No. 25-406

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

v.

AT&T, INC.

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

RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Under the Communications Act of 1934, the Federal Communications Commission may assess monetary "forfeiture penalties" for violations of the Act, including the requirement that telecommunications carriers take reasonable measures to protect certain customer data. 47 U.S.C. §§ 222, 503, 504. The Commission may impose such forfeiture penalties in administrative proceedings. *Id.* § 503(b)(4). If a carrier wants to guarantee judicial review, it must pay the penalty and then seek review in a court of appeals, which reviews the agency's order on the administrative record under the deferential standards of the Administrative Procedure Act. *Id.* § 402(a); 5 U.S.C. § 706(2). If the carrier wants a jury trial, by contrast, it must defy the Commission's order and refuse to pay, after which the Department of Justice ("DOJ") may, but is not required to, file a lawsuit in district court to collect the unpaid forfeiture. 47 U.S.C. § 504(a). While waiting for that DOJ lawsuit that might never come, the carrier suffers serious practical and reputational harms from the final Commission order.

The question presented is:

Whether the Communications Act violates the Seventh Amendment and Article III by authorizing the Commission to order the payment of monetary penalties for failing to reasonably safeguard customer data, without guaranteeing the defendant carrier a right to a jury trial.

RULE 29.6 STATEMENT

AT&T, Inc. is a publicly held company that has no parent company. No publicly held company owns 10% or more of its stock.

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INTRODUCTION

Just two Terms ago, in *SEC v. Jarkesy*, 603 U.S. 109 (2024), this Court held that a federal agency may not impose civil penalties for a claim in the nature of a common-law suit without affording a jury trial in an Article III court. Applying *Jarkesy* to the Federal Communication Commission's enforcement scheme, the court of appeals here held unconstitutional the issuance of a $57 million forfeiture order against AT&T, Inc. for a purported failure to act reasonably to protect certain customer information.

The Commission does not contest the court of appeals' holdings that the punitive fine is a civil penalty, that the enforcement action is analogous to a common-law negligence claim, and that the "public rights" exception for avoiding a jury trial is inapplicable. Rather, the Commission defends the forfeiture order on the ground that AT&T could have defied the final order requiring payment, waited for the Department of Justice ("DOJ") to initiate a new collection action in district court (up to five years later, if ever), and at that point requested a jury trial.

The court of appeals correctly rejected the Commission's argument, holding that the after-the-fact possibility of a jury trial does not comport with the demands of the Seventh Amendment or Article III. As an initial matter, a jury trial in a separate collection action cannot possibly satisfy the Seventh Amendment's guarantee of a jury trial in *this* action, in which the government has imposed a final, multimillion-dollar penalty on a defendant. Making matters worse, AT&T's ability to demand a jury trial is contingent on DOJ's discretionary decision to

initiate a collection action. The Commission rejoins that, in the absence of a district court judgment requiring payment, there is no harm, no foul. But Commission forfeiture orders imposing fines are not precatory directives made meaningful only by a subsequent collection action; they come with legal and practical consequences that trigger constitutional protections at the outset of the agency adjudication.

Nonetheless, AT&T respectfully submits that this Court should grant review. AT&T recognizes that this Court typically grants the Solicitor General's request to review a judgment invalidating agency action as unconstitutional. Since the court of appeals issued the decision below, moreover, a clear 2-1 split has developed. The D.C. Circuit and the Second Circuit have both upheld materially identical Commission forfeiture orders and rejected identical constitutional challenges pressed by similarly situated wireless carriers. One of those carriers, Verizon, has filed a petition for certiorari seeking review of the Second Circuit's decision and the same question presented as in this case. This Court should grant both cases, consolidate them for briefing and oral argument, and realign the parties so that the carriers are on one side and the Commission is on the other.

STATEMENT OF THE CASE

A. Legal Framework

Section 222 of the Telecommunications Act of 1996 requires telecommunications carriers to protect the confidentiality of "customer proprietary network information" ("CPNI"). 47 U.S.C. § 222(c); *see id.* § 222(h)(1)(A). As relevant here, carriers "must take

reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI." 47 C.F.R. § 64.2010(a).

"The Commission assesses forfeiture penalties for violations of the Act, including violations of section 222." Pet. App. 3a (citing 47 U.S.C. § 503(b)(3)(A)). Although the Commission has the option to designate an administrative law judge to adjudicate an alleged violation, the Commission rarely does so. *Id.*; *see* 47 U.S.C. § 503(b)(3)(A) (leaving choice to Commission's "discretion"). Instead, the Commission itself conducts the adjudication in two steps. First, the Commission issues a charging document called a notice of apparent liability ("NAL"). Pet. App. 4a. The subject of an NAL is not afforded a trial or hearing; it may only file a single written response. *Id.* Second, the Commission decides whether to affirm its own NAL. If the Commission affirms—as it almost always does—it issues a forfeiture order directing the carrier to pay the penalty, normally within 30 days. *Id.*

To challenge a forfeiture order, a carrier like AT&T can take one of two paths: (i) timely pay the ordered penalty and seek immediate review in a court of appeals under the Hobbs Act, 28 U.S.C. § 2342(1); or (ii) defy the Commission's order to pay and wait to see whether DOJ brings a collection action in district court within five years, *see* 47 U.S.C. § 504(a); 28 U.S.C. § 2462. *See* Pet. App. 5a.

B. Factual Background

In 2020, the Commission issued an NAL against AT&T (in parallel with other major carriers, including Verizon) for allegedly violating section 222.

Specifically, the Commission contended that AT&T acted unreasonably in protecting customer location information used to facilitate location-based services like Life Alert or AAA roadside assistance. In the Commission's view, AT&T should have terminated *every* location-based service providers' access to customer location information within 30 days of learning of one bad actor's misdeeds, no matter the essential (sometimes life-saving) services provided or the harms to customers that an abrupt termination would inflict. *See* Pet. App. 5a-7a. The total proposed penalty for AT&T amounted to $57 million. *Id.* at 7a.

In response, AT&T argued: (i) "the Commission's enforcement regime is unconstitutional under Article III, the Seventh Amendment, and the nondelegation doctrine"; (ii) the customer location information at issue is not CPNI; (iii) AT&T acted reasonably; and (iv) the forfeiture amount was arbitrary, capricious, and exceeded the $2 million statutory penalty cap. Pet. App. 7a.

In 2024, "the Commission rejected all of AT&T's arguments," "affirmed the proposed $57 million penalty," and "issued a forfeiture order demanding AT&T pay *** within 30 days." Pet. App. 7a-8a. Rather than defy the forfeiture order and wait to see whether DOJ would bring a collection action, AT&T elected to timely pay the penalty and seek immediate review in the court of appeals under the Hobbs Act. *Id.* at 8a.

C. Procedural History

1. The court of appeals vacated the Commission's order. It concluded that, under *Jarkesy*, the

Commission's "in-house adjudication violated the Constitution by denying [AT&T] an Article III decisionmaker and a jury trial." Pet. App. 2a.[1]

As a threshold matter, the court of appeals held that the enforcement proceeding against AT&T was a "suit at common law"—both because the $57 million forfeiture is a "civil penalt[y] *** that could only be enforced in courts of law" and because the alleged violation of section 222 for lack of reasonableness "is analogous to common law negligence." Pet. App. 9a-14a. The court then rejected the Commission's argument that the section 222 action was a matter historically adjudicated outside of Article III courts and thus subject to the "public rights" exception. *Id.* at 14a-20a.

Having decided that Seventh Amendment and Article III rights apply, the court of appeals turned to whether the Commission's forfeiture scheme is constitutionally sufficient. The court held that it is not. While acknowledging that the Commission's forfeiture scheme carries the "possibility of a back-end [collection action] trial," the court reasoned that "by the time DOJ sues (if it does), the Commission would have already adjudged a carrier guilty *** and levied fines"—resulting in "real-world impacts on carriers." Pet. App. 20a. "The Commission cite[d] no authority," the court observed, "supporting the proposition that

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[1] The court of appeals did not reach the remaining three issues that AT&T had raised before the Commission. *See* Pet. App. 8a. Judge Haynes concurred in the judgment only, but did not write separately. *See id.* at 1a n.*.

the constitutional guarantee of a jury trial is honored" by such a scheme. *Id.* at 21a.

The en banc court of appeals denied rehearing (with no poll requested). Pet. App. 1a. Concurrently, the panel issued a substitute opinion (which is already summarized above).

2. Shortly before the court of appeals resolved the Commission's rehearing request, the D.C. Circuit rejected a Seventh Amendment challenge to similar forfeiture orders imposing civil penalties for section 222 violations against T-Mobile and Sprint. *See Sprint Corp. v. FCC*, 151 F.4th 347, 359-362 (D.C. Cir. 2025), *reh'g petition filed*. A few weeks later, the Second Circuit aligned itself with the D.C. Circuit in another similar case involving Verizon. *See Verizon Commc'ns Inc. v. FCC*, 156 F.4th 86, 104-108 (2d Cir. 2025), *petition for cert. filed*, 2025 WL 3189623 (U.S. Nov. 6, 2025) (No. 25-567). Both circuits expressly disagreed with the Fifth Circuit's decision in this case.

DISCUSSION

Applying this Court's decision in *Jarkesy*, the court of appeals correctly held that the Commission's imposition of a $57 million civil penalty against AT&T, without affording a jury trial, violates the Seventh Amendment and Article III. In petitioning for certiorari, the Commission no longer disputes that imposition of a punitive civil penalty based on the reasonableness of AT&T's actions—*i.e.*, a "prototypical common law remedy" for a claim "analogous to common law negligence"—is a "suit at common law" within the meaning of the Seventh Amendment. Pet. App. 9a-14a. Nor does the Commission defend its

enforcement action under the "public rights" exception. *Id.* at 14a-20a.

Instead, the Commission seeks review only of the question of whether DOJ's ability to bring a collection action in district court cures the constitutional violation—on the theory that AT&T could have disregarded the forfeiture order's directive to pay the civil penalty and, assuming DOJ brought suit, demanded a jury trial. *See* Pet. 7. The court of appeals was right to reject that argument. *See* Pet. App. 20a-21a. But given the legal and practical importance of the issue, the development of a circuit conflict over the question presented, and the fact that the Court has now received a petition for certiorari in a case on the other side of the split, AT&T acquiesces in the Commission's request for certiorari.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE FORFEITURE SCHEME VIOLATES THE SEVENTH AMENDMENT AND ARTICLE III

A. The Forfeiture Penalty Scheme Infringed AT&T's Right To A Jury Trial In An Article III Court

In *Jarkesy*, this Court reinvigorated the constitutional principle that suits "in the nature of an action at common law" require "involvement by an Article III court," as well as "a jury if the Seventh Amendment applies," during "the initial adjudication" of the action. 603 U.S. at 127-128. Applied here, that rule means AT&T was entitled to argue its case to a jury *before* the Commission entered its forfeiture order. Like the in-house SEC "enforcement action" at

issue in *Jarkesy*, *id.* at 115, the Commission forfeiture proceeding here was one "in which *legal* rights were to be ascertained and determined," *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J.). Requiring AT&T to "defend [itself] before the agency rather than before a jury" was thus a denial of AT&T's Seventh Amendment right to a jury in that proceeding. *Jarkesy*, 603 U.S. at 115.

As the court of appeals explained, the possibility of a DOJ collection action following the Commission's imposition of a $57 million civil penalty does not "give [AT&T] everything promised by the Seventh Amendment and Article III." Pet. App. 20a. Although the Commission insists that AT&T "may obtain a jury trial in an Article III court," AT&T actually cannot on its own seek a federal court jury trial in response to a Commission adjudication. Pet. 2, 13. For one thing, review in the courts of appeals under the Hobbs Act "does not involve a jury." Pet. 4. For another, the Communications Act provides that "a civil suit" involving a forfeiture order can be brought in district court only "in the name of the United States." 47 U.S.C. § 504(a); *see* Pet. 15 (stating that "a Section 504(a) enforcement suit" must be "brought by the government"). Consequently, AT&T's ability to try its case to a jury depends entirely on whether DOJ chooses to initiate a collection action.

The upshot is that there is at most the "possibility" that "a carrier who fails to timely pay a forfeiture penalty may be sued by DOJ in federal district court"—the only forum in which AT&T may demand a jury trial. Pet. App. 20a. Yet "by the time DOJ sues (if it does), the Commission would have

already adjudged a carrier guilty of violating section 222 and levied fines." *Id.* *Jarkesy* precludes that result.

B. The Commission's Arguments Are Incorrect

The Commission offers two main grounds for reversing the court of appeals. Neither has merit.

1. The Commission's newly cited precedents are inapposite.

According to the Commission, this Court's precedents "allow[] a non-Article III federal tribunal to adjudicate a suit at common law without a jury, so long as the parties are entitled to a subsequent de novo jury trial in an Article III court." Pet. 8. But the cases upon which the Commission relies are of a piece with, and do not help the Commission avoid, *Jarkesy*'s statement that the Seventh Amendment and Article III guarantees attach to the "initial adjudication" of a suit at common law. 603 U.S. at 127-128.

The critical part of the Commission's explication of its favored authorities is the "so long as" proviso: initial adjudication without a jury is permissible "so long as the [aggrieved] parties are *entitled*" to exercise their constitutional right to a jury. Pet. 8 (emphasis added). To take the example of the Commission's leading case, a jury trial was available in that same action "at the request of either party." *Capital Traction Co. v. Hof*, 174 U.S. 1, 4 (1899); *see also* Pet. 8-10 (summarizing decisions wherein "the law *** ensure[d] that *either* party can have his case decided

by a jury before it is finally settled") (emphasis added) (internal quotation marks omitted).[2]

For the reasons discussed above (pp. 8-9, *supra*), AT&T has no assurance that the Commission's negligence-type action can be decided by a jury in an Article III tribunal; it must await a separate DOJ collection action that may never be brought. A constitutional right that cannot be exercised affirmatively, because it is conditioned on the government's unilateral action to launch a new case, is hardly "preserved." *Contra* Pet. 9. Indeed, it amounts to an "empty promise" of a jury trial that "is largely illusory in practice." *McLaughlin v. Chiropractic Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146, 167 (2025). The Commission never grapples with that limitation in proclaiming that "the statutory scheme *entitle*[*s*] [AT&T] to a de novo trial by jury." Pet. 10-12.

2. The Commission's adjudication itself triggers the Seventh Amendment.

The Commission further argues that the enforcement scheme avoids any constitutional violation because a regulated party need not pay a civil penalty absent a district court judgment in a DOJ collection action. The notion that forfeiture orders imposing fines are mere precatory statements, however, finds no support in law or fact.

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[2] The Commission's other primary authority mentions the Seventh Amendment only in passing when discussing the use of a "rebuttable presumption." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430 (1915).

For starters, the Communications Act does not speak in such terms. To the contrary, it provides that when the Commission "determine[s]" a violation has occurred, a regulated party "shall be liable to the United States for a forfeiture penalty." 47 U.S.C. § 503(b)(1). That penalty, in turn, "shall be payable into the Treasury of the United States." *Id.* § 504(a). Those are not "mere suggestions." Pet. App. 21a. They are the culmination of a proceeding that is "in its basic character a suit to determine and adjudicate *** traditional common-law issues"—namely, whether the defendant has breached a legal duty and, if so, "the amount" it is "obligated to pay." *Simler v. Conner*, 372 U.S. 221, 223 (1963).

The Commission's forfeiture order in this case confirms as much: "**IT IS ORDERED**" that AT&T "**IS LIABLE FOR A MONETARY FORFEITURE** in the amount of *** $57,265,625[.] *** Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) calendar days[.]" AR1:36-37. It would be news to regulated parties (and perhaps the Commission itself) for this Court to hold that such language—"is liable" and "[p]ayment *** shall be made"—has no legal effect.

To be sure, the Communications Act also provides that a DOJ collection action "for the recovery of a forfeiture imposed" by the Commission will be conducted via "a trial de novo." 47 U.S.C. § 504(a). But that does not negate the Commission's determination or the demand for payment. As the Act makes clear, the collection action is for "recovery" of a "penalty determined" and "forfeiture imposed"—past

tense. *Id.* "[N]o authority support[s] the proposition that the constitutional guarantee of a jury trial is honored by a trial occurring after an agency has already found the facts, interpreted the law, adjudged guilt, and levied punishment." Pet. App. 21a.

Beyond the requirement to pay, forfeiture orders have other "real-world impacts" pending a possible DOJ collection action. Pet. App. 20a. Notably, "the Commission must consider any history of prior adjudicated offenses in imposing future penalties." *Id.* at 20a-21a (citing 47 U.S.C. § 503(b)(2)(E)). A "prior adjudicated offense" includes the Commission's determinations underlying *unreviewed* forfeiture orders. *See, e.g.*, *Action for Child.'s Television v. FCC*, 59 F.3d 1249, 1265 (D.C. Cir. 1995) (Tatel, J., dissenting) ("[T]he Commission relies on its unreviewed *** determinations to impose increased penalties," and in "several instances *** has doubled and tripled forfeitures[.]").[3]

The Commission also gives short shrift to the "reputational harms" and other tangible risks (*e.g.*, increased financing costs) that regulated parties indisputably suffer when they are branded violators of

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[3] Ignoring its own history, the Commission points to the Communications Act's language "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 regulatory party." Pet. 13 (alteration in original) (quoting 47 U.S.C. § 504(c)). Under section 504(c), however, the "fact" that cannot be used is the "issu[ance] [of] a notice of apparent liability." *Id.* The provision says nothing about the facts underlying the NAL or, more importantly, the determinations made in an (unreviewed) forfeiture order finding liability.

the Communications Act and saddled with a multi-million-dollar fine. Pet. App. 21a. In the Commission's view, those practical consequences have nothing to do with the Seventh Amendment because they are not themselves civil penalties and could arise from the hypothetical grant of equitable relief only. Pet. 12-13. That argument misses the point: the fact that the harms and risks to AT&T here emanate from the forfeiture order that *did* impose monetary penalties reinforces the commonsense conclusion that an ensuing DOJ collection action (if ever brought) is not the "initial adjudication" necessitating a jury trial in an Article III court. *Jarkesy*, 603 U.S. at 128.

In any event, the Commission overlooks the obvious way in which reputational and other practical harms impermissibly burden an agency-adjudged violator's Seventh Amendment right to challenge a civil penalty. Because that right cannot be exercised unless DOJ brings a collection action, a deemed violator like AT&T has two options: either (i) endure the fallout from a forfeiture order while it awaits a collection action and a jury trial that may never materialize, in which case it will have no opportunity to overturn the Commission's findings in an Article III court; or (ii) ensure its right to Article III judicial review by forgoing a jury trial and challenging the forfeiture order in a court of appeals. *See* Pet. App. 5a. Unsurprisingly, the infeasibility of the first option effectively forces telecommunications carriers to abandon the possibility of a jury trial for the certainty of immediate Article III judicial review.

As such, the Commission is wrong to argue that AT&T effectively "waive[d]" its Seventh Amendment

claim by "cho[osing] to invoke an alternative review mechanism in which a jury is unavailable." Pet. 11. As this Court has held, "it [is] intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). AT&T has a constitutional right to Article III judicial review *and* a constitutional right to a jury trial when the government seeks monetary penalties. It cannot be forced to give up the latter in order to exercise the former. Any purported claim of waiver of a constitutional right in such circumstances cannot be valid. *See United States v. Kahan*, 415 U.S. 239, 242 (1974) ("The need to choose between waiving the Fifth Amendment privilege and asserting an incriminating interest in evidence sought to be suppressed, or invoking the privilege but thereby forsaking the claim for exclusion, creates what the Court characterized as an 'intolerable' need to surrender one constitutional right in order to assert another.").

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW

Notwithstanding the correctness of the court of appeals' reasoning, AT&T acquiesces in the Commission's petition for certiorari. The judgment below rests on an important constitutional issue with significant practical implications for the Commission and regulated parties alike. Given the conflict with the D.C. Circuit and the Second Circuit that has emerged on the identical question, *see* p. 6, *supra*, there is now uncertainty over the legal status of Commission forfeiture orders imposing massive civil penalties for common-law type claims. Only this

Court's definitive resolution of the question presented can ensure nationwide uniformity for all affected.

The Court has also received another petition seeking review of the Second Circuit's decision in *Verizon*. AT&T respectfully submits that the Court should grant that petition as well and consolidate both cases. As Verizon's petition explains, that is the Court's usual practice when it receives petitions from separate lower-court decisions presenting the same question. *See* 2025 WL 3189623, at *34. Such treatment is particularly appropriate here because this case and *Verizon* arise out of the same overarching Commission investigation and have been closely linked from the beginning. Granting and consolidating both cases would also allow the Court to reduce both cases to a single set of briefs.

If the Court agrees, it should realign the parties to this case. AT&T respectfully submits that it should be realigned as petitioner alongside Verizon, which is the more natural posture for presenting its challenge to the constitutionality of government action.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision of the court of appeals should be affirmed.

Respectfully submitted.

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