No. 26-473

In the Supreme Court of the United States

SLIGO CREEK CENTER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Ilya Shapiro
Counsel of Record
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

November 9, 2026

QUESTIONS PRESENTED

1. Whether the Seventh Amendment and Article III permit HHS to adjudicate and collect a $1.45 million civil money penalty in its own forum, without a jury, on the grounds that the claim is "unknown to the common law" and the penalized nursing home participates in Medicare.

2. Whether this Court should overrule *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), if it permits levying such a fine without a jury.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE FOURTH CIRCUIT'S PREMISE THAT HHS'S PENALTY IS "UNKNOWN TO THE COMMON LAW" IS HISTORICALLY FALSE 3

A. The Common Law Adjudicated Similar Public-Health Penalties Before Courts and Juries 4

B. Uninjured Informers Routinely Sued for Statutory Penalties in Debt in Trials Before Juries 5

C. Virginia Sent Its Smallpox Penalties against Physicians and Patients to Court, Not to Executive Officers 7

D. The Common Law Prosecuted Exposing Others to Contagion as a Public Nuisance by Indictment in the Ordinary Courts 8

E. HHS's Fines against Sligo Creek Target Similar Public-Health Concerns and Seek the Same Remedies as Common-Law Courts 10

II. MEDICARE PARTICIPATION DOES NOT CONVERT A PUNITIVE FINE INTO A PUBLIC RIGHT 12

III. *FCC V. AT&T* CANNOT SAVE HHS'S PENALTIES, WHICH BIND BEFORE A JURY SITS 14

IV. IF *ATLAS ROOFING* COMPELS THE DECISION BELOW, IT SHOULD BE OVERRULED 15

V. THIS CASE WARRANTS REVIEW, WITH A NARROW RULING FOR PETITIONER 17

A. The Circuits Apply Conflicting Tests to the Same Department's Penalties, and CMS Imposes Thousands of Them 18

B. A Ruling for Petitioner Would Leave HHS Ample Tools to Oversee Nursing Homes 19

C. This Case Is a Clean Vehicle for a Question *Sun Valley* Need Not Reach 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Atcheson v. Everitt, 1 Cowp. 382,
98 Eng. Rep. 1142 (K.B. 1776) 6

Atlas Roofing Co. v. OSHRC,
430 U.S. 442 (1977) ..... i, 2

Bonan v. FDIC, No. 24-3296
(7th Cir. Aug. 12, 2026) 18

Dep't of Lab. v. Sun Valley Orchards, LLC,
No. 25-966 (U.S. cert. granted Apr. 27, 2026) 3

FCC v. AT&T Inc.,
608 U.S. 531 (2026) 1, 2, 13, 14, 15, 19

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 16

Hepner v. United States, 213 U.S. 103 (1909) 6

*Janus v. Am. Fed'n of State, Cnty., & Mun.
Emps., Council 31*, 585 U.S. 878 (2018) 16

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 13

Metro. Asylum Dist. v. Hill,
6 App. Cas. 193 (H.L. 1881) 9

Mo., Kan. & Tex. Ry. Co. v. Wood,
95 Tex. 223 (1902) 9

NFIB v. Sebelius, 567 U.S. 519 (2012) 14

Ortega v. Off. of the Comptroller of the Currency,
155 F.4th 394 (5th Cir. 2025) 18

Parsons v. Bedford,
28 U.S. (3 Pet.) 433 (1830) 14

Payne v. Tennessee, 501 U.S. 808 (1991) 17

Pernell v. Southall Realty,
416 U.S. 363 (1974) 4

R v. Rimmington [2005] UKHL 63,
[2006] 1 A.C. 459 9

Rex v. Burnett, 4 M. & S. 272 (K.B. 1815) 9

Rex v. Vantandillo, 4 M. & S. 73, 105 Eng.
Rep. 762 (K.B. 1815) 9

SEC v. Jarkesy,
603 U.S. 109 (2024) 1, 4, 8, 11, 12, 16, 18, 19

Sun Valley Orchards, LLC v. U.S. Dep't of Lab., 148 F.4th 121 (3d Cir. 2025), *cert. granted*, No. 25-966 (U.S. Apr. 27, 2026) 18

Tex. Tobacco Barn, LLC v. HHS,
180 F.4th 229 (5th Cir. 2026) 18

Tull v. United States, 481 U.S. 412 (1987) ... 3, 4, 5, 11

United States v. Mundell, 27 F. Cas. 23
(C.C.D. Va. 1795) (No. 15,834) 6

Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 5, 6

Wellness Int'l Network, Ltd. v. Sharif,
575 U.S. 665 (2015) 13

Constitutional Provisions

U.S. Const. art. III ..... i, 13, 14, 15

U.S. Const. amend. VII ..... i, 3, 4, 13, 15, 17

Statutes

42 U.S.C. § 1320a-7a(e), (f), (g) 2, 15, 16, 19, 20

42 U.S.C. § 1395i-3(h)(2)(B)(ii)(I) 2

8 William Waller Hening, *The Statutes at Large* (1821) (Va. Act of 1769) 7

9 William Waller Hening, *The Statutes at Large* (1821) (Va. Act of 1778) 2

Regulations

42 C.F.R. § 483.65 (2016)..... 11, 17

42 C.F.R. § 483.80 (2025)..... 17

42 C.F.R. § 488.406 (2025)..... 19

42 C.F.R. § 488.431(b) (2025) 13, 14, 16, 20

42 C.F.R. § 488.436 (2025)..... 14

84 Fed. Reg. 34,737 (proposed July 18, 2019) 20

Rules

Sup. Ct. R. 10 18

Other Authorities

3 William Blackstone, *Commentaries on the Laws of England* (1768) 5

4 William Blackstone, *Commentaries on the Laws of England* (1769) 8, 9

Bill Concerning Inoculation for Smallpox (Dec. 27, 1777), Founders Online, Nat'l Archives..... 8

CDC, *Clinical Overview of Latent Tuberculosis Infection* (Apr. 17, 2025)..... 10

Declaration of Independence (U.S. 1776) 12

Gaye Wilson, *Jefferson: Advocate of Inoculation*, 15 Monticello Newsletter (Spring 2004) 7

KFF, *5 Key Facts About Nursing Facilities and Medicaid* (May 28, 2025) 14

Patrick Schumacher, Rockefeller Inst. of Gov't, *Just a Slap on the Wrist? The Role of Civil Money Penalties in the Regulation of Nursing Homes* (Mar. 2026) 19

INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs opposing government overreach, including in *SEC v. Jarkesy*, 603 U.S. 109 (2024), and *FCC v. AT&T Inc.*, 608 U.S. 531 (2026).

This case interests MI because it tests whether *Jarkesy* means what it says. The Fourth Circuit upheld a scheme that lets an agency find the facts, impose a $1.45 million fine, and collect the money before its own appeals end, all without a jury. MI writes to supply the history the court below never considered. Anglo-American common law punished the very conduct charged here, the failure of those responsible for the sick to guard against contagion, through lawsuits and prosecutions in the ordinary courts.

SUMMARY OF ARGUMENT

This case is about whether an executive agency may act as investigator, prosecutor, judge, and collector—imposing a seven-figure fine that no jury will ever review—if its target participates in a federal program. The Fourth Circuit said yes. History and this Court's precedents say no.

The Founding generation confronted a version of this problem. In 1778, Virginia, acting on a bill from a committee chaired by George Mason that included

---

[1] Rule 37 statement: Counsel for all parties received timely notice of *amicus*'s intent to file this brief. No party's counsel authored any of this brief, and no person or entity other than *amicus* funded its preparation or submission.

Thomas Jefferson, fined smallpox patients who exposed others—as well as physicians and other inoculators who failed to post disease notices. No one had to fall ill for the fines to be imposed, and the fines went where civil penalties often go: to the court. 9 William Waller Hening, *The Statutes at Large* 372–73 (1821).

Fast forward nearly 250 years. After tuberculosis (TB) surfaced at a Maryland nursing home, more than two dozen residents tested positive for TB infection. The Department of Health and Human Services (HHS), through the Centers for Medicare & Medicaid Services (CMS), charged the facility with failing to ensure timely treatment, among other deficiencies, and imposed $1,449,975 in civil money penalties. Pet. App. 3a–5a, 38a–40a, 97a–98a. The agency's factual findings are "conclusive" if supported by substantial evidence, 42 U.S.C. § 1320a-7a(e); *see* § 1395i-3(h)(2)(B)(ii)(I), and the entire penalty sits in escrow. Pet. 12–13. The Fourth Circuit blessed the arrangement on the theory that "this case involves 'a new cause of action, and remedies therefor, unknown to the common law.'" Pet. App. 12a (quoting *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 461 (1977)).

That premise is false. Civil penalties for public wrongs—public-health wrongs included—were recovered in actions of debt and tried to juries at common law, which prosecuted the failure to contain contagion as a public nuisance. HHS's charge targets the same conduct and seeks the classic legal remedy.

Nor does Medicare participation turn a punitive fine into a "public right." *FCC v. AT&T Inc.*, 608 U.S. 531 (2026), confirms the defect. There, the FCC's orders survived because they bind no one until a court, with a jury if demanded, decides the facts. But HHS's

orders bind without any jury ever seeing them. And if *Atlas Roofing* nonetheless compels the result below, this Court should overrule it.

The question warrants review now. The circuits apply conflicting methods to penalties imposed by the same department. CMS imposed more than 8,000 of these penalties in 2023, and a ruling for petitioner would leave HHS's nonmonetary remedies untouched. *Dep't of Labor v. Sun Valley Orchards, LLC*, No. 25-966 (U.S. cert. granted Apr. 27, 2026), currently before the Court, need not reach this Medicare question. At a minimum, the Court should hold this petition pending its decision there.

The common law did not let state officers, on their own say-so, fine an apothecary who exposed the public to smallpox. It required an indictment and a court. The Constitution guarantees Sligo Creek no less.

ARGUMENT

I. THE FOURTH CIRCUIT'S PREMISE THAT HHS'S PENALTY IS "UNKNOWN TO THE COMMON LAW" IS HISTORICALLY FALSE

The government does not contest that HHS's penalty "implicates the Seventh Amendment." Pet. App. 7a–8a. The court below nonetheless placed it within the public-rights exception because the claim is supposedly "unknown to the common law." *Id.* at 9a–12a. That premise is historically false. For more than a century before the Founding, Anglo-American law punished this very kind of conduct, and it did so in courts, ordinarily before juries. A claim with that pedigree is a suit that was legal in nature at common law. *See Tull v. United States*, 481 U.S. 412, 417 (1987) ("Prior to the Amendment's adoption, a jury trial was

customary in suits brought in the English *law* courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial.") (emphasis in original).

A. The Common Law Adjudicated Similar Public-Health Penalties Before Courts and Juries

Under *Jarkesy*, a penalty claim that is legal in nature presumptively concerns private rights, and *Atlas Roofing* does not displace that presumption when the claim has common-law roots in English law courts. *SEC v. Jarkesy*, 603 U.S. 109, 132–40 (2024). The *Jarkesy* Court distinguished *Atlas Roofing* on exactly that ground. The OSH Act's novel safety standards at issue in *Atlas Roofing*, it explained, "bring no common law soil with them," 603 U.S. at 137, while the SEC's antifraud provisions "target the same basic conduct as common law fraud," *id.* at 134. "[W]hat matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Id.* at 135. Nor must the fit be exact. The Seventh Amendment "requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law." *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).

The remedy here confirms the point. HHS imposed $12,541 per day for 114 days of "immediate jeopardy" in 2016 and $303 per day for 67 more, a total of $1,449,975. Pet. App. 40a, 97a–98a. Not a dollar compensates any victim. A civil penalty designed to punish or deter is "a type of remedy at common law that could only be enforced in courts of law." *Jarkesy*, 603 U.S. at 125 (quoting *Tull*, 481 U.S. at 422).

B. Uninjured Informers Routinely Sued for Statutory Penalties in Debt in Trials Before Juries

The closest civil analogue to the present case is the action of debt for a statutory penalty. In *Tull*, the government argued that a Clean Water Act penalty suit more closely resembled an action to abate a public nuisance. This Court held that, whether categorized as an action for debt or a public nuisance action, "both . . . are appropriate analogies to the instant statutory action." *Tull*, 481 U.S. at 420–21. Ultimately, "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* at 422. Government actions to recover civil penalties "historically have been viewed as one type of action in debt requiring trial by jury." *Id.* at 418–19.

Nor did these actions at common law require an injured plaintiff. Quite the opposite: the informer, a stranger to the wrong, was a principal engine of enforcement. Penal statutes, Blackstone explained, commonly gave their forfeitures "to any such person or persons as will sue for the same; and hence such actions are called popular actions, because they are given to the people in general." 3 Wm. Blackstone, *Commentaries on the Laws of England* *160 (1768). When the Crown took a share, the informer sued *qui tam*, for the king as well as for himself. *Id.* Beginning in the 14th century, Parliament enacted statutes letting informers recover penalties "even if they had not suffered an injury themselves," and such laws "continued to exist in England until 1951." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775–76 (2000). Such suits

"appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution." *Id.* at 776.

What matters here is how courts treated those suits: as civil actions, tried to juries. For example, in *Atcheson v. Everitt*, a plaintiff sued in debt for the penalty Parliament had imposed for bribery in elections, and the jury, after hearing a Quaker's evidence, returned a verdict for the plaintiff. *Atcheson v. Everitt*, 1 Cowp. 382, 382–83, 98 Eng. Rep. 1142, 1142–43 (K.B. 1776). Because a Quaker's affirmation was then received only in civil causes, the defendant insisted that a penalty suit was really criminal. Lord Mansfield, while reserving judgment, observed that "actions for penalties, are to a variety of purposes considered as civil suits," though this one "partakes much of the nature of a criminal cause." *Id.* at 383, 98 Eng. Rep. at 1143. Either way, a jury fixed the liability.

The First Congress carried the device across the Atlantic, enacting "a considerable number" of informer statutes, *Vt. Agency*, 529 U.S. at 776–77 & nn.6–7, and the early federal bench treated penalty suits as civil. In 1795, for example, Justice Iredell, riding circuit, held that a federal action of debt for a $200 revenue penalty "was not a proceeding in a criminal case" but "was, in truth, a civil suit." *United States v. Mundell*, 27 F. Cas. 23, 26–27 (C.C.D. Va. 1795) (No. 15,834). A century later, in an action of debt for a $1,000 immigration penalty, the Court could say that the defendant "was, of course, entitled to have a jury summoned." *Hepner v. United States*, 213 U.S. 103, 104–05, 115 (1909). From Westminster to this Court, a money penalty owed to the public was collected the same way: by a civil action, in a court, before a jury.

C. Virginia Sent Its Smallpox Penalties against Physicians and Patients to Court, Not to Executive Officers

Virginia used the action of debt for its public-health penalties too, as its experience with smallpox shows. When inoculation came to Norfolk in 1768 and again in 1769, it provoked riots both times. Dr. Archibald Campbell's house was burned "as a result of the inoculations carried out there," and Thomas Jefferson, "then practicing law," agreed to defend victims of the riots. Gaye Wilson, *Jefferson: Advocate of Inoculation*, 15 Monticello Newsletter (Spring 2004). The House of Burgesses answered with the 1769 statute. A fine of £1,000 was levied on anyone who imported smallpox matter to inoculate or spread the disease, and anyone who inoculated without a license was fined £100, each recoverable "by action of debt, bill, plaint, or information, in any court of record," with half going to the informer. 8 William Waller Hening, *The Statutes at Large* 371–73 (1821).

Independence did not change the use of courts to adjudicate such public-health fines. In 1778, acting on a bill reported by a committee that George Mason chaired and on which Jefferson sat, the General Assembly relaxed the licensing regime but imposed precautionary duties much like those charged here. *See* "Bill concerning Inoculation for Smallpox" (Dec. 27, 1777) (editorial note), Founders Online, Nat'l Archives, https://tinyurl.com/yc5xbyej. A smallpox patient who left the house or went among people not yet immune forfeited 40 shillings "for every offence." *Id.* A physician or other person who inoculated at a house and failed to post notice that smallpox was there forfeited 40 shillings "for every day that the same shall

be omitted or neglected." *Id.* And £3 was forfeited for each patient discharged from an inoculation hospital without cleansing and a certificate. *Id.* None of these penalties required proof that anyone caught the disease, or that anyone meant harm. All of them went to court. Sums above £5 were "recovered with costs, by action of debt or information, in any court of record"; smaller ones went "by petition in the court of the county where the offence shall be committed." *Id.* Ordinarily, "one half [went] to the informer." *Id.* Faced with the problem presented here, how to enforce money penalties against medical providers and patients who failed to guard against contagion, the Founding generation chose a court.[2]

D. The Common Law Prosecuted Exposing Others to Contagion as a Public Nuisance by Indictment in the Ordinary Courts

The conduct behind these smallpox-related statutes was no stranger to the common law itself. A common nuisance was an offense against the public at large, "indictable only, and not actionable," 4 Blackstone, *supra*, at *167. Blackstone classed statutory offenses against the public health, from breaching a plague confinement to evading quarantine, among the

---

[2] To be sure, English law let excise commissioners and justices of the peace impose some penalties summarily, *see* 4 William Blackstone, *Commentaries on the Laws of England* *277–79 (1769), and Virginia sent its smaller smallpox penalties to the county court by petition. But revenue collection is a recognized public-rights category. *Jarkesy*, 603 U.S. at 128–29. The remaining summary proceedings were petty matters decided by magistrates rather than by the officials who brought the charge. And Blackstone warned that their spread threatened "the disuse of our admirable and truly English trial by jury," 4 Blackstone, *supra*, at *278.

public wrongs punished in the courts. *Id.* at *161–62. The King's Bench applied those principles to contagion in 1815. In *Rex v. Vantandillo*, a mother was indicted for carrying a child, sick with smallpox, along a public highway past passersby and near their homes. Justice Le Blanc explained that one who "unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder" commits "a common nuisance to all the subjects, and indictable as such." 4 M. & S. 73, 75, 105 Eng. Rep. 762 (K.B. 1815). She was sentenced to three months' imprisonment. *R v. Rimmington*, [2005] UKHL 63, [13], [2006] 1 A.C. 459 (appeal taken from Eng.). The same year, in *Rex v. Burnett*, an apothecary was convicted on indictment for having inoculated children with smallpox and then exposed them, while infectious, in the street. 4 M. & S. 272, 273 (K.B. 1815).

Nor did the decisions remain isolated. Lord Blackburn later summarized the rule: when a disease is infectious, "there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection," and bringing the infected person into a public thoroughfare "is an indictable offence." *Metro. Asylum Dist. v. Hill*, 6 App. Cas. 193, 204 (H.L. 1881) (appeal taken from Eng.). That is the duty HHS enforces here: the obligation of those with custody of the sick to keep infection from spreading. And courts on both sides of the Atlantic have treated *Vantandillo* as a classic public nuisance ever since.[3]

---

[3] *See, e.g.*, *Mo., Kan. & Tex. Ry. Co. v. Wood*, 95 Tex. 223, 233–34 (1902) (quoting *Hill* and citing *Vantandillo* and *Burnett*); *Rimmington*, [2005] UKHL 63, [13] (discussing *Vantandillo* among the early public-nuisance authorities); *cf. Tex. Tobacco Barn, LLC*

E. HHS's Fines against Sligo Creek Target Similar Public-Health Concerns and Seek the Same Remedies as Common-Law Courts

Measured against this history, HHS's claim is a traditional one in modern dress. In 2015, two Sligo Creek staff members and a former resident were diagnosed with active TB, and more than two dozen residents tested positive; at least 19 had clear chest X-rays, indicating latent infection. Pet. App. 3a–4a, 31a–37a. Latent TB is not itself contagious, but without treatment about 5 to 10 percent of infected people develop TB disease over their lifetimes, and treatment is 90 percent effective at preventing that. CDC, *Clinical Overview of Latent Tuberculosis Infection* (Apr. 17, 2025). HHS found that the facility failed to ensure timely treatment for these residents, most of whom went untreated until September 2016; one was diagnosed with active TB in August 2016. Pet. App. 4a–5a, 37a, 45a. The charge, in short, is that a residential health facility failed to take required precautions against the spread of a contagious disease among vulnerable people in close quarters. The duty is preventive, not therapeutic. The rule HHS enforced is an infection-control regulation, 42 C.F.R. § 483.65 (2016), and treating latent infection is how a facility keeps it from becoming contagious disease.

That is exactly what Virginia targeted when it penalized discharging smallpox patients without cleansing, and what the King's Bench punished in *Burnett*: a failure to keep contagion from spreading. Unlike the

---

v. HHS, 180 F.4th 229, 234–37 (5th Cir. 2026) (finding common-law analogues for a public-health penalty arising from selling unauthorized vape products).

OSH Act's novel standards at issue in *Atlas Roofing*, the duty here comes with its own Founding-era penalty statutes, enforced in court. That is precisely the common-law soil *Atlas Roofing* found missing. The test is whether the Founding generation penalized this conduct and sent the penalty to a court of law rather than a court of equity or admiralty. *Tull*, 481 U.S. at 417. The OSH Act's standards had no such pedigree, *Jarkesy*, 603 U.S. at 137, so this test leaves *Atlas Roofing*'s own result undisturbed.

The Fourth Circuit's reasons for finding novelty fail. The court stressed that Congress authorized penalties "even when no resident has suffered or is at immediate risk of suffering harm." Pet. App. 11a. But public nuisance, the informer's action, and Virginia's smallpox statutes all imposed liability without proof that anyone fell ill; the absence of an injury requirement is a hallmark of these analogues, not a sign of novelty. The Fourth Circuit also said the duty "arose from petitioner's choice to participate in a voluntary government program." *Id.* at 10a. But the duties in *Jarkesy* were statutory too, imposed partly by the Investment Advisers Act on a federally regulated profession, 603 U.S. at 116, 118, and their statutory source did not make the SEC's fraud claim a public right.

The government's likely objections fare no better. HHS penalties require no intent, while *Vantandillo* involved knowledge. But Virginia's penalties required no intent, and *Tull* forecloses demanding element-by-element identity. 481 U.S. at 421. That the contagion cases were prosecutions only confirms the point: criminal or civil, the case went to a court, not to the officer who brought the charge.

The public-rights exception is an exception, and this Court has kept it that way. Because the exception "has no textual basis in the Constitution," a loose reading would let it "swallow the rule." *Jarkesy*, 603 U.S. at 131. What remains are a few historical categories: revenue collection, customs and immigration, relations with Indian tribes, public lands, and "the granting of public benefits," including patents. *Id.* at 128–30. As Justice Gorsuch explained, despite its "misleading name," the exception does not cover every suit the government brings "against an individual to remedy public harms." *Id.* at 152 (Gorsuch, J., concurring). The Founding generation knew the alternative well. When the English began "siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts," Americans "condemned Parliament," *Jarkesy*, 603 U.S. at 121, and the Declaration of Independence indicted the Crown "[f]or depriving us in many cases, of the benefits of Trial by Jury." *Declaration of Independence* para. 20 (U.S. 1776).

II. MEDICARE PARTICIPATION DOES NOT CONVERT A PUNITIVE FINE INTO A PUBLIC RIGHT

Because HHS's claim is a suit at common law, it "presumptively concerns private rights." *Jarkesy*, 603 U.S. at 128. The government cannot rebut that presumption by citing Sligo Creek's participation in Medicare. Indeed, a benefits decision concerns whether to grant, continue, or recover a payment from the public fisc—which HHS did not do here. It did not deny a claim, cut off reimbursement, or recoup an overpayment. It instead imposed a per-day fine unconnected to any federal dollar and payable whether

anyone was harmed. Pet. App. 11a. That is a sanction, not a spending decision.

CMS may collect an unpaid penalty by deducting it from sums owed to the facility, 42 C.F.R. § 488.431(b)(4) (2025), but that changes nothing. Payment for care already provided is earned compensation, not a gratuity, and a fine collected by offset is still a fine. The SEC could likewise "deduct a portion of the forfeiture from [a] tax return," which helped distinguish *Jarkesy* from *FCC v. AT&T*. *Jarkesy*, 608 U.S. at 544. This Court treated that power as what made the penalties immediately enforceable without a jury; nothing in *AT&T* suggests it made them public rights.

Nor is participation consent. Consent to non-Article III adjudication, "whether express or implied," must be "knowing and voluntary." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685 (2015). Nothing of the kind happened here. The court below did not rest on waiver, and nothing in the Medicare statute purports to condition participation on surrendering the Seventh Amendment right to trial by jury. Implied consent requires a litigant who knowingly chose the non-Article III forum. *Id.* A care facility that must accept the forum to stay in business has made no such choice.

The government could not extract such a waiver as the price of participation, either. The unconstitutional-conditions doctrine protects enumerated rights "by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). *AT&T* found that doctrine a poor fit, and the Court also found no coercion because a carrier could decline to pay and then contest the facts before a jury if the government sued. 608 U.S. at 546–48. A nursing home has no such

option. CMS collects first, by escrow or offset. 42 C.F.R. § 488.431(b). Nor can a nursing home simply walk away from Medicare and Medicaid. More than 60 percent of the nation's 1.2 million nursing-facility residents rely on Medicaid as their primary payer. Priya Chidambaram, et al., "5 Key Facts About Nursing Facilities and Medicaid," KFF.org (May 28, 2025), https://tinyurl.com/5h3jxzud; *cf. NFIB v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.) (finding Medicaid funding threat to be coercion). The scheme even puts a price on the agency hearing: a facility that forgoes it gets 35 percent off the penalty. 42 C.F.R. § 488.436 (2025). Unlike a plea bargain, the discount is not the price of giving up a jury that remains available—no jury is available at all. Acquiescence secured under that kind of pressure is not the "knowing and voluntary" consent *Wellness* requires.

The government's theory also has no stopping point. Federal money reaches hospitals, universities, defense contractors, and banks across the country. If accepting it converts every resulting penalty into a public right, *Jarkesy* protects only those wise enough to want nothing from Washington. HHS's penalty falls outside every recognized category and belongs before a jury in an Article III court.

III. *FCC V. AT&T* CANNOT SAVE HHS'S PENALTIES, WHICH BIND BEFORE A JURY SITS

The Seventh Amendment is satisfied if, "before legal rights and obligations are conclusively 'ascertained and determined,'" a party may have a jury decide the facts. *AT&T*, 608 U.S. at 540 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)). This Court held that FCC forfeiture orders do not violate the amendment because they resolve nothing definitively and the

commission's findings are not conclusive. *Id.* at 540–42. The commission cannot execute on its orders, and its factual findings "have no effect in a subsequent enforcement suit." *Id.* at 541–42. The SEC's penalties in *Jarkesy*, by contrast, "were immediately enforceable; the SEC could garnish the recipient's wages or deduct a portion of the forfeiture from his tax return," so fact-finding rested "with the SEC alone." *Id.* at 544.

HHS's scheme is far more like the SEC's penalties than an FCC forfeiture order. The secretary's findings, "if supported by substantial evidence," are conclusive on review. 42 U.S.C. § 1320a-7a(e). In the government's collection suit, matters "that were raised or that could have been raised" before the agency "may not be raised as a defense." § 1320a-7a(g). That is the inverse of the FCC scheme upheld in *AT&T*. CMS may collect the penalty into escrow once informal dispute resolution ends or 90 days after notice, whichever comes first, without awaiting any administrative hearing. 42 C.F.R. § 488.431(b)(1). Sligo Creek had to place its entire penalty in escrow, where it remains. Pet. 12–13. And if a facility does not pay, CMS may deduct the amount from sums owed to it, the twin of the SEC's tax-refund deduction. 42 U.S.C. § 1320a-7a(f); 42 C.F.R. § 488.431(b)(4).

Because HHS's penalties are conclusive and immediately enforceable, *AT&T* supplies no defense, and the scheme fails the public-rights analysis.

IV. IF *ATLAS ROOFING* COMPELS THE DECISION BELOW, IT SHOULD BE OVERRULED

If *Atlas Roofing* lets an agency impose conclusive penalties for conduct the common law tried to juries merely because Congress codified the duty anew, this

Court should overrule it. *See*, *e.g.*, *Axalta Coating Sys., LLC v. FAA*, 144 F.4th 467, 484 (3d Cir. 2025) (Bibas, J., concurring) ("But if we were not constrained by precedent, I would take *Jarkesy*'s first principles seriously: Public rights are a limited exception rooted in history. That would mean starting with the presumption that our case involves private rights and thus belongs in an Article III court."). *Jarkesy* already limited *Atlas Roofing* to schemes that "bring no common law soil with them," holding that its reasoning "cannot support any broader rule." 603 U.S. at 137–38. Yet the Fourth Circuit, following the Third, finds no such soil whenever a court deems a duty novel or technical, even when, as here, the conduct has a Founding-era pedigree. *Axalta*, 144 F.4th at 474–77; Pet. App. 9a–12a. Even judges bound to apply that precedent doubt it. *Atlas Roofing* "binds us," but after *Jarkesy* "the caselaw is also at war with itself." *Axalta*, 144 F.4th at 482 (Bibas, J., concurring). Every factor this Court weighs in deciding whether to retain a precedent favors overruling. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018).

Begin with the quality of *Atlas Roofing*'s reasoning. Its premise, that Congress may send "new" statutory claims to agencies, cannot be squared with the rule that Congress may not "conjure away the Seventh Amendment" by relabeling traditional claims. *Jarkesy*, 603 U.S. at 135 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989)). This case shows why. Every regulatory duty is "new" in the sense that a statute or rule now spells it out, and the infection-control rules for nursing homes, 42 C.F.R. § 483.65 (2016) (latest version at 42 C.F.R. § 483.80 (2025)), are new in that sense. But the wrong they target was penalized by Virginia's legislature and prosecuted in the King's

Bench long before HHS existed. A test that asks only whether a duty appears in a modern code will always find novelty, and thus will end-run around the jury.

The rule in *Atlas Roofing* has proven no more workable than it is sound. Courts that apply it and courts that do not now reach opposite results for the same department's penalties. It has also become an outlier among its doctrinal neighbors. *Granfinanciera* and *Jarkesy* locate the jury right in the substance of the claim, and *AT&T* asks whether the agency's decision binds. *Atlas Roofing* alone lets the novelty of a statutory duty, and Congress's choice of forum, override the substance of the claim.

Finally, reliance interests are slight. The reliance here is legislative and administrative, not the property and contract reliance that weighs most heavily in *stare decisis*. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). And *Jarkesy* has already unsettled any expectation that *Atlas Roofing* reaches penalties with a common-law pedigree. Agencies would keep both their nonmonetary remedies and a ready judicial path for penalties.

If the Fourth Circuit read *Atlas Roofing* correctly, *Atlas Roofing* is the blank check *Jarkesy* refused to write—and this Court should overrule it.

V. THIS CASE WARRANTS REVIEW, WITH A NARROW RULING FOR PETITIONER

The courts of appeals are divided over how to apply *Jarkesy* and *Atlas Roofing*, and the question is one of national importance. *See* Sup. Ct. R. 10(a), (c). Because a ruling for petitioner would be narrow, the Court can resolve it without disrupting nursing-home oversight.

A. The Circuits Apply Conflicting Tests to the Same Department's Penalties, and CMS Imposes Thousands of Them

The Fourth Circuit, in line with the Third Circuit's decision in *Axalta*, asks whether a statutory claim is "unknown to the common law," as in *Atlas Roofing*, and, if so, treats it as a public right. Pet. App. 9a–12a; *Axalta*, 144 F.4th at 474–77. In contrast, the Fifth Circuit asks whether the government has shown a "serious and unbroken historical pedigree" for the claimed public right, and it rejected a free-floating public-health category in holding an HHS penalty unconstitutional. *Tex. Tobacco Barn, LLC v. HHS*, 180 F.4th 229 (5th Cir. 2026) (quoting *Jarkesy*, 603 U.S. at 153 (Gorsuch, J., concurring)). That case arose under FDA authority rather than Medicare, but the same department's penalties are now judged by different tests depending on the circuit.[4] The Third Circuit, for its part, applied *Atlas Roofing* to FAA penalties in *Axalta*, but it held Department of Labor penalties outside the exception in *Sun Valley Orchards, LLC v. U.S. Dep't of Labor*, 148 F.4th 121 (3d Cir. 2025), *cert. granted*, No. 25-966 (U.S. Apr. 27, 2026), distinguishing *Axalta* because the H-2A claim resembled a contract action. The stakes are huge: CMS imposed 8,402 nursing-home penalties totaling $204 million in 2023 alone. Patrick Schumacher, Rockefeller Inst. of Gov't, *Just a*

---

[4] Courts outside the HHS context have also struggled to settle on a method, even when they uphold penalties. *See Bonan v. FDIC*, 187 F.4th 841 (7th Cir. 2026) (applying *Atlas Roofing* to FDIC penalties in what the court called "a close and challenging call"); *Ortega v. Off. of the Comptroller of the Currency*, 155 F.4th 394 (5th Cir. 2025) (relying chiefly on the history of federal bank regulation to uphold OCC penalties).

Slap on the Wrist? The Role of Civil Money Penalties in the Regulation of Nursing Homes 4–5 (Mar. 2026).

B. A Ruling for Petitioner Would Leave HHS Ample Tools to Oversee Nursing Homes

Holding that conclusive money penalties require a jury would not disable nursing-home oversight. Post-*Jarkesy*, the SEC may still "seek civil penalties in federal court," *Jarkesy*, 603 U.S. at 118, and the FCC may issue forfeiture orders that bind no one until the government sues and wins in court, *AT&T*, 608 U.S. at 537, 540–42.

HHS's most important remedies would be untouched. CMS and the states may terminate a provider agreement, appoint temporary management, deny payment, impose state monitoring, close a facility, and direct plans of correction. 42 C.F.R. § 488.406(a) (2025). None of these is a money penalty, and nothing in this case questions them. And Congress has already provided that HHS penalties "may be recovered in a civil action in the name of the United States." 42 U.S.C. § 1320a-7a(f). Two features stand between HHS and the *AT&T* model: findings that bind any later court, § 1320a-7a(e), (g), and collection before any jury, 42 C.F.R. § 488.431(b). Facilities could still waive an available jury or settle, and that choice would be a knowing one. The burden would be modest: in 2016, 81 percent of penalized facilities filed express waivers, another 15 percent did not contest, and only 4 percent pursued a hearing. 84 Fed. Reg. 34,737, 34,751 (proposed July 18, 2019). HHS would lose only the power to investigate, prosecute, judge, and collect at once.

C. This Case Is a Clean Vehicle for a Question *Sun Valley* Need Not Reach

Sligo Creek invoked *Jarkesy* before the agency within a week of the decision. Pet. App. 47a–50a. The Fourth Circuit decided the jury question on the merits in a published opinion, *id.* at 3a, 6a–13a, and found that petitioner forfeited only a broader argument that no public-rights exception exists, *id.* at 7a n.3. And the government did not contest *Jarkesy*'s first step. *Id.* at 7a–8a. *Sun Valley*, by contrast, arises under the H-2A visa program, and the government defends the Department of Labor's penalties there under the immigration category as well as its broader privilege theory. And if the Court reaches the privilege theory, which by the government's own account extends to § 1320a-7a, its decision will bear directly on this case.

At a minimum, the Court should hold the petition pending the decision in *Sun Valley* and then grant, vacate, and remand.

CONCLUSION

For these reasons, this Court should grant the petition or, at a minimum, hold it pending *Sun Valley*.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

November 9, 2026