No. 22-859

IN THE

# Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION,

*Petitioner,*

v.

GEORGE R. JARKESY, JR., ET AL.,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

1. Whether statutory provisions that empower the Securities and Exchange Commission ("SEC") to initiate and adjudicate administrative enforcement proceedings seeking civil penalties for common law claims violate the Seventh Amendment.

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## INTEREST OF AMICUS CURIAE[1]

The **Competitive Enterprise Institute** (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, it has done so through policy analysis, commentary, and litigation.

The right to property is sometimes endangered by public officials who assign it little weight. The approval of court decisions by a jury of twelve everyday Americans is critical to ensure that the right to property is appropriately respected. The Securities and Exchange Commission is one of many agencies that has been allowed to take such property without the involvement of a jury. This practice would never have been allowed when the Seventh Amendment was ratified. Amicus seeks a return to the Founding era's protection of property.

## SUMMARY OF ARGUMENT

English common law protected people's property and liberty by requiring a local jury to approve of any punishment or compensation for unlawful action.

The American colonists used that right to a civil jury trial to refuse to enforce unjust English laws. That

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, its members, or its counsel made such a monetary contribution.

jury power was stripped away in the course of transferring various public rights cases to the vice-admiralty courts. The Seventh Amendment was created to prevent the recurrence of this kind of dilution or elimination of rights.

While some public rights cases can be transferred out of Article III courts to other forums, there is no exception for such cases that derives from the text of the Seventh Amendment. Nor, historically, have any such cases been exempt from the right to a jury trial prior to *Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977).

Petitioner argues that the "public rights" exception to the Seventh Amendment allows suits that the government brings to be assigned to forums without a jury—thus bypassing the requirements of the Seventh Amendment. But that idea is entirely contrary to the Amendment's purpose: namely, the Amendment's goal is to prevent a repetition of what occurred in the vice-admiralty courts. Those "public rights" cases concerned violations of customs and trade laws with the government as a party. When those public rights claims were brought without a jury, it helped push the Founders to revolution. That deprivation of the jury trial right in vice-admiralty courts was part of the bill of particulars in the Declaration of Independence; it sparked the Seventh Amendment. To allow a public rights exception in our jurisprudence is to deny the very reason the Seventh Amendment exists.

Jarkesy is accused of a kind of fraud that was well known to the Founders, and such matters were

regularly heard in common law courts and required a jury when the Seventh Amendment was ratified. The Securities and Exchange Commission (SEC) levied a monetary penalty against Jarkesy and stripped him of his right to a lawful occupation; both such remedies require a jury. For that reason, the judgment of the Fifth Circuit should be affirmed.

## ARGUMENT

### I. THE HISTORY OF THE SEVENTH AMENDMENT REFUTES PETITIONER'S ARGUMENT.

Petitioner claims the first phrase of the Seventh Amendment, "Suits at common law," means the Amendment applies only to cases filed after the amendment was ratified brought in common law courts. Pet. 18-19. As the SEC is not a common law court, the claim is that the Seventh Amendment has no application. *Id.* But Petitioner never mentions any ratification-era support for this interpretation.

Petitioner's argument is contrary to the text and history of the amendment. In fact, the amendment was meant to "preserve" the right to a jury as it "existed under the English common law when the amendment was adopted." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (quoting *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

The transfer from the common law courts, in which a jury is provided, to a forum without a jury violates the right to a trial by jury in the common law suits that existed when the amendment was enacted. As shown below, Petitioner's interpretation is refuted by the

historical record—a series of injustices that prompted the Seventh Amendment.

Before the American Revolution, American colonists successfully used the civil jury to oppose actions by the English government. The royal governor of Massachusetts at the time, Francis Bernard, complained that a "custom house officer has no chance with a jury, let his cause be what it will." Governor Francis Bernard to Lords of Trade (August, 2, 1761), *reprinted in* Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, at 557 (Boston 1865). Another royal governor complained that "a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers." Governor William Shirley, *quoted in* Stephen Botein, *Early American Law and Society* 57 (1983).

As the resistance to British law by civil juries became increasingly apparent, the British government turned to the vice-admiralty courts to fine American colonists without a jury trial. The British government passed the Sugar Act (also called the American Act of 1764), 4 George III c. 15, and the Vice Admiralty Court Act of 1768, 8 George III c. 22, which transferred jurisdiction over all customs and other trade violations from common law courts, where a jury was required, to vice-admiralty courts, where a jury was not used. In these cases, the judges were appointed by the royal governor and paid by the fines they levied. These trade and customs violations were brought by the government as a party: they fall within what the Petitioners today describe as "public rights" cases.

"The vice-admiralty courts, in this country, when we were colonies, and also in the West Indies, obtained jurisdiction in revenue causes to an extent totally unknown to the jurisdiction of the English admiralty, and with powers quite as enlarged as those claimed at the present day. But this extension, by statute, of the jurisdiction of the American vice-admiralty courts beyond their ancient limits, to revenue cases and penalties, was much discussed and complained of on the part of this country, at the commencement of the revolution." James Kent, 1 *Commentaries on American Law* 377-78 (6th ed. 1848) (1826). "The effect of the statute as to such seizures embraced by it, is to withdraw them from the consideration of a jury, according to the course of the civil law." *Id.* at note b.

An example is the litigation against John Hancock, who was represented by John Adams, for violations of the Sugar Act. *Harrison v. The Liberty,* Vice Adm. Min. Bk. (June, 22, 1768). Joseph Harrison, who was collector of taxes for the port, seized the Liberty *in rem* for failure to pay the taxes for oil and tar loaded on the vessel. Harrison also sought penalties from Mr. Hancock *in personam* in the vice-admiralty courts without a jury.

In response to the vice-admiralty courts, the American colonists adopted the Declaration of Rights and Grievances during the Stamp Act Congress. That Declaration complained "[t]hat Tr[i]al by jury is the inherent and invaluable Right of every British Subject, in these Colonies" and that "by extending the Jurisdiction of the Courts of Admiralty, beyond its Ancient limits, have a Manifest tendency to Subvert the Rights, and liberties of the Colonists." Resolutions of the Stamp Act Congress (1765).

When the British continued to use the vice-admiralty courts to fine American colonists without juries, the Declaration of Independence listed as one of the "causes which impel them to the separation" legislation "depriving us, in many cases, of the benefits of trial by jury." Declaration of Independence (US 1776). These deprivations were solely caused by the absence of juries in vice-admiralty courts.

Justice Story described how "[a]t the time when the constitution was submitted to the people for adoption, one of the most powerful objections urged against it was, that in civil causes it did not secure the trial of facts by a jury." *U.S. v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812). The Seventh Amendment was therefore necessary to ensure that the miscarriages of justice in the vice-admiralty courts were not repeated.

The concerns that spurred the creation of the Seventh Amendment had certain similarities to those that spurred the Fourth. Those same vice-admiralty courts were issuing the general warrants that the Fourth Amendment was designed to prevent. The purpose of both amendments was to end the kind of abuse of authority imposed by the British government before the Revolutionary War.

Viewed in the light of this historical record, the idea that the Seventh Amendment was entirely inapplicable to cases transferred from common law courts to other forums is insupportable. The proper understanding of the Seventh Amendment is that it applied to the kinds of cases that were, at that time, in common law courts—while rejecting the improper transfer to vice-admiralty courts. The Amendment was created to prevent the transfer of such cases to

other forums, such as the vice-admiralty courts, which lacked juries.

If it were otherwise, Congress could choose to bypass juries whenever it wished merely by designating certain kinds of cases to certain kinds of forums. For instance, if Congress decided to create a new agency called "The Vice-Admiralty Agency," it could, under the public rights exception that is claimed, assign to that agency whatever civil cases the government wanted to bring without a jury trial. This hypothetical example is intended to illuminate the role and function of the Seventh Amendment: it appears that the exception claimed by Petitioner could function so as to eliminate the Seventh Amendment's purpose. The Founders were concerned that property might be taken by the government without approval by a jury of their peers. A strong public rights exception makes for weak property rights protection, and vice versa.

The Seventh Amendment was created to protect both against corrupt executives, like the British government, and corrupt judges, as many judges at the time were selected by and removable by the royal governor. "It is not only [a juror's] right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho [sic] in Direct opposition to the Direction of the Court." John Adams, Diary Notes on the Rights of Juries, in 1 *Legal Papers of John Adams* 229–30 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). "It is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one in which the judges may be suspected of bias, the jury

undertake to decide both law and fact." Thomas Jefferson, *Notes on the State of Virginia* 140 (J.W. Randolph ed., 1853) (1781–82); *see also Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

The civil jury trial right was meant to ensure that all other personal rights are respected by government officials. For instance, when government officials were accused of violating the Fourth Amendment, a civil action in trespass with a jury against those officials was used. *Mayo v. Wilson*, 1 N.H. 53 (1817). If government officials are the only fact-finders to determine whether their own conduct was constitutional, who could ever hold them to the law? It is precisely because the Seventh Amendment applied to such "public rights" cases against the government that Thomas Jefferson said, "I consider [trial by civil jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." Thomas Jefferson, 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861).

## II. THE SEVENTH AMENDMENT GENERALLY REQUIRES A JURY FOR MONETARY DAMAGES.

From this Court's very first interpretation of the Seventh Amendment until *Atlas Roofing*, this Court had rejected claims like those of Petitioner here. Rather than requiring a case to be in a common law forum for the Seventh Amendment to apply, this Court held the Seventh Amendment "to embrace all suits which are not of equity and admiralty jurisdiction, *whatever may be the peculiar form* which they may assume to settle legal rights." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) (emphasis added).

> By "common law", they [the Framers] meant what the constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.

*Id.* (referring to U.S. Const. Art. III Sec. 2, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution"). This Court thus rejected the idea that the Seventh Amendment applies only to common law court proceedings; instead, it held that the Amendment applies to any proceeding in which legal rights and remedies are administered.

The First Congress also recognized this principle in the Judiciary Act of 1789, requiring that "the trial of issues in fact in the circuit courts shall in all suits, except these of equity, and of admiralty and maritime jurisdiction, be by jury." 1 Stat. 80.

Admiralty cases can easily be distinguished from other cases: they concern ships at sea outside the territorial jurisdiction of the United States. Admiralty jurisdiction "excludes all creeks, bays and rivers, which are within the body of some country; and if the place be the sea-coast, then the ebbing and flowing of the tide determines the admiralty. The cause must arise *wholly* upon the sea, and not within the precincts of any country, to give the admiralty jurisdiction. If the action be founded on a matter done partly on land and party on water, as if a contract made on land to be executed at sea, or made at sea to be executed on land, the common law has the preference, and excludes the

admiralty." James Kent, 1 *Commentaries on American Law* 377-78 (6th ed. 1848) (1826) (emphasis added). The absence of a jury requirement for admiralty cases appears almost inevitable: at sea, local juries are often unavailable.

Distinguishing suits "at common law" from suits in equity rests on "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights *alone* were recognized, and equitable remedies were administered." *Parsons*, 28 U.S. at 447 (emphasis added). In cases of mixed law and equity remedies, a jury was required to determine the facts. Additionally, to be exempt from the jury requirement, only equitable rights could be at issue and only equitable remedies could be administered. In order for any legal remedies to be issued, such as a civil penalty, a jury was always required. *Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law.")

Legal remedies are generally designed to punish or compensate for past violations of the law—usually through a monetary damage award. There are various types of monetary damage awards (compensatory, special, punitive, nominal, liquidated, statutory, and so forth), but they are all legal remedies. Equitable remedies, on the other hand, encourage parties to follow the law in the future. Such remedies are not meant to punish; rather, they educate parties about the law and guide them to obey it from now on. *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020) (equitable relief "historically excludes punitive sanctions").

The Founders recognized that claims about past behavior could be used to take the property or liberty

of political dissidents or other disfavored individuals—even when they had broken no law. That is why legal claims must be submitted to a jury; that institution prevents the executive from treating disfavored individuals unequally. Equitable remedies don't raise the same concerns: they are primarily based on future behavior and thus apply to everyone in similar circumstances. Additionally, equitable remedies primarily raise questions of law, not questions of fact, and can therefore more easily be considered on appeal.

The remedy sought is still considered the most important trigger for the Seventh Amendment. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The remedy provides the best presumptive rule to determine if the Seventh Amendment right to a jury trial is triggered. Any claim of monetary damages should be presumed to require a jury.

Very generally, the presumption that there is a right to a jury trial if monetary damages are requested is a strong starting place. However, there are some exceptions to this rule that rest on the historical distinction between law and equity. Specific historical causes of action can serve as guideposts that show whether the Seventh Amendment is triggered.

Although there are narrow historical categories in which equitable remedies lead to a monetary transfer, the general rule is that the property at issue must already be owned by the plaintiff. The use of the equitable remedy is not meant to punish the defendant or compensate the plaintiff for harm, but to ensure the plaintiff has access to the property the plaintiff already owns.

Consider the example of a fiduciary relationship in which the principal is owed the profits of its agent in some venture. If that agent fails to get the principal's consent, the profits are rightfully owned by the principal even if no wrongdoing occurs, and a court in equity can order that property—the profits—to be returned to its rightful owner in equity. Likewise, equity will sometimes consider a constructive contract or trust to have been created in situations where a technical aspect of its creation was lacking, but where circumstances suggest that the parties would be better off generally if the law provides for constructive creation of the instrument.

In those narrow contexts in which it is historically clear that courts of equity could issue what are effectively monetary damages awards, then those narrow contexts provide exceptions to the normal presumption that all monetary damages awards require a jury.

In addition to monetary damage awards, it was recognized in England that "at the common law, no man could be prohibited from working in any lawful trade." *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1615). It was understood that "no man ought to be put from his livelihood without answer" in a common law court. 3 Sir. Edward Coke, *Institutes of the Common Law of England* 181 (1797). This was so that "every man might use what trade he pleased." 1 William Blackstone, *Commentaries on the Laws of England* 427–28 (8th ed. 1780).

Prohibiting someone from practicing a profession is somewhat similar to monetary damage awards in that "[E]very man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his

body and the 'work' of his hands, we may say, are properly his." John Locke, The Second Treatise of Government § 27, at 15 (3d J.W. Gough ed. 1966) (1689).

It is for that reason that in the United States:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate,' acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

*Dent v. State of W. Va.*, 129 U.S. 114 (1889).

To bar someone from practicing his or her trade or profession completely can be substantially harsher than depriving that person of property. That deprivation is a punishment for wrong behavior and thus a legal remedy. Only a jury of one's peers can be the appropriate fact-finder for such a remedy.

Once the remedy is determined to be a legal remedy, regardless of the forum, the Seventh Amendment requires the inclusion of the jury.

## III. "PUBLIC RIGHTS" PRIOR TO *ATLAS ROOFING* CONCERNED THE ABILITY TO ASSIGN CASES TO NON-ARTICLE III FORUMS BUT DID NOT MENTION A JURY TRIAL EXCEPTION.

The first discussion of "public rights" occurred in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). In that case, the parties both claimed title to the same land. The plaintiff sought ejectment of the defendant who purchased the land from the government, which had acquired the land through a lien on money that was owed. At issue was the validity of those liens. The Court found that while Article III did require lawsuits to be decided by judges, "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them … but which congress may or may not bring within the cognizance of the courts of the United States." *Id.* at 284. *Murray's Lessee* mentioned the Seventh Amendment only in passing, without mentioning any public rights exception; instead, this Court focused on Article III and the Due Process Clause and allowed the Treasury Department to create valid liens. There were no facts at issue for a jury to decide in this case.

The next public rights discussion occurred in *Crowell v. Benson*, 285 U.S. 22 (1932). There, the Deputy Commissioner of the United States Employees' Compensation Commission issued an award under the Longshoremen's and Harbor Workers' Compensation Act. The plaintiff sought to enjoin the enforcement of the award. This Court noted, "the distinction is at once apparent between cases of private right and those which arise between the government and persons

subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 50. This suggests that public rights are only those that "arise between the government and persons subject to its authority." *Id.*

The plaintiff in *Crowell* made a Seventh Amendment claim. However, the Court found that "[a]s the act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction." *Id.* at 39. As it is "within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing." *Id.* at 45. There was no claim that the public rights at issue were exempt from the Seventh Amendment, with the exception that admiralty jurisdiction made this case something other than a "suit at law."

There are issues of "public right" concerning issues that "arise between the government and persons subject to its authority," *Crowell*, 285 U.S. at 50, which can be assigned to non-Article III tribunals. *See also*, *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) ("a matter of public rights must at a minimum arise 'between the government and others' " (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))). Many cases involving private rights must go through Article III courts, but many of these non-Article III tribunals can issue permits and federal benefits and in general act similarly to courts of equity in issuing orders as to future activity. But prior to *Atlas Roofing*, there was never a claim that the right

to a jury trial did not exist for public rights cases when legal remedies (such as monetary damage awards) are used. No such case of legal remedies without a jury exists in the founding era or any time prior to *Atlas Roofing*.

## IV. *ATLAS ROOFING* CREATED THE FIRST EXCEPTION FOR JURY TRIAL OF PUBLIC RIGHTS.

Starting with *Atlas Roofing*, this Court's interpretation of the public right exception "has not been entirely consistent, and the exception has been the subject of some debate." *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

Even *Atlas Roofing* noted the error its interpretation might suggest, describing it as "well put" but "unpersuasive," that if the right to a jury "depend[s] on the identity of the forum to which Congress has chosen to submit a dispute," then "Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts." 430 U.S. at 457.

*Atlas Roofing* mischaracterized prior precedent to reach its conclusion that public rights are exempt from the Seventh Amendment. Below, we show that each of the cases cited by this Court in *Atlas Roofing* actually demonstrates the absence of historical support for the claims it contains.

*Atlas Roofing* starts by citing support from two cases that it acknowledges were not based on the Seventh Amendment, *Phillips v. Commissioner*, 283 U.S. 589, 599-600 (1931); *Murray's Lessee v. Hoboken Land Co.*, 59 U.S. at 284. *Atlas Roofing* notes that

"Neither of these cases expressly discussed the question whether the taxation scheme violated the Seventh Amendment." *Atlas Roofing*, 430 U.S. at 451. There is simply nothing pertinent to the Seventh Amendment in either case.

*Atlas Roofing* then cites two cases about the Sixth Amendment's impact on criminal jury trials: *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335 (1932); *Helvering v. Mitchell*, 303 U.S. 391 (1938). *Atlas Roofing* provides a quote from *Elting* about the "due process of law" that is unrelated to the Seventh Amendment. *Atlas* only refers to *Helvering*'s discussion of the Sixth Amendment. *Helvering* simply notes that criminal and civil cases have different requirements and that civil cases, such as in cases of equity, can avoid involving a jury. Noting that civil cases that involve matters of equity, unlike criminal cases, can avoid a jury does not create an exception for public rights.

Next, *Atlas Roofing* relies on *Oceanic Steam Navigation Company v. Stranahan*, 214 U.S. 320, 332 (1909), which concerned a fine issued to a steamship transporting foreign aliens with a dangerous contagious disease. Given the context—a vessel at sea—such fines would fall within the admiralty jurisdiction (rather than equity or law) and be exempt from the jury trial requirement. Likewise, *Crowell v. Benson* is exempt from the jury requirement because it is "within the admiralty jurisdiction." *Crowell*, 285 U.S. at 45.

The case of *Ex parte Bakelite Corp.,* 279 U.S. 438, 451 (1929), is then cited without explanation. That case mentions the Seventh Amendment only in the context of sovereign immunity, where the government

can refuse to be sued unless the right to a jury trial is waived.

Finally, *Atlas* claims that *Block v. Hirsh*, 256 U.S. 135 (1921), and *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) support this precedent, and provides a quote from *Pernell v. Southall Realty*, 416 U.S. 363 (1974), discussing those cases. But none of these three cases actually supports the *Atlas* decision.

According to *Block v. Hirsh*, 256 U.S. 135 (1921), the Seventh Amendment was not triggered in that case because "[w]hile the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word." *Id.* at 158. There was no material fact at issue, only questions of law, and thus no jury trial was necessary there.

In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937), the remedy sought was "[r]einstatement of the employee and payment for time lost." *Id.* at 48. Reinstatement is a classic equitable remedy. Payment for time lost is likewise a recovery of money property owned by the plaintiff, assuming the law was followed, not monetary damages. Breach of contract is historically a legal damage claim, but that is because it can cause consequential harms not mentioned in the contract that are also recoverable. However, specific performance of the underlying contract is an equitable remedy. This Court noted that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." *Id.* As this was a case of equity, the Seventh Amendment was not triggered.

*Atlas Roofing* cited this passage from *Pernell:* "*Block v. Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell*, 416 U.S. at 383. But *Pernell*'s focus was more precise: it described how administrative agencies are generally created to act similarly to courts of equity. As described above, the Seventh Amendment and jury trials are generally incompatible with courts of equity. The Committee on Administrative Procedure appointed by the Attorney General, in creating the Administrative Procedure Act, illuminated the nature and origins of many federal agencies in its description of them:

> Traditional noncriminal, private law operates for the most part in the same after-the-event fashion. . . . At best, in the ordinary action for money damages, it leads only to compensation for the injury, which is seldom as satisfactory as not having been injured at all. To be sure, courts of equity administer a substantial measure of preventive justice by giving injunctions against threatened injuries. But it is necessary to prove the threat, and other limitations confine the scope of this mode of relief. The desire to work out a more effective and more flexible method of preventing unwanted things from happening accounts for the formation of many (although by no means all) Federal administrative agencies.

Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to

Suggest Improvements Therein, *Administrative Procedure in Government Agencies*, 77th Cong. 1st Sess., S.doc.8, 13 (Jan. 29, 1941). Notably, it described the SEC as follows:

> A more recent example is the Securities and Exchange Commission. Within rather severe limits, the common law recognized a right in a purchaser of securities to recover damages from the seller results from false statements made in effecting the sale. The importance of truth in securities led to a demand that honest statements, as well as fuller and more informative statements be assured so far as possible in advance. If this end were to be accomplished, it could only be done by creating an administrative agency.

*Id*.

To be sure, the Seventh Amendment doesn't apply in an administrative forum. But that is not because administrative forums can issue money damages without a jury; rather, it is because such forums were historically established similarly to courts of equity, which lacked the authority to issue monetary damage awards. The SEC, for instance, first gained real civil monetary penalty authority in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931, 15 U.S.C. § 78a (1990). Prior to the establishment of a civil penalty scheme, one could understand why this Court could state that "the Seventh Amendment is generally inapplicable in administrative proceedings." But the modern state of affairs, in which administrative forums may issue money damages, has made *Pernell's* proposition obsolete.

Seventh Amendment concerns do not rest on whether the forum is an administrative or judicial one: the concern is that a deprivation of one's rights must be performed by a jury of one's peers. It is Article III and the Due Process Clause that determine whether claims need to be brought in Article III courts, not the Seventh Amendment. Thus, these cases stand for just the opposite of *Atlas Roofing*'s claims.

In short, none of the cases cited by *Atlas Roofing* endorses the conclusion that public rights are somehow exempt from the clear constitutional text that requires a jury trial. *Atlas Roofing* doesn't even try to connect its conclusion to the text of the Seventh Amendment or its history. *Atlas Roofing* should be overturned to restore the original meaning of the Seventh Amendment. It is hardly surprising that a new exception to the Seventh Amendment that was first detected in 1977, 232 years after the Seventh Amendment was ratified, may lack historical foundations.

## V. LEGAL RIGHTS ARE AT ISSUE AND LEGAL REMEDIES USED THAT REQUIRE A JURY.

The SEC accused Jarkesy of having "violated the antifraud provisions by making material misstatements and omissions" in security transactions. Pet. at 209a. Such misstatements and omissions in security transactions were often the gravamen of common law causes of action concerning common law rights. *See* 3 William Blackstone, *Commentaries on the Laws of England* *42 (Oxford: Clarendon Press, 1778) (explaining the common-law courts' jurisdiction over "actions on the case which allege any falsity or fraud.").

The action at issue is a suit; if it were not, this Court would be without jurisdiction to hear the case. U.S. Const. Art. III Sec. 2 (noting this Court's jurisdiction only extends to "all Cases, in Law and Equity, arising under this Constitution"). The question here is whether it is a suit in equity or at law.

The remedy the SEC employed involved a declaration and order to "cease and desist from committing or causing any violations or future violations" of the federal security laws; this is an equitable remedy. Additionally, it ordered disgorgement of $1,278,597 plus prejudgment interest. Such disgorgement, to the extent it is limited to profits and is paid to those who have been defrauded, is equitable. *Liu*, 140 S. Ct. at 1936; *Tull*, 481 U. S. at 424 (1987) ("disgorgement of improper profits" is "traditionally considered an equitable remedy"). Neither of these remedies would require a jury, but the SEC then moved beyond equitable remedies.

The SEC also issued a $450,000 civil money penalty. That is a monetary damages claim: a legal remedy requiring a jury. *Marshall v. Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1873) ("Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." ).

Furthermore, the SEC barred Jarkesy from associating with a variety of financial institutions and parties. This prohibition concerns Jarkesy's liberty and strips him of his right to practice his occupation due to an accusation of wrongdoing. That is a legal remedy that requires a jury to be allowed to consider the facts.

As the SEC action concerned legal rights and remedies under English common law, both of which require the inclusion of a jury, the absence of a jury was contrary to the Seventh Amendment. On this judgment, the Fifth Circuit should be affirmed.

## CONCLUSION

For the foregoing reasons, this Court should clarify two matters. First, this Court should clarify that deprivation of a person's right to earn a living and monetary damage awards generally require a jury, subject to historical exceptions. Second, this Court should clarify that if an administrative forum is unable to provide a jury, the Seventh Amendment prohibits that forum from issuing such remedies. The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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