Nos. 25-406 & 25-567

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

AT&T, INC.,
RESPONDENT

—and—

VERIZON COMMUNICATIONS, INC.
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SECOND CIRCUITS

BRIEF OF AMICUS CURIAE PROFESSOR ILAN WURMAN IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF THE ARGUMENT

In the courts below, none of the parties appreciated the precise nature of these cases. The regulated entities argue that these matters, involving money penalties, are matters of private rights. The regulatory agency argues that telecommunications are a matter of public rights. Neither is quite correct. These cases involve both types of rights. The question involved is whether the government may condition the receipt of a public right—for example, the privilege to broadcast over the radio airwave spectrum—on the recipient's forgoing a private right.

The doctrine that resolves such questions is called the doctrine of unconstitutional conditions, although it would be more apt to describe it as the doctrine of

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[*] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

constitutional conditions. This brief argues that the government may condition a public right on the recipient's forgoing a private right, including the right to a jury trial prior to the imposition of a fine, but only if the conditions meet specific requirements. A critical component of the analysis, supported by this Court's historic public rights cases, is that the consequence for failure to pay must be no more than the loss of the public privilege. Here, the statutory scheme requires payment of the penalties independently of the ongoing receipt or loss of the public benefit and is therefore unconstitutional for that reason.

This brief does not address the possibility, however, that the jury trial right is in fact preserved by statute. It is therefore filed on behalf of neither party.

ARGUMENT

I. This Court's leading precedents involving regulatory money penalties are properly understood as constitutional conditions cases.

In *Securities and Exchange Commission* v. *Jarkesy*, 603 U.S. 109 (2024), the majority and dissenting opinions understood the importance of one of this Court's leading precedents, *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909). *Oceanic Steam* involved a regulatory money penalty imposed on a vessel that sought to bring in immigrants with diseases that could have been detected prior to embarking on the voyage. If the vessel refused to pay, docking privileges were denied. This Court upheld the imposition of the regulatory fine.

The majority in *Jarkesy* concluded that the money penalty in *Oceanic Steam* was constitutional because Congress's power over foreign commerce and immi-

gration was "so total" as to permit the penalties. *Jarkesy*, 603 U.S. at 129 & n.1. That account does not sufficiently appreciate that Congress's authority over many areas is similarly total. The dissent, on the other hand, argued that if the money penalties involved in that case were constitutional, then "civil-penalty claims brought by the Government" to enforce statutory prohibitions within Congress's power to enact must be constitutional in a broad range of contexts. *Id.* at 176 (Sotomayor, J., dissenting). That is also incorrect because the failure to pay in *Oceanic Steam* involved only the loss of the public privilege itself.

Oceanic Steam was rather a case about constitutional conditions. It involved the question whether Congress can condition receipt of a public privilege (docking privileges to bring in immigrants, itself a public right) on forgoing a private right (the right to a jury trial in an Article III court before imposition of a money penalty). The Court concluded yes, because the only consequence of a failure to pay was loss of a public privilege and because the small money penalties were germane to the program in question; they induced efficient performance of the regulatory obligation at issue.

Understanding the nature of this Court's leading precedents helps explain many of this Court's public rights cases; why *Atlas Roofing Co.* v. *Occupational Health and Safety Review Commission*, 430 U.S. 442 (1977), erred by allowing imposition of money penalties outside a public rights scheme; and how the present cases should be resolved if the merits of the public rights question are reached.

A. Public rights

At the most basic level, private rights are natural rights belonging to the individual, which exist antecedent to civil society. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117-41 (1765); *see especially id.* at 119 (these rights "belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it"). These are the rights to life, liberty, and property that the government cannot take away without due process of law. U.S. CONST. amend V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law."). Any suit to deprive someone of such rights pursuant to a law of the United States would be a suit at common law, equity, or admiralty arising under the laws of the United States, thereby requiring an Article III adjudication, *id.* art. III, and the suit would require a jury for legal remedies, *id.* amend VII.

The private rights category also includes disputes between two private parties involving their legal relations—as this Court has said, "the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932). A court is required to declare or adjust any relative liberty or property rights. Thus, a court is required to declare the property of one belongs to another under existing law, or that a contract has been breached and performance is due. *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Stern* v. *Marshall*, 564 U.S. 462 (2011).

Public rights, in contrast, generally fall into two overlapping categories. The first includes rights that do not exist in the state of nature. These are rights—

or privileges or benefits, to be more precise—that only exist by virtue of government grace or largesse. Public employment is one example. Public welfare benefits are another: there is no public treasury in the state of nature, and certainly no private right to access welfare benefits derived from that treasury. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565-86 (2007); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 160-79 (2019).

This reasoning applies to other resources held by the government, such as public lands. Although there is a private right to land ownership, there is no private right to land the government owns for the benefit of all in common. The distribution of such land is in its nature like a welfare benefit. Once such lands or benefits are distributed, however, those benefits operate just as do private rights and thus vest in the individual receiving them. *See, e.g.*, *Burfenning* v. *Chicago, St. P., M. & O. Ry. Co.*, 163 U.S. 321 (1896).

A second category of public rights is common and limited natural resources. Access to these rights do, in a sense, exist in the state of nature. One can freely travel on roads and rivers in the state of nature. One can freely fish in the common lakes. One can—if one has the technology—freely access the airwaves or airspace. But unlike the general right to acquire property or to engage in locomotion or to enter into contracts, such rights belong to all in common in a narrower geographic sense. All equally have a right to access the common highways and rivers. All equally have a right to access the common fisheries. All equally have a right to access the airwaves. In their nature these rights are limited because not all can

access them at the same time or without depletion. That is what makes them "public rights" subject at all times to control by the whole. Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885, 921-24 (2023). As Caleb Nelson has summarized, public rights belong to the people as a whole, and typically include "proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury" and collective rights such as the "rights to sail on public waters or to use public roads." Nelson, *supra*, at 566.

The public rights doctrine, properly so called, is not truly an exception to Article III. If the public rights doctrine were limited to public benefits, for instance, sovereign immunity would bar any lawsuit over access. Without the sovereign's consent to suit, there would be no defendant and therefore no "case" or "controversy" for a court to resolve. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002). Without a "case" or a "suit," neither Article III nor the Seventh Amendment would apply. The sovereign's power to deny consent further implies the power to decide such matters by private bill or to delegate adjudication exclusively to the executive branch. *See also N. Pipeline*, 458 U.S. at 67 (observing that the doctrine permitting certain cases to be adjudicated in non-Article III courts "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued").

B. Constitutional conditions

The unconstitutional conditions doctrine, or the constitutional conditions doctrine, relates to the doctrine of public rights. The question in such cases is whether access to a public right can be conditioned on forgoing a private right. The doctrine arises, that is, when the government offers a benefit that it is "permitted but not compelled to provide"—such as direct subsidies, other welfare benefits, or public employment—on condition that the recipient perform or forgo an activity over which he has autonomous choice and which "a preferred constitutional right normally protects from government interference." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421-27 (1989).

The doctrine applies in a variety of contexts. It applies to the question whether Congress can condition the receipt of federal funds on states' forgoing regulatory autonomy. In *South Dakota* v. *Dole*, this Court upheld Congress's conditioning the receipt of a portion of federal highway funds on the states' increasing their legal drinking age. 483 U.S. 203 (1987). The theory seems to have been that the state has no right to the federal funding—it is a privilege the government can grant or deny at its pleasure—and so it can condition receipt of the privilege on the state's forgoing some regulatory autonomy with which the federal government could not directly interfere.

The constitutional conditions doctrine has featured in many individual rights cases, of particular relevance here. This Court has upheld conditions on public employment, which is a public privilege, that require employees to forgo First Amendment rights to engage in partisan political activity. *United Public*

Workers v. *Mitchell*, 330 U.S. 75 (1947); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616-17 (1973); 5 U.S.C. §§ 7321–7326. This Court has also upheld a condition on the receipt of welfare benefits that required recipients to forgo Fourth Amendment rights, requiring their agreement to welfare searches of their homes. *Wyman* v. *James*, 400 U.S. 309, 317-18 (1971). This Court has also suggested that a state's greater power to deny a building permit to preserve the public right of ocean access includes the lesser power to grant the permit on the condition of creating a public easement without compensation under the Fifth Amendment. *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

All of these problems have the same basic structure. The question is whether the government may condition the receipt of a public privilege or benefit to which there is no entitlement in the first place (federal highway funds, government employment, welfare benefits, obstructing public access to a common resource) on the recipient's forgoing what otherwise would be constitutionally protected autonomy (the right to regulate drinking age, to engage in partisan political activities, to enjoy privacy in the home, to prevent public access to one's property).

It should be noted that this Court does not often use the language of "unconstitutional conditions," and it has suggested that the doctrine is disfavored. This Court has often said that the rule is that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). Yet, that is precisely what this Court has permitted, so long as the government carefully adheres to the proper framework.

The central part of the analysis is germaneness. In the federalism context, the Court has explained that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207; *id.* at 208 & 208 n.3 (describing this condition as "germaneness"). In the public employment and First Amendment cases, the Court focused on the importance of efficiency, integrity, and neutrality among government servants and has held that forgoing some First Amendment rights is a legitimate and just "purpose" of legislation relating to such employment. *Ex parte Curtis*, 106 U.S. 371, 373 (1882); *Mitchell*, 330 U.S. at 97-98. In the welfare search context, the Court has approved suspicionless searches because the state has an "appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman*, 400 U.S. at 319. "[T]he greater power to deny for a good reason includes the lesser power to condition for the same reason," Professor Sullivan has explained, citing Robert Hale, "but government cannot impose a condition for a reason not germane to one that would have justified denial." Sullivan, *supra*, at 1460.

Critically, in each of these cases, the only consequence for failure to observe the condition was a loss of the public privilege. As soon as a public employee becomes again a private figure, he retains all of his First Amendment rights. And, as this Court explained in *Wyman*, "[t]he only consequence of [a] refusal" to agree to welfare searches "is that the payment of benefits ceases," which is "no different than if she had exercised a similar negative choice initially

and refrained from applying for [welfare] benefits." 400 U.S. at 325. If the consequence extended beyond loss of the privilege, then it would no longer be germane to that privilege and would not be a mere incident of the grant of the public right. The condition would instead be an impermissible regulation of private rights.

Another factor in the analysis is that the condition must not be unduly coercive: it must leave the recipient with a genuine choice whether to accept or refuse. This condition is less discussed. In the federalism cases, the Court's "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). In that case, losing a mere five percent of the state's federal highway funds was held not to be coercive, leaving the state a genuine choice to forgo the funds and maintain its lower drinking age. On the other hand, threatening a state with a loss of its entire Medicaid funding unless it agreed to administer an expanded program for the government was a "gun to the head." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 581 (2012).

C. This Court's precedents

This Court's public rights cases are explicable within the framework of the constitutional conditions doctrine. The central precedents supporting regulatory penalties involve the customs and immigration contexts.

Customs. The appraisal of imports has long been held to be a public right. *See, e.g.*, *Buttfield* v.

Stranahan, 192 U.S. 470, 493 (1904) ("As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised."); *Oceanic Steam*, 214 U.S. at 335 (quoting same).

In *Passavant* v. *United States*, 148 U.S. 214 (1893), and a few earlier cases,[1] the Court addressed whether the customs service could impose, without judicial review, additional "penalty" duties when the appraised value sufficiently differed from the value declared by the importer. The Court explained as a general matter that the government's tariff legislation provided "for a speedy and equitable adjustment" of the value, and if judicial review were available "the prompt and regular collection of the government's revenues would be seriously obstructed and interfered with." *Passavant*, 148 U.S. at 220. Judicial review would unfold years after the goods had left the government's possession. *See also Barlett*, 57 U.S. at 272-73 ("Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury, months and even years after the article has been withdrawn from the control of the government, and when the knowledge of the transaction has faded from the memories of its officers.").

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[1] *Bartlett* v. *Kane*, 57 U.S. 263, 270 (1853); *Sampson* v. *Peaslee*, 61 U.S. 571, 580 (1857).

As for the additional penalty, the Court explained that such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." *Passavant*, 148 U.S. at 221 (quoting *Bartlett*, 57 U.S. at 274). "They are designed to discourage undervaluation upon imported merchandise," the Court added, "and to prevent efforts to escape the legal rates of duty." *Id.* Whether designated a duty or a "penalty," Congress had the power to authorize its imposition, the Court held, because it "was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute." *Id.* at 222.

The question in the case, best understood, was whether as a condition of enjoying the public right of importing foreign goods, importers could be made to sacrifice a portion of their private rights. The answer was yes, and the Court went to great lengths to explain the condition's germaneness. If the reason for the condition would justify prohibiting the importation altogether, then it would be a constitutional condition. It seems clear that dishonesty on the part of the importer or failing to pay proper duties would be grounds to prohibit importation altogether and that, as a consequence, the government could exercise the lesser power of imposing a condition permitting importation on forgoing any Article III or jury rights should the collectors find discrepancies. All of the Court's observations regarding the necessity of an efficient means of revenue collection and the difficulty of holding on to imported goods for years while judicial review unfolds would support the conclusion of germaneness.

Even more importantly, the only consequence for failing to pay the duty was losing a public right, namely, the right to import the goods into the United States.[2] Hence the condition was directly connected to the continued enjoyment of a public right. If the penalty had been imposed *irrespective of* the right to import the goods, that would have raised a thornier constitutional problem. All penalties, even those independently enforceable, surely deter wrongdoing, and in this case would have deterred the importer from providing a false value. But once the right to import the goods is forfeited, there is no longer any reason to impose the penalty. Any imposed penalty would no longer be germane to the purpose of the public benefit. The individual would have forfeited the public benefit, and the public would have reclaimed it. A condition on the exercise of a privilege must terminate with the privilege, otherwise the condition itself would be the regulation rather than a mere incident of the grant of a public privilege. And Congress could certainly not have provided as a general, standalone regulation that penalties for violations of law be paid without courts or juries.

Immigration. This Court's subsequent language in the immigration context evokes the constitutional conditions doctrine more explicitly. Immigration is a

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[2] For the relevant provision, see An Act to simplify the laws in relation to the collection of the revenues, 26 Stat. 131, 134-35 (June 10, 1890). There was no consequence other than the goods could not be unloaded without paying the additional duty. Indeed, if the undervaluation was by over 40 percent, the goods could be seized, but the collector would still have to bring an action for fraud.

classic public right: there is no private right to enter into any country one pleases. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 967-70 (1988); *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1318 (1983) (noting the rights-privileges distinction as applied to these cases). In *Oceanic Steam*, this Court addressed the constitutionality of a money penalty imposed for bringing in aliens with "loathsome" or contagious diseases that could have been detected at the port of departure. 214 U.S. at 330. The determination of the customs and immigration officials at the port of entry were exclusive of judicial review and therefore conclusive. *Id.* at 333. Critically, the only consequence for failing to pay the penalty was the loss of the public privilege: no clearance papers would be given to any vessel from the company while the fines remained unpaid. *Id.* at 332.[3]

The Court did not use the term "unconstitutional conditions doctrine," but its language is rooted unmistakably in that idea. The Court stated: "We think . . . the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort

[3] John Harrison has explained that "clearance was very valuable to the steamship company, so it had strong incentives to pay the penalty," but that "clearance was a privilege, not a right," and therefore Congress "could create a form of executive adjudication by conditioning a benefit on compliance with the result of the adjudication." Harrison, *supra*, 54 Ga. L. Rev. at 182-83.

to judicial power for their enforcement." *Oceanic Steam*, 214 U.S. at 333. That is, the greater power to deny a public right altogether—clearance for vessels bringing in aliens—must necessarily include the lesser power to condition such clearance, which condition advances a purpose that would constitute permissible grounds to deny the public right altogether. Here, the permissible reason was to ensure "efficient performance" of a legitimate regulatory obligation to prevent the introduction of diseases. *Id.* at 337.

The Court stated subsequently in its opinion that because of the "absolute power of Congress over the right to bring aliens into the United States," it would be "constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and," therefore so too is it constitutional to "impose[] upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated." *Id.* at 342. That is classic germaneness analysis: the greater power to deny for a good reason includes a lesser power to condition for the same reason.

The Court then reemphasized the consequence of failing to pay the penalty—the loss of a public right—and its connection to administrative competence: Congress's "complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance, as a means of enforcing the penalty which there was lawful authority to impose." *Id.* at 343.

As noted, this Court in *Jarkesy* may not have sufficiently appreciated the nature of the *Oceanic Steam* precedent. It does not stand for the proposition that Congress's power over immigration is necessarily more total than its other granted powers. But neither does it stand for the proposition that Congress may freely permit the imposition of regulatory penalties in any area falling within its enumerated powers. Rather, the case stands for the proposition that Congress may condition a public privilege on forgoing a private right to an Article III court and Seventh Amendment jury if doing so is germane to the program and the only consequence for failing to pay is the loss of the public privilege.

It should now also be clear that *Atlas Roofing* was wrongly decided. That case involved regulatory penalties imposed for workplace safety violations. 430 U.S. 442. This Court upheld the penalty, reasoning that "Congress has often created new statutory obligations" and has "provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." *Id.* at 450. Both statements are true (but irrelevant): public rights cases never required judicial process and therefore required neither an Article III court nor a jury, and Congress has indeed created new statutory obligations, such as in *Passavant* and *Oceanic Steam*, and appended civil penalties.

The difference is that such penalties were an incident to a public rights regime and the only consequence for failing to pay the fine was loss of the public privilege. The statute in *Atlas Roofing* did not involve public privileges at all, but rather traditional

private rights: the rights to operate a private business, to hire workers, and the tort obligations of employer to employee. These rights exist antecedent to government, sovereign immunity does not apply, and the common law governed the relevant rights and relations. The imposition of money penalties without courts and juries cannot be understood as a condition on the receipt of some public benefit. There is no public benefit involved. The case involved private rights and only private rights.

II. Application to this case.

Applying this Court's *Jarkesy* decision, the Fifth Circuit below held that Article III and the Seventh Amendment applied to a civil monetary penalty against AT&T for violations of section 222 of the Telecommunications Act. *AT&T, Inc.* v. *FCC*, 149 F.4th 491 (5th Cir. 2025). Under that provision, telecommunications carriers have an obligation to protect the confidentiality of "customer proprietary network information," and could not "use, disclose, or permit access to" such information except as necessary to provide telecommunications services. *Id.* at 494. Commission regulations further provide that carriers "must take reasonable measures to discover and protect against attempts to gain unauthorized access to" such information. *Id.*

The court below concluded that the public rights exception did not apply because "[n]egligence claims against common carriers have been routinely adjudicated in state and federal courts." *Id.* at 501. It held that "the section 222 action is analogous to common law negligence" because, among other things, it "punishes carriers for failing to take reasonable measures to protect customers' personal data." *Id.* at 498-99.

The action "target[s] the same basic conduct" as the common law negligence claim. *Id.* at 499 (quoting *Jarkesy*, 603 U.S. at 125). "[T]he statutory action need not be 'identical' to a common law analogue," but must merely have a "close relationship" to it. *Id.* (quoting *Jarkesy*, 603 U.S. at 126).

The Fifth Circuit faithfully applied the relevant part of the *Jarkesy* analysis. A properly originalist analysis, however, which would account for the constitutional conditions doctrine, would proceed along different lines of inquiry. Access to the broadcasting spectrum, including the mobile phone network, is a classic public right. *Cf., e.g.*, *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-89 (1969) ("If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. . . . Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations."). The question, then, is not whether the violations of which AT&T had been accused had common-law analogues—they did—but whether imposing the penalties for an administrative finding of such violations was a germane condition to the continued receipt of a public benefit.

Under the statute, the FCC penalties are independently enforceable. 47 U.S.C. 503(b). That is, they apply whether or not the public right is given up. For that reason, they are not germane. Here, moreover, the penalty imposed was $57 million. The penalty appears to have been nothing but punishment. Although all punishments in a sense induce regulatory

compliance, in *Passavant* and *Oceanic Steam* the penalties were relatively small, and it could be said they were intended not to punish but only to induce future compliance. Here, it could perhaps be argued that the connection between the amount imposed and any particular harm to customers or to the cost of remedying the breaches is obscure. If the penalty is unconnected with the reason for its imposition, that is an argument against its germaneness.

If Congress revised the statute to provide that the failure to pay would result in loss of the relevant license, then the statute would possibly fit under the constitutional conditions framework. Germaneness would no longer be an issue, aside from the potential problem with imposing a massive penalty. But there would be an additional issue: the consequences to AT&T of losing their license would be so dire—it would end their business—that they would necessarily pay the fine. The loss of so valuable a privilege would effectively be coercive: at least arguably, it would not leave the company with a genuine choice. And for that reason, it also may not be constitutional to condition this particularly valuable privilege on forgoing private rights.

At a minimum, should the Court reach the merits of the public-rights question, it would have to address these questions.

CONCLUSION

If this Court reaches the merits of the question whether this case is a matter of public or private rights, it should reassess its understanding of its leading precedents, including *Oceanic Steam*. The reason money penalties were permissible in that case

was because the only consequence of failure to pay was the loss of a public privilege, and the condition was thought to be germane. The condition and threat of the loss of the public privilege were also not particularly coercive. *Atlas Roofing* erred because that case involved only private rights, and no public rights were at issue. *Jarkesy* similarly involved no public rights at all.

Here, a public right is at issue—the right to broadcast over the spectrum—but the money penalties involve private rights. The question is whether the statute conditions receipt of the public right on forgoing the private right, and whether that condition is germane. Here, the condition is not germane because the penalties are not imposed as a condition of ongoing receipt of the public privilege but are instead enforceable irrespective of the ongoing receipt of that privilege. It therefore goes beyond this Court's prior precedents, including the precedent of *Oceanic Steam*. If the Court reaches the merits of the question, it should clarify this Court's previous precedents and the connection between private and public rights in such regulatory schemes.

Respectfully submitted,

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