

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.)

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10 Washington, D.C.

11 Wednesday, November 29, 2023

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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 contested. The Court has never fully plumbed
5 its outer perimeters. I think what I'd say is
6 the strand of the doctrine that's relevant here
7 is the same one from Atlas, which is, when the
8 federal government, an agency, is enforcing a
9 federal statute in exercise of its sovereign
10 powers, that's a matter involving public rights.

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

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

23 We're not making an argument like that
24 here. We're resting on the argument that this
25 is a classic public rights case within this

1 Court's precedents and also we think properly
2 viewed as a matter of first principles.

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

9 MR. FLETCHER: Yeah.

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

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

25 What we think makes it a matter of

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

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

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

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

1 party involved in a crash, take that --

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

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

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

1 agency, to reduce the costs of the benefit of
2 healthcare that the government provides? No
3 court, no jury?

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

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

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

12 CHIEF JUSTICE ROBERTS: Yeah.

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, but, on
23 the private side, I guess they would be normal
24 fraud claims, right? I mean, the -- the
25 securities claims regulated by the SEC look a

1 lot like claims that could be brought in private
2 -- in court before a jury for fraud.

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

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

18 JUSTICE KAVANAUGH: Let's --

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

25 And when you have that situation, when

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

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

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

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

1 law.

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

7 JUSTICE GORSUCH: And, Mr. Fletcher --

8 JUSTICE KAVANAUGH: So your whole --

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

11 JUSTICE KAVANAUGH: Go ahead.

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

18 MR. FLETCHER: We do.

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

23 MR. FLETCHER: I -- I think that
24 depends, Justice Gorsuch. I think, on fines,
25 this is a point that Atlas made. Actually,

1 there, government can seek fines and it doesn't
2 trigger the Sixth Amendment jury trial right.

3 JUSTICE GORSUCH: Penalties?
4 Penalties?

5 MR. FLETCHER: Criminal fines.

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

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

15 JUSTICE GORSUCH: Oh, small fines?

16 MR. FLETCHER: Yes.

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

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

23 JUSTICE GORSUCH: So we'd agree --

24 MR. FLETCHER: -- there would be a
25 jury required in a criminal case.

1 JUSTICE GORSUCH: -- we --

2 MR. FLETCHER: Yes.

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

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

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

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

22 Jury trial, no jury trial?

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

25 (Laughter.)

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

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

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

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

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

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

17 JUSTICE GORSUCH: Yep.

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

20 JUSTICE GORSUCH: Yep.

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

24 JUSTICE GORSUCH: No --

25 MR. FLETCHER: Lots of other

1 constitutional problems.

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

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

11 MR. FLETCHER: When heard in court.

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

15 MR. FLETCHER: Yes.

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

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

24 MR. FLETCHER: Yes, but that's Atlas
25 too. And the Court recognized and looked at all

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

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

9 MR. FLETCHER: -- proceedings.

10 JUSTICE GORSUCH: I think the key --

11 MR. FLETCHER: And this is just that.

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

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

19 JUSTICE GORSUCH: It would evaporate
20 it?

21 MR. FLETCHER: No, not --

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

24 MR. FLETCHER: No. The Seventh
25 Amendment right that the Court recognized in

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

3 JUSTICE GORSUCH: Okay.

4 MR. FLETCHER: It's an administrative
5 proceeding. It's not a suit at common law.

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

9 MR. FLETCHER: Yes.

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

13 MR. FLETCHER: Yes.

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

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

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

24 MR. FLETCHER: Which was core to
25 Granfinanciera's reasoning --

1 JUSTICE GORSUCH: That's all right.

2 Fine.

3 MR. FLETCHER: -- is what I want to
4 say.

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

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

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

20 JUSTICE GORSUCH: Well, they'll create
21 some statute much like the one we have here that
22 looks a lot like fraud but a little bit
23 different in sovereign capacity.

24 MR. FLETCHER: Yeah. So there are a
25 lot of statutes that say that in those

1 circumstances, the government can proceed in
2 administrative proceedings without a jury trial
3 right, yes.

4 JUSTICE GORSUCH: Thank you.

5 JUSTICE SOTOMAYOR: Can we go --

6 JUSTICE KAVANAUGH: What would --

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

12 MR. FLETCHER: Yes.

13 JUSTICE SOTOMAYOR: Would you just
14 break them down?

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

21 Murray's Lessee, City of Arlington,
22 this Court has long recognized that it's
23 executive power to apply the law to the facts
24 and impose consequences prescribed by law in
25 particular cases.

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

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

22 JUSTICE KAVANAUGH: Mr. Fletcher --

23 JUSTICE SOTOMAYOR: The remedies --

24 JUSTICE KAGAN: Aren't there also
25 different elements --

1 JUSTICE SOTOMAYOR: I'm sorry. If I
2 may finish.

3 The remedies were different, but so
4 are the -- the elements of the fraud.

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

7 JUSTICE SOTOMAYOR: It's actually not
8 even fraud in all circumstances.

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

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

22 And so we don't require a showing of
23 reliance. We don't require a showing of damage
24 to private parties. As this Court said in
25 *Kokesh*, what we're looking for --

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

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

11 JUSTICE ALITO: Well, as to the
12 elements of -- of reliance, it doesn't make
13 sense to say that the Seventh Amendment provides
14 stronger protection when it is easier for the --
15 the -- the prosecuting party to prove a claim
16 than otherwise?

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

20 JUSTICE ALITO: I thought you were
21 saying that that was a difference.

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

23 JUSTICE ALITO: There are elements of
24 common law fraud that are omitted under this --
25 under these circumstances.

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

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

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

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

22 And it does seem odd from a
23 constitutional perspective to say that a private
24 suit triggers the Article III right to a federal
25 court and a jury, a private suit against you for

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

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

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

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

20 You know, Atlas itself is relying on a
21 line of decisions that go back to Helvering
22 versus Mitchell, to the two Elting cases, to
23 Stranahan from 1909, and even before that, all
24 of which stand for the same proposition that
25 civil penalties in government enforcement

1 actions are permissible, consistent with Article
2 III and the Seventh Amendment.

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

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

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

22 MR. FLETCHER: Yeah. So the plurality
23 in Northern Pipeline, which I think, you know,
24 also recognized exactly this issue, sort of
25 acknowledged that concern and said the reason is

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

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

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

21 I think our point is just that as a
22 separation-of-powers matter, as a historical
23 matter, it's permissible for Congress to give
24 adjudications to executive officials, that can
25 be executive power, and that Congress has a lot

1 of flexibility in deciding how to provide
2 judicial review.

3 JUSTICE JACKSON: And isn't that what
4 causes --

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

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

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

19 MR. FLETCHER: Right.

20 JUSTICE BARRETT: -- depend on the
21 forum --

22 MR. FLETCHER: Right.

23 JUSTICE BARRETT: -- rather than the
24 nature of the action, whether the action is a
25 private right or a public right.

1 How can that be?

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

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

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

18 MR. FLETCHER: Yeah.

19 JUSTICE BARRETT: -- that part of your
20 argument depends on reading Atlas Roofing for
21 all -- all that it's worth. And I agree Atlas
22 Roofing is a good case for you. But it seems to
23 me that that part that I read and part of the
24 premise of Atlas Roofing really doesn't depend
25 on the private rights/public rights; it really

1 kind of depends on the forum.

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

6 MR. FLETCHER: Yeah. It --

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

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

18 JUSTICE BARRETT: Public rights.

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

25 JUSTICE BARRETT: Then why would you

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

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

14 JUSTICE BARRETT: But why? You said
15 it applied to everything.

16 JUSTICE KAGAN: Is that because the
17 Seventh Amendment says suits? Is that why?

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

23 JUSTICE KAGAN: I mean, it's -- it's a
24 really interesting question that Justice Barrett
25 raises because I think it appeals to this

1 intuition, like, we know jury rights are very
2 important, and everybody agrees with that. And
3 the idea that you would have it in one place and
4 not have it in another place, well, why is that?

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

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

15 MR. FLETCHER: Yeah.

16 JUSTICE KAGAN: -- I think four or
17 five times?

18 MR. FLETCHER: At least.

19 JUSTICE BARRETT: But that's actually
20 not quite my question because, in Atlas Roofing,
21 it seemed to say -- I mean, I -- I -- I agree
22 that the Seventh Amendment and then the
23 separation of powers under the Article III line
24 of cases reinforce each other in this respect,
25 but then why in Atlas Roofing is it assuming

1 that the exact same suit would trigger a right
2 to a jury trial in a court but not -- but could
3 simultaneously be assigned to an agency?

4 Because I take that to be the exact same thing.

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

9 MR. FLETCHER: Yeah.

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

14 MR. FLETCHER: Right.

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

19 MR. FLETCHER: So I apologize, Justice
20 Barrett. I may -- I may not be completely
21 following. I think it's that only if it is in
22 court do you ask the Seventh Amendment question,
23 which, as you say, sometimes the answer is yes,
24 you have a jury trial right; sometimes the
25 answer is no, you don't have a jury trial right.

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

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

9 Mr. Chief Justice, do you want me to
10 wait until --

11 CHIEF JUSTICE ROBERTS: Why don't you
12 finish your question and then --

13 JUSTICE JACKSON: Okay.

14 CHIEF JUSTICE ROBERTS: -- we'll move
15 on to --

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

21 The concern that you mentioned many
22 times was is the law of fraud being federalized.
23 And when the law of fraud is being federalized,
24 the Seventh Amendment is implicated because what
25 the Seventh Amendment is doing is protecting the

1 right of a person who has a common law fraud
2 claim to bring it in federal court and not have
3 it directed into some forum where they don't get
4 a jury trial.

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

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

1 a common law suit.

2 MR. FLETCHER: Justice Barrett --

3 CHIEF JUSTICE ROBERTS: Briefly,
4 counsel.

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

14 JUSTICE JACKSON: Right. But what
15 about the Seventh Amendment?

16 MR. FLETCHER: Right.

17 JUSTICE JACKSON: Aren't we asking
18 what the Seventh Amendment protects?

19 MR. FLETCHER: And the point that I'm
20 making is the point from Oil States and the
21 Court's other cases, which is the Seventh
22 Amendment is essentially downstream from Article
23 III. It applies -- it's a forum-dependent right
24 by its terms, suits at common law. If you have
25 something permissibly assigned to an

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

7 I'm sorry, Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank -- thank
9 you, counsel.

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

21 But it can't be the case that it's a
22 suit -- would be a suit at common law, it would
23 have been tried at Westminster, but the
24 government calls it something different, but
25 it's the same thing?

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

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

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

16 CHIEF JUSTICE ROBERTS: Thank you.
17 And just one more question.

18 Atlas Roofing is 50 -- 50 years old.
19 And the extent of impact of government agencies
20 on daily life today is enormously more
21 significant than it was 50 years ago. I mean,
22 does that have any -- should that be a concern
23 for us or a consideration when we're trying to
24 consider what power the government has to take
25 away the jury trial right or, as an antecedent

1 to that, to take away the right to go into
2 court?

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

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

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

22 You know, at that time, Congress --
23 the Court said these are already very common
24 practices. They have only become more so ever
25 since as Congress has relied extensively on this

1 Court's holding that this is a permissible way
2 to provide for the government to enforce the
3 rights held by the public.

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, that's
23 right, but that wasn't my point that it could be
24 in one place or another.

25 My point was more it could be in one

1 place we have the protections of Article III
2 against the government, or the government can
3 decide we think we'll be better off deciding
4 that in our own agency before our own employees.

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you.
23 Justice Thomas?

24 JUSTICE THOMAS: Mr. Fletcher, would
25 you give us a brief definition, your definition

1 of public rights?

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

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

12 JUSTICE THOMAS: So it's the nature of
13 the government's enforcement?

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

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

23 MR. FLETCHER: Right. And I
24 understand the intuition that you have written
25 about and that some scholarship has written

1 about that says the -- the public rights/private
2 rights question should be are there private
3 rights like property or liberty at stake on one
4 side of the ledger.

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

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

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

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

22 So the question asked by the Chief
23 Justice concerns the textual argument that the
24 Seventh Amendment doesn't apply here because
25 it's not a suit.

1 Why is it not a suit?

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

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

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

20 JUSTICE ALITO: Doesn't that seem
21 like --

22 MR. FLETCHER: It's still a right.

23 JUSTICE ALITO: -- doesn't that seem
24 like a pretty patent evasion of the Seventh
25 Amendment to say this protection which was

1 regarded at the time of the adoption of the Bill
2 of Rights as sufficiently important to merit
3 inclusion in the Constitution can be nullified
4 simply by changing the label that is attached to
5 a tribunal?

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

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

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

21 Would you say that is still not a
22 suit?

23 MR. FLETCHER: I think that is still
24 not a suit, but Article III would have much more
25 to say about that, and it there imposes much

1 greater constraints on Congress's ability to
2 assign that sort of dispute between private
3 parties to an agency in the first place.

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

11 MR. FLETCHER: Yeah.

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

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

19 I take the force of your response,
20 which is it seems odd to say that we can just
21 take something away from a court and hand it to
22 an agency, and I'm trying to respond to that by
23 saying there is a constraint on that and an
24 important one. It's Article III and the Due
25 Process Clause, just not the setting.

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

7 Can we not infer that?

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

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

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

23 Isn't the theory of the Seventh
24 Amendment that people in this country should
25 have protection against having their liberty or

1 property taken away by officials who are
2 answerable to a powerful executive, that the
3 jury should be set up as a buffer between what
4 the -- in that situation?

5 Isn't that the theory of it?

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

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

22 JUSTICE ALITO: Well, I'm talking
23 about the Seventh Amendment to the Constitution
24 of the United States. Justice Kavanaugh's
25 question was what sense does it make to say you

1 have this protection when you're being sued by a
2 private party, whose resources are certainly
3 going to be more limited than the resources of
4 the federal government, but when the same thing
5 happens to you and the party that's against you
6 is the federal government, well, this right to a
7 jury trial simply goes out the window.

8 Does that make sense?

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

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

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

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

10 MR. FLETCHER: Exactly.

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

14 MR. FLETCHER: Exactly, yes.

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

17 MR. FLETCHER: Integrity of the
18 securities markets, yes.

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

24 MR. FLETCHER: Exactly right. And I
25 think that also points up why it would be very

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

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

18 MR. FLETCHER: Correct. Yes.

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

25 Penalties seem similar, but how about

1 if it included restitution, meaning now we're
2 going to pay the money to a private party?
3 Would that pose a problem?

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

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

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

18 And that's not new here. The two
19 Elting cases from 1932 that we describe, the
20 penalties were not just a civil monetary penalty
21 enforced by administrative officials. Those
22 were immigration cases about unlawfully bringing
23 non-citizens to the country. And administrative
24 officials also made people who violated those
25 laws refund the non-citizens' fare for the

1 passage to the country.

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

7 JUSTICE SOTOMAYOR: All right. Thank
8 you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

21 But I also want you to go forward from
22 Atlas Roofing because, of course, there are
23 precedents that we have that have been eroded
24 over time, that have been changed, that -- that
25 don't get a hundred percent of their value 50

1 years later as they do the moment they were
2 issued.

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

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

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

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

1 the protections that that entails. And the
2 Court said in the line that I quoted in my
3 introduction the understanding from the
4 beginning has been that Congress can legislate,
5 impose civil penalties, and have executive
6 officials impose those penalties in the first
7 instance.

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

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

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

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

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

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

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

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

1 consequences. It's immigration, it's seizing
2 goods, it's taxes, it's customs all throughout
3 our history. It happens all the time.

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

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

23 JUSTICE KAGAN: And when the Chief
24 Justice made the point that it's been 50 years
25 and things have changed and that administrative

1 agencies are more powerful, well, so too in
2 those a hundred years, I mean, our problems have
3 only gotten more complicated and difficult.

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

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

1 permanent debarment from an industry or
2 revocation of a license or something like that.

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

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

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

19 And then Justice Brennan in
20 Granfinanciera I think addressed your argument
21 pretty squarely when he said Congress cannot
22 eliminate a party's Seventh Amendment right to a
23 jury trial merely by relabeling the cause of
24 action and placing jurisdiction in an
25 administrative agency.

1 Thoughts?

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

5 JUSTICE GORSUCH: I just quoted from
6 Granfinanciera.

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

11 JUSTICE GORSUCH: Are you saying I
12 misread it, Mr. Fletcher?

13 MR. FLETCHER: No, Justice Gorsuch.
14 I'm saying --

15 JUSTICE GORSUCH: You said -- you said
16 that that's a purely taxonomic change.

17 MR. FLETCHER: Yes.

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

21 MR. FLETCHER: Yes. I think, in
22 context, Granfinanciera is talking about a
23 proceeding that was in a bankruptcy court in the
24 Article III setting. I think the Court's
25 subsequent cases, including Oil States, have

1 said, if you're permissibly in an Article III
2 tribunal, then the Seventh Amendment doesn't
3 have independent work to do.

4 I apologize for misidentifying the
5 case I was relying on.

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

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

22 JUSTICE GORSUCH: I'll get to -- I'll
23 get to Customs in a second, but with respect to
24 the growth that the Chief Justice and Justice
25 Kagan were talking about, this SE -- this is not

1 your grandfather's SEC, right?

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

6 MR. FLETCHER: That's right.

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

12 MR. FLETCHER: Not quite. Both 2010
13 and the 1990 --

14 JUSTICE GORSUCH: 1990.

15 MR. FLETCHER: -- amendment as well,
16 but yes.

17 JUSTICE GORSUCH: The 1990 and the
18 2010.

19 MR. FLETCHER: Yes.

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

22 MR. FLETCHER: For the SEC, yes, not
23 for agencies writ large.

24 JUSTICE GORSUCH: I understand. And
25 as I -- I went back and looked just to see, you

1 know, what's the scope of -- of the problem
2 here, you know, and I came up with -- my law
3 clerk found that the ALJs in the SEC, there are
4 a total of five of them. Is that about right?

5 MR. FLETCHER: I -- I think it may be
6 three now, yes.

7 JUSTICE GORSUCH: May be three?

8 MR. FLETCHER: Yes.

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

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

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

18 MR. FLETCHER: About 80 percent of
19 them are at SSA.

20 JUSTICE GORSUCH: Yeah.

21 MR. FLETCHER: The rest of them are at
22 other agencies, yes.

23 JUSTICE GORSUCH: Okay. And -- and
24 then, with respect to history, your best
25 examples I think are on page 23 of your brief.

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

2 JUSTICE GORSUCH: The Customs, right?

3 MR. FLETCHER: Yeah.

4 JUSTICE GORSUCH: Tax and immigration?

5 MR. FLETCHER: Yes.

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

8 MR. FLETCHER: I mean, Atlas Roofing
9 as well.

10 JUSTICE GORSUCH: Obviously.

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

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

24 JUSTICE GORSUCH: Okay. Then, with
25 respect to Tull and Granfinanciera and their

1 impact, Justice White, for whom I have great
2 fondness, thought that they were overruled,
3 didn't he?

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

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

13 MR. FLETCHER: Yes.

14 JUSTICE GORSUCH: Right? That was not
15 the test writ large, correct?

16 MR. FLETCHER: Yes. And it's not our
17 test writ large either.

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

24 MR. FLETCHER: I agree.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

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

10 MR. FLETCHER: Great.

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

14 MR. FLETCHER: Yes.

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

1 penalties.

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

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

12 JUSTICE KAVANAUGH: Sure. Go ahead.

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

20 I think that's true of a lot of the
21 things that we think of as being classic public
22 rights-type cases. And I think the reason why I
23 would warn you away from reading it differently
24 is that if you read it that way, as some of the
25 scholarship has done, then I think Congress

1 really and this Court has only two choices.

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

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

18 And if you adopt the rule that it's
19 only things that we can say can be done
20 exclusively by the administrative officers
21 without any judicial review at all, then I think
22 you're in a really untenable choice in those
23 areas and lots of others too.

24 JUSTICE KAVANAUGH: Right. But the
25 flip side, I guess -- and you've said this --

1 you know, this started with Atlas Roofing -- you
2 know, I know you have your cases it relies on,
3 1972 ACUS report that you properly mentioned,
4 and it seemed like a small matter then
5 potentially, but, as others have pointed out, it
6 expands to other agencies.

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

13 Is that your position?

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

16 JUSTICE KAVANAUGH: What's the
17 potentially?

18 MR. FLETCHER: I -- I -- I think the
19 questions that you'd want to ask are, you know,
20 there are constraints about is this the sort of
21 federal regulatory scheme that you're talking
22 about in Atlas Roofing and here that's always
23 been a feature of these. We're not just trying
24 to have -- federalize, you know, tort law or
25 something like that.

1 JUSTICE KAVANAUGH: Right.

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

6 JUSTICE KAVANAUGH: But assuming those
7 things away, yes, the logic of your position is
8 that --

9 MR. FLETCHER: Yeah.

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

14 MR. FLETCHER: Yeah.

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

25 So your response to that is Atlas

1 Roofing?

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

6 JUSTICE KAVANAUGH: I'm going to get
7 to that.

8 MR. FLETCHER: Then I'll -- then I'll
9 save it for that.

10 (Laughter.)

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

16 JUSTICE KAVANAUGH: Right, would
17 exacerbate it, yeah. Okay.

18 MR. FLETCHER: Exactly. So -- but --
19 but saving that for removal and focusing just on
20 the -- the Seventh Amendment and -- and that
21 question, you know, I -- I think the takeaway
22 that I would give you from the unappealing
23 dichotomy that the sort of really strict
24 understanding of trying to locate this rule in
25 Article III and saying only if it could be

1 exclusively assigned to an administrative agency
2 with no judicial review at all can it ever be
3 assigned to them on the one hand or everything's
4 got to go to the district court in the first
5 instance, you know, I think that's untenable as
6 a practical matter. It's overturning a huge
7 swath of law.

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

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

22 MR. FLETCHER: I think that's part of
23 the chronology really. You know, the suits in
24 federal court, by and large, came first in terms
25 of when penalties could be sought, and Congress

1 later came along and added them to the
2 administrative proceedings as well. You know, I
3 think that's different. Congress is making
4 judgments at different times.

5 JUSTICE KAVANAUGH: But why would the
6 SEC bring suits in federal court?

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

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

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

20 They might also make a judgment about
21 which one is likely to be faster under the
22 circumstances of the case. There are some
23 circumstances where -- especially where they've
24 settled a case or where it's a sort of follow-on
25 proceeding that's going to be very simple that

1 they choose to file those administratively
2 rather than burdening the courts with those.

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

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

20 MR. FLETCHER: Yeah. So I -- I think
21 they are large. You know, already in Atlas
22 Roofing, the Court said that these are common.
23 They've become only more so since the 1992 ACUS
24 report that we cite says that that --

25 JUSTICE KAVANAUGH: But the -- a small

1 interruption. They could always just bring the
2 suit in federal court, though. They're filing
3 everything in the in-house tribunal. They could
4 just file the same kinds of things in federal
5 court.

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

8 JUSTICE KAVANAUGH: Yes.

9 MR. FLETCHER: -- agencies as well.

10 JUSTICE KAVANAUGH: Some of them can
11 and some --

12 MR. FLETCHER: Some --

13 JUSTICE KAVANAUGH: -- would need new
14 statutes.

15 MR. FLETCHER: Some can; many cannot.
16 And to bring all of those cases that are now
17 proceeding administratively into the courts
18 would be a huge imposition on the courts. Just
19 in terms of the numbers, you know, the 1992 ACUS
20 report that we cite counted more than 200
21 statutes at that point. And we very quickly got
22 to two dozen agencies that have the authority to
23 impose penalties in administrative proceedings
24 now. So it -- it really would be -- I don't
25 want you to think that it's just about the SEC

1 and it can just go to court --

2 JUSTICE KAVANAUGH: Yeah.

3 MR. FLETCHER: -- because it could
4 really have wide repercussions.

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

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

9 JUSTICE KAVANAUGH: FERC. We have a
10 FERC amicus brief.

11 Okay. On the Article II issue
12 quickly, one question there, that this seems
13 problematic under Free Enterprise Fund.

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

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

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: My questions are
12 just clarifying just to make sure I understand
13 exactly where you're going here.

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

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

23 We think also, in addition, there's no
24 concern that Congress is circumventing the laws
25 of fraud by just replicating or federalizing the

1 common law fraud because the elements are very
2 different. But that's not the principal
3 distinction we're relying on.

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

8 MR. FLETCHER: Yes.

9 JUSTICE BARRETT: And that's because
10 it's a suit because the judge is the
11 fact-finder?

12 MR. FLETCHER: That's because it's a
13 suit.

14 JUSTICE BARRETT: Well, and the --

15 MR. FLETCHER: And -- and -- and under
16 this --

17 JUSTICE BARRETT: Yes. Suits --

18 MR. FLETCHER: -- Court's analysis in
19 Tull --

20 JUSTICE BARRETT: Yes. Qualify --

21 MR. FLETCHER: -- it would qualify as
22 triggering a Seventh Amendment right.

23 JUSTICE BARRETT: -- judicial
24 proceedings.

25 MR. FLETCHER: Exactly. Yes.

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

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

20 JUSTICE BARRETT: Because it's
21 forum-dependent?

22 MR. FLETCHER: Exactly.

23 JUSTICE BARRETT: Okay. And then I
24 just want to clarify, Justice Kavanaugh asked
25 you what's the limiting principle because

1 Congress always, we hope, is acting in the
2 public interest.

3 MR. FLETCHER: Yeah.

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

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

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

24 JUSTICE BARRETT: But just to
25 interrupt for one second, but, you know, we are

1 talking here about securities law, but Congress
2 can enact such a scheme and has enacted such
3 schemes in many, many, many different areas.
4 The Chief Justice began by pointing some of
5 those out. So, in all of these areas,
6 healthcare, highway management, what have you --

7 MR. FLETCHER: Exactly. And --

8 JUSTICE BARRETT: -- it could happen.

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

17 JUSTICE BARRETT: Okay. So we've
18 talked some about fallout. So, here, what the
19 SEC got from Jarkesy in disgorgement was more
20 than civil penalties.

21 MR. FLETCHER: Correct.

22 JUSTICE BARRETT: Right. And the SEC
23 also got other kinds of injunctive relief.

24 MR. FLETCHER: Correct.

25 JUSTICE BARRETT: Right. So why isn't

1 -- why do you need civil penalties? Because,
2 you know, Jarkesy's not disputing that you can
3 get those kinds of things in administrative
4 proceedings. So why civil penalties too?

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

8 JUSTICE BARRETT: Okay.

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

22 JUSTICE BARRETT: Even if they were
23 considered traditionally equitable remedies?

24 MR. FLETCHER: So, again, if -- if you
25 -- there's a couple ways that you could depart

1 from Atlas Roofing. One would be to say we're
2 decoupling the Seventh Amendment from the
3 Article III inquiry, and we're going to
4 recognize a new class of suits where Article III
5 would let you give it to an agency, but the
6 Seventh Amendment still requires a trial by
7 jury. There, I think such a rule might be
8 limited to civil penalties because the other
9 remedies are equitable.

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

18 JUSTICE BARRETT: Yeah, I agree with
19 you there. Okay. Thank you, Mr. Fletcher.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I agree that
23 Atlas Roofing resolves this case, but like many
24 of my colleagues, I guess I don't understand
25 your reading of Atlas Roofing as suggesting

1 there's no Seventh Amendment issue at all if the
2 fact-finding function is assigned to the agency.

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

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

18 You say that's forum-dependent, but --
19 but the -- the question is, when can they give
20 it to one forum versus the other? And in my
21 view, the Seventh Amendment and what Atlas
22 Roofing is saying is that it's -- it's
23 claim-dependent. It's the part of your argument
24 where you talk about is this a situation in
25 which Congress is taking a common law duty,

1 right, action, or whatever and moving it into
2 the administrative process?

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

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

18 But there are also other duties in the
19 world. Those duties can be created by statute,
20 right? They're not common law duties. And when
21 you have a new duty -- Atlas Roofing many, many
22 times talks about this being a new statutory
23 duty that has been created. When you have a new
24 duty, the Seventh Amendment isn't implicated.

25 MR. FLETCHER: Justice Jackson, that's

1 just not right. If it's a new duty --

2 JUSTICE JACKSON: Okay.

3 MR. FLETCHER: -- that's enforced in
4 court, even statutory rights enforced in court
5 can trigger Seventh Amendment rights.

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

13 MR. FLETCHER: Right.

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

19 MR. FLETCHER: So I think we're saying
20 the same thing. And the only place I might
21 differ is that in that, if the -- if Congress
22 chooses the administrative forum instead, we
23 think there's an Article III inquiry there where
24 you have to ask does Article III let Congress
25 choose the administrative inquiry.

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

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

15 MR. FLETCHER: Mm-hmm.

16 JUSTICE JACKSON: In that situation,
17 does the Seventh Amendment kick in? I think
18 Atlas Roofing says no, because we're not talking
19 about a situation in which Congress has
20 alternatively said any common law fraud claim
21 out there in the world concerning securities has
22 to now be brought in this administrative action.

23 If you're relying on the common law
24 and you're bringing this kind of claim, you
25 don't get a jury trial anymore. You have to

1 come before the SEC. That's a Seventh Amendment
2 problem because we're steal -- do you understand
3 what I'm saying?

4 MR. FLETCHER: Mm-hmm.

5 JUSTICE JACKSON: Like, so it's a suit
6 at common law because you have the common law
7 claim that is now implicating the Seventh
8 Amendment right. But it's not a suit at common
9 law when Congress creates a new duty and gives
10 it to the SEC or some agency to enforce.

11 MR. FLETCHER: Through administrative
12 proceedings.

13 JUSTICE JACKSON: Through
14 administrative proceedings.

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

20 JUSTICE JACKSON: All right. And I
21 think the problem then is that if I'm right
22 about this, then I think it solves a lot of the
23 concerns that my colleagues have about Congress
24 shifting into, you know, a -- you know, certain
25 things into administrative proceedings because,

1 really, the Seventh Amendment is only implicated
2 if they're shifting into administrative
3 proceedings things that were suits at common
4 law, meaning claims at common law.

5 They're -- they're stealing from the
6 private person who's protected by the
7 Constitution that right, right?

8 MR. FLETCHER: Yes.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. McColloch.

13 ORAL ARGUMENT OF S. MICHAEL MCCOLLOCH

14 ON BEHALF OF THE RESPONDENTS

15 MR. MCCOLLOCH: Mr. Chief Justice, and
16 may it please the Court:

17 Congress has steadily expanded the
18 SEC's authority over the past several decades
19 and now, like a house that's been added onto too
20 many times, it's -- it's crushing the original
21 foundation.

22 For the Seventh Amendment, that
23 foundation was set in 1791. The founders
24 thought that they had enshrined this right for
25 government claims against citizens' property

1 rights, still staying from the Stamp Act and the
2 abuses of the vice admiralty courts.

3 My friend's really radical position is
4 antithetical, totally antithetical, to the
5 founders' intent. The jury trial right should
6 apply especially when the government is coming
7 after a citizen for penalties on a common law
8 claim.

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

16 These underlying claims do not
17 suddenly morph into public rights claims just
18 because the government happens to stand in as
19 the -- as the proxy plaintiff.

20 You'd be surprised to hear this from
21 our briefing, but we don't think you need to
22 overrule Atlas Roofing. Atlas Roofing actually,
23 as modified by subsequent decisions, provides a
24 useful template for analyzing at least the
25 public/private rights analysis and leads to the

1 same conclusion that Mr. Jarkesy was entitled to
2 -- to a jury for these claims. And, by the way,
3 it's pronounced Jarkesy, not -- not a number of
4 other ways that it -- that it's been pronounced
5 by -- by many.

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

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

19 And, finally, the -- the structural
20 error of the Take Care Clause is a -- is a -- is
21 a clear violation. We all agree that the ALJs
22 at the SEC are constitutional officers, and we
23 all agree that they're protected by at least two
24 layers of for-cause tenure protection. Mr.
25 Jarkesy's entitled to vacatur.

1 Be happy to take your questions.

2 JUSTICE THOMAS: You seem to read
3 Atlas different from the government, and it
4 seems as though you have a polar opposite
5 position from the government.

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

8 MR. McCOLLOCH: Yes -- yes, Your
9 Honor.

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

16 But, in Atlas Roofing, it's -- it's
17 helpful to realize that the Court right before
18 it discussed the -- how -- how the OSHA claims
19 are new and how different they are, the Court
20 discussed a decision seven years earlier, Ross
21 v. Bernhard, where the Court held that a
22 shareholder derivative action against directors
23 and third parties under one of the securities
24 acts, the Investment Company Act, which
25 prevented larceny, embezzlement,

1 misrepresentations, the same exact claims that
2 are alleged in this -- in this case here against
3 Mr. Jarkesy, back then, under the common law, a
4 shareholder derivative action had to be in a
5 court of equity. So you don't get a jury in a
6 court of equity. We'll get to the -- the -- the
7 forum impact later. We'll address that in a few
8 minutes.

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

16 And so, therefore, because the
17 underlying claim belongs to the corporation, the
18 underlying claim is a private one. The
19 underlying claim -- the real victim was the
20 company, so they're entitled to a jury. So the
21 -- the Court juxtaposes that. You look at the
22 nature of the claim versus the elements of these
23 OSHA claims.

24 Now the OSHA -- and this gets really
25 right to the heart of what the problem here is.

1 OSHA created a number of brand -- brand new --
2 the Court used the word "new," I think, 11 times
3 in that decision -- used that to describe these
4 -- these regular -- very -- a lot of minutiae,
5 very precise regulatory requirements, such as
6 what Atlas Roofing got penalized for, I think,
7 \$600 for improper placement of a roof or a
8 ceiling cover.

9 So these were not claims that ever
10 existed at common law. And those claims --

11 JUSTICE KAGAN: But, Mr. McColloch --

12 MR. MCCOLLOCH: Yes.

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

21 Congress is not required by the
22 Seventh Amendment to choke the already crowded
23 federal courts with new types of litigation or
24 prevent it from committing some new types of
25 litigation to administrative agencies with

1 special confidence. That's another.

2 There's another. There's another.

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

10 MR. McCOLLOCH: Yes, Your Honor, and
11 -- and I think we're -- we're pretty close
12 actually. So maybe the -- the -- the dispute is
13 over what "new" is.

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

16 MR. McCOLLOCH: No.

17 JUSTICE KAGAN: That's the issue.

18 (Laughter.)

19 JUSTICE KAGAN: I mean, that's the
20 issue. That's the result.

21 MR. McCOLLOCH: Well --

22 JUSTICE KAGAN: The Seventh Amendment
23 is no bar.

24 MR. McCOLLOCH: Well, and -- and,
25 respectfully, Your Honor, for several reasons,

1 that's where we very much part -- part ways, so
2 --

3 (Laughter.)

4 JUSTICE KAGAN: I thought that that
5 was going to be true.

6 (Laughter.)

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

16 JUSTICE KAGAN: Now we are close.

17 MR. McCOLLOCH: -- all -- all these
18 new duties.

19 JUSTICE KAGAN: I think that that's
20 exactly right. I think that the OSH Act was --
21 I mean, it -- it didn't -- the holding was not
22 dependent on this necessarily, but -- but OSH
23 Act says, look, there were ways to proceed
24 against these kinds of employers in federal
25 court. You could bring a negligence suit. You

1 could bring a wrongful death suit. But, the
2 Court says, Congress thought that wasn't enough.
3 Congress thought you shouldn't have to wait
4 until the injury happens. And so Congress gave
5 power to OSHA under the OSH Act in order to
6 bring claims for all kinds of workplace safety
7 issues before a death took place, before an
8 injury occurred.

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

22 MR. McCOLLOCH: Okay. Your Honor, the
23 -- the -- okay. So the -- the word
24 "prophylactic" is -- is a useful one, as -- as
25 my friend --

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

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

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

22 JUSTICE KAGAN: And Atlas Roofing says
23 that is perfectly fine to do. It is perfectly
24 fine. You have these -- these suits that can go
25 forward in federal court, but that's not enough

1 to solve the problem, Congress thought.

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

13 MR. MCCOLLOCH: And I think -- and the
14 reason, Your Honor, respectfully, it's -- it's
15 not the end of this case is -- is -- is twofold.
16 Number one, the -- the -- the -- the charges
17 against Mr. Jarkey were for traditional fraud
18 with harm, with damages, which is what he was
19 penalized for, what Patriot28 was -- was ordered
20 disgorgement for.

21 So the -- the -- the charges, the
22 allegations in the order instituting proceedings
23 and -- and -- and in the final order of the
24 Commission were traditional fraud claims --

25 JUSTICE JACKSON: No, I'm sorry. By

1 -- by -- by nature or were the -- was that the
2 actual cause of action? Because, for me, that
3 matters. Was the government coming in and
4 saying the cause of action here is traditional
5 fraud? Is the -- is -- we're relying on the
6 common law cause of action to be bringing this
7 claim against Mr. Jarkey?

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

10 JUSTICE JACKSON: Right. So they were
11 bringing the cause of action under the statute
12 that they had -- that Congress had created,
13 right?

14 MR. McCOLLOCH: Yes, Your Honor, but
15 -- but with actual harm alleged.

16 JUSTICE JACKSON: No, no, no, I
17 understand. The allegations may overlap with a
18 fraud claim. They could have chosen the common
19 law as the cause of action and brought a common
20 law claim, but I think, if they had done that,
21 the Seventh Amendment would say you have to do
22 that in the -- you know, a regular court. But,
23 instead, what they said is we're going to do the
24 cause of action that exists under the federal
25 statute that creates this new right, and per

1 Atlas Roofing, the Court says there's no Seventh
2 Amendment barrier to them bringing that claim in
3 an administrative agency rather than the court.

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

14 JUSTICE JACKSON: But wasn't it --

15 JUSTICE BARRETT: Yes --

16 JUSTICE JACKSON: Go ahead.

17 MR. McCOLLOCH: -- this Court --

18 JUSTICE BARRETT: I --

19 MR. McCOLLOCH: Yes, Your Honor.

20 JUSTICE BARRETT: Sorry. I was just
21 going to say, but Justice Jackson's asking an
22 important question here because we pointed out
23 in our discussions with Mr. Fletcher that our
24 cases have not been very clear about how to
25 distinguish public from private rights.

1 And if I understand you correctly and
2 if I understood your brief correctly, you're
3 really saying that the distinction depends on
4 whether this was a right at common law, and,
5 here, this bears a lot of resemblance to a right
6 at common law, the fraud.

7 MR. McCOLLOCH: Yes, Your Honor.

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

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

21 MR. McCOLLOCH: Yes. So this Court
22 has held that a -- a -- a claim that serves the
23 same essential function as a traditional common
24 law right is -- is -- is a private right.

25 JUSTICE BARRETT: Does that solve

1 Justice Kagan's problems? Because couldn't you
2 say that the OSHA Act did that? You know,
3 protected -- served kind of the same functions
4 as -- as negligence and wrongful death suits?

5 MR. McCOLLOCH: It does not serve the
6 same function. It's -- it's more -- it's
7 addressing more --

8 JUSTICE BARRETT: It's prophylactic.

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

18 JUSTICE BARRETT: So insider trading,
19 can that go to the administrative agency, or
20 does that have to go --

21 MR. McCOLLOCH: Insider trading is --
22 is prosecuted under the traditional fraud
23 claims. Again, the fraud sections in 10b-5 are
24 -- and they -- they were taken out of -- as our
25 -- our brief explains, they -- they were drawn

1 largely from what was -- what -- what -- what
2 common law fraud, how it was litigated at the
3 time in the 1930s.

4 And it was always a scheme, artifice,
5 fraud, or misrepresentations, and that is --
6 those are the sections under which insider
7 trading cases are -- are -- are prosecuted.

8 CHIEF JUSTICE ROBERTS: How broad --

9 JUSTICE SOTOMAYOR: Could -- would --
10 I'm sorry.

11 CHIEF JUSTICE ROBERTS: I was just
12 going to ask how broadly your theory reaches
13 beyond the SEC. I mean, does it cover tax
14 deficiency proceedings?

15 MR. McCOLLOCH: No, Your Honor. So,
16 you know, there are certain things we -- again,
17 we get into this definition, and part of why we
18 have a problem with or we've -- we've pointed
19 out to the Court our concerns about joining at
20 the hip the public rights doctrine with -- with
21 Seventh Amendment rights. But, you know, you
22 get into what's the definition of -- of public
23 rights versus private rights, and, first of all,
24 by -- by default, claims are private rights.

25 The public rights is -- is called, as

1 this Court has called it, the public rights
2 exception. But things -- things that are --
3 are -- are or of or belong to the government,
4 there are claims that are between an individual
5 and the government only.

6 So customs, immigration, benefits,
7 franchises, permissions, debts to the
8 government, I would put taxes under debts to the
9 government, and so there are things that were
10 traditionally, like customs, were always handled
11 even back 240 years ago, were handled outside
12 of -- of Article III, out of -- out of --
13 outside of courts.

14 So there is -- there's that -- that
15 limited universe of things that are between an
16 individual and the government, but just, again,
17 Granfinanciera I think resolved this and took a
18 big bite out of Atlas Roofing when it rejected
19 taxonomic changes, taking a common law claim,
20 throwing it into a statutory scheme like a
21 tossed salad with a bunch of -- a bunch of
22 public rights inserted, most of them
23 prophylactic, and -- and then claiming, well, as
24 to that private -- as to that private rights
25 claim, it was private right, now it's public.

1 And maybe we've reworded it a little
2 bit. Maybe we've added a section here or there.
3 We've got --

4 JUSTICE KAVANAUGH: Mr. Fletcher says
5 that that's only as to cases between private
6 parties, however. So how do you respond to
7 that?

8 MR. MCCOLLOCH: Okay. And -- and --
9 and so this Court or -- this Court has not yet
10 -- this is a matter of first impression in this
11 precise context. Atlas Roofing was the last
12 case that kind of dealt with this issue where
13 it's an enforcement action by -- by the
14 government.

15 But the Court has made crystal-clear
16 that it does not matter who the -- the -- the --
17 the parties are. The Seventh Amendment right is
18 based on -- or back -- back up.

19 Private rights are based on the
20 underlying -- the nature of the underlying
21 claim, not the forum that the case happens to be
22 filed in or adjudicated in and not who the
23 parties are.

24 JUSTICE KAGAN: See, Mr. McColloch, I
25 think that that's not a -- a right reading of

1 our precedent. I mean, what has happened since
2 Atlas Roofing -- we've actually never had since
3 Atlas Roofing another, if you will,
4 public/public case, where -- public/private
5 case, where there's a government entity on one
6 side of the V, and the reason that we've not had
7 those in 50 or 60 years is because those have
8 been thought the easy cases.

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

16 So those are the hard cases. But
17 we've never suggested that in a case where
18 Congress has given an agency the power to
19 enforce something and the agency is -- is
20 bringing the charge, if you will, that --
21 that -- that -- you know, that that's just not
22 -- it's -- that's settled.

23 MR. MCCOLLOCH: Well, it -- it -- it's
24 settled only to the extent no one's brought it
25 up and forced this issue since Atlas Roofing in

1 this --

2 JUSTICE KAGAN: I agree.

3 MR. McCOLLOCH: -- in this context.

4 JUSTICE KAGAN: Nobody has had the,
5 you know,chutzpah --

6 (Laughter.)

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

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

20 But the -- you can't read many of
21 the -- through the archives of the -- of the
22 founders and the federalist and the
23 anti-federalist writings and not come away with
24 the conclusion that their concern -- one of
25 their -- arguably, the primary concern certainly

1 of the anti-federalists, who won the debate over
2 the Seventh Amendment, was to protect from
3 jury-less courts adjudicating matters that
4 existed at common law for penalties against
5 citizens.

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

15 Like, what makes it hard is when a
16 statutory scheme looks like it could be
17 displacing the normal common law private-to-
18 private enforcement of a fraud claim.

19 But I think what Justice Kagan is
20 saying is that the reason why these cases, the
21 ones in which the statute is giving the
22 enforcement authority to the government for the
23 benefit of the public, are not hard and why
24 people haven't continued to bring these is
25 because it doesn't look anything like the common

1 law scenario where we've had two private parties
2 fighting over fraud and they brought it to
3 court.

4 Instead, Congress has created a new
5 thing to supplement that private scenario or
6 maybe it's brand new in any event, but it
7 doesn't -- it's not a common-law-rooted kind of
8 thing that is being brought in court -- I mean,
9 sorry, brought in the administrative agency with
10 all the concerns that many of my colleagues have
11 raised.

12 MR. MCCOLLOCH: Okay. Well, there are
13 several issues there. I'll -- I'll try to
14 remember them and -- and address them all. And
15 -- and all -- all good points, but keep in mind
16 that the common law claims that -- that were
17 incorporated into the securities acts are, in
18 fact, litigated privately.

19 JUSTICE JACKSON: No, they're just --
20 there -- there -- there's a parallel claim.
21 There's the world that existed before, so a
22 person who's injured by this kind of
23 misrepresentation in their securities portfolio
24 or whatever still has the common law scenario,
25 they can go to court, bringing a fraud claim,

1 right?

2 I think this actually hurts you and
3 your analysis. The fact that those still exist
4 mean that Congress was not trying to take those
5 over, shift those away. Congress created a new
6 right, a new opportunity for the government to
7 come in and for the benefit of the public make,
8 yes, admittedly, a similar kind of claim, but I
9 think you have to admit this is a new cause of
10 action, right?

11 MR. McCOLLOCH: Well, I do not agree
12 with that.

13 JUSTICE JACKSON: Okay. All right.
14 So that's where we diverge.

15 MR. McCOLLOCH: If you go back -- if
16 you -- if you -- if you -- if you look at fraud
17 claims as litigated in the 1800s and early 1900s
18 and even today, basic fraud cases, they -- they
19 cite -- they -- they use the scheme or artifice
20 to defraud, misrepresentations, violation of
21 fiduciary, all of -- all of these issues that
22 are litigated just in state courts today for
23 fraud are litigated --

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

1 (Laughter.)

2 JUSTICE KAGAN: There's always a
3 requirement of reliance, there's always a
4 requirement of injury, there's always a
5 requirement of scienter. Some of these
6 securities acts do not require scienter. Some
7 of them do not require reliance or injury.

8 These are different kinds of causes of
9 actions put in a different place with a
10 different party on the other side of the V.

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

13 JUSTICE KAGAN: A bit? No scienter?
14 No reliance? No injury?

15 MR. McCOLLOCH: Well, in -- in this
16 case, he was alleged to have had scienter. He
17 was alleged to have committed all of the terms
18 of common law fraud that -- that -- in -- in
19 this case. And our argument from the beginning
20 has been that the -- the actual claims made
21 against Jarkesy in this case are common law
22 claims that -- that required a right to trial by
23 jury under the Seventh Amendment.

24 JUSTICE SOTOMAYOR: But that wasn't
25 what the government had to prove. Over here,

1 counsel. Right here, counsel.

2 MR. McCOLLOCH: Yes.

3 JUSTICE SOTOMAYOR: I have the mask
4 on.

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

16 If that had been the -- the
17 administrative process and the only thing the
18 SEC had asked for, would your argument be
19 identical, that that -- they had to go to court
20 to ask for those things? If this is a common
21 law fraud claim, but the only remedies they're
22 seeking are common law remedies that don't
23 require -- never required a jury, are you taking
24 the position they had to go to a court
25 nevertheless?

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

16 JUSTICE SOTOMAYOR: So you're saying
17 they didn't require a jury trial, but that
18 doesn't answer my first question. Would Article
19 III have required --

20 MR. McCOLLOCH: Article III.

21 JUSTICE SOTOMAYOR: -- judicial
22 adjudication?

23 MR. McCOLLOCH: And I believe Article
24 III would require that. The Seventh Amendment,
25 though, would not.

1 JUSTICE SOTOMAYOR: All right. So
2 you're basically going to that broader point
3 that -- you're actually asking for that
4 fundamental change that Mr. Fletcher talked
5 about. You're saying any action has to go to
6 federal court if it has an analogue in federal
7 -- in common law.

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

9 JUSTICE SOTOMAYOR: Quite dramatic.

10 MR. McCOLLOCH: And we believe that's
11 --

12 JUSTICE SOTOMAYOR: I -- I'm not quite
13 sure why that holding, which at common law
14 included things -- like your own brief goes on
15 and on about this, that if it was a deprivation
16 of life, property, or -- life and property, you
17 had to go to court.

18 I don't know why immigration --
19 immigration issues don't have to go to court
20 under that theory, why customs duties don't have
21 to go to court, why any of the other things that
22 you're exempting out wouldn't have gone to
23 court. They all involve money.

24 MR. McCOLLOCH: They all involve
25 money, but there are certain things that have

1 been traditionally litigated or -- or
2 adjudicated or assessed outside of the court
3 process even back at the time of the founding.
4 And so those -- those -- those are just this
5 unique --

6 JUSTICE SOTOMAYOR: That's a very --
7 that's a very amorphous line. I'm --

8 JUSTICE BARRETT: Well, and -- I'm
9 sorry.

10 JUSTICE SOTOMAYOR: I'm sorry, just
11 one last question.

12 I'm assuming, when we're being asked
13 to change laws, we usually have a section saying
14 stare decisis shouldn't apply here. The
15 dramatic change that you're proposing in our
16 approach and jurisdiction is going to have
17 consequences across the board. We're going to
18 have to decide questions like the one you
19 assume, that that long list is exempt, but we're
20 going to have to decide whether that's true, and
21 we have a series of other agencies with very big
22 responsibilities, start with the EPA, start with
23 the Commodities Commission, the Postal Service,
24 that can assess penalties for transporting
25 hazardous materials in interstate traffic. All

1 of those agencies will have to -- will have to
2 go to court, correct?

3 MR. McCOLLOCH: Well, Your Honor, I
4 think we're --

5 JUSTICE SOTOMAYOR: All of their
6 proceedings are now nullified under your theory?

7 MR. McCOLLOCH: I think that we -- we
8 are not arguing for a big change in the law. We
9 -- we --

10 JUSTICE SOTOMAYOR: I -- you've just
11 said any -- any suit that seeks civil penalties
12 that has an analogue and not an exact duplicate
13 but an analogue in common law has to go to
14 federal court.

15 MR. McCOLLOCH: Well, that's what this
16 Court has held many times going back 200 years,
17 and so --

18 JUSTICE SOTOMAYOR: For private -- for
19 suits.

20 MR. McCOLLOCH: But there are certain
21 things that have been deemed exempt from that
22 under, again, another long strain of cases, such
23 as immigration, tax, et cetera, that -- and
24 Social Security is like the easiest example.

25 The Chief Justice asked a little more

1 difficult question about, you know, public
2 health benefits, but there's a long tradition of
3 Social Security. That's a government benefit.
4 You know, what the government giveth, it could
5 taketh away. It can -- and it can adjudicate.
6 And so those are just different.

7 This -- the argument we're making
8 affects a tiny percentage of the total things
9 that are handled -- that today are adjudicated
10 administratively.

11 JUSTICE SOTOMAYOR: Should we take --

12 MR. McCOLLOCH: We're only --

13 CHIEF JUSTICE ROBERTS: Thank you.

14 JUSTICE SOTOMAYOR: -- should we take
15 you at your word, or should we have asked for
16 briefing on the consequences?

17 MR. McCOLLOCH: Well --

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

20 MR. McCOLLOCH: Well, and -- well, and
21 --

22 JUSTICE SOTOMAYOR: It wasn't briefed
23 by the government. It wasn't briefed by you.

24 MR. McCOLLOCH: And -- and if -- if
25 the Court wants supplemental briefing, we'd be

1 happy to -- to offer a supplemental briefing.
2 You know, we would, first of all, strongly
3 prefer that the Court deem the public/private
4 rights doctrine more or less irrelevant to -- to
5 -- to the assessment of or evaluation of the
6 applicability of the Seventh Amendment. We
7 believe that the subsequent cases have done that
8 and not just Granfinanciera.

9 This -- this Court was very helpful in
10 -- in -- in Stern v. Marshall in laying out
11 descriptors of things, what -- what are really
12 private rights. You know --

13 CHIEF JUSTICE ROBERTS: Thank --

14 MR. MCCOLLOCH: -- this is an Article
15 III case.

16 CHIEF JUSTICE ROBERTS: Yeah, thank
17 you, counsel. I'd -- we've just been talking
18 about areas that aren't covered, and you've
19 mentioned a couple here. I wanted to know if
20 you can give us -- I realize it may not be
21 completely, I'm not holding you to this -- but a
22 list of the areas that you think would not fall
23 within the arguments that you're making today.

24 You've mentioned taxes. You've
25 mentioned duties, Social Security benefits. Are

1 there others that you would like to add, or
2 maybe you can refer us to some place where you
3 have a full list?

4 MR. MCCOLLOCH: You know, immigration.
5 There -- there are a number of areas. And it
6 would probably be a -- a pretty long list of
7 things that wouldn't be affected. Things --
8 again, the best example is the OSHA regulations.
9 Proper placement of ceiling covers, you know,
10 those -- those kinds of things that are subject
11 to sort of traffic-ticket-level fines just are
12 not things that were ever recognized at common
13 law.

14 And most of the things that the
15 Article I courts throughout the federal
16 government do are, in fact, new claims that are
17 regulatory issues, that don't have an analogue
18 in 18th Century English practice.

19 And so we're only talking about a tiny
20 percentage. And -- and, really, here, we're
21 just talking about fraud claims, traditional
22 fraud claims, and at least where they've been
23 charged as traditional fraud claims, that -- and
24 I know it's kind of -- the Court's going to be a
25 little concerned, do we have to do

1 case-by-case-by-case-by-case analysis of this?
2 Well, unfortunately, for most things, you have
3 to do a case-by-case analysis.

4 The -- the whole public/private rights
5 doctrine is frankly a mess. It's not the
6 Court's fault. It's because it's so -- it's a
7 very difficult, vexing issue. And -- and this
8 Court has declined actually to specifically
9 define it itself. And maybe that's what you're
10 asking us.

11 And so I don't mean to punt on the
12 question, other than to say we're not asking for
13 a big change in the law. And, you know, may --
14 maybe the -- we're -- we're a little bit talking
15 past each other. We're just saying when a --
16 when a -- a -- a common law claim or something
17 approximating the -- the same purposes of a
18 common law claim that existed 200 years ago in
19 England, that is -- is thrown into a statutory
20 scheme, that that still requires the right to
21 trial by jury, just like in *Granfinanciera*. It
22 was in an Article I bankruptcy court, and the
23 Court held even -- they left -- this Court left
24 alone whether or not that Article I assignment
25 was okay. They left that alone and just sort

1 of, okay, let's assume it is. We're still going
2 to say for this fraudulent transfer claim that
3 was a core proceeding incorporated into the
4 statutory scheme, we're saying you've got a
5 right to trial by jury for that.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: Excuse me. Could you
11 complete this sentence for me? A statutory
12 claim is sufficiently close to a common law
13 action for Seventh Amendment purposes when it?

14 MR. McCOLLOCH: Serves the same
15 essential function as a common law action
16 recognized in the courts of England in 1791.

17 JUSTICE ALITO: Serves the same
18 essential function?

19 MR. McCOLLOCH: Essential function.

20 JUSTICE ALITO: And why would that not
21 be true here?

22 MR. McCOLLOCH: Well, it -- these
23 fraud claims do serve the same essential -- in
24 the securities acts, under 10b-5, do -- do serve
25 the same essential function.

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

3 MR. McCOLLOCH: Why is it the same?

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

5 MR. McCOLLOCH: Because it has all of
6 the elements --

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

9 MR. McCOLLOCH: Why isn't it?

10 JUSTICE ALITO: Why is it?

11 MR. McCOLLOCH: It's the same -- it's
12 -- it's -- it's the same because it has all the
13 same elements. There were -- there were cases
14 back in 18th Century England that were
15 securities-type cases, fraud cases. There was
16 one case that we cite in our brief that was
17 rendered King v. Cawood in 1790, the year before
18 the Seventh Amendment was enacted, where the
19 government civilly prosecuted for penalties Mr.
20 Cawood for violation of a financial fraud -- a
21 financial statute.

22 So this -- this is a fraud claim.
23 They allege misrepresentations. They allege --
24 they allege reliance. They allege materiality.
25 And they allege damages.

1 JUSTICE ALITO: Well, were they
2 required to allege all those things?

3 MR. McCOLLOCH: They were not
4 necessarily required to, but they did, and they
5 usually do.

6 JUSTICE ALITO: Do you -- could we
7 decide this case on the narrow ground that the
8 statutory securities fraud claims are
9 sufficiently close to a common law fraud action
10 because the elements of the statutory claim are
11 a logical subset of the latter?

12 MR. McCOLLOCH: Yes, Your Honor.

13 JUSTICE ALITO: I know you think the
14 public rights/private rights distinction is
15 fuzzy, but do you think it's a difficult
16 question whether customs duties are public
17 rights or private rights -- involve public
18 rights or private rights? Same thing for
19 immigration. Same things for taxation. Same
20 thing for Social Security. Same thing for the
21 Postal Service.

22 Do you think that's a tough question?

23 MR. McCOLLOCH: No, Your Honor.

24 JUSTICE ALITO: Then why is it
25 necessary for us to jettison that inquiry?

1 MR. McCOLLOCH: Well, I don't think
2 you need to. I mean, I -- I think -- I think
3 that inquiry -- that's been well settled.
4 Plenty of cases allowing immigration, customs,
5 all of those areas to be -- to be adjudicated
6 administratively by the executive branch and,
7 again, were -- were done back in the -- most of
8 those done back in the -- in the 1800s --

9 JUSTICE ALITO: Okay. Thank you.

10 MR. McCOLLOCH: -- that way.

11 JUSTICE ALITO: Thank you.

12 MR. McCOLLOCH: So it's a long
13 tradition.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: So explain your
17 dividing line again. Serves the same essential
18 functions as a common law right in suit? Can
19 the government sue you without a statute for not
20 paying your taxes?

21 MR. McCOLLOCH: Without a statute?

22 JUSTICE SOTOMAYOR: Yes.

23 MR. McCOLLOCH: No.

24 JUSTICE SOTOMAYOR: Can the government
25 sue you for fraud under the common law if you

1 didn't have materiality, reliance -- and
2 reliance?

3 MR. McCOLLOCH: No.

4 JUSTICE SOTOMAYOR: Could they sue you
5 in common law for fraud?

6 MR. McCOLLOCH: If you defrauded the
7 government.

8 JUSTICE SOTOMAYOR: Exactly. But
9 they're not charging you here with defrauding
10 the government. They're not claiming injury to
11 the individual -- to other individuals. They're
12 claiming that the injury is to them.

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

14 JUSTICE SOTOMAYOR: To the government
15 but not in terms of money.

16 MR. McCOLLOCH: The SEC alleged in the
17 -- does allege in these cases in general and
18 alleged here --

19 JUSTICE SOTOMAYOR: When you go into a
20 private suit, other than a qui tam action where
21 the government is letting you sue in their name,
22 is the private individual recovering penalties
23 for the government and its injuries to the
24 securities market, or is it -- is it recovering
25 penalties for the individual's own injury?

1 MR. McCOLLOCH: In this case --

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

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

8 JUSTICE SOTOMAYOR: So what's the
9 essential function that's the same in an action
10 by the government and an individual?

11 MR. McCOLLOCH: This -- the --

12 JUSTICE SOTOMAYOR: The elements are
13 not the same. The remedies go to one party, not
14 the other. I'm -- I'm at a loss.

15 MR. McCOLLOCH: Okay, Your Honor. The
16 -- the substantive elements are the same, which
17 I think is the end of the inquiry, but to take
18 it further, the SEC takes those penalties,
19 according to them, they take most of the
20 penalties and most of the disgorgement money
21 that they take in and return it to the victims.

22 JUSTICE SOTOMAYOR: You know --

23 MR. McCOLLOCH: And so --

24 JUSTICE SOTOMAYOR: -- that's --
25 that's very generous of the government, but it's

1 not -- you know, I can give my money to charity,
2 but it's not the Court's right to -- the Court
3 doing that. It's the SEC choosing to do that.

4 MR. McCOLLOCH: The SEC --

5 JUSTICE SOTOMAYOR: Just like the
6 victim could choose and probably does give the
7 government some of the money in taxation. I'm
8 not sure if penalties are exempt or not.

9 MR. McCOLLOCH: Well, and -- and
10 sometimes courts frequently in these SEC fraud
11 cases appoint receivers who are ordered by the
12 court to collect money and return it to the --
13 to the investors. So -- but the SEC largely --

14 JUSTICE SOTOMAYOR: Thank you,
15 counsel.

16 MR. McCOLLOCH: -- acts today --

17 JUSTICE SOTOMAYOR: Thank you,
18 counsel.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Mr. McColloch, if you
21 look at the history of the securities
22 legislation in this country, a lot of it came
23 into effect, of course, after the Great
24 Depression, and then there would have been two
25 more recent tranches. One came after the

1 savings and loan crisis, and the other came
2 after the 2008 Great Recession, if you want to
3 call it that.

4 And each time Congress thought, you
5 know, something is going terribly wrong here and
6 people are being defrauded and people are being
7 harmed. And these common law suits that you're
8 talking about were not solving the problem.

9 And Congress said: We have to give
10 the SEC responsibilities. We have to give them
11 powers. We have to give them greater
12 authorities. And I guess what I'm wondering is
13 when you say, well, we should go back to the
14 common law suits that were brought 200 years ago
15 in the courts of Westminster, I mean, is
16 Congress's judgment after the depression, after
17 the savings and loan crisis, after the Great
18 Recession, is Congress's judgment that more
19 powers were needed within an administrative
20 agency entitled to no respect?

21 MR. MCCOLLOCH: No, it's entitled to
22 lots of respect. And, again, everything that
23 the -- that the securities acts do and
24 everything the SEC does we support. And it
25 doesn't have -- it's not a matter of not

1 respecting Congress.

2 Congress acted appropriately, except
3 insofar as they eventually in 1990 and then in
4 19 -- in 1990, when they allowed the SEC to sue
5 people outside of the regulatory universe,
6 people that were regulated and registered, they
7 gave them the authority to -- to come after any
8 person and then, in Dodd-Frank in 2010, allowed
9 them to get penalties against any person. They
10 didn't really use that power against any person
11 when they couldn't get penalties. And so, as
12 soon as they got the penalty authority, that's
13 when they could go after any person for
14 securities fraud.

15 And our argument is, has been, and --
16 and I believe the Fifth Circuit's holding is
17 that basic securities fraud allegations, whether
18 they're inside or outside of a statutory scheme,
19 the nature of the claim is private. The nature
20 of the claim, it's just exactly the same. It's
21 -- it's analogous enough to common law claims
22 that existed in 1791 in England --

23 JUSTICE KAGAN: Thank you.

24 MR. McCOLLOCH: -- and, therefore, the
25 Seventh Amendment applies, period.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: I just wanted to
4 clarify a few things that I found confusing.

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

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

9 JUSTICE GORSUCH: Okay. And then I
10 had thought that, as well, that for -- when they
11 -- when the SEC seeks civil monetary penalties,
12 it has to prove causation between the
13 defendant's conduct and a loss to persons.

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

15 JUSTICE GORSUCH: That's statutorily
16 required?

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

18 JUSTICE GORSUCH: Okay. So those
19 elements all match up?

20 MR. McCOLLOCH: They match up very
21 neatly, yes.

22 JUSTICE GORSUCH: Okay. And I thought
23 in Tull Justice Brennan made the point that
24 there doesn't have to be a perfect common law
25 analogue.

1 MR. McCOLLOCH: The -- the common law
2 analogue is a very low bar.

3 JUSTICE GORSUCH: Okay. And I thought
4 he said that the more important thing were the
5 penalties sought, that you look at the common
6 law analogue of the cause of action and -- and
7 -- and the relief sought and where those -- and
8 he placed special emphasis on the second part.

9 MR. McCOLLOCH: Correct, Your Honor.
10 And that the main issue, the more important of
11 the two elements was not the 1791 guidepost but
12 was -- was actually whether or not the
13 government's seeking penalties.

14 JUSTICE GORSUCH: Thank you.

15 MR. McCOLLOCH: And so it's all about,
16 you know, if the government's seeking penalties,
17 the -- the government is required to take the
18 case, again, under all of the other elements
19 we've talked about, it's required to take the
20 case in front of a jury if the -- if -- if their
21 target wants a jury trial.

22 JUSTICE GORSUCH: And Congress is free
23 to prescribe that and extend that and expand it
24 any way it wants.

25 MR. McCOLLOCH: Yeah.

1 JUSTICE GORSUCH: It just can't take
2 away a person's right to be heard before his
3 peers.

4 MR. McCOLLOCH: Correct. And for that
5 matter, the SEC could fix this problem by itself
6 this afternoon by giving people the option. The
7 problem here is that it's mandatory. It's
8 coercive. Most of the other cases, situations
9 at other agencies, people have an opt-out or
10 they can choose which -- which forum they go in.

11 The problem here is that it's
12 coercive. And so the SEC gets to -- gets to
13 unilaterally strip your Seventh Amendment and a
14 number of other rights away. By choosing that
15 forum --

16 JUSTICE GORSUCH: Thank you.

17 MR. McCOLLOCH: -- the SEC could fix
18 that in a heartbeat.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Yeah. Two
23 questions. For those cases that are covered by
24 your rule, whatever the scope of that is,
25 agencies, I think, under your approach could

1 still bring those same suits in federal court,
2 so there would still be full enforcement of all
3 the regulatory statutes, environmental,
4 securities, what have you.

5 But Mr. -- so I think I understand
6 your point on that. But Mr. Fletcher says
7 that's still a big problem because Congress
8 would have to enact statutes that allowed
9 agencies that don't have the authority to go to
10 federal court to do so, and he says that would
11 be a burden on federal courts.

12 And I just want to get any response
13 you might have to that.

14 MR. MCCOLLOCH: If -- if -- if there's
15 a -- if there's a common law claim for penalties
16 embedded in some of those statutes, then the
17 answer is yes.

18 JUSTICE KAVANAUGH: Well, that's not
19 the question. The question is what's -- what --
20 what about the burden on federal courts that Mr.
21 Fletcher raised, respond to that, and then the
22 burden on agency enforcement for those agencies
23 that don't have the authority to seek federal
24 civil penalties in federal court now.

25 MR. MCCOLLOCH: I could -- I could

1 speak most authoritatively to -- to -- to the
2 SEC and what effect it would have there. The
3 SEC, seeing the handwriting on the wall, has
4 already, I believe, withdrawn or returned its --
5 its securities fraud cases back to federal
6 court. So this whole notion of choking the
7 federal courts with lots and lots of cases is --
8 it didn't happen because they've already been
9 returned to the federal courts. Soon after they
10 got this authority in 2010, it went way up, and
11 then these constitutional challenges started
12 getting filed and it went back down.

13 And so I don't think -- in fact, I
14 think the -- the impact at the SEC if this Court
15 upholds the Fifth Circuit on the Seventh
16 Amendment will be zero. It'll be virtual --
17 virtually nothing.

18 JUSTICE KAVANAUGH: Okay. And then
19 second question is, if you're asking us, as some
20 of the questions suggest, to scale back, narrow
21 a precedent of ours in order that an individual
22 has a right to federal court rather than an
23 in-house tribunal, before we do that, we should
24 know that it's more than just housekeeping, that
25 it matters. And you haven't really said, you

1 know, it really matters to be in federal court
2 rather than an in-house agency tribunal, and
3 here's your opportunity.

4 MR. McCOLLOCH: You mean it matters
5 constitutionally or as a practical --

6 JUSTICE KAVANAUGH: No. Matters,
7 like, you know, we could change precedent, but
8 if it doesn't have any impact other than
9 housekeeping of where you file your briefs,
10 which tribunal you file it in, then, you know,
11 that's -- that's a lot to ask us to narrow a
12 precedent --

13 MR. McCOLLOCH: Well --

14 JUSTICE KAVANAUGH: -- for where you
15 file your briefs.

16 But does it matter?

17 MR. McCOLLOCH: It -- it -- it matters
18 --

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

21 MR. McCOLLOCH: It matters -- it
22 matters quite a bit, you know, to -- even beyond
23 the right to trial by jury, which -- which is
24 the most important of the ramifications, but
25 there's all kinds of due process issues. There

1 are prejudice issues embedded in this whole
2 process. There are a number of -- we had -- we
3 had two other issues that we raised in the Fifth
4 Circuit that they just left behind because they
5 thought they had bitten off enough with -- with
6 these three issues that the Court granted cert
7 on.

8 So the -- and if we did get back and
9 if you rule against us on everything, we've
10 still got -- they -- we've got civil --

11 JUSTICE KAGAN: More is coming?

12 MR. MCCOLLOCH: -- issues still
13 coming.

14 (Laughter.)

15 MR. MCCOLLOCH: So -- but we think the
16 Court will uphold the Seventh Amendment right
17 here, and the -- the difference between going to
18 federal court -- and I've done both -- going to
19 federal court and going to an administrative
20 proceeding is stark.

21 The -- the discovery rights are almost
22 zero. The -- the Division of Enforcement gets a
23 one- or two- or three-year head start on you.
24 They then give you an 8-terabyte disk that you
25 can't even search and say you're going to trial

1 in three or four months, and -- and off you go.

2 The Rules of Evidence don't apply.

3 The hearsay rule doesn't apply except when it
4 does. When we tried to get hearsay admitted, it
5 was -- it was denied because the hearsay --
6 because of the hearsay rule, when -- when the
7 Division of Enforcement tried to get and did get
8 copious evidence into -- into the record, and we
9 objected to hearsay, the --

10 JUSTICE KAVANAUGH: Okay.

11 MR. McCOLLOCH: -- ALJ said --

12 JUSTICE KAVANAUGH: Thank you.

13 MR. McCOLLOCH: -- hearsay doesn't
14 apply.

15 JUSTICE KAVANAUGH: Thank you.

16 MR. McCOLLOCH: It makes a big
17 difference.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: I have a question
21 about equitable remedies. So, when I talked to
22 Mr. Fletcher about whether the SEC would still
23 be able to get injunctive relief and
24 disgorgement, because they're equitable
25 remedies, Mr. Fletcher expressed concern that

1 the Court, in deciding the Seventh Amendment
2 question in your favor, might actually limit the
3 ability of agencies to get equitable remedies.

4 And then, when Justice Sotomayor asked
5 you some questions about that, you said the
6 Seventh Amendment would not stand as a barrier
7 in that context, but Article III would.

8 So, if we decided in your favor on the
9 Seventh Amendment question, do you think that
10 would necessarily resolve any kind of Article
11 III question? And if not, why did you even
12 bring it up?

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

15 JUSTICE BARRETT: Well, you brought it
16 up to Justice Sotomayor.

17 MR. McCOLLOCH: Well, I did. I
18 thought that was part of her question. But what
19 -- what I was -- what I was trying to say is,
20 number one, the Seventh Amendment issue doesn't
21 require the Court necessarily to resolve the
22 Article III issue. We don't think that the
23 Article III public/privates rights --
24 public/private right analysis is even necessary
25 to resolve this case under the Seventh

1 Amendment, which is the issue that was raised
2 below, the issue that was ruled on below.

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

7 MR. McCOLLOCH: I will say most of the
8 time, 95 percent of the time, the analysis under
9 public/private rights and the analysis under
10 Seventh Amendment for whether it was a common
11 law -- a claim that existed at common law is
12 going to come out the same. It comes out with
13 the same result.

14 And that's why this -- this construct
15 has worked for the last 50, 60 years, and maybe
16 no one's challenged it for -- for that reason.
17 And that's why we're saying we can -- we can
18 live with Atlas Roofing because Atlas Roofing
19 properly construed and as it's been
20 substantially modified by a number of subsequent
21 decisions comes to the same result.

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

1 MR. McCOLLOCH: Yes, Your Honor.

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

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

7 JUSTICE BARRETT: Is that --

8 MR. McCOLLOCH: -- a position on that.
9 We -- because we're not here -- Jarkesy does not
10 have an equitable remedy issue to -- to worry
11 about. It's a -- we only raised a Seventh
12 Amendment issue, and it was because of the
13 penalties, and it was because of Dodd-Frank.

14 JUSTICE BARRETT: Notwithstanding what
15 you told Justice Sotomayor?

16 MR. McCOLLOCH: Notwithstanding what I
17 told Justice Sotomayor.

18 JUSTICE BARRETT: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So I've heard you
22 say several times that we can live with Atlas
23 Roofing, and I'm trying to understand why, and
24 I'm reading the part of Atlas Roofing where
25 they're describing the past cases that they've

1 -- that the Court is relying on. And it seems
2 as though the basic proposition is, when
3 Congress creates new statutory public rights, it
4 may assign their adjudication to an
5 administrative agency with which a jury trial
6 would be incompatible without violating the
7 Seventh Amendment's injunction that jury trial
8 is to be preserved in suits at common law.

9 All right. So I think that's the sort
10 of basic proposition, and I understand your
11 argument to be this is not the creation of a new
12 statutory public right.

13 MR. McCOLLOCH: Correct, Your Honor.

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

22 MR. McCOLLOCH: Yes, as -- as they
23 were alleged in this case. Yes.

24 JUSTICE JACKSON: But I'm not talking
25 about the allegations. I'm talking about the

1 elements, what the government had to prove in
2 order to establish a violation of 10b-5.

3 MR. McCOLLOCH: They are substantially
4 the same and certainly serve the same essential
5 function as -- as a -- as a traditional --

6 JUSTICE JACKSON: Right, but --

7 MR. McCOLLOCH: -- common law fraud
8 claim.

9 JUSTICE JACKSON: -- but, in Atlas
10 Roofing, we had the service of the same
11 essential function of a tort claim. But
12 Congress -- the Court here still said it was new
13 statutory claim. It described the circumstances
14 under which it arise -- it arose and called it
15 new.

16 So I guess I'm trying to understand
17 why here, even though you're right, the
18 allegations, one could have made perhaps a
19 standard common law fraud claim out of the
20 allegations, if the elements of the statutory
21 claim are different, why are you suggesting that
22 it is not new?

23 MR. McCOLLOCH: Well, so I would push
24 back on -- on the notion that the OSHA
25 regulatory prophylactic claims sound in tort.

1 They don't sound in tort.

2 JUSTICE JACKSON: Because?

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

5 JUSTICE JACKSON: Do you have to have
6 injury here as an element?

7 MR. McCOLLOCH: You do not have to
8 have injury as an element, but to get damages,
9 you do, so you don't get penalties.

10 JUSTICE JACKSON: No, I understand,
11 but -- but as an element, right, you say the
12 OSHA claims didn't have the injury element. We
13 don't have that element here either. So why are
14 these claims old and those claims new?

15 MR. McCOLLOCH: Be -- because those
16 claims are -- again, they're so -- they're so
17 prophylactic as to whether your ceiling cover is
18 in exactly the right position, no one could sue
19 in tort over that because there's no -- there --

20 JUSTICE JACKSON: Because the duty is
21 arising out of the -- the -- the statutory --

22 MR. McCOLLOCH: Only out of the
23 statute.

24 JUSTICE JACKSON: All right. And the
25 duty here is arising out of the statute in the

1 same way, I think, but let me just ask you this.
2 You keep talking about Granfinanciera, if I'm
3 pronouncing it correct. I guess I'm a little
4 worried about the rule that you're asking us to
5 adopt insofar as it's suggesting that it doesn't
6 have to be a common law claim that Congress has
7 appropriated on all fours with all the elements.

8 It can be something that is like a
9 common law claim.

10 MR. MCCOLLOCH: Yes, Your Honor.

11 JUSTICE JACKSON: And I just don't
12 know where that comes from because the
13 Granfinanciera case, it was the fraudulent
14 conveyance claim. It was the sort of scary
15 scenario in which Congress is moving actual
16 common law claims into the administrative
17 process or in that case into the bankruptcy
18 process, and the Court rightly said no, I'm
19 sorry, you have a Seventh Amendment problem with
20 doing that.

21 So I -- I don't know that
22 Granfinanciera gives you the rule that we have
23 previously held that something that looks like a
24 common law claim, even though it's statutorily
25 new, raises the same kind of Seventh Amendment

1 issue.

2 MR. McCOLLOCH: Well, you know, so,
3 really, what Granfinanciera stands for in this
4 case is -- is, again, the condemnation of
5 taxonomic changes and -- and it --

6 JUSTICE JACKSON: But it's only
7 taxonomic if it's actually the same claim,
8 right?

9 MR. McCOLLOCH: It's --

10 JUSTICE JACKSON: I mean, if it's --
11 if it's the same claim on all fours and Congress
12 is just changing the name, then I get you. We
13 have exactly the problem that the Seventh
14 Amendment is concerned about.

15 What I'm still worried about is you're
16 saying Congress can create a new claim, but as
17 long as it looks kind of like a common law claim
18 or it's substantially close, I -- I don't really
19 know what the -- how close it has to be, but as
20 long as it kind of looks like a -- a common law
21 claim, the same Seventh Amendment concerns
22 arise, and I don't know that we've ever said
23 that before.

24 MR. McCOLLOCH: And I think the Court
25 has said that. Again --

1 JUSTICE JACKSON: In what case?

2 MR. McCOLLOCH: -- the -- the same
3 essential function test. Give me a moment, I
4 can find you -- and I know we have cases in our
5 brief that -- that -- that do cite that. And in
6 Stern v. Marshall, which is one of the most --
7 one of the two most recent cases where the
8 courts at least dealt with what constitutes
9 private right versus public right, this Court
10 gave sort of a -- a nice listing of about five
11 examples of -- of how you can tell the
12 difference.

13 And a private right says that the
14 underlying claim for relief "does not flow from
15 a federal statutory scheme, as in Thomas, or is
16 not completely dependent upon adjudication of a
17 claim created by federal law."

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Rebuttal, Mr. Fletcher?

22 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

23 ON BEHALF OF THE PETITIONER

24 MR. FLETCHER: Thank you, Mr. Chief
25 Justice. I'd like to say just a quick word

1 about removal and then talk about the Seventh
2 Amendment issue.

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

7 And in Free Enterprise Fund, there was
8 a real concern that the president regulated
9 parties and the public wouldn't know whether or
10 not the Securities and Exchange Commission
11 actually supported the enforcement and policy
12 actions that the Board was taking or just had to
13 tolerate those actions because of the strict
14 removal protection.

15 Now apply those same questions here
16 and you get exactly the opposite results. Here,
17 we know exactly what the Commission thinks about
18 the ALJ's decision in this case because the
19 Commission had the right to and exercised the
20 right to conduct plenary review, adopt parts of
21 it, and reject other parts of it.

22 I think that's constitutionally
23 adequate means of supervision of adjudicative
24 officers. We think that's the lesson from the
25 plurality opinion in Arthrex.

1 Also, in Free Enterprise Fund, this
2 Court said the most telling problem with the
3 scheme it confronted there was its novelty.
4 That's the through line of this Court's recent
5 cases like Seila Law, like Arthrex, like
6 Collins.

7 No foothold in history or tradition is
8 a telling constitutional problem. Here, it goes
9 the other way. The removal protection for ALJs
10 has been a central feature of administrative law
11 since the APA.

12 Now, on the Seventh Amendment,
13 obviously, the focus is Atlas Roofing. And I
14 think my friend has to do one of three things.
15 He has to distinguish it, he has to convince you
16 that you've overruled it already, or he has to
17 convince you that you should overrule it now.
18 And I don't think he's done any of those.

19 So, first of all, on distinguishing
20 it, I think it's helpful to be very concrete
21 about what was at issue in Atlas Roofing. The
22 statute at issue there said, and I quote, "that
23 employees had a right to be at a workplace free
24 from recognized hazards that were likely to
25 cause serious injury or death."

1 What had happened was that one
2 employer failed to shore up a trench and it
3 collapsed and an employee died, and another
4 employee fell through an open roof and died.

5 Those things could have been the basis
6 for wrongful death or negligence actions
7 evaluated under very similar standards, and yet
8 the Court had no problem saying that they were
9 validly enforced through administrative
10 proceedings because Congress had created a
11 federal statutory scheme.

12 It has done the same thing here. The
13 securities laws serve different purposes than
14 the common law of fraud. Congress is not just
15 taking and federalizing disputes between private
16 parties adjudicated in courts of common law. I
17 think the clearest indication of that is this
18 Court's decision in *Kokesh*, which explained why
19 the remedies that the SEC gets, even when they
20 are monetary or compensatory, are not for
21 private parties. They are remedies for a public
22 wrong and they are therefore properly considered
23 penalties. I think, for much the same reason,
24 this is not the case where you have a concern
25 about circumvention of the common law rights.

1 I think the other thing that I would
2 say is that he has tried to convince you that
3 you've overruled Atlas Roofing already in
4 Granfinanciera, but the parts of the opinion
5 that he is talking about and, with respect,
6 Justice Gorsuch, that you have quoted are about
7 suits between private parties.

8 When you talk about suits involving
9 the government, Granfinanciera is explicit. It
10 says, "even when Congress does something that is
11 closely analogous," that's a quote from the
12 common law, or effectively supplants a common
13 law cause of action with a new statutory cause
14 of action enforced by the government, that is
15 something that it can assign to an
16 administrative tribunal.

17 So, finally, that leaves him, I think,
18 asking you to overrule Atlas Roofing in one way
19 or another, on Seventh Amendment or on public
20 rights, and I think there are several reasons
21 not to do that.

22 One is that my friend just hasn't
23 asked. As Justice Sotomayor said, the words
24 "stare decisis" do not appear in his brief.
25 Even now, I don't think he has grappled with the

1 practical consequences of adopting any of the
2 rules that he has offered, and I also don't
3 think he's given you a new principle to adopt.

4 So I take the point, Justice Alito,
5 about immigration cases and tax cases and
6 customs cases. In some ways, those sound like
7 public rights, but the cases involve the
8 imposition of penalties, the requirement of
9 private parties to pay penalties for violating
10 those statutes.

11 If you look at it from a private
12 party's perspective, that's private property
13 just like the civil penalty here. The Seventh
14 Amendment and Article III don't apply
15 differently in the immigration space. When the
16 government seeks immigration penalties in court,
17 it has to do it in front of a jury.

18 So the reason why the government can
19 get administrative penalties in immigration
20 cases and in those other cases is because that
21 is not an invasion of Article III. It is not a
22 violation of the Seventh Amendment. And for the
23 reasons that the Court said in Atlas Roofing,
24 the same thing is true here.

25 So, finally, I would just like to say,

1 you know, going back to this Court's decision in
2 Brackeen last year, the Court said the parties
3 before us have raised real concerns with our
4 past precedent. They've made arguments based on
5 history.

6 But they haven't taken on the burden
7 that we expect parties to take on when they ask
8 us to overrule precedent. They haven't
9 acknowledged what they're asking for. They
10 haven't grappled with practice and principle,
11 and so whatever those arguments might be in a
12 future case, we're not going to engage with them
13 here.

14 I think you should do the same thing
15 today. I think you can reverse the decision
16 below and uphold the Securities and Exchange
17 Act's provisions at issue here without going one
18 inch beyond Atlas Roofing. And I think a
19 decision reversing the -- the Fifth Circuit on
20 that basis would leave the law exactly where you
21 found it today.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. Counsel.

25 The case is submitted.

1 (Whereupon, at 12:22 p.m., the case
2 was submitted.)
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