No. 22-859

In The
Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

GEORGE R. JARKESY, JR., AND PATRIOT28 LLC,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE INSTITUTE FOR JUSTICE, SUN VALLEY ORCHARDS, LLC, PROCRAFT MASONRY, LLC, AND C.S. LAWN & LANDSCAPE, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes & Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice is a national, public interest law firm that litigates to uphold constitutional rights, including property rights. As part of that mission, IJ litigates to ensure that governments provide appropriate procedures before taking property. *See, e.g.*, *Ingram v. Wayne County*, 81 F.4th 603 (6th Cir. 2023) (civil forfeiture); *Hohenberg v. Shelby County*, 68 F.4th 336 (6th Cir. 2023) (code enforcement); *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005) (eminent domain). Those procedures include an independent judge and jury. IJ is currently litigating to uphold the requirements of Article III and the Seventh Amendment in cases where the government seeks to impose monetary fines, and IJ is joined by clients in those cases as *Amici* here.

Sun Valley Orchards, LLC is a family farm in New Jersey that has been subjected to over half a million dollars in civil fines and "back wages" (payable to the government, not employees) by a Department of Labor administrative judge. The bulk of the liability (over $300,000) was imposed because of an error filling out DOL paperwork; the second largest portion (over $140,000) was imposed based on a credibility determination made by the agency judge. Sun Valley is currently challenging the constitutionality of agency adjudication in the Third Circuit, and IJ is

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or part or made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amici* made a monetary contribution to its preparation or submission.

representing Sun Valley in that case. *See Sun Valley Orchards LLC v. DOL*, No. 23-2608 (3d Cir.).

C.S. Lawn & Landscape, Inc. is a landscaping business in Kent Island, Maryland that has been subjected to over $50,000 in fines and "back wages" by a Department of Labor administrative judge. The bulk of the liability (over $43,000) was imposed because C.S. Lawn allegedly housed workers in an apartment that was habitable but zoned "suburban industrial." The DOL judge reasoned that these zoning law issues made statements on federal paperwork inaccurate. C.S. Lawn, also represented by IJ, is currently challenging the constitutionality of agency adjudication in the United States District Court for the District of Columbia. *See C.S. Lawn & Landscape, Inc. v. DOL*, No. 23-cv-1533 (D.D.C.).

ProCraft Masonry, LLC is a masonry business located in Tulsa, Oklahoma that is currently fighting over $31,000 in fines assessed by the Department of Homeland Security for alleged errors on I-9 forms completed by employees when they started working at the business. The bulk of the fine ($24,000) was assessed because employees sometimes took more than three days to complete the form. DHS offered a 10% discount if ProCraft agreed to settle but warned that, otherwise, ProCraft would be forced to defend itself in agency court. ProCraft, represented by IJ, is currently challenging the constitutionality of agency adjudication in the United States District Court for the Northern District of Oklahoma. *See ProCraft Masonry, LLC v. DOJ*, No. 23-cv-393 (N.D. Okla.).

SUMMARY OF ARGUMENT

I. Property occupied a central place for the founding generation, and the Framers acted, in the Constitution, to protect property rights. One way they did so was through independent judges and juries. The importance of independent judicial process when the government acts to take property is recognized in the constitutional text and in founding-era documents.

Agency judges cannot serve that role. Agency judges are employees of the executive branch and, as such, the Constitution ***requires*** that they be subject to control by politically accountable officials. As agency employees, agency judges have an acknowledged duty to follow agency policy, and failure to do so can constitute grounds for removal. Their decisions are also often subject to revision by political appointees. Agency judges are, in short, biased by constitutional design.

Nevertheless, today these inherently biased agency judges impose significant fines—fines that have the potential to destroy a business. Sun Valley was held liable for over half a million dollars by a DOL agency judge who spent practically her entire career as a DOL employee; the liability contributed to financial pressure that, ultimately, put the farm out of business. C.S. Lawn was held liable for over $50,000 by a federal agency judge for allegedly violating local zoning law, and ProCraft Masonry is currently defending against over $31,000 in fines for alleged paperwork errors. *Amici* are small businesses that cannot afford these fines. Fines like these should be imposed—if at all—by independent judges and juries.

II. This Court's cases confirm that fines must be imposed in real courts, where the right to trial by jury can be preserved.

The Seventh Amendment analysis in this case should be straightforward. The Court has already held that actions to impose monetary penalties were historically tried to juries. *See Tull v. United States*, 481 U.S. 412, 418 (1987). And the Court has also already held that, when an action would historically have been tried to a jury, Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be brought … to an administrative tribunal." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989). Those two holdings decide this appeal: This case falls within the historical jury-trial right, and trial by agency bureaucrat is incompatible with that right.

While the Court's cases have tested the boundaries of the Seventh Amendment, they are consistent with that conclusion. Cases that involve "public rights," and that may be adjudicated by the executive branch, involve questions that historically could have been resolved by the political branches. To give an obvious example: Payment of benefits claims is an inherently executive function, so adjudication of Social Security claims involves public rights. Historically, executive officials were similarly charged with tax collection, customs enforcement, and border control. By contrast, executive employees did not historically adjudicate liability for fines.

The only case that potentially holds otherwise is *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

However, as Justice White correctly advised, "*Atlas Roofing* is no longer good law." *Granfinanciera*, 492 U.S. at 79 (White, J., dissenting). The broad language of *Atlas Roofing* has been superseded by later decisions, particularly *Granfinanciera* and *Tull*. If anything is left of *Atlas Roofing* it is only the narrowest holding—rejecting the claim that the agency adjudication in that case had to be followed by a ***second*** trial in the federal courts, where a jury would exercise "*de novo*" review over the agency. Pet. Br., *Atlas Roofing*, 1976 WL 194263, at *19–20, *86 (1976). So understood, *Atlas Roofing* does not resolve the antecedent question whether monetary penalty proceedings can be adjudicated outside the Article III courts at all. If the Court reads *Atlas Roofing* for anything more than that, then *Atlas Roofing* should be overruled.

III. Correctly enforcing the Seventh Amendment would not overburden the federal courts. Most of what agency judges do involves "public rights"; most agency judges are employed by the Social Security Administration, and there is no question that paying benefits is an executive function. Cases to issue permits or licenses, to terminate public employment, or to grant admission at the border also involve quintessential "public rights." And while cases to impose monetary penalties ***do*** require a jury trial, most such cases settle (and thus impose little judicial burden). For those defendants who refuse to settle, any burden on the judiciary is constitutionally required and irrelevant.

IV. Finally, a word of caution: The government has suggested that cases involving "immigration" implicate public rights, Pet. 11, but, while that is broadly true, it is also an oversimplification. Executive branch

officials historically determined whether to grant admission to the country, and cases raising such questions involve public rights. However, a fine or other penalty does not involve public rights merely because it in some way touches on the immigration system. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896). A contrary rule would affect the Seventh Amendment rights of every employer in the country, as ***every*** employer, like ProCraft Masonry, could be fined in agency courts for errors on its I-9 paperwork. And many other employers, like Sun Valley and C.S. Lawn, could be fined in agency courts merely because they employ workers on visas, even though the fines involve garden variety employment issues unrelated to immigration status. The Court should take care not to inadvertently endorse an overbroad "immigration" exception to the Seventh Amendment.

ARGUMENT

I. Agency Bureaucrats Cannot Serve The Constitutional Function Of Independent Judges And Juries.

When the government tries to take property as punishment, the Constitution provides a simple safeguard: a jury of ordinary people who assess the facts and decide if you truly did something wrong. Agency judges cannot serve that role.

A. The Need For An Independent Judiciary Is Particularly Acute When The Government Takes Property.

Property rights occupied a central place for the founding generation. *See* Paul J. Larkin, Jr., *The*

Original Understanding of "Property" in the Constitution, 100 MARQ. L. REV. 1, 27 (2016). The Virginia Declaration of Rights listed the "means of acquiring and possessing property" among mankind's "inherent" natural rights. VA. DECL. OF RIGHTS § 1 (1776). The *Federalist Papers* deemed the "first object of government" to be the protection of the "faculties of men, from which the rights of property originate." FEDERALIST NO. 10 (James Madison). Property was "the main object of Society." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 1966); *see also id.* at 534 ("the principal object of Society"). As John Adams put it, "property must be secured or liberty cannot exist." 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

One way the Founders protected property rights was by providing for independent judges and juries. In fact, one of the colonists' grievances against King George III was that he had "depriv[ed] us of the accustomed and inestimable privilege of Trial by Jury, in cases affecting ***both life and property***." SECOND CONTINENTAL CONGRESS, DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775) (emphasis added). This grievance made its way into the Declaration of Independence, which faulted the King for "depriving us, in many cases, of the benefits of Trial by Jury." THE DECLARATION OF INDEPENDENCE, para. 20 (U.S. 1776).

Independent judges and juries guard against the arbitrary or improper exercise of government power, including the use of government power to limit property rights. Patrick Henry thus praised the jury as the "the best appendage of freedom" by which "our

ancestors secured their lives ***and property***." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 324, 544 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888) (emphasis added); *see also* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852) ("The trial by jury protects person and property, inviolate to their possessors, from the hand of the law.").

The Virginia Declaration of Rights declared that "in controversies ***respecting property*** … the ancient trial by jury is preferable to any other and ought to be held sacred." VA. DECL. OF RIGHTS § 11 (1776) (emphasis added). Other founding-era state constitutions similarly linked the jury right to property rights. *See, e.g.*, PA. CONST. art. XI (1776) ("controversies respecting property"); N.C. CONST. art. XIV (1776) ("controversies at law, respecting property"); N.H. BILL OF RIGHTS art. XX (1783) ("controversies concerning property"). Virginia's commentary upon the ratification of the Constitution—which contributed to the enactment of the Seventh Amendment—likewise stated that "in controversies ***respecting property*** … the ancient trial by jury is one of the greatest securities to the rights of the people." THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 224 (R. Ketcham ed., 2003) (emphasis added).

Going back further, Magna Carta provided that "[n]o free man shall be … stripped of his rights ***or possessions*** … except by the lawful judgment of his equals or by law of the land." MAGNA CARTA cl. 39

(1215) (emphasis added).[2] William Blackstone quoted this provision in his *Commentaries* and stated that the jury right is particularly important in cases involving the government, as "in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject." 4 WILLIAM BLACKSTONE, COMMENTARIES *343.

That the Seventh Amendment was similarly focused on deprivations of property can be seen from the text, which preserves the right in cases "where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. The civil jury right was intrinsically linked to protection for property.

Other parts of the Constitution are similarly explicit that deprivation of property requires independent judicial process. Most obviously: "No person shall be … deprived of life, liberty, ***or property***, without due process of law." U.S. CONST. amend. V (emphasis added). Of course, this case arises under the Seventh Amendment, not the Due Process Clause. But the Seventh Amendment is one—discrete and express—part of the "process of law" that the Constitution guarantees. Article III is another. *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1542 (2020) ("The deprivation of life, liberty, and property generally requires judicial process and therefore judicial power."). The Framers' express concern to ensure appropriate process when government

[2] *Available at* The UK National Archives, Magna Carta, https://bit.ly/3QmErdB.

takes property should inform the interpretation of the Seventh Amendment and Article III.

In line with this insight, this Court has recognized the importance of independent process when the government terminates property rights. The Court has recognized the "duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *see also id.* at 81 (noting the "high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference"). "Due protection of the rights of property has been regarded as a vital principle of republican institutions." *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–36 (1897) (marks omitted). Procedures to ensure neutral decisionmaking are particularly important where, as here, "the Government has a direct pecuniary interest in the outcome." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993).

In fact, even the government and its *amici* partly concede the point. In the portion of its brief defending restrictions on removal, the government states: "The potential for actual or perceived undue influence is increased by the fact that … ALJs typically resolve disputes between regulated parties and the agency itself." U.S. Br. 53. The Association of Administrative Law Judges likewise states, as *amicus*, that agency judges "have a different relationship to the executive power than do executive officials engaged in policymaking and enforcement" and that "a greater degree of insulation from arbitrary removals from office is needed to protect fair and just adjudications." Br.

Ass'n Admin. L. Judges 3. That is exactly why the Constitution requires independent judges and juries.

B. Agency Courts Are Concededly Biased By Design.

Agency bureaucrats cannot step into the shoes of independent judges and juries. This is not a comment about anyone's integrity or professionalism; it is a product of the fact that agency judges are—definitionally—agency employees.

As a matter of constitutional principle, agency judges ***must*** be accountable to political appointees. The "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws," *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 499 (2010), and the "exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate," *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021). An independent agency judge would be a constitutional oxymoron.

Part of an ALJ's job is to follow agency policy. The *Manual for Administrative Law Judges*, a publication of the Administrative Conference of the United States, states that it is the ALJ's "duty to decide all cases in accordance with agency policy." ACUS, MANUAL FOR ADMINISTRATIVE LAW JUDGES 107 (3d ed. 1993).[3] Consistent with that understanding, the

[3] *Available at* https://perma.cc/EAF3-NHNG; *see also* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES i, 136–37 (2004).

government concedes in its brief that "refusal to follow established agency policy would constitute 'good cause' for removal," U.S. Br. 52, and contemplates that "good cause" would include "failure to accept supervision," *id.* at 61.

A landmark survey of agency judges confirms that agency judges feel pressure to side with their agency. *See* PAUL R. VERKUIL *ET AL.*, ACUS, THE FEDERAL ADMINISTRATIVE JUDICIARY 916–17, 927–28 (1992).[4] That study found that 61% of federal ALJs reported that "agency interference" was a "problem" in their work, with 26% reporting that it was a frequent problem. *Id.* at 916–17. Non-trivial numbers of ALJs reported that they felt "pressure for different decisions" as well as "threats to independence." *Id.* at 922. Unsurprisingly, studies find that agencies enjoy a higher "win" rate before agency judges. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1645–46 (2016).

And it gets worse. In many cases, the decisions of agency judges are subject to plenary review by political appointees (even as those decisions are subject only to highly deferential review by the judicial branch, *see infra* Part I.D). That is the case here, as the government points out. *See* U.S. Br. 52 (stating that SEC has "plenary power to replace [an ALJ's] decision with its own ruling"). The same is also true for other agencies: The Secretary of Labor, for instance, has asserted effectively limitless authority to overrule agency judges. *See* 85 Fed. Reg. 13186 (Mar. 6, 2020).

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[4] *Available at* https://perma.cc/B7VJ-6XQV.

By law, agency heads can be involved in both enforcement and adjudication in the same case. 5 U.S.C. § 554(d)(2)(C).

So, while statutes provide some limited protections for ALJ independence, the reality is that, under the government's theory, none of those protections are required. Worse, as the Fifth Circuit held, those limited protections themselves violate constitutional provisions that govern the executive branch. *See* Pet. App. 28a–34a. At best, any independence that agency judges might enjoy is temporary, limited, and conditional. At worst, the independence of agency judges is itself unconstitutional. Either way, agency judges are biased by constitutional design.

C. Nevertheless, Agency Judges Today Impose Significant Fines.

Today, inherently biased agency judges impose significant fines in a range of cases. The experience of *Amici* illustrates how that phenomenon affects real people who are targeted for sanctions by the administrative machine. In each case, the government is seeking to impose significant liability that calls out for neutral adjudication—both to determine liability and to decide the appropriate amount of any fine.

Sun Valley Orchards, for instance, was held liable for over $500,000 by a DOL judge. *See Administrator v. Sun Valley Orchards, LLC*, No. 2017-TAE-00003 (DOL Oct. 28, 2019).[5] The ALJ in Sun Valley's case was a DOL lifer: She began working at DOL not long after graduating from law school, and, except for a

[5] *Available at* https://perma.cc/F4XJ-PZAQ.

one-year stint at the Social Security Administration, worked at DOL for her entire legal career.[6]

A significant proportion of the liability in Sun Valley's case—over $140,000—turned on a credibility determination. *See Sun Valley Orchards,* No. 2017-TAE-00003, at 44. The agency claimed that some of Sun Valley's employees were unlawfully fired, whereas Sun Valley claimed they quit. The ALJ weighed the testimony and held that the testimony of Sun Valley's management, "compared to the employees, lacks credibility." *Id.* That kind of fact finding is appropriately the role of a jury; it is "the exclusive province of the jury … to judge of the credibility of the witnesses." *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 50–51 (1837). In Sun Valley's case, though, that role was served by an agency employee.

The liability imposed on Sun Valley contributed to financial pressure that put the farm out of business. *See* Jason Nark, *Selling the Farm: Why One South Jersey Farmer Decided to Call It Quits*, PHILA. INQUIRER (Aug. 28, 2022).[7] In addition to $140,000 imposed based on a credibility finding, the ALJ also imposed a $198,450 fine because of how Sun Valley described its meal plan for workers in agency paperwork. *See* 2017-TAE-00003, at 35–43. While agency regulations give broad discretion to set the amount of a fine, subject only to an upward cap, *see* 29 C.F.R.

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[6] *See* Resume of ALJ Timlin (at page 109), *available at* https://perma.cc/UD4J-UAWH. The practice of essentially laundering ALJ hires through the Social Security Administration is a common way for agencies to avoid the Office of Personnel Management hiring process. *See* Barnett, *supra*, at 1674 n.205.

[7] *Available at* https://bit.ly/3M0w84w.

§ 501.19, the ALJ deferred to enforcement staff's penalty determination, which it upheld as "reasonable" and "rational." 2017-TAE-00003, at 43.

C.S. Lawn and ProCraft are likewise facing significant fines imposed for technical violations. In C.S. Lawn's case, an ALJ imposed over $43,000 in liability because C.S. Lawn rented workers an apartment that was zoned "suburban industrial," even though the ALJ did not find the apartment substandard in any way. *See Administrator v. C.S. Lawn & Landscape, Inc.*, No. 2018-TNE-00023, at 37–39 (DOL Sept. 6, 2019).[8] ProCraft, meanwhile, has been targeted for over $31,000 in liability, primarily because employees did not complete their I-9 paperwork within three days. *See ProCraft*, No. 23-cv-393, D.E. 3-1. In both instances, agency judges both decide liability and determine the amount of the fine.

Agency records are filled with other examples of significant fines imposed for regulatory infractions. EPA's administrative courts, for example, imposed a $230,958 penalty because a company did not complete paperwork, *In re VSS Int'l, Inc.*, No. CWA-20-02 (EPA Dec. 16, 2020); fined another company $126,800 for grinding tree stumps into wood chips, *In re Vico Constr. Corp.*, No. CWA-05-01 (EPA Sept. 29, 2005); and

[8] *Available at* https://perma.cc/B96J-UEPL. In both *Sun Valley* and *C.S. Lawn*, the amounts awarded by the ALJ included "back wages" in addition to fines. These "back wages" are payable to the agency. DOL may eventually pass on some of those amounts to the workers, but DOL's own inspector general found that does not always occur. *See* DOL, OFFICE OF INSPECTOR GENERAL, WAGE AND HOUR DIVISION NEEDS TO STRENGTHEN MANAGEMENT CONTROLS FOR BACK WAGE DISTRIBUTIONS (Mar. 2015), *available at* https://perma.cc/M3JR-NEQU.

fined a company and its chief executive $131,014 for inadequate leak detection on an underground tank, *In re Andrew B. Chase*, No. RCRA-13-04 (EPA Aug. 1, 2014). A judge at the USDA imposed a penalty of $22,448 for entering a sore horse in a championship show. *In re Daphne France*, No. 20-J-0045 (USDA Feb. 13, 2023). Fines imposed by DOJ ALJs for I-9 paperwork violations can likewise easily amount to tens of thousands of dollars.[9]

D. Later Review Is No Substitute For Independent Adjudication.

Deferential "appellate" review cannot supply the independent decisionmaking required by the constitutional scheme.

Judicial review of agency decisions is necessarily limited. Formally, courts review agency decisions through a deferential lens, asking if the decision is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *see also Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) ("[T]he threshold for such evidentiary sufficiency is not high."). Courts, moreover, review agency decisions on a closed record, based on facts determined by the agency. *See, e.g.*, *Duckworth v. United States ex rel. Locke*, 705 F. Supp. 2d 30, 40 (D.D.C. 2010).

Sun Valley's experience illustrates the point. In addition to challenging the constitutionality of agency adjudication, Sun Valley sought review of the

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[9] *See generally* DOJ, OCAHO, Administrative Decisions, https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

underlying merits in district court. The district court judge held that, "[b]ecause the Court owes deference to the ALJ's evaluation of the evidence and assessment of the credibility of witnesses," he was compelled to reject such claims. *Sun Valley Orchards LLC v. DOL*, 2023 WL 4784204, at *10 (D.N.J. July 27, 2023). The ALJ's factual findings were effectively final.

The so-called "appellate model" also disregards the fact that defendants must fight their way through biased agency proceedings to access the federal courts—a costly process that can take years. As ProCraft's experience demonstrates, agencies use these costs and delays for leverage in settlement negotiations: Agency enforcement personnel in ProCraft's case specifically noted that "a complaint will be filed with the Office of Chief Administrative Hearing Officer (OCAHO), which will be followed by a full discovery request," and that it "will generally take a year or more to reach a point where a hearing on the merits can be scheduled at a later date." *ProCraft*, No. 23-cv-393, D.E. 3-2 at 2. The enforcement official followed this up with a settlement offer. *Id.* A defendant might reject such an offer if—after persevering through discovery—they could present their case to a jury. Settlement becomes more attractive when the reward of perseverance is a hearing before an agency employee.

Such heavy-handed settlement tactics are no accident; they are an intended byproduct of the current system of agency courts. In 1972, the Administrative Conference of the United States recommended shifting penalty proceedings from the Article III courts to agency courts. *See* ACUS, RECOMMENDATION 72-6, CIVIL MONEY PENALTIES AS A SANCTION (Dec. 14,

1972).[10] In doing so, ACUS stated that the "quality of the settlements under the current system is a concern." *Id.* The accompanying report was more explicit: "a knowledgeable defendant may have undue leverage and may ultimately be able to force an unwise settlement." HARVEY J. GOLDSCHMID, ACUS, REPORT IN SUPPORT OF RECOMMENDATION 72-6 at 90 (1972).[11] The recommendation and report put nicer lipstick on the pig, but the point is clear: The government shifted adjudication from courts to agencies in order to give agencies more settlement leverage, which comes at the expense of defendants who would otherwise exercise their jury right. The resulting settlements cannot be addressed through appellate review.

In fact, this Court has already rejected the premise of the so-called "appellate model" in the due process context. In *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972), a government argued that a trial judge's bias was irrelevant because "any unfairness at the trial level can be corrected on appeal." The Court rejected that claim, reasoning that "the State's trial court procedure [cannot] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication," as a defendant is "entitled to a neutral and detached judge in the first instance." *Id.* at 61–62.

II. This Court's Cases Confirm That Actions To Impose Fines Require A Jury Trial.

This Court's cases support a clear rule: Historically, proceedings to impose monetary fines were tried

[10] *Available at* https://perma.cc/WBL4-Y4T9.
[11] *Available at* https://perma.cc/V3DB-CLYE.

to juries, and the same must be true today. Some cases test the boundaries of this rule, but all can be distinguished; to the extent that they cannot, they should be overruled.

A. At Common Law, Monetary Fines Were Tried To Juries.

1. This Court's cases adopt a straightforward, historical approach to determining whether a case implicates "private rights." *See, e.g.*, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1376-77 (2018); *Stern v. Marshall*, 564 U.S. 462, 488-89 (2011). The Court asks whether an issue is of the sort that historically would have been determined by the executive branch, without involvement by the courts, or whether it involves the type of issue that would have been tried in the courts.

The "private rights" category includes issues that would have been tried both in courts of equity and courts of law. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). At a minimum, however, the private rights category includes "any matter which, from its nature, is the subject of a suit at the common law," *Stern*, 564 U.S. at 488 (quoting *Murray's Lessee*, 59 U.S. at 284), or "the stuff of the traditional actions at common law tried by the courts at Westminster," *id.* at 484 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring). If a case traditionally would have been tried to a jury, then it involves private rights.

2. This historical approach supports a blanket rule: Actions to impose monetary penalties require a jury trial.

The Court conducted the necessary historical analysis in *Tull v. United States*, 481 U.S. 412, 418–19 (1987), and concluded that "[a]ctions by Government to recover civil penalties under statutory provisions … historically have been viewed as one type of action in debt requiring trial by jury." Under *Tull*, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422.

Other authorities agree. Blackstone stated that the court of the king's bench, the "supreme court of common law in the kingdom," would have jurisdiction over actions "which, being a breach of the peace, favor of a criminal nature, although the action is brought for a civil remedy; and for which the defendant ought in strictness to pay a fine to the king." 3 COMMENTARIES at *41–42. Common law courts held that imposition of a penalty "is as much a civil action, as an action for money had and received." *Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1147 (K.B. 1775); *see also Calcraft v. Gibbs,* 101 Eng. Rep. 11, 11 (K.B. 1792) (jury trial on action for "penalties on the game laws"); *Cox v. Mundy*, 96 Eng. Rep. 267, 267 (K.B. 1764) (jury trial for action "for a penalty incurred by having foreign lace in her house").

This tradition remained in place through the nation's early history. *See, e.g.*, *Stearns v. United States*, 22 F. Cas. 1188, 1192 (C.C.D. Vt. 1835) (No. 13,341) ("Actions for penalties are civil actions, both in form and in substance."); *United States v. Gates*, 25 F. Cas.

1263, 1266 (S.D.N.Y. 1845) (No. 15,191) ("Ordinarily mere statutory penalties are to be sued for and recovered by action of debt."); *United States v. Chouteau*, 102 U.S. 603, 611 (1880) ("Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law."); *Lees v. United States*, 150 U.S. 476, 478 (1893) ("From the earliest history of the government, the jurisdiction over actions to recover penalties and forfeitures has been placed in the district court."); *Hepner v. United States*, 213 U.S. 103, 108 (1909) ("It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal."); *cf. Stockwell v. United States*, 23 F. Cas. 116, 121 (C.C.D. Me. 1870) (No. 13,466), *aff'd*, 80 U.S. 531 (1871) ("[p]enalties accruing by the breach of the act" could be collected "by indictment, information, debt, or action on the case").

Even as late as 1972, it was still true that the "vast majority of agencies must be successful in a *de novo* adjudication in federal district court … before a civil money penalty may be imposed." GOLDSCHMID, *supra*, at 899. Agency adjudication of monetary fines is a distinctly recent phenomenon.

3. The government argues that, even if this case would be tried to a jury in federal court, no jury is required if the agency instead proceeds in an administrative forum. That argument, however, is inconsistent with *Granfinanciera*, which makes clear that "Congress cannot eliminate a party's Seventh

Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency." 492 U.S. at 61. At common law, actions to impose monetary penalties were tried to juries, and agencies cannot evade that requirement by proceeding in an administrative forum. It is that simple.

B. The Court's Precedents Can (And Should) Be Reconciled With That Common Law Rule.

1. The government argues that this Court's precedents instead require a terrifyingly broad definition of "public rights" that would sweep up practically any case involving the government. *See* U.S. Br. 23.

Not so. The public rights category is, simply, the converse of the private rights category: While private rights include "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," *Murray's Lessee*, 59 U.S. at 284, public rights include matters that "from their nature do not require judicial determination" because they involve "the performance of the constitutional functions of the executive or legislative departments," *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (marks and citation omitted). In other words, public rights involve functions that historically could have been carried out in the first instance by the political branches.

True "public rights" therefore implicate the historical role of the executive. The executive branch has always awarded benefits, issued patents, regulated its own employees, collected taxes, and imposed

customs duties. By contrast, the executive branch has ***not*** always adjudicated factual and legal issues concerning liability for penalties. Indeed, the government in its brief presents ***no evidence whatsoever*** that the adjudication of penalties was historically understood to be one of the "constitutional functions of the executive or legislative departments."

2. While the Court over the years has tested the boundaries of this basic allocation of power, it has done so in ways that, ultimately, are consistent with this historical rule.

First, *Murray's Lessee* affirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." 59 U.S. at 284. The facts of *Murray's Lessee* involved a dispute between the federal government and its employee over the collection of federal revenue—a class of dispute that, the Court emphasized, could historically be resolved without involvement by the courts. *Id.* at 285.

Second, *Crowell* affirmed a no-fault workers' compensation system under which the agency's factfinding role was akin to "parties, masters, and commissioners or assessors" who might be called upon to "take and state an account or to find the amount of damages." 285 U.S. at 51. The Court emphasized that, at admiralty, such issues would historically have been decided without a jury. *Id.* at 51–52.

Third, the Court has approved agency adjudication of questions concerning collection of taxes and customs duties. *See Passavant v. United States*, 148

U.S. 214, 220 (1893) (customs); *Helvering v. Mitchell*, 303 U.S. 391 (1938) (taxes). These, too, fit within the relevant history, as both customs and taxes were historically collected by executive officials. *See, e.g.*, James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1875 (2010). The judiciary did have a role to play, as customs and revenue officials could be held liable after-the-fact through actions for damages. *Id.* But, given the practical realities of customs and tax collection, that role was one of review. Such matters may, then, be determined by executive officials in the first instance, with later judicial review.[12]

Fourth, the Court has allowed customs officials to condition a grant of permission for a ship to disembark on an agreement to make a monetary payment. *See Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 329 (1909); *Lloyd Sabaudo Societa v. Eltin*, 287 U.S. 329, 333 & n.1 (1932). These payments were required because the customs officials determined that the ships had not complied with certain regulations. But, ultimately, payment had to be made in order to secure a permit to leave harbor, and the issuance of such permits is a traditional executive function. Thus, the Court in *Oceanic* specifically distinguished a permit denial from other "methods which were not within the competency of administrative duties, because they required the exercise of judicial authority." 214

[12] This is, at bottom, how the tax system works today. A party can challenge a tax in the Article II courts without paying, or can instead pay and sue in the Article III courts for a refund. *Compare* 26 U.S.C. § 6213(a), *with* 28 U.S.C. § 1346(a)(1).

U.S. at 343. Those cases, also, fit within historical bounds.[13]

Finally, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court recognized that an agency with rulemaking power may, rather than proceeding by rule, use adjudication to set regulatory policy. The Court, again, took care to emphasize that, under traditional common law standards, the relief afforded by the agency did not trigger the right to trial by jury. *Id.* at 48 (invoking the traditional exemption for claims where "recovery of money damages is an incident to equitable relief").

The ultimate lesson of these cases is that, in each, the Court upheld agency adjudication only after conducting a careful historical analysis. That same analysis, here, leads to the opposite result. There is no support for the idea that executive officials historically would have adjudicated factual and legal issues pertaining to the imposition of monetary penalties. That, instead, was the appropriate role of common law courts and juries.

3. The only possible sticking point is *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). Decided just five

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[13] *See generally* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 604 n.189 (2007) (discussing these cases). Requiring a money payment as a condition of a permit can, of course, raise other constitutional issues—and may even, in some instances, constitute a taking. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (recognizing constitutional limits on exactions); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (same). But, in any event, that is not what the SEC has done here. The SEC has imposed liability, plain and simple, just like a court would do.

years after ACUS recommended shifting adjudication of monetary penalties from the Article III courts to agency tribunals, *Atlas Roofing* has sometimes been read as granting blanket approval for agency adjudication of monetary penalties.

However, while *Atlas Roofing* does contain broad language, it cannot be read in a vacuum. A broad reading of *Atlas Roofing* would be incompatible with the later decisions in *Tull* and *Granfinanciera*. If actions to impose money penalties fall within the Seventh Amendment (*Tull*), and if Congress cannot avoid the Seventh Amendment by shifting cases to agency courts (*Granfinanciera*), then *Atlas Roofing* cannot stand for the proposition that agencies can impose penalties through in-house agency judges. If it did, the three cases would be at war.

The Court expressly disapproved the broad language of *Atlas Roofing* in *Granfinanciera*. The Court in *Granfinanciera* was explicit: Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be brought … to an administrative tribunal." 492 U.S. at 52. In so holding, the Court quoted and disapproved *Atlas Roofing*'s suggestion that the jury right can be limited merely because "proceedings have been placed in 'an administrative forum with which the jury would be incompatible.'" *Id.* at 61 (quoting, with disapproval, *Atlas Roofing*, 430 U.S. at 450). The Court stated that it viewed the public/private right distinction differently from what "*Atlas Roofing*'s discussion suggests," *id.* at 53, and disavowed "[w]hatever terminological distinctions *Atlas Roofing* may have suggested," *id.* at 55 n.10.

Justice White, dissenting in *Granfinanciera*, stated that the Court's decision "can be read as overruling or severely limiting the relevant portions of" several opinions, including *Atlas Roofing*, 492 U.S. at 71 n.1, and, correctly, raised the prospect that "*Atlas Roofing* is no longer good law." *Id.* at 79.

To the extent it means anything at all, *Atlas Roofing* should be limited to the specific question raised by the litigants: The petitioners in *Atlas Roofing* took for granted that the penalties in that case could be adjudicated in the first instance in an agency court; they argued that administrative hearing had to be followed by a ***second*** trial in federal court, where a jury would exercise *de novo* review over the agency. *See* Pet. Br., *Atlas Roofing*, 1976 WL 194263, at *19–20 (1976) ("*de novo* review in district court would come after the administrative process is complete"); *id.* at *86 ("the *de novo* review would occur after a testimonial and evidentiary record has already been made in the administrative process"). Presented with that argument, *Atlas Roofing* declined to alter the statutory scheme by requiring two trials.[14] But the Court had no occasion to resolve the separate and antecedent question of whether such proceedings could be adjudicated outside the Article III courts at all—the question that has been the focus of the Court's more recent "private rights" decisions. That separate question is left to be answered here.

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[14] *See Tull*, 481 U.S. at 418 n.4 (likewise explaining that *Atlas Roofing* addressed a narrow question involving the "functional compatibility [of the jury right] with proceedings outside of traditional courts of law").

If the Court instead reads *Atlas Roofing* more broadly, then *Atlas Roofing* should be overruled. *Atlas Roofing* failed to engage in the historical analysis required by this Court's cases, and, as such, "was not well reasoned." *Janus v. AFSCME*, 138 S. Ct. 2448, 2481 (2018). The vague, multi-factor test suggested by *Atlas Roofing* draws a line between "public" and "private" rights that, in practice, has "proved to be impossible to draw with precision," *id.*, as demonstrated by the Court's repeated struggles with the test. *See Oil States*, 138 S. Ct. at 1373 (recognizing that "precedents applying the public-rights doctrine have 'not been entirely consistent'"); *see also Stern*, 564 U.S. at 488. The decision in *Atlas Roofing* was also decided "against a very different legal and economic backdrop." *Janus*, 138 S. Ct. at 2483. It has led to a dramatic expansion in the use of agency judges to impose monetary fines, while, at the same time, its reasoning has been fatally undermined by subsequent precedent. Nor is there any relevant reliance interest: Going forward, agencies can simply pursue penalties in a manner that complies with the Seventh Amendment. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020). In short, *Atlas Roofing* is "an 'anomaly' in our ... jurisprudence," *Janus*, 138 S. Ct. at 2483, and should not control the decision here.

III. Adherence To The Constitution Would Not Overburden The Federal Courts.

Other *amici* argue that the Court should decline to enforce the Seventh Amendment based on "[w]orkload factors," Br. Admin. Law Scholars 29, and to spare "busy district court dockets," Br. Nat'l Treasury Emp. Union 9–10.

Such arguments are properly irrelevant. *See, e.g.*, *N. Pipeline*, 458 U.S. at 74. If enforcing the Constitution overburdens the Article III courts, the appropriate solution is for Congress and the President to appoint more Article III judges.

In any event, predictions of catastrophe overlook the limited scope of the right at issue. Most of what federal ALJs do fits comfortably within the "public rights" doctrine. Of 1,931 ALJs employed by the federal government, a full 1,655 are employed by the Social Security Administration to address benefits claims, and an additional 101 are employed by the Office of Medicare Hearings and Appeals.[15] And much of what ALJs do at other agencies is similarly noncontroversial. At DOL, for instance, many adjudications involve the Davis-Bacon Act, a law that governs government contractors.[16] At EPA, many adjudications involve whether to issue permits.[17] Federal ALJs decide questions involving federal employees, licenses, permits, patents, debarment from federal programs, and other issues that would historically have been decided—at least in the first instance—by the executive branch. If the Court were to properly enforce the Seventh Amendment, most of what federal ALJs do would go undisturbed.

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[15] *See* Office of Personnel Management, *Federal ALJs By Agency,* https://perma.cc/2A7UY5S9 (data as of March 2017).

[16] *See generally* DOL, *Secretarial and Administrative Review Board Decisions*, https://www.dol.gov/agencies/oalj/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.

[17] *See generally* EPA, *Active Dockets*, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Active+Dockets?OpenView.

Predictions of catastrophe also overlook the fact that most penalty proceedings settle. In 1972, at a time when most defendants targeted for monetary penalties by federal agencies were still able to insist on adjudication in the federal courts, an ACUS report found that agencies "settle well over 90% of cases." GOLDSCHMID, *supra*, at 899. Settlements remain overwhelmingly common today. *See*, *e.g.*, Ronald H. Rosenberg, *Doing More or Doing Less for the Environment: Shedding Light on EPA's Stealth Method of Environmental Enforcement*, 35 B.C. ENV'T AFFS. L. REV. 175, 196 (2008). As a practical matter, then, the relevant question is not whether every person who is targeted for a penalty will receive a jury trial (no more than every person accused of a crime actually receives a jury). Instead, the question is whether the government should be allowed to strengthen its hand in settlement negotiations with those who do not contest liability by sacrificing the jury rights of those who insist they did nothing wrong. So viewed, the question answers itself.

IV. While The Right To A Judge And Jury Is Not Unlimited, The Court Should Take Care Not To Recognize A Boundless "Immigration" Exception.

One final point. The government has suggested that cases involving "immigration" fall within the public rights category. Pet. 11. While that is true in some sense, it is also an oversimplification. The Court, in drafting its opinion, should take care not to endorse a sweeping "immigration" exception to the Seventh Amendment that would sweep up broad categories of penalty proceedings that only tangentially

touch upon the nation's immigration laws—including the penalty proceedings that *Amici* are currently challenging in the lower courts.

To be sure, cases involving the decision whether to admit a person into the country fall within the public rights category. The decision to allow or deny admission to the country was made by executive branch officials, and, in recognition of that history, this Court has held that executive officials may adjudicate cases involving the decision to grant admission at the border or to exclude, expel, or deport aliens. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

The Court's cases make clear, however, that this "immigration" doctrine is limited to the question of admission or exclusion. So, for instance, in *Wong Wing*, the Court held that if Congress attempts to promote its immigration policy through additional punishments, such as "infamous punishment at hard labor, or by confiscating their property," then it "must provide for a judicial trial to establish the guilt of the accused." 163 U.S. at 237; *see also* Nelson, *supra*, at 604 n.189 (discussing the decision); *see also supra* pp. 24–25 (discussing cases).

The experience of *Amici* shows why this matters. ProCraft Masonry has been targeted for fines because employees did not always complete their I-9 paperwork within three days of starting work; and while I-9 paperwork is related to immigration—in the sense that its purpose is to ensure that employees are authorized to work—such paperwork is legally required every time ***any*** employee starts work ***anywhere*** within the United States. *See* 8 C.F.R. § 274a.2. Sun

Valley and C.S. Lawn, meanwhile, were fined for garden variety employment law issues that just happened to involve workers on employment visas. The issues in these cases will not determine anybody's immigration status. If cases like these can be adjudicated in agency courts just because they are in some sense related to immigration, then practically every business in the country will be at risk of losing its Seventh Amendment rights.

Ultimately, of course, the Court in this case has no reason to sort through exactly what immigration-related proceedings involve "public rights." The Court should, however, take care not to inadvertently cut off the claims of *Amici*—and others like them—with a categorical reference to "immigration" cases.

CONCLUSION

The decision below should be affirmed.

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