -- in fact, I
3 think the -- the impact at the SEC if this Court
4 upholds the Fifth Circuit on the Seventh
5 Amendment will be zero. It'll be virtual --
6 virtually nothing.

7 JUSTICE KAVANAUGH: Okay. And then
8 second question is, if you're asking us, as some
9 of the questions suggest, to scale back, narrow
10 a precedent of ours in order that an individual
11 has a right to federal court rather than an
12 in-house tribunal, before we do that, we should
13 know that it's more than just housekeeping, that
14 it matters. And you haven't really said, you
15 know, it really matters to be in federal court
16 rather than an in-house agency tribunal, and
17 here's your opportunity.

18 MR. McCOLLOCH: You mean it matters
19 constitutionally or as a practical --

20 JUSTICE KAVANAUGH: No. No. Matters,
21 like, you know, we could change precedent, but
22 if it doesn't have any impact other than
23 housekeeping of where you file your briefs,
24 which tribunal you file it in, then, you know,
25 that's -- that's a lot to ask us to narrow a

1 precedent --

2 MR. McCOLLOCH: Well --

3 JUSTICE KAVANAUGH: -- for where you
4 file your briefs.

5 But does it matter?

6 MR. McCOLLOCH: It -- it -- it matters
7 --

8 JUSTICE KAVANAUGH: See, all right.
9 It obviously does, but how and why and how much?

10 MR. McCOLLOCH: It matters -- it
11 matters quite a bit, you know, to -- even beyond
12 the right to trial by jury, which -- which is
13 the most important of the ramifications, but
14 there's all kinds of due process issues. There
15 are prejudgment issues embedded in this whole
16 process. There are a number of -- we had -- we
17 had two other issues that we raised in the Fifth
18 Circuit that they just left behind because they
19 thought they had bitten off enough with -- with
20 these three issues that the Court granted cert
21 on.

22 So the -- and -- and if we did get
23 back and if you rule against us on everything,
24 we've still got -- they -- we've got civil --

25 JUSTICE KAGAN: More is coming?

1 MR. McCOLLOCH: -- issues still
2 coming.

3 (Laughter.)

4 MR. McCOLLOCH: So -- but we think the
5 Court will uphold the Seventh Amendment right
6 here, and the -- the difference between going to
7 federal court -- and I've done both -- going to
8 federal court and going to an administrative
9 proceeding is stark.

10 The -- the discovery rights are almost
11 zero. The -- the Division of Enforcement gets a
12 one- or two- or three-year head start on you.
13 They then give you an 8-terabyte disk that you
14 can't even search and say you're going to trial
15 in three or four months, and -- and off you go.

16 The Rules of Evidence don't apply.
17 The hearsay rule doesn't apply except when it
18 does. When we tried to get hearsay admitted, it
19 was -- it was denied because the hearsay --
20 because of the hearsay rule, when -- when the
21 Division of Enforcement tried to get and did get
22 copious evidence into -- into the record, and we
23 objected to hearsay, the --

24 JUSTICE KAVANAUGH: Okay.

25 MR. McCOLLOCH: -- ALJ said --

1 JUSTICE KAVANAUGH: Thank you.

2 MR. McCOLLOCH: -- hearsay doesn't
3 apply.

4 JUSTICE KAVANAUGH: Thank you.

5 MR. McCOLLOCH: It makes a big
6 difference.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: I have a question
10 about equitable remedies. So, when I talked to
11 Mr. Fletcher about whether the SEC would still
12 be able to get injunctive relief and
13 disgorgement, because they're equitable
14 remedies, Mr. Fletcher expressed concern that
15 the Court, in deciding the Seventh Amendment
16 question in your favor, might actually limit the
17 ability of agencies to get equitable remedies.

18 And then, when Justice Sotomayor asked
19 you some questions about that, you said the
20 Seventh Amendment would not stand as a barrier
21 in that context, but Article III would.

22 So, if we decided in your favor on the
23 Seventh Amendment question, do you think that
24 would necessarily resolve any kind of Article
25 III question? And if not, why did you even

1 bring it up?

2 MR. McCOLLOCH: Well, I -- I don't
3 know that we did bring it up. It's just it's --

4 JUSTICE BARRETT: Well, you brought it
5 up to Justice Sotomayor.

6 MR. McCOLLOCH: Well, I -- I did. I
7 thought that was part of her question. But what
8 -- what I was -- what I was trying to say is,
9 number one, the Seventh Amendment issue doesn't
10 require the Court necessarily to resolve the
11 Article III issue. We don't think that the
12 Article III public/private rights --
13 public/private right analysis is even necessary
14 to resolve this case under the Seventh
15 Amendment, which is the issue that was raised
16 below, the issue that was ruled on below.

17 JUSTICE BARRETT: But doesn't it bear
18 on it? Because, if you're looking to see what
19 was a suit at common law, I mean, isn't that
20 private right?

21 MR. McCOLLOCH: I will say most of the
22 time, 95 percent of the time, the analysis under
23 public/private rights and the analysis under
24 Seventh Amendment for whether it was a common
25 law -- a claim that existed at common law is

1 going to come out the same. It comes out with
2 the same result.

3 And that's why this -- this construct
4 has worked for the last 50, 60 years, and maybe
5 no one's challenged it for -- for that reason.
6 And that's why we're saying we can -- we can
7 live with Atlas Roofing because Atlas Roofing
8 properly construed and as it's been
9 substantially modified by a number of subsequent
10 decisions comes to the same result.

11 JUSTICE BARRETT: So is -- let's see.
12 You said that on the Seventh Amendment question,
13 our deciding in your favor would work a very
14 small change?

15 MR. McCOLLOCH: Yes, Your Honor.

16 JUSTICE BARRETT: But it sounds to me
17 that what you're really hoping for deep down is
18 a really big change because you want even the
19 equitable remedies cases out of agencies too.

20 MR. McCOLLOCH: We don't have --

21 JUSTICE BARRETT: Is that --

22 MR. McCOLLOCH: -- a position on that.
23 We -- because we're not here -- Jarkesy does not
24 have an equitable remedy issue to -- to worry
25 about. It's a -- we only raised a Seventh

1 Amendment issue, and it was because of the
2 penalties, and it was because of Dodd-Frank.

3 JUSTICE BARRETT: Notwithstanding what
4 you told Justice Sotomayor?

5 MR. McCOLLOCH: Notwithstanding what I
6 told Justice Sotomayor.

7 JUSTICE BARRETT: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: So I've heard you
11 say several times that we can live with Atlas
12 Roofing, and I'm trying to understand why, and
13 I'm reading the part of Atlas Roofing where
14 they're describing the past cases that they've
15 -- that the Court is relying on. And it seems
16 as though the basic proposition is, when
17 Congress creates new statutory public rights, it
18 may assign their adjudication to an
19 administrative agency with which a jury trial
20 would be incompatible without violating the
21 Seventh Amendment's injunction that jury trial
22 is to be preserved in suits at common law.

23 All right. So I think that's the sort
24 of basic proposition, and I understand your
25 argument to be this is not the creation of a new

1 statutory public right.

2 MR. McCOLLOCH: Correct, Your Honor.

3 JUSTICE JACKSON: All right. So
4 Justice Sotomayor asks and Justice Kagan asked a
5 lot of questions probing that part of this. And
6 so your answer is, even though the elements are
7 different, there's some overlap, as Justice
8 Gorsuch points out. But are the elements of
9 this 10b-5 action the same on all fours with
10 common law fraud?

11 MR. McCOLLOCH: Yes, as -- as -- as
12 they were alleged in this case. Yes.

13 JUSTICE JACKSON: But I'm not talking
14 about the allegations. I'm talking about the
15 elements, what the government had to prove in
16 order to establish a violation of 10b-5.

17 MR. McCOLLOCH: They are substantially
18 the same and certainly serve the same essential
19 function as -- as a -- as a traditional --

20 JUSTICE JACKSON: Right, but --

21 MR. McCOLLOCH: -- common law fraud
22 claim.

23 JUSTICE JACKSON: -- but, in Atlas
24 Roofing, we had the service of the same
25 essential function of a tort claim. But

1 Congress -- the -- the Court here still said it
2 was new statutory claim. It described the
3 circumstances under which it arise -- it arose
4 and called it new.

5 So I guess I'm trying to understand
6 why here, even though you're right, the
7 allegations, one could have made perhaps a
8 standard common law fraud claim out of the
9 allegations, if the elements of the statutory
10 claim are different, why are you suggesting that
11 it is not new?

12 MR. McCOLLOCH: Well, so I would push
13 back on -- on the notion that the OSHA
14 regulatory prophylactic claims sound in tort.
15 They don't sound in tort.

16 JUSTICE JACKSON: Because?

17 MR. McCOLLOCH: Because you don't have
18 to have any injury. If -- if -- again --

19 JUSTICE JACKSON: Do you have to have
20 injury here as an element?

21 MR. McCOLLOCH: You do not have to
22 have injury as an element, but to get damages,
23 you do, so you don't get penalties.

24 JUSTICE JACKSON: No, I understand,
25 but -- but as an element, right, you say the

1 OSHA claims didn't have the injury element. We
2 don't have that element here either. So why are
3 these claims old and those claims new?

4 MR. McCOLLOCH: Be -- because those
5 claims are -- again, they're so -- they're so
6 prophylactic as to whether your ceiling cover is
7 in exactly the right position, no one could sue
8 in tort over that because there's no -- there --

9 JUSTICE JACKSON: Because the duty is
10 arising out of the -- the -- the statutory --

11 MR. McCOLLOCH: Only out of the
12 statute.

13 JUSTICE JACKSON: All right. And the
14 duty here is arising out of the statute in the
15 same way, I think, but let me just ask you this.
16 You keep talking about Granfinanciera, if I'm
17 pronouncing it correct. I guess I'm a little
18 worried about the rule that you're asking us to
19 adopt insofar as it's suggesting that it doesn't
20 have to be a common law claim that Congress has
21 appropriated on all fours with all the elements.

22 It can be something that is like a
23 common law claim.

24 MR. McCOLLOCH: Yes, Your Honor.

25 JUSTICE JACKSON: And I just don't

1 know where that comes from because the
2 Granfinanciera case, it was the fraudulent
3 conveyance claim. It was the sort of scary
4 scenario in which Congress is moving actual
5 common law claims into the administrative
6 process or in -- in that case into the
7 bankruptcy process, and the Court rightly said
8 no, I'm sorry, you have a Seventh Amendment
9 problem with doing that.

10 So I -- I don't know that
11 Granfinanciera gives you the rule that we have
12 previously held that something that looks like a
13 common law claim, even though it's statutorily
14 new, raises the same kind of Seventh Amendment
15 issue.

16 MR. McCOLLOCH: Well, you know, so,
17 really, what Granfinanciera stands for in this
18 case is -- is, again, the condemnation of
19 taxonomic changes and -- and it --

20 JUSTICE JACKSON: But it's only
21 taxonomic if it's actually the same claim,
22 right?

23 MR. McCOLLOCH: It's --

24 JUSTICE JACKSON: I mean, if it's --
25 if it's the same claim on all fours and Congress

1 is just changing the name, then I get you. You
2 -- we have exactly the problem that the Seventh
3 Amendment is concerned about.

4 What I'm still worried about is you're
5 saying Congress can create a new claim, but as
6 long as it looks kind of like a common law claim
7 or it's substantially close, I -- I don't really
8 know what the -- how close it has to be, but as
9 long as it kind of looks like a -- a common law
10 claim, the same Seventh Amendment concerns
11 arise, and I don't know that we've ever said
12 that before.

13 MR. MCCOLLOCH: And I think the Court
14 has said that. Again --

15 JUSTICE JACKSON: In what case?

16 MR. MCCOLLOCH: -- the -- the same
17 essential function test. Give me a moment, I
18 can find you -- and I know we have cases in our
19 brief that -- that -- that do cite that. And in
20 Stern v. Marshall, which is one of the most --
21 one of the two most recent cases where the
22 courts at least dealt with what constitutes
23 private right versus public right, this Court
24 gave sort of a -- a nice listing of about five
25 examples of -- of how you can tell the

1 difference.

2 And a private right says that the
3 underlying claim for relief "does not flow from
4 a federal statutory scheme, as in Thomas, or is
5 not completely dependent upon adjudication of a
6 claim created by federal law."

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Mr. Fletcher?

11 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

12 ON BEHALF OF THE PETITIONER

13 MR. FLETCHER: Thank you, Mr. Chief
14 Justice. I'd like to say just a quick word
15 about removal and then talk about the Seventh
16 Amendment issue.

17 So, on removal, I just want to take it
18 at a 30,000-foot level. I think the lesson from
19 this Court's cases is -- is that removal is
20 about accountability and control.

21 And in Free Enterprise Fund, there was
22 a real concern that the president regulated
23 parties and the public wouldn't know whether or
24 not the Securities and Exchange Commission
25 actually supported the enforcement and policy

1 actions that the Board was taking or just had to
2 tolerate those actions because of the strict
3 removal protection.

4 Now apply those same questions here
5 and you get exactly the opposite results. Here,
6 we know exactly what the Commission thinks about
7 the ALJ's decision in this case because the
8 Commission had the right to and exercised the
9 right to conduct plenary review, adopt parts of
10 it, and reject other parts of it.

11 I think that's constitutionally
12 adequate means of supervision of adjudicative
13 officers. We think that's the lesson from the
14 plurality opinion in *Arthrex*.

15 Also, in *Free Enterprise Fund*, this
16 Court said the most telling problem with the
17 scheme it confronted there was its novelty.
18 That's the through line of this Court's recent
19 cases like *Seila Law*, like *Arthrex*, like
20 *Collins*.

21 No foothold in history or tradition is
22 a telling constitutional problem. Here, it goes
23 the other way. The removal protection for ALJs
24 has been a central feature of administrative law
25 since the APA.

1 Now, on the Seventh Amendment,
2 obviously, the focus is Atlas Roofing. And I
3 think my friend has to do one of three things.
4 He has to distinguish it, he has to convince you
5 that you've overruled it already, or he has to
6 convince you that you should overrule it now.
7 And I don't think he's done any of those.

8 So, first of all, on distinguishing
9 it, I think it's helpful to be very concrete
10 about what was at issue in Atlas Roofing. The
11 statute at issue there said, and I quote, "that
12 employees had a right to be at a workplace free
13 from recognized hazards that were likely to
14 cause serious injury or death."

15 What had happened was that one
16 employer failed to shore up a trench and it
17 collapsed and an employee died, and another
18 employee fell through an open roof and died.

19 Those things could have been the basis
20 for wrongful death or negligence actions
21 evaluated under very similar standards, and yet
22 the Court had no problem saying that they were
23 validly enforced through administrative
24 proceedings because Congress had created a
25 federal statutory scheme.

1 It has done the same thing here. The
2 securities laws serve different purposes than
3 the common law of fraud. Congress is not just
4 taking and federalizing disputes between private
5 parties adjudicated in courts of common law. I
6 think the clearest indication of that is this
7 Court's decision in *Kokesh*, which explained why
8 the remedies that the SEC gets, even when they
9 are monetary or compensatory, are not for
10 private parties. They are remedies for a public
11 wrong and they are therefore properly considered
12 penalties. I think, for much the same reason,
13 this is not the case where you have a concern
14 about circumvention of the common law rights.

15 I think the other thing that I would
16 say is that he has tried to convince you that
17 you've overruled *Atlas Roofing* already in
18 *Granfinanciera*, but the parts of the opinion
19 that he is talking about and, with respect,
20 Justice Gorsuch, that you have quoted are about
21 suits between private parties.

22 When you talk about suits involving
23 the government, *Granfinanciera* is explicit. It
24 says, "even when Congress does something that is
25 closely analogous," that's a quote from the

1 common law, or effectively supplants a common
2 law cause of action with a new statutory cause
3 of action enforced by the government, that is
4 something that it can assign to an
5 administrative tribunal.

6 So, finally, that leaves him, I think,
7 asking you to overrule Atlas Roofing in one way
8 or another, on Seventh Amendment or on public
9 rights, and I think there are several reasons
10 not to do that.

11 One is that my friend just hasn't
12 asked. As Justice Sotomayor said, the words
13 "stare decisis" do not appear in his brief.
14 Even now, I don't think he has grappled with the
15 practical consequences of adopting any of the
16 rules that he has offered, and I also don't
17 think he's given you a new principle to adopt.

18 So I take the point, Justice Alito,
19 about immigration cases and tax cases and
20 customs cases. In some ways, those sound like
21 public rights, but the cases involve the
22 imposition of penalties, the requirement of
23 private parties to pay penalties for violating
24 those statutes.

25 If you look at it from a private

1 party's perspective, that's private property
2 just like the civil penalty here. The Seventh
3 Amendment and Article III don't apply
4 differently in the immigration space. When the
5 government seeks immigration penalties in court,
6 it has to do it in front of a jury.

7 So the reason why the government can
8 get administrative penalties in immigration
9 cases and in those other cases is because that
10 is not an invasion of Article III. It is not a
11 violation of the Seventh Amendment. And for the
12 reasons that the Court said in Atlas Roofing,
13 the same thing is true here.

14 So, finally, I would just like to say,
15 you know, going back to this Court's decision in
16 Brackeen last year, the Court said the parties
17 before us have raised real concerns with our
18 past precedent. They've made arguments based on
19 history.

20 But they haven't taken on the burden
21 that we expect parties to take on when they ask
22 us to overrule precedent. They haven't
23 acknowledged what they're asking for. They
24 haven't grappled with practice and principle,
25 and so whatever those arguments might be in a

1 future case, we're not going to engage with them
2 here.

3 I think you should do the same thing
4 today. I think you can reverse the decision
5 below and uphold the Securities and Exchange
6 Act's provisions at issue here without going one
7 inch beyond Atlas Roofing. And I think a
8 decision reversing the -- the Fifth Circuit on
9 that basis would leave the law exactly where you
10 found it today.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. Counsel.

14 The case is submitted.

15 (Whereupon, at 12:22 p.m., the case
16 was submitted.)

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