**Nos. 25-406 and 25-567**

# In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS,

*v.*

AT&T, INC.

VERIZON COMMUNICATIONS INC., PETITIONER,

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

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

## BRIEF FOR AT&T, INC. AND VERIZON COMMUNICATIONS INC.


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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 FCC 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. 47 U.S.C. § 402(a); 5 U.S.C. § 706(2). If the carrier wants a jury trial, by contrast, it must defy the FCC's order and refuse to pay, after which the Department of Justice 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 FCC order. The question presented is:

Whether the Communications Act violates the Seventh Amendment and Article III by authorizing the FCC 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.

## DISCLOSURE STATEMENT

AT&T, Inc. certifies that it is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of AT&T, Inc.'s stock.

Verizon Communications Inc. certifies that it is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of Verizon Communications Inc.'s stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Regulations and administrative materials:



Other authorities:

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## INTRODUCTION

Two Terms ago, in *SEC* v. *Jarkesy*, this Court reaffirmed that the Seventh Amendment guarantees a jury in *all* "Suits at common law," even those that Congress has assigned to a federal agency for adjudication. 603 U.S. 109, 134 (2024). Because "[w]hat matters is the substance of the action," not where it is brought, Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims" be resolved by "an administrative tribunal."

*Id.* at 134-135 (citation omitted). *Jarkesy* thus held that the SEC could not constitutionally force individuals and businesses "to defend themselves before the agency rather than before a jury" in a claim for civil penalties for fraud. *Id.* at 115.

These consolidated cases concern a similar attempt to end-run the Seventh Amendment. Using in-house proceedings, the Federal Communications Commission ordered wireless carriers to pay tens of millions of dollars in forfeiture penalties for supposedly violating a statutory duty to safeguard their customers' data. The FCC claimed the authority to ratchet up that number into the billions of dollars or more, but selected the fines levied here based on the level of culpability that it perceived. That remedy is plainly punitive and thus legal, and the underlying cause of action parallels common-law negligence, too. So these should be easy cases under *Jarkesy*. Indeed, the government apparently no longer contests that the FCC's claims triggered the Seventh Amendment.

The government instead rests on a distinct statutory quirk to defend the FCC penalty scheme. After the FCC issues a final in-house order directing payment within 30 days, a carrier has two options. First, it can pay the penalty and go straight to a court of appeals for APA-style review (where no jury is available). Second, the carrier can defy the final agency order and wait to see if the Department of Justice brings a collection action in federal district court at some point over the next five years. Because *that separate collection action* would carry a right to a jury trial, the government sees no Seventh Amendment problem with imposing massive in-house penalties beforehand—penalties that, not coincidentally, carri-

ers always pay. In the decisions below, the Second Circuit blessed the FCC's *Jarkesy* workaround, while the Fifth Circuit rejected it.

The Fifth Circuit got it right. The after-the-fact possibility of a jury trial in a separate debt-collection action does not satisfy the Seventh Amendment for two alternative reasons.

First, the Seventh Amendment entitles AT&T and Verizon to demand a jury *before* the FCC enters final orders; it does not promise them the mere possibility of a jury long after the fact. The FCC proceedings result in final, binding, appealable adjudications, in which a federal agency "determine[s]" with the force of law that the carriers "shall be liable to the United States." 47 U.S.C. § 503(b)(1). One need only look at the face of the orders here, which "**ORDER[**]" the payment of massive penalties and give instructions and a deadline for doing so. AT&T Pet. App. 131a; Verizon Pet. App. 138a. Providing a jury in a possible *different* "suit"—a collection action that DOJ unilaterally decides whether to bring against a defaulting carrier—does not cure the deprivation of a jury in the earlier, liability-determining action.

Second, even if a penalty-now-trial-later system could satisfy the Seventh Amendment in some circumstances, the FCC scheme imposes an unconstitutional burden on the carriers' jury-trial right. To maintain even the chance at an eventual jury in a DOJ collection action, a carrier must forgo its statutory right to petition for review of the final FCC order in a court of appeals. That means giving up the carrier's only guaranteed way of obtaining judicial review, leaving any further judicial proceedings entirely up to the government. Carriers *never* choose that option

because leaving an unpaid forfeiture order on the "permanent Commission record" risks serious practical harms, *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 256 (2012), not only to the carrier's reputation and business, but before the Commission itself. Forcing carriers to suffer those "real-world impacts," Verizon Pet. App. 37a, as the cost of preserving their jury-trial right is precisely "the type of coercion that the unconstitutional conditions doctrine prohibits," *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

The FCC's current in-house enforcement scheme is not brand new. It has been on the books since 1978—one year after this Court's decision in *Atlas Roofing Co.* v. *Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977). But it is novel in our larger constitutional history. Like the SEC's administrative-penalty procedures in *Jarkesy*, the FCC's administrative-penalty procedures "take from the jury" its constitutional "prerogative" to "settle[] "questions of fact in common-law actions." *Walker* v. *New Mexico & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897). This Court should recognize that scheme for what it is: another "stealthy encroachment[]" on the jury-trial right. *Boyd* v. *United States*, 116 U.S. 616, 635 (1886).

## OPINIONS BELOW

*AT&T*, No. 25-406: The amended opinion of the court of appeals (Pet. App. 1a-22a) is reported at 149 F.4th 491. The original opinion of the court of appeals (Pet. App. 23a-45a) is reported at 135 F.4th 230. The final order of the Federal Communications Commission (Pet. App. 46a-145a) is available at 39 FCC Rcd. 4216.

*Verizon*, No. 25-567: The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 156 F.4th 86. The final order of the Federal Communications Commission (Pet. App. 41a-151a) is available at 39 FCC Rcd. 4259.

## JURISDICTION

*AT&T*, No. 25-406: The judgment of the court of appeals was entered on April 17, 2025. That court amended its opinion and denied a petition for rehearing on August 22, 2025. The petition for a writ of certiorari was filed on October 2, 2025.

*Verizon*, No. 25-567: The judgment of the court of appeals was entered on September 10, 2025. The petition for a writ of certiorari was filed on November 6, 2025.

On January 9, 2026, this Court granted both petitions and consolidated the cases. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief.

## STATEMENT OF THE CASE

### A. Legal Background

1. In 1934, Congress created the Federal Communications Commission and charged it with "regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 *et seq.* Decades later, Congress added Section 222 to the Communications Act. Telecommunications Act of 1996,

Pub. L. No. 104-104, § 702, 110 Stat. 56, 148-149. That provision imposes on telecommunications carriers the duty to protect the confidentiality of certain customer information known as "customer proprietary network information," or CPNI. 47 U.S.C. § 222(c). CPNI includes information relating to "the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service" that is "made available . . . solely by virtue of the carrier-customer relationship." *Id.* § 222(h)(1)(A).

The Commission has implemented Section 222 through regulations that require carriers to "take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI." 47 C.F.R. § 64.2010(a). Those regulations generally require a customer's "opt-out approval or opt-in approval" before CPNI is disclosed. *Id.* § 64.2007(b).

Violations of Section 222 and its implementing regulations are punishable by hefty penalties. Under Section 503 of the Act, the FCC may impose inflation-adjusted monetary forfeitures, capped (in 2020) at about $200,000 for each violation or each day of a continuing violation, up to about $2 million for any single act or omission. 47 U.S.C. § 503(b)(2)(B); *see* 47 C.F.R. § 1.80(b)(2), (b)(12). The Commission claims broad discretion in how it counts violations—including whether the charged conduct amounts to a single act or separate violations. *See* AT&T Pet. App. 102a-105a; Verizon Pet. App. 114a-116a. By subdividing a single act or course of conduct into many violations, the Commission can far exceed the $2 million cap.

The Commission claims considerable flexibility to set a daily forfeiture amount beneath those statutory maximums. The agency has established "base" penal-

ty amounts for some violations, *see* 47 C.F.R. § 1.80(b)(11), Table 1, while inventing others in individual adjudications (including here). It claims discretion to impose "upward adjustments" to those base amounts of 50%, 100%, or more. AT&T Pet. App. 105a; Verizon Pet. App. 121a. In considering whether to impose such adjustments, the FCC considers "the nature, circumstances, extent, and gravity of the violation." 47 U.S.C. § 503(b)(2)(E). The FCC may also look past the particular violation and assess the violator's "degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *Ibid.*; *see* 47 C.F.R. § 1.80(b)(11), Table 3.

2. Section 503 generally authorizes the FCC to impose monetary forfeiture penalties against carriers—indeed, against any "person" who "willfully or repeatedly" violates any provision of the Act or "any rule, regulation, or order issued by the Commission"—in administrative proceedings. 47 U.S.C. § 503(b)(1). That was not always the case. When first enacted, Section 503 provided for forfeiture penalties only against persons who accepted prohibited rebates from carriers and thus circumvented the Commission's rate-setting powers. Communications Act of 1934, Pub. L. No. 73-416, § 503, 48 Stat. 1064, 1101. Under Section 504, it was up to the Attorney General, not the Commission, "to prosecute for the recovery of [such] forfeitures" in "a civil suit in the name of the United States." *Id.* § 504. Violators found liable in such civil suits were required to "forfeit . . . three times the amount of the money [they had] received or accepted" from the carriers, "to be ascertained by the trial court." *Id.* § 503.

Congress altered both the scope and operation of Section 503 several times. In 1960, Congress expanded that provision to cover "licensee[s] or permitee[s] of a broadcast station" who willfully or repeatedly violated the Act or a Commission rule or order. Communications Act Amendments, Pub. L. No. 86-752, § 7(a), 74 Stat. 889, 894 (1960). Congress set the forfeiture amount at a sum "not to exceed $1,000" per violation, and did not provide any criteria for evaluating the appropriate amount. *Ibid.* Congress also required, for the first time, that the FCC send a "written notice of apparent liability," and offer the recipient a chance to respond, before any forfeiture could be imposed. *Id.* § 7(b). But as before, the Commission did not itself adjudicate liability or impose the forfeiture; the statute still left that to civil suits brought by DOJ.

Congress redesigned Section 503 into its modern form in 1978. Under those amendments, the statute applies to any "person" who violates the Act, an FCC regulation, or an FCC order. Communications Act Amendments, Pub. L. No. 95-234, § 2, 92 Stat. 33, 33 (1978). The Commission, not a court, now adjudicates the claim: the agency "determine[s]" whether the defendant "shall be liable to the United States for a forfeiture penalty" for "willful[] or repeated[]" violations of law. *Ibid.* And the Commission likewise "determin[es]" and "assesse[s]" "the amount of [the] forfeiture penalty," pursuant to the broad, malleable criteria noted above. *Ibid.*

3. That administrative framework, which is still in force today, includes two alternative procedures through which the Commission may "determine[]" that a person is "liable to the United States for a for-

feiture penalty." 47 U.S.C. § 503(b)(1). First, the Commission may proceed by formal adjudication before an administrative law judge or the Commission itself. 47 U.S.C. § 503(b)(3). A carrier can seek review of that decision only in a court of appeals, with no jury right. *Id.* §§ 503(b)(3)(A), 402(a). In practice, the Commission never takes this path, at least to AT&T's and Verizon's knowledge.

Second—and as relevant here—the Commission may issue a written notice of apparent liability (essentially a charging document) and then provide the defendant an opportunity to submit a written response. 47 U.S.C. § 503(b)(4). After receiving the response, the Commission may issue a final forfeiture order that directs the defendant to pay the penalty. 47 C.F.R. § 1.80(g)(4). That final order must "requir[e] that [the forfeiture] be paid in full and stat[e] the date by which the forfeiture must be paid," typically within 30 days. *Ibid.* This second path, in turn, opens up two potential avenues for judicial review.

*Option 1*: After the agency issues a final forfeiture order, the defendant may pay in full and then petition for review of that "final order" in an appropriate court of appeals. 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342(1), 2344. The court of appeals reviews the FCC's order on the administrative record; no jury is involved. 28 U.S.C. §§ 2346, 2347(a). The court applies familiar APA standards, setting aside the order only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

*Option 2*: After the agency issues a final forfeiture order, the defendant can refuse to pay the penalty. At that point, the defendant is in violation of the final

Commission order, and the Department of Justice must decide whether to enforce the Commission's forfeiture order and seek to collect the unpaid money. If the Department chooses to proceed, it files a civil suit in district court "in the name of the United States" within five years of the FCC's order. 47 U.S.C. § 504(a); 28 U.S.C. § 2462. DOJ can file suit either where the defendant-carrier's principal office is located or in any district in which the carrier has deployed its communications network. 47 U.S.C. § 504(a). The defendant is entitled to a jury "trial de novo" in that subsequent collection action. *Ibid.*

In practice, the FCC always issues penalties using the notice-of-apparent-liability process, and carriers always seek judicial review under Option 1. Option 2—the Section 504 default-and-be-sued process—is entirely theoretical. To the best of AT&T's and Verizon's knowledge, it has never been used where the Commission has imposed a forfeiture on a carrier. Section 504 collection actions are occasionally brought against pirate operators of unlicensed radio or television stations, and are normally resolved through summary judgment or default judgment. As a result, no Section 504(a) jury trial has occurred since Congress's 1978 amendments to the forfeiture scheme. *See* Chamber of Commerce Cert. Amicus Br. (No. 25-567) 16. That is not surprising: carriers that appear regularly before the Commission—including to obtain and transfer the licenses they require to do business—do not make themselves scofflaws by defying final agency orders that require them to pay their main regulator tens of millions of dollars by set dates.

### B. Factual Background

AT&T and Verizon provide nationwide voice and data services over their wireless networks. To enable calls and data transmissions, customer devices and carrier towers continually "ping" one another. As a result, carriers may be able to approximate a customer's location at any given time. *See Carpenter* v. *United States*, 585 U.S. 296, 300, 309 (2018).

Until March 2019, AT&T and Verizon each operated a Location-Based Services (LBS) program that—with customers' affirmative consent—granted certain third parties access to device-location information for those customers' benefit. The other nationwide wireless carriers operated similar programs. AT&T Pet. App. 53a-54a; Verizon Pet. App. 49a-50a. AT&T's and Verizon's programs worked through two "location information aggregators," LocationSmart and Zumigo. AT&T Pet. App. 53a-54a; Verizon Pet. App. 49a-50a. These aggregators contracted with other companies that offered services that wireless customers wanted, like roadside assistance (with AAA), fraud mitigation (with Bank of America), and emergency medical response (with LifeAlert). AT&T Pet. App. 54a; Verizon Pet. App. 52a.

Third-party access to device-location information was heavily controlled. For example, both AT&T and Verizon used contracts that required various information-security measures. AT&T Pet. App. 54a-56a; Verizon Pet. App. 50a-51a. All approved providers in both carriers' LBS programs also had to obtain explicit consent from a customer before requesting access to that customer's location data. AT&T Pet. App. 55a; Verizon Pet. App. 50a-51a. Both Verizon and AT&T conducted regular audits of their LBS

programs to detect fraud and ensure customer consent. AT&T Pet. App. 56a-57a; Verizon Pet. App. 52a-54a.

In May 2018, *The New York Times* reported that a company named Securus Technologies had misused AT&T's, Verizon's, and other wireless carriers' LBS programs to let a Missouri sheriff obtain device-location information in an unapproved manner, without adequate verification of customer consent. Within days, both AT&T and Verizon terminated Securus's access. AT&T Pet. App. 60a; Verizon Pet. App. 58a. Ultimately, each carrier wound down its LBS programs by early 2019. AT&T Pet. App. 60a-62a; Verizon Pet. App. 59a-61a.

**C. Procedural Background**

1. After the *New York Times* article, the FCC opened an investigation into AT&T, Verizon, Sprint, and T-Mobile. In February 2020, the agency issued similar "Notice[s] of Apparent Liability" to all four carriers, alleging violations of Section 222 of the Communications Act and its implementing regulation, 47 C.F.R. § 64.2010. *See* 35 FCC Rcd. 1743, 1743 (AT&T NAL); 35 FCC Rcd. 1698, 1698 (Verizon NAL). These initial notices "propose[d] a penalty" for "apparently violating" Section 222 and the accompanying regulations. AT&T NAL 1744; Verizon NAL 1699. The Commission proposed a $57,265,625 penalty for AT&T and a $48,318,750 penalty for Verizon.

In April 2024, years after receiving the carriers' written responses, the Commission issued a final "Forfeiture Order" to each of the four carriers, including the two orders under review. AT&T Pet. App. 46a-48a; Verizon Pet. App. 41a, 43a. The Commission

concluded that the device-location data at issue is CPNI under Section 222. It also concluded that the carriers had failed to reasonably protect that information before and after the Securus disclosures. AT&T Pet. App. 64a, 88a; Verizon Pet. App. 63a-64a, 88a-89a.

The Commission then assessed a forfeiture penalty against each carrier. In AT&T's case, the Commission determined that the supposed failure to safeguard customer data amounted to not one but 84 separate, continuing violations—one for each aggregator or provider that remained in the LBS program more than 30 days after the *New York Times* article was published. The Commission also adopted what it called a "relatively modest" 25% upward adjustment. AT&T Pet. App. 101a; *see* 47 C.F.R. § 1.80(b)(11), Table 3. It thus "ordered that . . . AT&T, Inc., is liable for a monetary forfeiture in the amount of" $57,265,625 for "willfully and repeatedly violating section 222 of the Act and section 64.2010 of the Commission's rules." AT&T Pet. App. 131a.

In Verizon's case, the Commission took a similar approach and determined that Verizon had committed 63 separate, continuing violations. Verizon Pet. App. 120a. The Commission also adopted a 50% upward adjustment. Verizon Pet. App. 120a-121a. The Commission thus "ordered that . . . Verizon Communications is liable for a monetary forfeiture in the amount" of $46,901,250 for "willfully and repeatedly violating section 222 of the Act and section 64.2010 of the Commission's rules." Verizon Pet. App. 138a.

Remarkably, the Commission described these penalties as "eminently *conservative*." AT&T Pet. App. 105a; Verizon Pet. App. 116a. The agency asserted

that each carrier's practices had "placed the sensitive location information of *all* its customers at unreasonable risk." AT&T Pet. App. 108a; Verizon Pet. App. 116a. Thus, the Commission argued, it "could well have chosen to look to the total number of [each carrier's] subscribers when determining the number of violations." AT&T Pet. App. 108a; Verizon Pet. App. 116a. That approach would have resulted in "tens of millions" of adjudicated violations by each carrier, and thus "significantly higher forfeiture[s]" than what the Commission ultimately imposed. AT&T Pet. App. 108a; Verizon Pet. App. 117a. To be clear, that logic would authorize forfeiture penalties in the hundreds of *trillions* of dollars for either carrier.

Having settled on its "conservative" figure of only tens of millions apiece, the Commission ordered that "[p]ayment of the forfeiture shall be made" by each carrier within 30 days, following the process in 47 C.F.R. § 1.80. AT&T Pet. App. 131a; Verizon Pet. App. 139a. That rule directs that forfeitures "be paid electronically using the Commission's electronic payment system" at the FCC's fee-processing website. 47 C.F.R. § 1.80(i); *see* https://www.FCC.gov/licensing-databases/fees (outlining payment methods).

2. After paying the penalty to ensure judicial review, AT&T filed a timely petition for review in the Fifth Circuit. The Fifth Circuit granted the petition and vacated the FCC's forfeiture order. AT&T Pet. App. 2a. Applying this Court's decision in *Jarkesy*, the court of appeals held that the FCC's administrative forfeiture proceedings violate the Seventh Amendment. *Id.* at 22a.

The Fifth Circuit first concluded that AT&T had a right to a jury trial. Following *Jarkesy*, the court

looked to the remedy sought and the nature of the Section 222 cause of action, and held that the Seventh Amendment applied. AT&T Pet. App. 9a-14a. The FCC's monetary forfeitures are civil penalties, which "are the prototypical common law remedy." *Id.* at 10a (citation omitted). And an action punishing carriers "for failing to take reasonable measures to protect customers' personal data" is "closely analogous to a negligence action," a classic common-law tort. *Id.* at 11a, 13a. The Fifth Circuit also rejected the government's argument that this case fell under the "public rights" exception to the Seventh Amendment's jury requirement. *Id.* at 14a.

The court of appeals then rejected the government's contention that the possibility of a "back-end" jury trial in a Section 504 collection action was sufficient to satisfy the Seventh Amendment. AT&T Pet. App. 20a. "To begin," the court explained, "by the time DOJ sues (if it does), the Commission would have already adjudged a carrier guilty of violating section 222 and levied fines." *Ibid.* The court disagreed 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." *Id.* at 21a. The court emphasized that forfeiture orders "are not mere suggestions," but instead have "real-world impacts," including because "the Commission must consider any history of prior adjudicated offenses" in future forfeiture cases and because "widely publicized" FCC orders can cause serious "reputational harm." *Ibid.*

3. Verizon likewise complied with the Commission's forfeiture order by paying the penalty in full. Verizon then petitioned for review in the Second Cir-

cuit, arguing (as relevant here) that the order violated the Seventh Amendment.

Unlike the Fifth Circuit, the Second Circuit denied the petition. Verizon Pet. App. 3a. The court assumed without deciding that the Seventh Amendment applied, but concluded that Verizon "had, and chose to forgo, the opportunity" for a jury trial via Section 504. *Id.* at 3a, 35a-36a. The court observed that Section 504 requires the government to enforce any penalty in a trial de novo in federal district court. The court thus reasoned that Verizon could have declined to pay the forfeiture and awaited a DOJ collection action; had it done so, "it could have gotten [a jury] trial." *Id.* at 35a. The court recognized that an unpaid forfeiture order creates "real-world impacts," but found no constitutional problem on the theory that the order "does not, by itself, compel payment." *Id.* at 36a-37a. The government could compel payment only through a later collection action, with a right to a jury trial. *Id.* at 36a.

4. Sprint and T-Mobile also immediately paid and filed petitions for review of the forfeiture orders against them. The D.C. Circuit denied the petitions, finding no Seventh Amendment violation. *See Sprint Corp.* v. *FCC*, 151 F.4th 347, 353 (D.C. Cir. 2025).

## SUMMARY OF ARGUMENT

The FCC's in-house forfeiture scheme violates the Seventh Amendment and Article III when, as here, it is used to adjudicate legal disputes.

I. As the government no longer contests, FCC forfeiture proceedings to enforce Section 222 implicate the Seventh Amendment because such claims are legal, not equitable. As in *Jarkesy*, the "remedy" im-

posed "is all but dispositive." 603 U.S. at 123. Monetary forfeiture penalties are the prototypical common-law remedy designed to punish wrongdoing rather than restore the status quo. The FCC's Section 222 claims here also closely resemble common-law negligence claims. And the narrow public-rights exception does not apply, as judges and juries have considered negligence-based claims against common carriers since the Founding.

II. The government nonetheless contends that the FCC forfeiture scheme is constitutional because defendants can potentially access a jury: they can defy a final FCC penalty order, become debtors to the government, and wait up to five years for DOJ to potentially bring a Section 504 collection suit. But the Seventh Amendment entitles defendants to plead their case to a jury *before* the FCC enters final, binding forfeiture orders against them. It does not relegate them to hoping for a jury in a different suit that may never materialize.

A. Like the SEC proceedings in *Jarkesy*, FCC forfeiture proceedings are "Suits at common law" covered by the Seventh Amendment because "legal rights [are] to be ascertained and determined." *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830). In all such "Suits," the Seventh Amendment forbids any adjudicator—whether a court, special master, or agency—from "finally determin[ing] any of the issues in [the] action" without the aid of a jury. *In re Peterson*, 253 U.S. 300, 307 (1920). That is precisely what the FCC does: it issues a final order that determines legal rights and imposes a binding obligation to pay the assessed penalty.

B. The option for a carrier to defy the FCC and possibly get a jury in a DOJ-initiated collection action does not change the analysis. A collection action would be a distinct "Suit[] at common law," and providing a jury in that second "Suit" does nothing to cure the earlier denial. To be sure, if DOJ never seeks to collect, a delinquent carrier may never be forced to cut a check. That is true of many final government decisions—including court orders—and does not negate their legal force. Plus, the Seventh Amendment protects against more than a defendant's ultimate pocketbook injury. It ensures that plaintiffs and defendants alike may have their factual disagreements resolved by a jury if the case falls within the historical category of disputes that belonged to the common law.

C. The FCC forfeiture scheme finds no support in this Court's precedents. The two cases the government cites do not endorse a penalty-now-trial-later regime in proceedings that determine legal rights. Instead, the Court upheld schemes involving initial non-jury determinations only where the parties were *guaranteed* a jury trial *before* final resolution of the "Suit." Those Seventh Amendment principles cut against the government here.

D. The broader history points the same way. Congress empowered the earliest administrative agencies to investigate and make tentative recommendations when hearing private disputes, not to issue binding judgments with the force of federal law. As the 20th century progressed, Congress relaxed that rule a bit, but retained it for agency proceedings involving claims for the payment of money. Only in the latter half of the 20th century did Congress intro-

duce administrative authority like what the FCC exercised here. That aberrational approach broke from the original and correct understanding of the limits the Seventh Amendment imposes on jury-less administrative adjudication, as this Court confirmed in *Jarkesy*.

III. Alternatively, the FCC penalty scheme is unconstitutional because it imposes too great a burden on the exercise of carriers' Seventh Amendment rights. This Court has repeatedly recognized the "overarching principle" that the government may not "coerc[e] people into giving" up their constitutional rights. *Koontz*, 570 U.S. at 604.

The FCC forfeiture scheme does just that. A carrier that wishes to preserve any chance at a jury trial must defy the FCC order, relinquishing the only guaranteed path within the carrier's control of obtaining judicial review. But that defiance risks leaving the FCC order on the books without any judicial scrutiny. Unpaid FCC forfeiture orders can have serious collateral impacts, including injury to the carrier's reputation, *Fox*, 567 U.S. at 255-256, and harm from the Commission's future use of forfeiture orders to increase other penalties, deny licenses, and withhold critical regulatory permissions. In the real world, carriers cannot afford to stand on their jury-trial right at the cost of enduring these injuries. They *always* pay, so that they may appeal as of right and immediately seek to invalidate the FCC's order. In combination, those circumstances render the right to a jury "unavailing for [defendants'] protection." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 45 (1899). The Seventh Amendment deserves better.

## ARGUMENT

The FCC's administrative process for imposing multimillion-dollar Section 222 penalties violates telecommunications carriers' Seventh Amendment right to a jury. The Seventh Amendment applies because such penalties impose legal, rather than equitable, relief. Critically, a carrier's constitutional right to a jury trial attaches *before* those penalties are finally imposed against it. The mere possibility of a jury trial in a separate debt-collection action, brought at the government's sole election, cannot save the administrative scheme here. That is not what the Seventh Amendment means when it guarantees a jury trial in a common-law "Suit." And even if debt-collection actions could be wedged into the same overarching "Suit," requiring regulated parties to become delinquent on their government debts to obtain a jury trial is too steep a price to impose on the exercise of their constitutional rights.

### I. FCC FORFEITURE PROCEEDINGS TO ENFORCE SECTION 222 IMPLICATE THE SEVENTH AMENDMENT.

It appears to be common—or at least uncontested—ground that the Seventh Amendment guarantees a right to a jury trial in an Article III court when the FCC seeks forfeiture penalties for violations of Section 222. Just like the SEC's claim for civil penalties in *Jarkesy*, the FCC's claims here are "legal in nature" and do not implicate the narrow public-rights exception. 603 U.S. at 122, 124, 134. The Fifth Circuit concluded as much, AT&T Pet. App. 2a, the Second Circuit assumed the same, Verizon Pet. App. 3a,

and the government no longer contests the point, *see* AT&T Pet. 7.

### A. Forfeiture Proceedings To Enforce Section 222 Are Legal Rather Than Equitable.

"To determine whether a suit is legal in nature," courts must "consider the cause of action and the remedy it provides." *Jarkesy*, 603 U.S. at 122-123. Both considerations clearly mark Section 222 actions as legal rather than equitable.

1. Begin with the "more important" consideration: whether the "cause[] of action . . . provide[s] a type of remedy available only in law courts." *Jarkesy*, 603 U.S. at 123, 136 (citation omitted). The FCC invoked its statutory authority to order a "forfeiture penalty," 47 U.S.C. § 503(b)(1), of $57 million against AT&T and nearly $47 million against Verizon. As in *Jarkesy*, that "remedy is all but dispositive" here. 603 U.S. at 123. FCC forfeiture penalties are the "prototypical common law remedy," *AT&T*, 149 F.4th at 498 (citation omitted), as they are designed to punish wrongdoing rather than "restore the status quo," *Tull* v. *United States*, 481 U.S. 412, 422 (1987). Two features of the FCC forfeiture scheme make that particularly clear.

First, like the district court in *Tull*, *see* 33 U.S.C. § 1319(d), and the SEC in *Jarkesy*, *see* 15 U.S.C. §§ 78u-2(c), 80b-3(i)(3), the FCC decides the amount of the penalty by looking to "the nature, circumstances, extent, and gravity of the violation," as well as the carrier's "degree of culpability" and "history of prior offenses." 47 U.S.C. § 503(b)(2)(E). Applying those factors to both AT&T and Verizon here, the FCC explained that it was imposing a "substantial upward

adjustment" based on its view that the "conduct was egregious" and that a large penalty was needed to create the "necessary disincentive to engage in similar conduct again." AT&T Pet. App. 105a-107a; Verizon Pet. App. 122a-124a. Those considerations sound in punishment, not remediation.

Second, as was also true of the SEC in *Jarkesy*, the FCC "is not obligated to return any money to victims." 603 U.S. at 124. By law, "[t]he forfeitures provided for" in the Communications Act "shall be payable into the Treasury of the United States." 47 U.S.C. § 504(a). Such a payment "by definition does not 'restore the status quo' and can make no pretense of being equitable." *Jarkesy*, 603 U.S. at 124 (quoting *Tull*, 481 U.S. at 422).

2. Were more needed, the "close relationship" between these Section 222 claims and a common-law negligence action "confirms" that the Seventh Amendment applies. *Jarkesy*, 603 U.S. at 125. As the Fifth Circuit correctly explained, the "substance" of the claimed violation "is closely analogous to a negligence action." *AT&T*, 149 F.4th at 499. Section 222 imposes a statutory "duty to protect the confidentiality" of CPNI. 47 U.S.C. § 222(a). The FCC has long understood that duty to require carriers to "take reasonable measures to discover and protect against . . . unauthorized access." 47 C.F.R. § 64.2010(a).

Here, the Commission effectively concluded that both AT&T's and Verizon's conduct fell below an objectively reasonable standard of care. The FCC discussed additional precautions that the carriers could reasonably have taken to satisfy their duty, such as by "directly verifying consumer consent." AT&T Pet. App. 92a-93a; Verizon Pet. App. 98a. And the FCC

concluded that the "grav[ity]" of the "risks" "outweighed" the carriers' existing "data security measures." AT&T Pet. App. 92a; *see* Verizon Pet. App. 98a. Such judgments are quintessential features of a generic negligence suit. *See United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *see also, e.g.*, *Toretto* v. *Donnelley Fin. Sols., Inc.*, 583 F. Supp. 3d 570, 592 (S.D.N.Y. 2022) (evaluating claim that defendant "was negligent by failing to exercise reasonable care in safeguarding Plaintiffs' personal information"). These forfeiture actions thus closely resemble a common-law tort suit, even if the two are not "identical." *Jarkesy*, 603 U.S. at 126; *see Tull*, 481 U.S. at 421 ("precisely analogous common-law cause of action" not required).

### B. The Public-Rights Exception Does Not Apply.

The FCC contended below that this case falls within the so-called "public rights exception" to the Seventh Amendment. *See* FCC 5th Cir. Br. 30; FCC 2d Cir. Br. 60. The government did not repeat that argument in its *AT&T* petition, and with good reason. The public-rights exception is limited to a specific "class of cases" made up of "historic categories" of executive or legislative adjudication. *Jarkesy*, 603 U.S. at 128, 130. The exception does not apply where, as here, the government attempts to enforce a statute that both "provide[s] civil penalties" and "target[s] the same basic conduct" as a common-law tort. *Id.* at 134. *Jarkesy* was clear that actions that "resemble[] a traditional legal claim" cannot involve public rights. *Id.* at 135.

Below, the government argued that this case involves public rights because Section 222 regulates common carriers, who were traditionally seen as "exercis[ing] a sort of public office." FCC 5th Cir. Br. 31. But there is no longstanding historical practice of adjudicating the legal rights of common carriers in administrative schemes. On the contrary, at common law, negligence claims for damages against common carriers were "routinely adjudicated in state and federal courts." *AT&T*, 149 F.4th at 501. Indeed, carriers' common-law duty "to take reasonable action . . . to protect" passengers "against unreasonable risk," Restatement (Second) of Torts § 314A(1) (1965), was *developed by courts* in a series of tort actions litigated before juries. *See, e.g.*, *White* v. *Boulton*, (1791) 170 Eng. Rep. 98 (K.B.); *Kelley* v. *Manhattan Ry. Co.*, 20 N.E. 383, 387 (N.Y. 1889).

* * *

In sum, an FCC action seeking a monetary forfeiture penalty for violations of Section 222 is a "suit[] in which *legal* rights [are] to be ascertained and determined." *Parsons*, 28 U.S. at 447. The Seventh Amendment thus guarantees defendant carriers the right to a jury trial in an Article III forum.

## II. DEFENDANTS ARE DENIED THEIR RIGHT TO A JURY IN FCC FORFEITURE PROCEEDINGS.

The government now apparently accepts that there *is* a Seventh Amendment right to a jury in FCC forfeiture proceedings; it just believes that the FCC scheme preserves that right. Its argument goes like this: because Section 504 of the Communications Act provides for a de novo jury trial in a hypothetical,

after-the-fact DOJ collection action, a defendant in administrative proceedings can simply default on the FCC's forfeiture order, become a debtor to the government, wait to see whether DOJ brings a collection suit, and then demand a jury trial there. AT&T Pet. 7; Verizon Pet. App. 35a-36a.

That is not a "right of trial by jury." The Seventh Amendment entitles AT&T and Verizon to plead their case to a jury *before* the FCC enters final, binding forfeiture orders against them. Those orders are the culmination of proceedings that constitute "Suits at common law" to which the Seventh Amendment attaches. In such proceedings, an adjudicator may not "finally determine any of the issues in [the] action" without the aid of a jury. *Peterson*, 253 U.S. at 307. The Seventh Amendment is not satisfied merely because AT&T and Verizon have a theoretical jury-trial right in a separate collection proceeding instituted at the sole election of a different governmental entity.

### A. FCC In-House Forfeiture Proceedings Are "Suits" In Which Carriers Have A Right To A Jury.

"[T]hose who founded our Nation considered the right to trial by jury a fundamental part of their birthright." *Thomas* v. *Humboldt County*, 146 S. Ct. 27, 27 (2025) (mem.) (Gorsuch, J., respecting the denial of certiorari). To that generation, a collection of "sensible and upright jurymen, chosen by lot from among those of the middle rank" and "not appointed till the hour of trial," were thought "the best investigators of truth." 3 William Blackstone, Commentaries on the Laws of England 380 (8th ed. 1778); *see* The Federalist No. 83, pp. 500-501 (C. Rossiter ed.

1961) (A. Hamilton). The jury also served a more overtly political function: it "provide[d] the common citizen with a sympathetic forum in suits against the government." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 708 (1973). As one prominent Antifederalist put it, juries were a bulwark against "lordly" adjudicators more often inclined "to protect the officers of government" than rule for the "weak and helpless citizen." *Essay of a Democratic Federalist* (Oct. 17, 1787), *in* 3 The Complete Anti-Federalist 61 (Herbert Storing ed. 1981).

The Seventh Amendment was added to the Constitution to address those concerns in "Suits at common law." U.S. Const. amend. VII. That Amendment guarantees the right to demand a jury before "*legal* rights [are] ascertained and determined," whether by a court or an agency. *Parsons*, 28 U.S. at 447; *see Jarkesy*, 603 U.S. at 115. Here, legal rights are finally determined in the FCC forfeiture proceedings that culminate in a final order to pay the government a specified sum of money by a specified date through specified means, with a right to judicial review only under deferential APA standards. The FCC forfeiture proceedings are thus the relevant "Suit" for Seventh Amendment purposes.

1. The Seventh Amendment preserves the "right of trial by jury" "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. At the Founding, the term "Suit" had the same meaning that it does today: "the prosecution, or pursuit, of some claim, demand, or request," "for the purpose of establishing [the] claim against it by [a] judgment." *Cohens* v. *Virginia*,

19 U.S. (6 Wheat.) 264, 407-408 (1821); *see* 2 Samuel Johnson, A Dictionary of the English Language (2d ed. 1756) ("Suit" "in law" "is sometimes put for the instance of a cause, and sometimes for the cause itself deduced in judgment.").

Where the proceedings implicate legal rights, the Seventh Amendment makes the civil jury "the constitutional tribunal provided for trying facts." *Berry* v. *United States*, 312 U.S. 450, 453 (1941). Thus, Congress may not "take[] away from juries and give[]" to any other actor "any part of the exclusive power of juries to weigh evidence and determine contested issues of fact." *Ibid.*; *see Walker*, 165 U.S. at 596 (same). So too, "in all cases sounding in damages these damages must be assessed by the jury and not by [a] court independently thereof." *Dimick* v. *Schiedt*, 293 U.S. 474, 478 (1935).

This Court applied those principles in 1920 in *Peterson*. There, the trial judge (Judge Augustus Noble Hand) had appointed an "auditor"—akin to a special master—in an "action at law" to "form a judgment and express an opinion upon such of the items as he found to be in dispute." 253 U.S. at 304, 306. Although the auditor's purpose was merely to assist the jury in a "more intelligent consideration of the issues," *id.* at 307, the plaintiff contended that any "proceedings" before the auditor without its consent "violate[d] the Seventh Amendment," *id.* at 305.

This Court disagreed and upheld the appointment, but only because the auditor's role was advisory in nature. The Court explained that the auditor could make "*tentative* findings" that could "be admitted at the jury trial as evidence," and was "not to *finally* determine any of the issues in the action, the final de-

termination of all issues of fact to be made by the jury." *Peterson*, 253 U.S. at 304, 310-311, 314 (emphases added). The latter, the Court made clear, would have been unconstitutional. As Justice Brandeis explained, a "compulsory reference [to an adjudicator] with power to determine issues is impossible in the federal courts because of the Seventh Amendment." *Id.* at 314 (citing *United States* v. *Rathbone*, 27 F. Cas. 711 (C.C.S.D.N.Y. 1828) (No. 16,121)).

2. That principle, simple as it might seem, resolves this case. A federal agency violates the Seventh Amendment by usurping the constitutional province of the jury and "finally determin[ing]" the substance of any suit at common law. *Peterson*, 253 U.S. at 307. That is what happened in *Jarkesy*, and it is what happened here: the FCC finally "determine[d] and adjudicate[d]" "traditional common-law issues." *Simler* v. *Conner*, 372 U.S. 221, 223 (1963).

As this Court confirmed in *Jarkesy*, the Seventh Amendment applies with full force where an administrative agency purports to adjudicate a suit at common law. It "has long been settled that the right" to a jury "extends beyond the common-law forms of action recognized" at the Founding. *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974). As Justice Story explained in *Parsons*, the Seventh Amendment "embrace[s] all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." 28 U.S. at 447; *see* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 513 (4th ed. 1878) ("[A] change in the forms of action will not authorize

submitting common-law rights to a tribunal in which no jury is allowed.").

An in-house administrative adjudication is one such "peculiar form" of proceeding used to "settle legal rights." *Parsons*, 28 U.S. at 447. Although Congress has authority to create administrative agencies, it lacks the power to "conjure away the Seventh Amendment by mandating that traditional legal claims" be resolved by such "administrative tribunal[s]." *Jarkesy*, 603 U.S. at 135 (quoting *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 52 (1989)). "[W]hat matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Ibid.* To "hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies . . . all causes of action not grounded in state law," regardless of whether they "possess a long line of common-law forebears." *Granfinanciera*, 492 U.S. at 52. "The Constitution nowhere grants Congress such puissant"—or potent—"authority." *Ibid.*

Like the in-house SEC "enforcement action" in *Jarkesy*, 603 U.S. at 115, the FCC forfeiture proceedings here were ones "in which legal rights were to be ascertained and determined," *Parsons*, 28 U.S. at 447 (emphasis omitted). The FCC exercised statutory authority to "*determine*[]" whether the defendant carriers had "willfully or repeatedly failed to comply with" their duty to reasonably safeguard customer data, and to "*determine*[]" the "amount of any forfeiture penalty." 47 U.S.C. § 503(b)(1), (2) (emphases added). Once the FCC makes those determinations, the carriers "*shall be liable* to the United States for [that] forfeiture penalty." *Id.* § 503(b)(1) (emphasis added).

That is not an advisory procedure. The FCC "determine[s] and adjudicate[s]" both whether the defendant carriers breached a legal duty and, if so, "the amount" they are "obligated to pay." *Simler*, 372 U.S. at 223.

The FCC's determinations are final in every sense. By statute, they are embodied in a "final order[] of the Federal Communications Commission," subject to review in the court of appeals. 28 U.S.C. § 2342(1); *see* 47 U.S.C. § 402(a). "A 'final order'" under that statute "is one that imposes an obligation, denies a right, or fixes some legal relationship." *Honicker* v. *U.S. Nuclear Reg. Comm'n*, 590 F.2d 1207, 1209 (D.C. Cir. 1978). In contrast with the FCC's initial notice of *apparent* liability, its forfeiture orders fix liability at the conclusion of an administrative proceeding. *Compare* 47 U.S.C. § 503(b)(1), *with id.* § 503(b)(4).

The specific orders here are clear that they are final commands, not tentative suggestions. Both announce the agency's legal and factual "finding[s]" and "conclusion[s]." *E.g.*, AT&T Pet. App. 76a, 80a; Verizon Pet. App. 76a, 80a. They state that the Commission has "adjudicate[d] the merits" in "imposing a forfeiture." Verizon Pet. App. 128a; *see* AT&T Pet. App. 118a-119a. They note that the Commission has determined, "[b]ased on the record before" it, that the carriers have "willfully and repeatedly violated section 222 of the Act." AT&T Pet. App. 131a; Verizon Pet. App. 138a. Then, lest there be any doubt, each order concludes with the following capitalized and bolded language:

> **IT IS ORDERED** that . . . [AT&T/Verizon] **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of [$57,265,625/$46,901,250] for willfully and repeatedly violating section 222 of the Act. . . . Payment of the forfeiture shall be made . . . within thirty (30) calendar days.

AT&T Pet. App. 131a; Verizon Pet. App. 138a-139a. The orders further provide instructions for payment, detailing how and where to send the money. AT&T Pet. App. 131a-134a; Verizon Pet. App. 139a-142a.

There should thus be no question that the FCC has conclusively adjudicated "traditional legal claims," *Granfinanciera*, 492 U.S. at 52, rather than offering a tentative recommendation to some future adjudicator. Before a defendant can be ordered to pay $50 million in civil penalties, the "aid of juries is . . . required by the Constitution itself." *Id.* at 51. No such aid was available to the defendant carriers here.

### B. Section 504 Does Not Solve The Seventh Amendment Problem.

The government has argued that Section 504 distinguishes the FCC's administrative-penalty scheme from the scheme that this Court invalidated in *Jarkesy*. It makes two related arguments. First, it lumps together the FCC in-house proceeding and a hypothetical Section 504 collection action into a single "Suit," in which a jury may be available at some point. Second, the government insists that there is no relevant injury for Seventh Amendment purposes until a

carrier is actually forced in such a collection action to pay the legal liability. Neither theory works.

1. The government first combines the FCC forfeiture proceeding and a later-instituted DOJ collection action into a single "Suit" for Seventh Amendment purposes. To do so, it characterizes the FCC's administrative proceedings as merely an "initial decision." AT&T Pet. 11; *see* Verizon Pet. App. 36a, 126a & n.270. That is wrong. An FCC forfeiture proceeding imposes a final, binding legal obligation. For that reason and others, the FCC forfeiture proceeding and Section 504 collection action are two *different* suits at common law.

As explained above, an FCC forfeiture proceeding is a distinct Seventh Amendment "Suit" in its own right because it represents a "peculiar form" of "settl[ing] legal rights." *Parsons*, 28 U.S. at 447. By definition, a final, appealable forfeiture order "fixes some legal relationship" and "imposes an obligation." *Honicker*, 590 F.2d at 1209. Here, the final FCC orders fixed each carrier's liability to the United States and status as violator of federal law, and imposed the obligation to pay tens of millions of dollars in penalties within 30 days. AT&T Pet. App. 131a-134a; Verizon Pet. App. 138a-142a. That is consistent with the Commission's statutory authority: Section 503 empowers it to "determine[]" how much a person "shall be liable." 47 U.S.C. 503(b)(1). No ordinary citizen reading the text of Section 503 or receiving the bolded, capitalized demand to pay would think that the FCC's forfeiture order is merely a recommendation to pay—especially after having previously received the Commission's initial notice of *apparent* liability, which

*is* tentative and preliminary. *See* AT&T NAL; Verizon NAL.

To be sure, a follow-on debt-collection action might be practically necessary if a carrier ever chose to defy its legal obligation to pay. But that does not change the binding nature of the obligation itself, just as the possibility of garnishment does not mean that a debtor may legally ignore his bills, and the possibility of contempt proceedings does not mean that a litigant may ignore a court order. In *Jarkesy*, too, it was theoretically open to the defendants to choose defiance, which would have forced the SEC to "refer the matter to the Attorney General" to "recover such penalty by action in the appropriate United States district court." 15 U.S.C. § 78u(d)(3)(C); *see id.* §§ 78u-1(d), 78aa. No one suggested in *Jarkesy* that the existence of this back-end enforcement mechanism sapped the SEC's order of its own legal meaning.

Any eventual Section 504 action is its own "suit" for Seventh Amendment purposes. For starters, unlike an appeal as of right to a higher tribunal by the *losing* party, which is a "continuation of the same suit," *Cohens*, 19 U.S. (6 Wheat.) at 409, a Section 504 collection action is brought by the *winning* party. That is necessarily a distinct action rather than a continuation, as no existing judgment is "reversed or affirmed." *Id.* at 411. The Communications Act recognizes as much and describes a Section 504 action as its own "civil suit," 47 U.S.C. § 504(a), collecting on a "forfeiture penalty" already "determined" and "imposed" by the FCC, *id.* § 503(b)(2), (4). That "suit" is "prosecute[d]" by a different party (DOJ); "instituted" "in the name of" a different entity (the United States); and brought in a different kind of forum (fed-

eral court). *Id.* § 504. And it can be filed up to five years after the FCC issues its order, 28 U.S.C. § 2462—nothing like the typical 30- or 90-day deadline for appealing to a higher tribunal.

As a historical matter, too, Section 504 suits are independent constitutional events. They resemble historical "action[s] of debt" to recover "on a judgment," which this Court has frequently described as "original suit[s]" rather than "only a continuation of the former suit." *Davis* v. *Packard*, 32 U.S. 276, 285 (1833); *see Gould* v. *Hayden*, 63 Ind. 443, 448 (1878) (actions on a judgment are "an original cause of action" that may be brought "in the same or some other court of competent jurisdiction" and "prosecut[ed]" "to final judgment"). When there were factual disputes in such debt-collection actions, "the issue [was] to the jury." *Wood* v. *Agostines*, 47 A. 108, 109 (Vt. 1899). The same was true when judgment creditors sought the common law writ of *scire facias*, another mechanism for collection of unpaid judgments: the "proceeding was triable by jury at common law" if factual disputes arose. *Hickox* v. *McKinley*, 278 S.W. 671, 673 (Mo. 1925).

2. The government has also argued that any proceedings "before a § 504(a) trial create no Seventh Amendment injury" because, if the government never files such a collection action, the carrier never has to pay. Verizon Pet. App. 36a-37a; *see* AT&T Pet. 12. That is wrong for two reasons.

First, and most simply, the government again ignores the distinction between a legally binding obligation to pay and the actual transfer of money. The FCC's forfeiture orders formally and unambiguously mandate payment. That creates a clear Seventh

Amendment injury. The government's position appears to be that orders to pay from a federal agency are meaningless pieces of paper, at least until a debt collector comes knocking at the door. But our legal system does not run on Justice Holmes's "bad-man theory that law's meaning lies in the penalties for noncompliance." *Gray-Bey* v. *United States*, 201 F.3d 866, 872 (7th Cir. 2000) (Easterbrook, J., dissenting).

Second, the government is wrong to treat actual pocketbook injury as the only possible Seventh Amendment harm. The Seventh Amendment protects against *all* injuries that might possibly flow from a jury-less adjudication of actions at law—including, for example, the "adverse impact on" a business's "reputation" that can result from the FCC's formal and final "findings of wrongdoing" in "the permanent Commission record." *Fox*, 567 U.S. at 256; *see infra*, pp. 44-50. The Amendment's protections turn on whether a cause of action is "legal," not on whether a penalty has come due. That is why plaintiffs, not just defendants, may demand a jury in legal cases. *See Dimick*, 293 U.S. at 486-487. It is why both parties are entitled to a jury even where no money is at stake, so long as the claim is a legal one. *See, e.g.*, *Pernell* v. *Southall Realty*, 416 U.S. 363, 375-376 (1974) (right to jury in eviction dispute). And it is why both parties may demand a jury in disputes involving only intangible harms. *See, e.g.*, *Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970) (defamation).

The government objects that non-pecuniary injuries can also flow from a grant of "equitable relief" against a party. *See* AT&T Pet. 13. But that confuses the inquiry. The Seventh Amendment guarantees a jury to determine the facts in certain *kinds of*

*disputes*—"suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized." *Parsons*, 28 U.S. at 447 (emphasis omitted). It does not guarantee a jury trial based on what *kinds of harms* will flow from the resolution of that dispute—even if those anticipated harms help determine on what side of the historical law/equity divide the dispute falls. The Framers enshrined in the Seventh Amendment what they "regarded as the normal and preferable mode of disposing of issues of fact." *Dimick*, 293 U.S. at 485-486. So where "the substance of the action" comes within the common law's ambit—which the FCC's claims in this case do, as no one at this point disputes—the Seventh Amendment requires a jury before the action is finally adjudicated. *Jarkesy*, 603 U.S. at 134.

### C. The FCC Forfeiture Scheme Finds No Support In This Court's Precedents.

The government bases its penalty-now-trial-later view of the Seventh Amendment on two of this Court's cases: *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899), and *Meeker* v. *Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915). *See* AT&T Pet. 8. Properly understood, however, both cases confirm the constitutional problem with the distinct FCC scheme here.

1. Start with *Hof*. There, this Court upheld a statute that authorized justices of the peace to enter initial decisions in suits at law involving "small debts" (up to $300) without a jury, or at least not one compliant with the Seventh Amendment. 174 U.S. at 28, 45-46. But *Hof* upheld the statute only because it gave "*either party*" the "right to appeal" the initial

judgment "to a court of record, and to have a trial by jury in that court." *Id.* at 45 (emphasis added). *Hof* explained why such a scheme was permissible: "where a law secures a trial by jury upon an appeal," "although such law may provide for a primary trial without the intervention of a jury," either party, "if he thinks proper, can have his case decided by a jury before it is finally settled." *Id.* at 30 (quoting *Steuart* v. *City of Baltimore*, 7 Md. 500, 512 (1855)).

*Hof* thus recognizes the same rule as *Peterson*: even if the Seventh Amendment allows some preliminary non-jury adjudication, it guarantees that a party "can have his case decided by a jury *before it is finally settled*" and subject only to deferential, non-jury review. 174 U.S. at 30 (emphasis added). The statute in *Hof* complied with that rule because, although it caused some "delay in reaching the jury trial," *Peterson*, 253 U.S. at 310, the statute still guaranteed such a trial at a subsequent "stage of [the] action," *Hof*, 174 U.S. at 23. Both parties were therefore assured of a trial by jury before the entry of "final judgment." *Id.* at 5.

That reasoning does not apply to the FCC forfeiture scheme. The statute here does not "give[] to either party the *right* of appealing to a court, where [it] will have the benefit of a trial by jury." *Hof*, 174 U.S. at 25 (emphasis added). Carriers have no statutory entitlement to appeal an adverse FCC forfeiture order to a court in which a jury is available. Instead, the appeal right is strictly circumscribed to petitions for review in a court of appeals, where no jury trial is available. *See* 47 U.S.C. § 402(a). True, the carrier can defy the FCC's order and hope the government sues to collect—a waiting game that can last up to five

years. But nothing *requires* DOJ to file a collection suit. If the government opts never to do so, no jury is ever made available.

Moreover, the Court in *Hof* drew on a "settled practice" and a "long line of judicial decisions" upholding similar "acts for the speedy recovery of small debts out of court." 174 U.S. at 17, 23 (citation omitted). There is no such unique or established history here. *See infra*, Part II.D. The FCC's forfeiture scheme, which allows for the imposition of at least tens of millions of dollars in penalties—and under the FCC's math, billions or trillions more—bears no resemblance to that pre-*Hof* system for adjudicating "small debts." 174 U.S. at 17-18, 28.

2. The government next cites *Meeker* v. *Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915). The government claims that *Meeker* upheld against a Seventh Amendment challenge "a statute that empowered the Interstate Commerce Commission (ICC) to make an initial award of damages" against a carrier, so long as the statute "allowed the carrier to demand a jury trial when the injured party sued . . . to collect the damages." AT&T Pet. 8.

That badly misreads *Meeker*, which had nothing to do with whether the ICC could constitutionally adjudicate the relevant dispute without providing a jury, or whether providing a jury in a back-end enforcement suit was sufficient protection for defendants. Those questions never came up. Instead, as the Fifth Circuit explained, *Meeker* addressed only the constitutionality of a specific "provision treating the ICC's initial factfinding as a 'rebuttable presumption' " in the later private collection action. *AT&T*, 149 F.4th at 502 n.15 (quoting *Meeker*, 236 U.S. at 430). The challeng-

er railroad had argued that the Seventh Amendment forbade Congress from imposing that presumption. *Meeker* rejected that argument, explaining that the presumption was "merely a rule of evidence" that took no ultimate "question of fact from either court or jury." 236 U.S. at 430 (citing "many other state and Federal enactments establishing other rebuttable presumptions"). Indeed, this Court later cited *Meeker* for the limited proposition that it does not violate the Seventh Amendment to "endow[] an official act or finding with a presumption of regularity or of verity." *Peterson*, 253 U.S. at 311.

### D. The FCC Forfeiture Scheme Finds No Support In History.

Stepping back, the government's misreading of *Meeker* reflects the historical shift in administrative law that has produced the constitutional problem here. Looking at the case with modern eyes, the government assumes that the ICC's damages order in *Meeker*, like the FCC's order here, was a final and binding administrative adjudication. But it was not: much like the auditor's report in *Peterson*, the ICC's monetary determinations were tentative and intended to be used as evidence to be presented *to a jury*, without having any final or binding effect in their own right. That is how administrative agencies were more commonly used in our Nation's earlier history. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 595-603 (2007); Attorney General's Comm. on Admin. Proc., Final Rep. 82 (1941). It was only as the 20th century progressed that Congress began using administrative agencies as freestanding adjudicators of legal rights.

The ICC is a paradigmatic example. As originally designed by Congress in 1887, any ICC "action or conclusion upon matters of complaint brought before it" was "neither final nor conclusive." *Kentucky & Ind. Bridge Co.* v. *Louisville & Nashville R.R. Co.*, 37 F. 567, 612 (C.C.D. Ky. 1889). Rather, the ICC functioned as "referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial . . . determination." *Id.* at 613.

In 1906, Congress enacted the Hepburn Act to make certain ICC orders self-executing. Pub. L. No. 59-337, § 4, 34 Stat. 584, 589 (1906). But that statute expressly *excluded* "orders for the payment of money," *ibid.*, which remained mere recommendations intended for use as evidence in a civil trial. Other statutes enacted around that time adopted a similar dichotomy, treating agency orders as self-enforcing only if they did not involve monetary relief. *See, e.g.*, Shipping Act, Pub. L. No. 64-260, § 23, 39 Stat. 728, 736 (1916) (United States Shipping Board); Packers and Stockyards Act, Pub. L. No. 67-51, § 313, 42 Stat. 159, 167 (1921) (Packers and Stockyards Administration).

None of this was by accident. Congress, the courts, and even the ICC itself understood that parties could not "be deprived of [their jury] right through conferring authority to award reparation upon a tribunal that sits without a jury as assistant." 1887 Interstate Com. Comm'n Ann. Rep. 27. So "any determination that reparation should be made, in a case in which a suit at law might have been maintained, [could] not be made absolutely binding and enfor[ce]able against the defendant." *Ibid.* Tentative

and non-binding recommendations were all that the agency could constitutionally do.

That clear limitation on federal agencies' power to adjudicate essentially legal disputes became muddled during the 20th century, resulting in the occasional statement by this Court that "the Seventh Amendment is generally inapplicable in administrative proceedings." *Atlas Roofing*, 430 U.S. at 454 (citation omitted). Perhaps not coincidentally, the FCC forfeiture scheme here shifted in 1978, one year after *Atlas Roofing* was decided. That year, Congress abandoned a system of civil suits brought by DOJ and authorized the Commission to both adjudicate violations and set the amount of forfeitures in-house. *See* pp. 7-8, *supra*.

But as this Court recognized and explained in *Jarkesy*, the *Atlas Roofing* statement about the Seventh Amendment was "a departure from our legal traditions." 603 U.S. at 138 n.4. It rested on an overextension of earlier cases to which the Seventh Amendment did not apply because they fell outside the category of "suits at common law." *See Jarkesy*, 603 U.S. at 155-156 (Gorsuch, J., concurring). The Court quickly set about "clarif[ying]" the Seventh Amendment's application in *Tull*, then in *Granfinanciera*, and most firmly in *Jarkesy* itself. 603 U.S. at 137-139 & n.4; *see id.* at 157-158 (Gorsuch, J., concurring).

In short, this Court has never signed off on the penalty-now-trial-later approach to the Seventh Amendment embodied in the FCC forfeiture scheme. To the contrary, properly understood, both the Court's earliest and its most recent precedents indicate that the FCC forfeiture scheme destroys what the Seventh Amendment was intended to "save": "the

jury trial [as] a solid uniform feature in a free government." *Federal Farmer No. 16* (1788), *reprinted in* 2 The Complete Anti-Federalist 327 (Herbert Storing ed. 1981).

## III. ALTERNATIVELY, THE FCC FORFEITURE SCHEME IMPERMISSIBLY BURDENS CARRIERS' EXERCISE OF THEIR SEVENTH AMENDMENT RIGHTS.

Even if a debt-collection action counted as the same "suit" for Seventh Amendment purposes, the Communications Act's procedures for assessing forfeiture penalties would still be unconstitutional because they impose too heavy a burden on the exercise of constitutional rights. Under the combination of Sections 503 and 504, carriers must sacrifice their ability to demand judicial review of forfeiture orders as the price of exercising their "right" to a jury trial.

To recap, a carrier has two options for challenging an FCC order. First, it can pay the penalty and appeal as of right. Second, it can defy the FCC's order and wait to see whether DOJ files a collection action under Section 504. Only the second path offers a chance at a jury. But choosing that path means giving up the carrier's right to *guarantee* judicial review by paying and appealing; it leaves any judicial review solely in DOJ's hands. Thus, to keep open its chance at a jury, a carrier must pass up the only surefire option of obtaining review of the factual and legal conclusions embodied in the FCC's order. Carriers never do that, because FCC forfeiture orders have serious "real-world impacts," Verizon Pet. App. 37a, and carriers cannot risk letting them go unchallenged before a neutral, Article III adjudicator.

### A. The Unconstitutional-Conditions Doctrine Applies To Jury-Trial Rights.

In decisions across "a variety of contexts," this Court has recognized the "overarching principle, known as the unconstitutional conditions doctrine," that the government may not "coerc[e] people into giving" up their constitutional rights. *Koontz*, 570 U.S. at 604 (collecting cases). For example, no State may "effectively penalize[]" the "exercise of the right to travel" by denying free medical care to residents who arrived within the last year. *Memorial Hosp.* v. *Maricopa Cnty.*, 415 U.S. 250, 256-257 (1974). Nor may the States or the federal government "impermissibly burden the right not to have property taken without just compensation" by demanding property as a condition for granting an unrelated permit. *Koontz*, 570 U.S. at 607.

The Court has applied that same principle to jury-trial rights. In *United States* v. *Jackson*, the Court considered a statute that permitted application of the death penalty "only to those defendants who assert[ed] the right to contest their guilt before a jury." 390 U.S. 570, 581 (1968). Thus, a "defendant who abandon[ed] the right to contest his guilt before a jury [was] assured that he" could not be executed. *Ibid.* The Court struck down the law, holding that its "inevitable effect" was to "impose an impermissible burden upon the assertion of" defendants' "Sixth Amendment right to demand a jury trial." *Id.* at 581, 583. The Court has guarded against similar "unreasonable and burdensome regulations" "impair[ing]" the Seventh Amendment jury right as well. *Hof*, 174 U.S. at 28 (citation omitted); *see Peterson*, 253 U.S. at 310 (con-

sidering whether appointment of auditor was an "undue obstruction of the right to a jury trial").

In *Hof*, the Court considered "what conditions may be imposed upon the demand" of a jury trial "consistently with preserving the right to it." 174 U.S. at 23. The statute at issue there required a party who wished to appeal from the initial decision of the justice of the peace to post a bond to cover the potential judgment in the district court. *Id.* at 45-46. Looking again to Founding-era practice, *id.* at 17, *Hof* found no "unreasonable hardship" from that mere "inconvenience" for disputes up to the "moderate amount" of $300. *Id.* at 25, 28, 45 (citations omitted). But the Court recognized that any statute that did "unreasonably obstruct[] the right of trial by jury," by placing "the defendant in circumstances which render[] [the] right unavailing for his protection," would be "unconstitutional and void." *Id.* at 20, 45.

### B. The FCC Forfeiture Scheme Unreasonably Burdens Carriers' Jury-Trial Rights.

Requiring carriers to forgo their statutory right to demand scrutiny of the FCC's findings by a neutral Article III adjudicator is an unconstitutional burden on the exercise of carriers' Seventh Amendment rights. Both the Second Circuit and Fifth Circuit below recognized that the FCC's imposition of a forfeiture order has immediate and harmful "real-world impacts." AT&T Pet. App. 20a; Verizon Pet. App. 37a. Because FCC forfeiture orders have immediate and serious impacts that carriers cannot risk letting stand, the "inevitable effect" of that condition is "to discourage assertion" of the carriers' right to a jury trial. *Jackson*, 390 U.S. at 581. The fact that carriers

*never* defy an FCC order and wait for a collection action, but rather always pay and appeal immediately, confirms that the statutory scheme "render[s] [the] right" to a jury "unavailing for [their] protection." *Hof*, 174 U.S. at 20.

1. To start, the agency's formal and conclusive "findings of wrongdoing can result in harm to a [carrier's] reputation." *Fox*, 567 U.S. at 256. *Fox* is particularly instructive because the FCC there used the same Section 503(b)(4) notice-of-apparent-liability process to determine that certain networks had violated Commission rules against indecency and obscenity. *Id.* at 248, 255. In response to several broadcasters' arguments that they lacked fair notice, the government argued that there could be no constitutional violation because the FCC had not "impose[d] a sanction" of any monetary amount. *Id.* at 255. The Court squarely rejected that argument. It explained that even an order imposing no penalty "could have an adverse impact on [a broadcaster's] reputation." *Id.* at 256. That "observation [was] hardly surprising," the Court explained, "given that the challenged orders, which are contained in the permanent Commission record, describe[d] in strongly disapproving terms" the broadcasters' alleged actions, and were "widely publicized." *Ibid.* (citing news articles).

All of that applies here, and more. Like the orders in *Fox*, the orders against AT&T and Verizon include official findings of wrongdoing. They also go further, announcing that AT&T and Verizon have engaged in "willful and repeated violation[s]" and require a strong "disincentive to engage in similar conduct again in the future." Verizon Pet. App. 61a, 124a; *see* AT&T Pet. App. 107a, 131a. The Commission's (mis-

guided) criticisms here are even more scathing than in *Fox*, labeling the carriers' actions as "egregious" misconduct that "caused substantial harm" and even "threat[ened] national security and public safety." AT&T Pet. App. 106a-107a; Verizon Pet. App. 122a-123a. And like the orders in *Fox*, the orders here have received widespread press coverage. *See, e.g.*, Ben Glickman, *FCC Fines Wireless Carriers About $200 Million for Sharing Customer Data*, Wall St. J. (Apr. 29, 2024); David Shepardson, *FCC Fines US Wireless Carriers Over Illegal Location Data Sharing*, Reuters (Apr. 29, 2024).

Those reputational harms can manifest in other ways, too. For example, companies must generally account for unpaid orders on their books. *See* Loss Contingencies, Codification of Acct. Standards § 450-20 (Fin. Acct. Standards Bd.). They must at least consider whether to disclose these orders in securities filings. *See* 17 C.F.R. § 229.103. And they may be harmed by unpaid debts to the government when seeking credit and financing.

2. Unpaid forfeiture orders can also have serious collateral consequences in future Commission proceedings. As this Court observed in *Fox*, the FCC has "the statutory authority to use its finding" of wrongdoing in a forfeiture order "to increase any future penalties" for alleged violations of the Communications Act or Commission regulations. *Fox*, 567 U.S. at 255; *see* 47 U.S.C. § 503(b)(2)(E) ("In determining the amount of such a forfeiture penalty, the Commission . . . shall take into account . . . any history of prior offenses."). That future financial harm creates a further imperative for carriers to seize their guaranteed chance at wiping away the FCC's determination by

paying and appealing, rather than insisting on a jury trial that may never come.

In response, the government points to Section 504(c) of the Act. *See* AT&T Pet. 13. That provision states that whenever the Commission "issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of" the recipient, unless "the forfeiture has been paid" or "a court of competent jurisdiction has ordered payment." 47 U.S.C. § 504(c). The government contends that Section 504(c) prevents the Commission from using an unpaid forfeiture order until after "the government files and wins a Section 504 suit." AT&T Pet. 13. There are two problems with that contention.

First, that is not the interpretation of Section 504(c) that the FCC has long espoused. Instead, the Commission has long claimed that, "[c]onsistent with" 504(c), it *can* use unpaid "forfeitures against a violator in subsequent proceedings"—though in a specific way. *In re Comm'n's Forfeiture Pol'y Statement & Amend. of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087, 17102-17103 (1997). The Commission may "use the facts underlying a violation" to establish a "pattern of noncompliant behavior [by] a licensee in a subsequent [license] renewal, forfeiture, [license] transfer, or other proceeding." *Ibid.* To be sure, a carrier may present evidence in a future proceeding to dispute an earlier factual finding. *See id.* at 17103. But that is cold comfort, when the FCC has already rejected the carrier's evidence and no reviewing court has told the agency otherwise.

Second, the Commission's current view of Section 504(c) is no future guarantee. Section 504(c) limits what the FCC may do with a "notice of apparent liability looking toward the imposition of a forfeiture"—that is, the paper that kicks off the proceeding. It says nothing about what the FCC may do with the *final* forfeiture order that actually "impose[s]" the penalty after the Commission has considered the recipient's written response. 47 U.S.C. § 503(b)(4); *see* 47 C.F.R. § 1.80(g) (distinguishing the "notice of apparent liability" from the final "[f]orfeiture order" "requiring that [the penalty] be paid in full"). Given the textual opening, the Commission may not always read Section 504(c) to provide even the limited protection that it currently offers to carriers after a final order.

Apart from their use to increase fines in future proceedings, unchallenged forfeiture orders can establish detrimental Commission precedent. The Commission often uses forfeiture orders to announce novel interpretations of statutes or regulations. If no judicial review is available, then carriers may be required to change their practices to come into compliance, often at considerable expense. *See, e.g.*, *In re Data Breach Reporting Requirements*, 38 FCC Rcd. 12523, 12583-12584 (2023) (relying on interpretation first adopted in 2014 forfeiture order). The orders here are a perfect example. *See* AT&T Pet. App. 141a (dissenting statement of Commissioner Carr) (criticizing Commission for relying on new interpretation of Section 222 that FCC had "never held"). When facing the calcification of adverse FCC precedent, carriers cannot risk waiting half a decade (or forever) for their

chance to challenge the FCC's legal interpretation in court.

3. Unpaid forfeiture orders carry still other serious costs before the Commission and other governmental entities. For starters, unresolved enforcement actions may weigh against carriers in applications for government contracts. *See* 48 C.F.R. §§ 9.104-1(d) (requiring a "satisfactory record of integrity and business ethics"), 9.105-1(c)(5) (permitting government procurement officers to consult with "[o]ther sources such as . . . Government agencies" about compliance). Of equal concern, wireless carriers—like broadcasters, cable television providers, wireline telephone providers, and other heavily regulated entities—are repeat players that frequently appear before the Commission to procure or renew required licenses, win approval for mergers or other transactions, and obtain other discretionary regulatory permissions critical to their businesses.

The FCC has broad discretion to grant or deny such requests based on "public convenience" or the "public interest." *See, e.g.*, 47 U.S.C. §§ 307(a), 309(a), 310(d); *see also FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (noting that the standard "serves as a supple instrument for the exercise of discretion"). Indeed, the government ominously noted before the Fifth Circuit that "AT&T's wireless" business "is wholly contingent" on the Commission's determination that it acts "consistent with the public interest." FCC 5th Cir. Br. 34. And this Court has recognized that when the government has that sort of "broad discretion" over permissions essential to a business's continued operation, regulated parties are "especially vulnerable to the type of coercion that the unconstitu-

tional conditions doctrine prohibits." *Koontz*, 570 U.S. at 605; *see City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) ("[T]he mere existence of the licensor's unfettered discretion . . . intimidates parties" into changing their conduct, "even if the discretion and power are never actually abused.").

Carriers, like judges, cannot be "required to exhibit a naiveté from which [other] citizens are free." *Diamond Alt. Energy, LLC* v. *EPA*, 606 U.S. 100, 122 (2025). In the real world, no business can afford to thumb its nose at its principal regulator by defying an order to pay that regulator tens of millions of dollars in penalties. Nor can any business surrender its only guaranteed opportunity to ask a judge to instruct the Commission that it has legally or factually erred. Businesses in that position are not merely "likely to accede" to the pressure and forgo their chance at a jury, *Koontz*, 570 U.S. at 605—they are *certain* to do so, as the unbroken track record over the last 50 years makes clear.

## CONCLUSION

The judgment of the Fifth Circuit in *AT&T* should be affirmed. The judgment of the Second Circuit in *Verizon* should be reversed.

Respectfully submitted.

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# APPENDIX

## APPENDIX

## TABLE OF CONTENTS

# APPENDIX

1. U.S. Const. amend. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. 47 U.S.C. § 222 provides:

**Privacy of customer information**

**(a) In general**

Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

**(b) Confidentiality of carrier information**

A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

**(c) Confidentiality of customer proprietary network information**

**(1) Privacy requirements for telecommunications carriers**

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

**(2) Disclosure on request by customers**

A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

**(3) Aggregate customer information**

A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasona-

ble and nondiscriminatory terms and conditions upon reasonable request therefor.

**(d) Exceptions**

Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

**(1)** to initiate, render, bill, and collect for telecommunications services;

**(2)** to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services;

**(3)** to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service; and

**(4)** to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title) or the user of an IP-enabled voice service (as such term is defined in section 615b of this title)—

**(A)** to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

**(B)** to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

**(C)** to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

**(e) Subscriber list information**

Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

**(f) Authority to use location information**

For purposes of subsection (c)(1), without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to—

**(1)** call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title) or the user of an IP-enabled voice service (as such term is defined in section 615b of this title), other than in accordance with sub-section (d)(4); or

**(2)** automatic crash notification information to any person other than for use in the operation of an automatic crash notification system.

**(g) Subscriber listed and unlisted information for emergency services**

Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service or a provider of IP-enabled voice service (as such term is defined in section 615b of this title) shall provide information described in subsection (i)(3)(A) (including information pertaining to subscribers whose information is unlisted or unpublished) that is in its possession or control (including information pertaining to subscribers of other carriers) on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions to providers of emergency services, and providers of emergency support services, solely for purposes of delivering or assisting in the delivery of emergency services.

**(h) Definitions**

As used in this section:

**(1) Customer proprietary network information**

The term "customer proprietary network information" means—

**(A)** information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

**(B)** information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

**(2) Aggregate information**

The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

**(3) Subscriber list information**

The term "subscriber list information" means any information—

**(A)** identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

**(B)** that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

**(4) Public safety answering point**

The term "public safety answering point" means a facility that has been designated to receive emergency calls and route them to emergency service personnel.

**(5) Emergency services**

The term "emergency services" means 9-1-1 emergency services and emergency notification services.

**(6) Emergency notification services**

The term "emergency notification services" means services that notify the public of an emergency.

**(7) Emergency support services**

The term "emergency support services" means information or data base management services used in support of emergency services.

3. 47 U.S.C. § 503 provides:

**Forfeitures**

**(a) Rebates and offsets**

Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this chapter, shall in addition to any other penalty provided by this chapter forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the ac-

tion, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

**(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period**

**(1)** Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

**(A)** willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

**(B)** willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

**(C)** violated any provision of section 317(c) or 509(a) of this title; or

**(D)** violated any provision of section 1304, 1343, 1464, or 2252 of title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture un-

der subchapter II, part II or III of subchapter III, or section 507 of this title.

**(2)**

**(A)** If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act described in paragraph (1) of this subsection.

**(B)** If the violator is a common carrier subject to the provisions of this chapter or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this subsection shall not exceed $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act described in paragraph (1) of this subsection.

**(C)** Notwithstanding subparagraph (A), if the violator is—

**(i)**

**(I)** a broadcast station licensee or permittee; or

**(II)** an applicant for any broadcast license, permit, certificate, or other instrument or authorization issued by the Commission; and

**(ii)** determined by the Commission under paragraph (1) to have broadcast obscene, indecent, or profane language, the amount of any forfeiture penalty determined under this subsection shall not exceed $325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act.

**(D)** In any case not covered in subparagraph (A), (B), or (C), the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act described in paragraph (1) of this subsection.

**(E)** The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Subject to paragraph (5) of this section, if the violator is a manufacturer or service provider subject to the requirements of section 255, 617, or 619 of this

title, and is determined by the Commission to have violated any such requirement, the manufacturer or provider shall be liable to the United States for a forfeiture penalty of not more than $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

**(3)**

**(A)** At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

**(B)** If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

**(4)** Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

**(A)** the Commission issues a notice of apparent liability, in writing, with respect to such person;

**(B)** such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

**(C)** such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

**(5)** No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certifi-

cate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in the case of violations of section 303(q) of this title, if the person involved is a non-licensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

**(6)** No forfeiture penalty shall be determined or imposed against any person under this subsection if—

**(A)** such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred—

**(i)** more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

**(ii)** prior to the date of commencement of the current term of such license,

whichever is earlier; or

**(B)** such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

For purposes of this paragraph, "date of commencement of the current term of such license" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) of this title pending decision on an application for renewal of the license.

4. 47 U.S.C. § 504 provides:

**Forfeitures**

**(a) Recovery**

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be

recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: Provided, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo: Provided further, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties provided in this chapter. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

**(b) Remission and mitigation**

The forfeitures imposed by subchapter II, parts II and III of subchapter III, and sections 503(b) and 507 of this title shall be subject to remission or mitigation by the Commission under such regulations and methods of ascertaining the facts as may seem to it advisable, and, if suit has been instituted, the Attorney General, upon request of the Commission, shall direct the discontinuance of any prosecution to recover such forfeitures: Provided, however, That no forfeiture shall be remitted or mitigated after determination by a court of competent jurisdiction.

**(c) Use of notice of apparent liability**

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, 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.

5. 47 C.F.R. § 1.80 provides in relevant part:

**Forfeiture proceedings.**

**(a)** ***Persons against whom and violations for which a forfeiture may be assessed.*** A forfeiture penalty may be assessed against any person found to have:

**(1)** Willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission;

**(2)** Willfully or repeatedly failed to comply with any of the provisions of the Communications Act of 1934, as amended; or of any rule, regulation or order issued by the Commission under that Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding on the United States;

**(3)** Violated any provision of section 317(c) or 508(a) of the Communications Act;

**(4)** Violated any provision of sections 227(b) or (e) of the Communications Act or of §§ 64.1200(a)(1) through (5) and 64.1604 of this title;

**(5)** Violated any provision of section 511(a) or (b) of the Communications Act or of paragraph (b)(6) of this section;

**(6)** Violated any provision of section 1304, 1343, or 1464 of Title 18, United States Code; or

**(7)** Violated any provision of section 6507 of the Middle Class Tax Relief and Job Creation Act of 2012 or any rule, regulation, or order issued by the Commission under that statute.

**(8)** Violated section 60506 of the Infrastructure and Jobs Act of 2021 or 47 CFR part 16.

**Note 1 to paragraph (a):**

A forfeiture penalty assessed under this section is in addition to any other penalty provided for by the Communications Act, except that the penalties provided for in paragraphs (b)(1) through (4) of this section shall not apply to conduct which is subject to a forfeiture penalty or fine under sections 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 223(b), 364(a), 364(b), 386(a), 386(b), 506, and 634 of the Communications Act. The remaining provisions of this section are applicable to such conduct.

**(b)** ***Limits on the amount of forfeiture assessed—***

* * *

**(2)** *Forfeiture penalty for a common carrier or applicant.* If the violator is a common carrier subject to the provisions of the Communications Act or an applicant for any common carrier license, permit, certifi-

cate, or other instrument of authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed $251,322 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $2,513,215 for any single act or failure to act described in paragraph (a) of this section.

* * *

**(11)** *Factors considered in determining the amount of the forfeiture penalty.* In determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

**Note 2 to paragraph (b)(11):**

*Guidelines for Assessing Forfeitures.* The Commission and its staff may use the guidelines in tables 1 through 4 of this paragraph (b)(11) in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceilings per violation or per day for a continuing violation stated in section 503 of the Communications Act and the Commission's rules are described in paragraph (b)(12) of this section. These statutory maxima became effective September 13, 2013. Forfeitures issued under other sec-

tions of the Act are dealt with separately in table 4 to this paragraph (b)(11).

* * *

**(c)** ***Limits on the time when a proceeding may be initiated.***

**(1)** In the case of a broadcast station, no forfeiture penalty shall be imposed if the violation occurred more than 1 year prior to the issuance of the appropriate notice or prior to the date of commencement of the current license term, whichever is earlier. For purposes of this paragraph, "date of commencement of the current license term" means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect under section 307(c) pending decision on an application for renewal of the license.

**(2)** In the case of a forfeiture imposed against a carrier under sections 202(c), 203(e), and 220(d), no forfeiture will be imposed if the violation occurred more than 5 years prior to the issuance of a notice of apparent liability.

**(3)** In the case of a forfeiture imposed under section 227(e), no forfeiture will be imposed if the violation occurred more than 4 years prior to the date on which the appropriate notice was issued.

**(4)** In the case of a forfeiture imposed under section 227(b)(4)(B), no forfeiture will be imposed if the violation occurred more than 4 years prior to the date on which the appropriate notice is issued.

**(5)** In all other cases, no penalty shall be imposed if the violation occurred more than 1 year prior to the date on which the appropriate notice is issued.

**(d)** ***Preliminary procedure in some cases; citations.*** Except for a forfeiture imposed under sections 227(b), 227(e)(5), 511(a), and 511(b) of the Act, no forfeiture penalty shall be imposed upon any person under the preceding sections if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the issuance of the appropriate notice, such person:

**(1)** Is sent a citation reciting the violation charged;

**(2)** Is given a reasonable opportunity (usually 30 days) to request a personal interview with a Commission official, at the field office which is nearest to such person's place of residence; and

**(3)** Subsequently engages in conduct of the type described in the citation. However, a forfeiture penalty may be imposed, if such person is engaged in (and the violation relates to) activities for which a license, permit, certificate, or other authorization is required or if such person is a cable television operator, or in the case of violations of section 303(q), if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) from the Commission or the permittee or licensee who uses that tower. Paragraph (c) of this section does not limit the issuance of citations. When the requirements of this paragraph have been satisfied with respect to a particular violation by a particular per-

son, a forfeiture penalty may be imposed upon such person for conduct of the type described in the citation without issuance of an additional citation.

* * *

**(f)** ***Alternative procedures.*** In the discretion of the Commission, a forfeiture proceeding may be initiated either:

**(1)** By issuing a notice of apparent liability, in accordance with paragraph (f) [*sic*] of this section, or

**(2)** a notice of opportunity for hearing, in accordance with paragraph (g) [*sic*].

**(g)** ***Notice of apparent liability.*** Before imposing a forfeiture penalty under the provisions of this paragraph, the Commission or its designee will issue a written notice of apparent liability.

**(1)** *Content of notice.* The notice of apparent liability will:

**(i)** Identify each specific provision, term, or condition of any act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, or instrument of authorization which the respondent has apparently violated or with which he has failed to comply,

**(ii)** Set forth the nature of the act or omission charged against the respondent and the facts upon which such charge is based,

**(iii)** State the date(s) on which such conduct occurred, and

**(iv)** Specify the amount of the apparent forfeiture penalty.

**(2)** *Delivery.* The notice of apparent liability will be sent to the respondent, by certified mail, at his last known address (see § 1.5).

**(3)** *Response.* The respondent will be afforded a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent.

**(4)** *Forfeiture order.* If the proposed forfeiture penalty is not paid in full in response to the notice of apparent liability, the Commission, upon considering all relevant information available to it, will issue an order canceling or reducing the proposed forfeiture or requiring that it be paid in full and stating the date by which the forfeiture must be paid.

**(5)** *Judicial enforcement of forfeiture order.* If the forfeiture is not paid, the case will be referred to the Department of Justice for collection under section 504(a) of the Communications Act.

**(h)** *Notice of opportunity for hearing.* The procedures set out in this paragraph apply only when a formal hearing under section 503(b)(3)(A) of the Communications Act is being held to determine whether to assess a forfeiture penalty.

**(1)** Before imposing a forfeiture penalty, the Commission may, in its discretion, issue a notice of opportunity

for hearing. The formal hearing proceeding shall be conducted by an administrative law judge under procedures set out in subpart B of this part, including procedures for appeal and review of initial decisions. A final Commission order assessing a forfeiture under the provisions of this paragraph is subject to judicial review under section 402(a) of the Communications Act.

**(2)** If, after a forfeiture penalty is imposed and not appealed or after a court enters final judgment in favor of the Commission, the forfeiture is not paid, the Commission will refer the matter to the Department of Justice for collection. In an action to recover the forfeiture, the validity and appropriateness of the order imposing the forfeiture are not subject to review.

**(3)** Where the possible assessment of a forfeiture is an issue in a hearing proceeding to determine whether a pending application should be granted, and the application is dismissed pursuant to a settlement agreement or otherwise, and the presiding judge has not made a determination on the forfeiture issue, the presiding judge shall forward the order of dismissal to the attention of the full Commission. Within the time provided by § 1.117, the Commission may, on its own motion, proceed with a determination of whether a forfeiture against the applicant is warranted. If the Commission so proceeds, it will provide the applicant with a reasonable opportunity to respond to the forfeiture issue (see paragraph (f)(3) of this section) and make a determination under the procedures outlined in paragraph (f) of this section.

**(i)** *Payment.* The forfeiture should be paid electronically using the Commission's electronic payment system in accordance with the procedures set forth on the Commission's website, *www.fcc.gov/licensing-databases/fees.*

**(j)** *Remission and mitigation.* In its discretion, the Commission, or its designee, may remit or reduce any forfeiture imposed under this section. After issuance of a forfeiture order, any request that it do so shall be submitted as a petition for reconsideration pursuant to § 1.106.

* * *

6. 47 C.F.R. § 64.2010 provides in relevant part:

**Safeguards on the disclosure of customer proprietary network information.**

**(a)** *Safeguarding CPNI.* Telecommunications carriers must take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI. Telecommunications carriers must properly authenticate a customer prior to disclosing CPNI based on customer-initiated telephone contact, online account access, or an in-store visit.

**(b)** *Telephone access to CPNI.* Telecommunications carriers may only disclose call detail information over the telephone, based on customer-initiated telephone contact, if the customer first provides the carrier with a password, as described in paragraph (e) of this section, that is not prompted by the carrier asking for readily available biographical information, or account information. If the customer does not provide a password,

the telecommunications carrier may only disclose call detail information by sending it to the customer's address of record, or by calling the customer at the telephone number of record. If the customer is able to provide call detail information to the telecommunications carrier during a customer-initiated call without the telecommunications carrier's assistance, then the telecommunications carrier is permitted to discuss the call detail information provided by the customer.

**(c)** *Online access to CPNI.* A telecommunications carrier must authenticate a customer without the use of readily available biographical information, or account information, prior to allowing the customer online access to CPNI related to a telecommunications service account. Once authenticated, the customer may only obtain online access to CPNI related to a telecommunications service account through a password, as described in paragraph (e) of this section, that is not prompted by the carrier asking for readily available biographical information, or account information.

**(d)** *In-store access to CPNI.* A telecommunications carrier may disclose CPNI to a customer who, at a carrier's retail location, first presents to the telecommunications carrier or its agent a valid photo ID matching the customer's account information.

**(e)** *Establishment of a password and back-up authentication methods for lost or forgotten passwords.* To establish a password, a telecommunications carrier must authenticate the customer without the use of readily available biographical information, or account information. Telecommunications carriers may create a back-up customer authentication method in the event of

a lost or forgotten password, but such back-up customer authentication method may not prompt the customer for readily available biographical information, or account information. If a customer cannot provide the correct password or the correct response for the back-up customer authentication method, the customer must establish a new password as described in this paragraph.

**(f)** *Notification of account changes.*

**(1)** Telecommunications carriers must notify customers immediately whenever a password, customer response to a back-up means of authentication for lost or forgotten password, online account, or address of record is created or changed. This notification is not required when the customer initiates service, including the selection of a password at service initiation. This notification may be through a carrier-originated voicemail or text message to the telephone number of record, or by mail to the address of record, and must not reveal the changed information or be sent to the new account information.

**(2)** Beginning on July 15, 2024, paragraph (f)(1) of this section does not apply to a change made in connection with a line separation request under 47 U.S.C. 345 and subpart II of this part.

**(g)** *Business customer exemption.* Telecommunications carriers may bind themselves contractually to authentication regimes other than those described in this section for services they provide to their business customers that have both a dedicated account representative and a contract that specifically addresses the carriers' protection of CPNI.

**(h)** *Subscriber Identity Module (SIM) changes.* A provider of commercial mobile radio service (CMRS), as defined in 47 CFR 20.3, including resellers of wireless service, shall only effectuate SIM change requests in accordance with this section. For purposes of this section, SIM means a physical or virtual card associated with a device that stores unique information that can be identified to a specific mobile network.

**(1)** *Customer authentication.* A CMRS provider shall use secure methods to authenticate a customer that are reasonably designed to confirm the customer's identity before executing a SIM change request, except to the extent otherwise required by 47 U.S.C. 345 (Safe Connections Act of 2022) or subpart II of this part. Authentication methods shall not rely on readily available biographical information, account information, recent payment information, or call detail information unless otherwise permitted under 47 U.S.C. 345 or subpart II of this part. A CMRS provider shall regularly, but not less than annually, review and, as necessary, update its customer authentication methods to ensure that its authentication methods continue to be secure. A CMRS provider shall establish safeguards and processes so that employees who receive inbound customer communications are unable to access CPNI in the course of that customer interaction until after the customer has been properly authenticated.

**(2)-(6)** [Reserved]

**(7)** *Employee training.* A CMRS provider shall develop and implement training for employees to specifically address fraudulent SIM change attempts, com-

plaints, and remediation. Training shall include, at a minimum, how to identify potentially fraudulent SIM change requests, how to identify when a customer may be the victim of SIM swap fraud, and how to direct potential victims and individuals making potentially fraudulent requests to employees specifically trained to handle such incidents.

**(8)** [Reserved]

**(9)** *Compliance.* This paragraph (h) contains information-collection and/or recordkeeping requirements. Compliance with this paragraph (h) will not be required until this paragraph is removed or contains a compliance date.