

**In the Supreme Court of the United States**

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,  
*Petitioners,*

v.

AT&T, INC.,  
*Respondents.*

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VERIZON COMMUNICATIONS INC.,  
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,  
*Respondents.*

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On Writs of Certiorari to the United States Courts of Appeals  
for the Fifth and Second Circuits

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**BRIEF FOR THE MANHATTAN INSTITUTE AND THE  
RUTHERFORD INSTITUTE AS *AMICI CURIAE*  
IN SUPPORT OF AT&T, INC. AND VERIZON  
COMMUNICATIONS INC.**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

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 historically sponsored scholarship and filed briefs opposing government overreach.

The Rutherford Institute (“RI”) is a nonprofit civil liberties organization that was founded in 1982 by its President, John W. Whitehead. RI provides legal assistance at no charge to individuals whose constitutional rights have been violated, educates the public about issues affecting their freedoms, and works tirelessly to ensure that the government abides by the rule of law.

*Amici* have a strong interest here because these cases implicate important liberty interests against government overreach in violation of the separation of powers and rights under the Seventh Amendment to the Constitution. “[A]s Alexander Hamilton wrote in *The Federalist Papers*, ‘there is no liberty if the power of judging be not separated from the legislative and executive powers.’” *SEC v. Jarkesy*, 603 U.S. 109, 127 (2024) (quoting *The Federalist* No. 78, p. 466 (C. Rossiter ed. 1961), in turn, quoting 1 Montesquieu, *The Spirit of Laws* 181 (10th ed. 1773)). “Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.” *Clinton*

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<sup>1</sup> No party’s counsel authored this brief and no person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission.

*v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

### SUMMARY OF ARGUMENT

Less than two years ago, this Court reaffirmed in *SEC v. Jarkesy* that an enforcement agency violates its target’s Seventh Amendment right to a jury trial—and transgresses the separation of powers—if it “concentrate[s] the roles of prosecutor, judge, and jury in the hands of the Executive Branch” when adjudicating common-law claims. 603 U.S. 109, 140 (2024). The enforcement actions here raise the same concerns. Like the SEC in *Jarkesy*, here the Federal Communications Commission acted as investigator, prosecutor, judge, and jury: It investigated AT&T and Verizon for alleged violations of privacy rules based on theories of negligence, issued the carriers “Notices of Apparent Liability” (essentially, administrative complaints), and then adjudicated those complaints in forfeiture orders that found the carriers liable and ordered them to pay tens of millions of dollars in civil penalties. No jury ever reviewed those findings.

The government does not dispute before this Court that the enforcement actions qualify as “[s]uits at common law” for purposes of the Seventh Amendment. Instead, the government argues that the carriers’ constitutional right to a jury trial was satisfied because, instead of paying the penalties and challenging the forfeiture orders before an appellate court, the carriers could have ignored the FCC’s demand for payment and waited for a potential collection action by the Department of Justice—at which point, if that action ever materialized within

the five-year limitations period, they could have presented their defenses to a jury in a *de novo* trial.

This convoluted, post-adjudication process fails to allow the *meaningful* exercise of Seventh Amendment rights. The target of an FCC forfeiture order has no control over whether a jury will ever review the order's adverse findings. It is only if DOJ chooses to bring a collection action that a jury may be empaneled in a follow-on collection proceeding. But jury trials in these types of proceedings are unheard of.

Moreover, reputable licensees cannot run the risk of sustaining a host of harms if they flout a forfeiture order and FCC directive to pay the penalty assessed. Even setting aside the reputational harm that accompanies an agency finding that the licensee has violated the law, the FCC has cautioned that it may “use the facts underlying a violation” found in a forfeiture order (or even a Notice of Apparent Liability) in future licensing proceedings involving the same party—potentially complicating future mergers and other transactions requiring FCC approval—and may increase penalties in any future enforcement proceeding based on the same underlying “facts.” See *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17102-03, ¶¶ 33-34 (1997). And this is so even where those “facts” have never been examined, much less found, by a jury. Given the looming threat of prejudicial action in future licensing proceedings from an unchallenged forfeiture order, it is no surprise that licensees typically either settle FCC enforcement actions or, as the carriers did here, pay the penalty and promptly challenge the forfeiture order (without a jury trial) in federal court.

Even if a licensee were brave (or foolhardy) enough to defy the FCC’s demand for payment and forgo immediate appellate review of its forfeiture order—thus leaving its adverse findings intact—licensees cannot compel DOJ to actually bring the enforcement action that the government touts here as the path to an eventual trial before a jury. This contingent possibility of a jury trial is no right at all.

The government insists there is no Seventh Amendment problem because the enforcement target need not pay the monetary penalty and, so the argument goes, the “nonmonetary” consequences of a forfeiture order are insufficient to implicate the jury-trial right. This argument fails. Even if those “nonmonetary” consequences could be neatly severed from the order’s monetary penalty (they cannot), the practical effect of the FCC’s enforcement regime—including the Commission’s warning that it may “use the facts underlying a violation” previously found by the agency to the licensee’s detriment in future licensing and enforcement proceedings (*Forfeiture Policy Statement*, 12 FCC Rcd at 17102-03)—is to coerce enforcement targets into forgoing their jury-trial right and thereby impose monetary penalties without abiding by the Seventh Amendment. This scheme amounts to an unconstitutional condition, or at least an impermissible burden, on the targets’ Seventh Amendment right to a jury trial.

If this Court affirms the Second Circuit in the *Verizon* case, it would weaken Seventh Amendment rights for corporate and individual targets of enforcement alike. And it could encourage other agencies to create their own artificial processes for

post-adjudication jury trials that are contingent on *the government's* discretionary action rather than the *enforcement target's* ability to secure a jury trial.

By contrast, affirming the Fifth Circuit in the *AT&T* case would ensure that the law is enforced by agencies within constitutional constraints. This approach would not prevent the FCC from continuing to use its in-house procedures to adjudicate claims that are not legal in nature (e.g., purely equitable claims) or where the target waives its right to a jury trial. Nor would it prevent the agency from ordering licensees to desist from conduct that violates lawful agency rules and to otherwise comply with the law. Congress, moreover, remains free to expand the FCC's ability to bring common-law enforcement claims by authorizing the agency to file such actions directly in federal court and, if the FCC declines to do so, allow the enforcement target to remove the action to federal court. Either way, this would ensure that such claims can be adjudicated by a jury rather than by the agency acting as “prosecutor, judge, and jury,” *Jarkesy*, 603 U.S. at 140.

## ARGUMENT

### **I. The FCC's Post-Adjudication Offer of a Jury Is Illusory.**

The FCC's enforcement process deprives targets of their constitutional right to a jury trial as part of the “initial adjudication” of common-law claims *Jarkesy*, 603 U.S. at 128, and offers only a contingent and uncertain path to one later. Because the enforcement target has no control over when and how to exercise its jury-trial right, and because it must

risk a cascade of adverse consequences—from reputational harm to prejudicial agency action in future licensing and enforcement proceedings—if it is to have any hope of a jury trial, this process falls far short of the constitutional floor. The Seventh Amendment protects a meaningful jury trial, not a speculative possibility after an agency has already adjudicated liability and imposed penalties, and this Court’s decision in *Jarkesy* confirms that any curtailment of that right must be “scrutinized with the utmost care.” 603 U.S. at 121. The FCC’s post-adjudication path to potentially obtaining a jury trial is a mirage and fails to pass muster under *Jarkesy*’s exacting standard.

**A. The FCC Provides No Access to a Jury During the Initial Agency Adjudication.**

The FCC’s forfeiture procedures do precisely what this Court forbade in *Jarkesy*. They “concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch.” *Jarkesy*, 603 U.S. at 140. This “is the very opposite of the separation of powers that the Constitution demands.” *Id.*; see also *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 205, 207 (2023) (Gorsuch, J., concurring).

Following an investigation in which the FCC typically demands documents and information from the enforcement target, see 47 U.S.C. § 403, the enforcement process almost always starts when the FCC issues the target a Notice of Apparent Liability for Forfeiture (“NAL”), see *id.* § 503(b)(4). The NAL, which is akin to an administrative complaint, informs the target of its alleged misconduct and violations of

statutory provisions or rules administered by the FCC, and proceeds to impose a sanction (typically, a monetary penalty). The target has 30 days to pay the proposed penalty in full or file a written statement contesting liability and/or the proposed penalty. This is typically the sole opportunity for the target to be heard. *See, e.g.*, FCC Enforcement Overview (FCC Enf. Bur. April 2020), at 15-16, *available at* [https://www.fcc.gov/sites/default/files/public\\_enforcement\\_overview.pdf](https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf); *see also* 47 U.S.C. § 503(b)(1), (2) (statutory authorization for FCC to “determine[ ] . . . forfeiture penalt[ies],” which make the target “liable to the United States for [the] forfeiture penalty”); *id.* § 503(b)(4) (statutory authorization for NAL process); *id.* § 504(a) (specifying that forfeitures “shall be payable into the Treasury of the United States”).<sup>2</sup>

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<sup>2</sup> As an alternative to the routine NAL process, the FCC has the “discretion” to instead issue a Notice of Opportunity for Hearing (“NOH”) and proceed via a formal trial-like hearing before the Commission or an in-house Administrative Law Judge. *See* 47 U.S.C. § 503(b)(3)(A); 47 C.F.R. § 1.201; Enforcement Overview at 16. The FCC rarely uses the NOH process, however, and the overwhelming majority of its enforcement actions follow the routine NAL process. While the NOH process at least has the surface appeal of providing a hearing before a purportedly neutral (albeit in-house) ALJ, like the routine NAL process, it does not involve a jury trial. *Cf. Jarquesy*, 603 U.S. at 117 (administrative adjudication before SEC ALJ, followed by review by the Commission); *id.* at 142 (Gorsuch, J., concurring) (noting that “the SEC’s Commissioners—the same officials who authorized the suit against Mr. Jarquesy—[had] the power to preside over his case themselves and issue judgment”).

If it rejects the target's arguments in response to the NAL—unsurprisingly, a frequent occurrence—the FCC issues a forfeiture order requiring payment by a specified date (typically, within 30 days of issuance of the order). Formally, the target then has two options. It may (1) pay the forfeiture amount, as directed, and petition for review in the appropriate federal court of appeals (without a jury), *see* 28 U.S.C. § 2344; 47 U.S.C. § 402(a), or (2) defy the FCC's payment directive and simply refuse to pay the forfeiture amount.

If the target takes the first route—the option *every* reputable FCC licensee invariably takes if it fails to reach an earlier settlement with the agency—the court of appeals reviews the FCC's factual findings with significant deference, as the Second Circuit did below. *See Verizon Commc'ns Inc. v. FCC*, 156 F.4th 86, 94 (2d Cir. 2025) (“An agency's factual findings must be supported by substantial evidence, which means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (citation and internal quotation marks omitted)). No jury reviews the FCC's allegations or factual findings via this process.

If the target takes the second route, the adverse findings remain in place and the FCC may—but, as discussed below, is not obligated to—refer the forfeiture to the Department of Justice. If DOJ chooses to pursue the matter, it will bring a collection action in an appropriate district court, *see* 47 U.S.C. § 504(a), and that action, if it is not resolved on a dispositive motion, theoretically can result in a jury trial that reviews the FCC's factual findings *de novo*.

The enforcement target thus has no control over whether it will receive a jury trial on the adverse findings of fact and determination of liability in the forfeiture order. It is only if DOJ chooses to bring a collection action—and only if that action is not otherwise resolved on a dispositive motion (such as a motion for summary judgment filed by the government)—that a jury may be empaneled as part of a follow-on collection proceeding. As discussed below, however, that never happens in practice. Jury trials in Section 504 collection proceedings to enforce FCC forfeiture orders are unheard of.

Reputable licensees cannot run the risk of sustaining a host of harms if they flout a forfeiture order and FCC directive to pay the penalty assessed. So they either settle or, as the carriers did here, pay and seek immediate appellate review of the forfeitures (without a jury trial). Even if they were bold—or, perhaps more accurately, foolhardy—enough to defy the FCC and accept being branded as a lawbreaker, they cannot compel the filing of the DOJ action that the government touts as the path to an eventual trial before a jury. The FCC's adverse finding and its panoply of adverse consequences (*see infra* at pp. 10-14)—all based on allegations investigated by the FCC, charges brought by the FCC, and violations found by the FCC—thus may linger. This contingent possibility of a jury trial is no right at all.

### **B. The FCC Prevents Targets from Meaningfully Exercising Their Seventh Amendment Right to a Jury Trial.**

As the FCC enforcement actions here starkly illustrate, the hypothetical post-adjudication process to obtain potential scrutiny by a jury fails to allow the meaningful exercise of Seventh Amendment rights—which both *Jarkesy* and analogous precedent require. See *Jarkesy*, 603 U.S. at 121 (“[A]ny seeming curtailment of the right’ has always been and ‘should be scrutinized with the utmost care.” (citation omitted)); see also *United States v. Booker*, 543 U.S. 220, 237 (2005) (explaining in Sixth Amendment context that new sentencing practices “forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government”). The hypothetical option posited by the government here is illusory because, as discussed above, the target has no control over whether and when a DOJ collection action will be brought and, in any event, faces at least three significant and lasting harms.

*First*, if an enforcement target seeks to exercise its notional right to obtain a jury trial by refusing to pay the penalty demanded, that leaves the FCC’s adverse findings intact—at least until the theoretical Section 504 jury trial arrives (if it ever arrives).<sup>3</sup> And, in the

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<sup>3</sup> The FCC does not refer all cases to DOJ for collection and, of the cases that the FCC does refer, DOJ does not always prosecute. Instead, the FCC’s Enforcement Bureau or Media

meantime, the FCC warns that it reserves the right to take prejudicial action against the target in future licensing transactions, including major merger transactions, by “us[ing] the facts underlying a violation” found in a NAL—and, by extension, a forfeiture order—“in a subsequent proceeding.” *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17102-03, ¶¶ 33-34 (1997) (asserting that “the Commission may use the facts underlying a violation in a subsequent proceeding”; that “[w]hat the Commission has done in the past, and what we will continue to do where appropriate, is to use the facts underlying the prior violations” in “subsequent [license] renewal, forfeiture, transfer, or other proceeding[s]”; and that these purported underlying facts could be introduced as evidence “going to the fitness of the licensee” and its alleged “pattern of non-complaint behavior”); *see also Policy Regarding*

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Bureau refers the matter to the FCC’s Office of General Counsel (“OGC”), which, in turn, must refer the matter to a local U.S. Attorney’s Office. *See* FCC Directive 1157.5, Forfeiture Tracking, Collections and Follow-up Systems (FCC Enf. Bur. May 2023), at 2 (“If the [civil monetary penalty] is not paid, OGC *may* refer the [forfeiture order] to DOJ for enforcement . . . .” (emphasis added)). These Offices, which have competing enforcement priorities, have discretion whether to prosecute. At any of these contingent steps, then, a collection case may stall. Contrary to the D.C. Circuit’s suggestion in *Sprint Corp. v. FCC*, 151 F.4th 347, 361 (D.C. Cir. 2025), that is not necessarily welcome news for the enforcement target given the potentially serious implications for future licensing transactions if the touted Section 504 jury trial—and opportunity to challenge the forfeiture order’s adverse findings—never materializes because the government declines to file a collection action.

*Character Qualifications in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, 102 FCC 2d 1179, 1209, ¶ 56 (1986) (explaining that, in exercising its licensing authority, “we will in the future treat violations of the Communications Act, Commission rules or Commission policies as having a potential bearing on character qualifications”), *recon. dismissed and denied*, 1 FCC Rcd 421 (1986); *In Re Application of Enid Pub. Radio Ass’n*, 25 FCC Rcd 9138, 9141, 9144-46, ¶¶ 8, 13-14 (FCC Media Bur. 2010) (“*Enid*”) (renewing license only for a truncated term, “less than the maximum otherwise permitted,” and subject to restrictive conditions based on, *inter alia*, prior order admonishing licensee for violating FCC rules).<sup>4</sup>

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<sup>4</sup> The FCC’s *Forfeiture Policy Statement* distinguished Section 504(c) of the Communications Act, which provides that “[i]n any case where the Commission issues a *notice of apparent liability* looking toward the imposition of a forfeiture . . . , that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.” 47 U.S.C. § 504(c) (emphasis added); see *Forfeiture Policy Statement*, 12 FCC Rcd at 17102-03, ¶ 34. Importantly, Section 504(c) does not restrict the FCC’s future use of a final *forfeiture order* (as distinct from a *NAL*). Further, while the FCC interprets Section 504(c) to prevent it from “us[ing] the mere issuance or failure to pay an *NAL* to the prejudice of the subject,” it asserts the right to make prejudicial

It bears emphasis that these “facts” that the FCC deems itself free to rely on to the detriment of enforcement targets in future proceedings were never found by any jury. And if an enforcement target does not pay the forfeiture (the only way to have any chance of a jury trial), it forgoes its opportunity to obtain immediate appellate review of the FCC’s adverse findings. *Cf. AT&T Corp. v. FCC*, 323 F.3d 1081, 1085 (D.C. Cir. 2003) (“[H]ere, where AT&T has already paid the penalty rather than wait for the Government to commence a recovery action, it has the option—and the right—to initiate suit in the court of appeals pursuant to section 402(a).”). Worse still, the target obtains no review by a jury *or any Article III court* if DOJ declines to file a collection action.

*Second*, the FCC asserts the right to use the facts underlying a forfeiture order (or preceding NAL) to increase penalties in future cases. *See* 47 U.S.C. § 503(b)(2)(E) (requiring the Commission to take into account “prior offenses” when assessing a “forfeiture penalty”); *see also, e.g., Matter of Abdias Datis, Miami, Fla.*, 40 FCC Rcd 1963, 1966-67, ¶ 10 & nn.37, 38 (2025) (NAL proposing increased penalty based on, *inter alia*, prior forfeiture order issued against enforcement target); *Enid*, 25 FCC Rcd at 9141, 9143-44, ¶¶ 8, 12 (NAL proposing increased penalty based on, *inter alia*, prior order admonishing target for violating FCC rules), *adopted*, 26 FCC Rcd 5205 (FCC

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use of “the facts underlying the prior violations that may have been the subject of an NAL.” 12 FCC Rcd at 17102-03, ¶ 34.

Media Bur. 2011) (adopting NAL’s increased penalty in final forfeiture order).

*Third*, and finally, the forfeiture order itself—a finding that the licensee has violated the law—inflicts a severe reputational harm on the licensee that can undermine future business prospects while the looming threat of enforcement could scare away investors and business partners. *Cf. FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 256 (2012) (“[FCC’s] findings of wrongdoing can result in harm to a broadcaster’s ‘reputation with viewers and advertisers.’” (internal quotation omitted)).

DOJ could even wait up to five years before moving to enforce the forfeiture order, with adverse consequences lingering all the while. *See* 28 U.S.C. § 2462. That is five years of an unreviewable sanction to preserve even the contingent possibility of a jury trial. This structure inverts the ordinary appellate process. Normally, the *sanctioned party* controls the right to obtain judicial review—and thus any delay in alleviating the sanction can be attributed to the sanctioned party’s own neglect. But the FCC’s byzantine statutory scheme enables *the government* to control whether such judicial and jury review will be available and, even if it ultimately will, allows the government to delay such review by waiting until the last moment to file its collection action. That means the government is free to delay while the enforcement target suffers the nonmonetary sanction.

Given these serious practical consequences of refusing to pay a forfeiture order, it is not surprising that reputable FCC licensees—repeat players with

frequent business before the agency, such as the carriers here—never take the hypothetical option pressed by the government. It is telling that Section 504 DOJ collection actions invariably involve fly-by-night enterprises who violated the FCC’s rules by, for example, operating pirate radio stations, *see, e.g., United States v. Sutton*, 2024 WL 2926594, at \*1 (W.D. Ark. Mar. 27, 2024), *report and recommendation adopted*, 2024 WL 2922991 (June 10, 2024); spamming consumers with “robocalls,” *see, e.g., United States v. Rhodes*, 2024 WL 3403045, at \*1 (D. Mont. May 30, 2024); “spoofing” their caller ID to engage in harassing telemarketing, *see, e.g., United States v. Abramovich*, 2023 WL 9547893, at \*2 (S.D. Fla. 2023) (subsequently stayed pending the court’s decision on plaintiff’s motion for summary judgment); or padding bills with fraudulent charges (“cramming”), *see, e.g., United States v. Net One Int’l, Inc.*, 2021 WL 7502539, at \*1 (M.D. Fla. Feb. 25, 2021), *report and recommendation adopted*, 2021 WL 7502538 (M.D. Fla. Mar. 16, 2021). These entities are rarely repeat players before the Commission and thus suffer few of the consequences described above. Moreover, the jury trials touted by the government in these failure-to-pay cases invariably do not even materialize. These cases are typically resolved on successful motions by the government for judgment on the pleadings, *see, e.g., Sutton*, 2024 WL 2926594, at \*1, or summary judgment, *see, e.g., United States v. Pennington*, 2023 WL 2542594, at \*10 (E.D. Ky. Mar. 16, 2023), *appeal dismissed*, No. 23-5337, 2023 WL 11091211 (6th Cir. Nov. 28, 2023). Others are resolved on motions for default judgment where the defendant fails to present any defense (or even

appear). *See, e.g., United States v. Polynice*, 2022 WL 860381, at \*1 (S.D. Fla. Mar. 23, 2022).

**C. The Government’s Attempt to Skirt the Seventh Amendment by Severing a Forfeiture Order’s “Nonmonetary” Harms Fails.**

The government contends there is no constitutional obstacle here because the enforcement target can refuse to pay the monetary penalty—albeit at the risk of incurring the serious adverse consequences discussed above—and, so the argument goes, the FCC could then impose these supposedly severable nonmonetary penalties without necessitating a jury trial. Gov’t Pet. in *FCC v. AT&T, Inc.* (No. 25-406) at 12–13 (Oct. 2, 2025); *accord, Verizon*, 156 F.4th at 106. But the nonmonetary harms inflicted by a forfeiture order’s finding that the enforcement target has broken the law cannot be neatly divorced from the order’s penalty assessment, which the FCC demands the target to promptly pay to the Treasury.

More fundamentally, the FCC’s argument ignores the *in terrorem* effect of these nonmonetary consequences that burden the free exercise of Seventh Amendment rights. The practical effect of an unpaid and unchallenged forfeiture order, coupled with the FCC’s warnings in its *Forfeiture Policy Statement*, is to coerce enforcement targets into forgoing their jury-trial right and thereby impose monetary penalties without abiding by the Seventh Amendment. Even assuming that the FCC could impose the same nonmonetary harms in isolation without

necessitating a jury trial, by imposing both monetary and nonmonetary harms together and then conditioning access to a jury on potentially forgoing *any* challenge to the nonmonetary harms, the FCC is able to evade jury review of its monetary sanctions.

This scheme amounts to an unconstitutional condition—or at least an impermissible burden—on the targets’ Seventh Amendment right to a jury trial. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (“[T]he unconstitutional conditions doctrine . . . vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”); *see also Sheetz v. Cnty. of El Dorado, Cal.*, 601 U.S. 267, 279 (2024) (unconstitutional-conditions doctrine applies to burdens on the right to “access . . . federal courts”) (citing *Terral v. Burke Const. Co.*, 257 U.S. 529, 533 (1922)). After all, “[c]onstitutional rights would be of little value if they could be . . . indirectly denied’ or ‘manipulated out of existence.’” *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (omission in original; citations omitted). Put simply, the FCC cannot wield its licensing authority to evade the Seventh Amendment guardrails around the agency’s ability to bring enforcement actions that assert legal claims.

The government and the Second Circuit are also wrong to suggest that the Commission can evade the Seventh Amendment by insisting that the enforcement target need not pay the penalty assessed even though the forfeiture order directs it to do so within 30 days. *Verizon*, 156 F.4th at 106. Surely the SEC in *Jarkesy* could not have avoided the Seventh

Amendment defect that doomed its enforcement action by following its penalty assessment with a letter saying, “Actually, never mind about payment for now. We may decide to collect any time within the next five years, in which case you can have your right to a jury trial at that point.”

*Jarkesy* reaffirms that the Seventh Amendment is implicated by claims that are “legal in nature,” including those “akin to” common law claims. *Jarkesy*, 603 U.S. at 122, 126, 134 (quoting *Granfianciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). And here, the government does not dispute that its enforcement actions against the carriers are legal in nature (indeed, they are akin to classic common-law claims for negligence) and that they sought monetary penalties—the “prototypical common law remedy,” *id.* at 123. “If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.” *Id.* at 128 (citation omitted).

Moreover, the Seventh Amendment attaches to the “initial adjudication” of an action at common law. *See id.* at 128 (“In contrast to common law claims, no involvement by an Article III court *in the initial adjudication* is necessary in [cases involving public rights].” (emphasis added)); *see also id.* at 168 (Sotomayor, J., dissenting) (disagreeing with the Court’s “conclusion that Congress cannot assign a certain public-rights matter for *initial adjudication* to the Executive because it must come only to the Judiciary” (emphasis added)). So, whatever the government may later elect to do with respect to collecting a penalty owed to the Treasury, that cannot

retroactively convert an action that is legal in nature—and therefore triggers the jury-trial right—into a different action that falls outside the Seventh Amendment. As in the case of other constitutional rights, the Seventh Amendment “does not leave” regulated parties “at the mercy of *noblesse oblige*.” *Fox Television Stations*, 567 U.S. at 255 (citation omitted).

## **II. The Second Circuit’s Reasoning Would Encourage Other Agencies to Undermine the Constitutional Scheme, While the Fifth Circuit’s Approach Allows Continued Enforcement Within Constitutional Constraints.**

### **A. Validating the FCC’s Conditional Jury-Trial Right Would Provide a Roadmap for Other Agencies to Circumvent the Seventh Amendment.**

A decision by this Court affirming the Second Circuit’s flawed judgment would weaken Seventh Amendment rights for not just corporate enforcement targets such as the carriers here, but also for *individuals* who may find themselves in the crosshairs of any future FCC enforcement action. *Cf. Booker*, 543 U.S. at 237 (addressing how Sixth Amendment “right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government”).

Worse still, a decision endorsing the Second Circuit’s blessing of the government’s convoluted, post-adjudication theory of Seventh Amendment

rights could encourage other agencies to create their own artificial processes for post-adjudication jury trials that are contingent on actions the government may or may not take after it prosecutes and determines liability on common-law claims.

As the government acknowledged in *Jarkesy*, more than two dozen agencies can impose civil penalties in administrative proceedings.<sup>5</sup> And like the FTC and the SEC, many of these agencies are authorized to issue collateral, nonmonetary sanctions that would not be reviewable by a jury pending the DOJ's decision to bring an enforcement action.

For example, under the Second Circuit's rationale, the SEC could shirk this Court's holding in *Jarkesy*

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<sup>5</sup> See Tr. of Oral Arg. 78-79 (Principal Deputy Solicitor General); see also 5 U.S.C. § 1215(a)(3)(A)(ii) (Merit Systems Protection Board); 7 U.S.C. §§ 9(10)(C), 13a (Commodity Futures Trading Commission); §§ 499c(a), 586, 2279e(a) (Department of Agriculture); 8 U.S.C. §§ 1324c, 1324d (Department of Justice); 12 U.S.C. §§ 5563(a)(2), (c), (Consumer Financial Protection Bureau); 16 U.S.C. § 823b(c) (Federal Energy Regulatory Commission); 20 U.S.C. § 1082(g) (Department of Education); 21 U.S.C. § 335b (Department of Health and Human Services/Food and Drug Administration); 29 U.S.C. § 666(j) (Occupational Safety and Health Review Commission); 30 U.S.C. §§ 820(a) and (b) (Federal Mine Safety and Health Review Commission); 31 U.S.C. § 5321(a)(2) (Department of the Treasury); 33 U.S.C. §§ 1319(d) and (g) (Environmental Protection Agency); 39 U.S.C. § 3018(c) (Postal Service); 42 U.S.C. § 3545(f) (Department of Housing and Urban Development); 46 U.S.C. § 41107(a) (Federal Maritime Commission); 47 U.S.C. § 503(b)(3) (Federal Communications Commission); 49 U.S.C. § 521 (Federal Railroad Administration); § 46301 (Department of Transportation).

by using its in-house process to adjudicate securities fraud claims seeking monetary penalties so long as it notifies enforcement targets that they can withhold payment, subject to a follow-on DOJ collection action that may never occur. Of perhaps even greater concern, the SEC could then leverage its adverse findings in the penalties order to take future adverse actions against the enforcement target, such as by delisting it from national exchanges. *See* 15 U.S.C. §§ 78l(k), (authorizing “summar[y]” suspension of trading if “in [the Commission’s] opinion the public interest and the protection of investors so require”), (d) (authorizing delisting from a national securities exchange “upon such terms as the Commission may deem necessary to impose for the protection of investors”). Like the FCC here, the SEC could argue that these collateral effects do not trigger the jury-trial right because they involve “nonmonetary” sanctions. But this flawed argument, if accepted, would allow the SEC to wield the threat of delisting (a collateral nonmonetary sanction) to unconstitutionally coerce enforcement targets into surrendering their constitutional right to a jury trial for the monetary penalties.

Adopting the Second Circuit’s reasoning would therefore open the door for agencies to subvert the Seventh Amendment’s guarantee and skirt this Court’s decision in *Jarkesy* by creating artificial, post-adjudication procedures that deny a meaningful jury-trial right.

**B. Affirming the Fifth Circuit’s Decision, by Contrast, Preserves the Seventh Amendment Right While Still Permitting Agency Flexibility.**

Endorsing the Fifth Circuit’s correct reasoning, on the other hand, ensures that the law is enforced by agencies within constitutional constraints.

Crucially, this does not mean that an agency is foreclosed from bringing *any* kind of administrative enforcement action using its in-house procedures. There would be no Seventh Amendment bar to purely administrative proceedings for claims that are not legal in nature (for example, equitable claims or claims that otherwise fall within the “public rights” exception), *see Granfinanciera*, 492 U.S. at 53–54, nor for any claims if the defendant chooses to waive its right to a jury trial, *see Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 675, 677-679 (2015).

Nor does the Fifth Circuit’s approach encourage evasion of regulation. Lawfully adopted agency rules (including FCC rules) of course continue to apply. And the FCC can order regulated entities to comply with those rules. *See, e.g.*, 47 U.S.C. § 312(b) (authorizing FCC to issue “cease and desist” orders where, *inter alia*, a person has “violated or failed to observe any rule or regulation of the Commission authorized by” the Communications Act); *Robocall Enf. Notice to All U.S.-Based Voice Serv. Providers*, 39 FCC Rcd 5579, 5580 (2024) (noting that the FCC’s Enforcement Bureau “has issued numerous ‘cease-and-desist’ letters, warning voice service providers that they were originating or transmitting suspected illegal

robocalls and could be subject to blocking”). What the agency cannot do, however, is force an enforcement target to run the gauntlet of an in-house adjudication of a common-law claim seeking civil monetary penalties where the target has been denied its constitutional right to present its defense to a jury.

Affirming the Fifth Circuit’s judgment also would not stand in the way of a straightforward legislative fix that allows the FCC to bring common-law claims seeking monetary penalties without running afoul of the Constitution: Congress could amend the Communications Act to allow *either* party to initiate a jury trial by (a) authorizing the FCC to bring its enforcement action in a district court in the first instance (as the SEC can do, *see Jarkesy*, 603 U.S. at 116) and (b) if the FCC declines to do so, allowing the enforcement target to remove the action to the district court, where it will be afforded the opportunity to contest the government’s allegations before a jury.<sup>6</sup>

In sum, a decision by this Court that upholds the Fifth Circuit (rather than the Second Circuit) will not hobble legitimate enforcement; it will instead reaffirm *Jarkesy*’s central holding that any administrative enforcement must proceed in a manner consistent with the Seventh Amendment and the separation of powers.

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<sup>6</sup> The government appropriately concedes that, in a *de novo* district court proceeding, the enforcement target must be able to “contest the legal (as well as the factual) determinations underlying the relevant FCC forfeiture order.” Gov’t Pet. in *FCC v. AT&T, Inc.* (No. 25-406) at 15 (citing *McLaughlin Chiropractic Associates v. McKesson Corp.*, 606 U.S. 146, 152 (2025)).

**CONCLUSION**

For the foregoing reasons, this Court should affirm the Fifth Circuit and reverse the Second Circuit.

Respectfully submitted,

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