Nos. 25-406 & 25-567

In The

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

AT&T, INC.
Respondent.

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the Second and Fifth Circuits

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF AT&T, INC. AND VERIZON COMMUNICATIONS INC.

Tahmineh Dehbozorgi
Carl Wu
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320

Robert Johnson
Counsel of Record
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd. #256
Shaker Heights, OH 44120
(703) 682-9320
rjohnson@ij.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

RULES

INTEREST OF *AMICUS*[1]

The Institute for Justice ("IJ") is a national, public interest law firm that litigates to uphold constitutional rights, including property rights. IJ litigates to ensure that governments provide appropriate procedures before taking property. *See, e.g.*, *Ingram v. Wayne County*, 81 F.4th 603 (6th Cir. 2023) (civil forfeiture); *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005) (eminent domain). Those procedures include an independent judge and jury.

IJ previously submitted an *amicus* brief in *SEC v. Jarkesy*, 603 U.S. 109, 145 (2024), and is currently litigating Article III and Seventh Amendment challenges to administrative agencies' in-house adjudication schemes. *See, e.g.*, *C.S. Lawn & Landscape, Inc. v. DOL*, No. 23-cv-1533 (D.D.C); *ProCraft Masonry, LLC v. DOJ*, No. 23-cv-393 (N.D. Okla.). Through that work, IJ has particular insight into the impact of agency adjudication on small businesses, many of whom cannot afford to contest liability multiple times in multiple different forums in order to eventually present their defense to an impartial judge and jury. For the types of small businesses that IJ represents, the legal rule proposed by the government in this case would badly undermine the holding of *Jarkesy*.

---

[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or part or made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amicus* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The government does not dispute that the penalty proceeding at issue in this case "is a suit at common law" and "falls outside the public-rights exception." Govt. Pet. 7. Instead, the government has proposed an exception to Article III and the Seventh Amendment that would apply whenever "the parties are entitled to a subsequent de novo jury trial in an Article III court." *Id.* at 8.

Unfortunately, this case presents an odd set of circumstances to consider that proposed rule. For one thing, the agency procedures at issue appear relatively straightforward, as (apparently) the carriers need only submit a written filing to the agency. For another, if any regulated entities can afford to go through multiple rounds of procedures to vindicate their right to a judge and jury it would be these large telecom carriers. And most problematically, there appears to be a lurking factual dispute about whether these procedures are voluntary: The parties do not frame the issue in terms of "voluntariness," but the government at least implies that the carriers could ignore the agency entirely, file nothing in response to the notice of liability, and suffer no consequences (while the carriers strongly argue the contrary).

All this threatens to cloud the issue, but the government does not restrict its proposed rule to these circumstances. The government does not limit its rule to simple agency procedures, large and well-resourced defendants, or even to voluntary adjudications. The government instead proposes a blanket rule under which regulated entities (no matter how small) can be

compelled to navigate agency procedures (no matter how complex or time-consuming) as a condition of someday (no matter how remote that someday may be) presenting their defense to a real judge and jury.

For many regulated entities—particularly small businesses of the sort that IJ represents—the reality is that the government's proposed rule would provide a roadmap to circumvent *SEC v. Jarkesy*, 603 U.S. 109 (2024). Agencies could "reform" their procedures to place the right to judge and jury at the end of years (and potentially multiple rounds) of agency proceedings. In *Jarkesy* itself, for instance, the SEC could comply with the government's proposed rule by forcing Mr. Jarkesy to navigate over six years of agency proceedings—all overseen by biased agency judges—so long as there was a theoretical jury at the end of the procedural rainbow. Most small businesses and individuals cannot afford to run such a gauntlet.

At the same time, the carriers' response to the government's proposed rule also leaves something to be desired when viewed in this broader context. The carriers at times suggest that a later "de novo" trial might suffice but for the fact that they have "no statutory entitlement to appeal … to a court in which a jury is available" and instead must depend on the FCC to file a collection action. Br. 37. The distinction between waiting for the FCC to file—as opposed to filing your own appeal—may well be significant to these telecom carriers in the context of this regulatory scheme. But for smaller regulated entities caught in more interminable agency proceedings an eventual right to "appeal" would provide only cold comfort, as most could never exercise the right in practice.

The Court should reject the proposed "judge and jury later" rule, but for a different reason. Whatever its merits under the Seventh Amendment, the government's proposed rule cannot be squared with Article III. The right to an Article III judge is broader than the right to a jury, insofar as it applies to stages of adjudication that precede the empanelment of any jury. *See, e.g.*, *Gomez v. United States*, 490 U.S. 858, 864 (1989) (noting Article III issues that would be raised by allowing a non-Article III judge to preside over *voir dire* without the parties' consent). Article III judges typically make legal rulings at the threshold of litigation—including legal rulings that weed out insufficient allegations—and oversee pre-hearing procedures to ensure fairness to all sides. Even when Article III judges employ magistrates, commissioners, or other adjuncts, Article III judges retain supervisory responsibility (something that is impossible when adjudication instead proceeds in an agency court). The government's proposed "judge and jury later" rule does not allow for the full judicial role and gives short shrift to Article III.

In the related context of due process, this Court has already held that the right to a neutral judge is not satisfied by the availability of later "de novo" review—and, instead, attaches to the first adjudication of a person's rights. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972); *see also Jarkesy*, 603 U.S. at 151 (Gorsuch, J., concurring) ("the Due Process Clause confirms these conclusions"). The right to a neutral judge (which, in this context, means an Article III judge) applies whenever the government adjudicates private rights. Adjudication before a judge who does not satisfy that requirement is a "here-and-

now injury," *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023), that is not cured by the possibility of another later adjudication.

Rather than grapple with Article III, the government rests its proposed rule on case law applying the Seventh Amendment. The government overreads its cited Seventh Amendment cases, as the carriers explain. *See* Br. 44 (discussing *Cap. Traction Co. v. Hof*, 174 U.S. 1 (1899)). But, more fundamentally, judges and juries serve different roles, and, in this context, the two must be analyzed separately. Juries are only empaneled for part of a case, but judges must oversee the entire case.

This application of Article III may seem uncompromising, but it comes with a key exception: voluntariness. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015); *see also CFTC v. Schor*, 478 U.S. 833, 850–51 (1986). Agencies can give regulated entities the choice to opt into in-house agency penalty proceedings, so long as they also give the choice to opt out. Moreover, agencies can adopt internal procedures to decide whether to file a penalty enforcement proceeding, and, as part of that process, can give regulated entities the opportunity to voluntarily present their defense. The procedure just has to be voluntary.

This exception for voluntary procedures is significant because (as noted above) there appears to be a lurking factual dispute about whether these proceedings are in fact voluntary. The parties talk around the issue but never quite address it. The government focuses on a related issue: It insists that the carriers have the option to refuse to pay, but it never says

whether they could refuse to participate. The carriers, meanwhile, frame the issue in terms of unconstitutional conditions. *See* Br. 43–44. And, to be sure, the unconstitutional conditions doctrine is a helpful frame to think through the question of coercion. But that framing also ignores the fact that this Court has already articulated a standard for voluntariness in the Article III context.

For non-Article III adjudication to be voluntary, at a minimum a litigant must be "made aware of the need for consent and the right to refuse it, and still voluntarily appear[ ] to try the case." *Wellness Int'l*, 575 U.S. at 685 (citation omitted). Given that neither party addresses this standard, we will not offer any definitive opinion on how it should apply to this case. But we will offer one observation: The *Wellness International* standard indicates that for procedures to be voluntary the government must at a minimum ***say*** that they are voluntary. Otherwise, how can regulated entities know if they are required to participate? And, since the government never says those words, it is hard to see how the standard set out in *Wellness International* could be met.

ARGUMENT

Part I of this brief explains why the government's proposed blanket rule should be rejected as inconsistent with Article III and a proper understanding of the judicial role (and also under the Seventh Amendment). Part II then turns to the lurking issue of voluntariness, which the parties come close to addressing but never quite confront, and which may well be dispositive in this case.

I. The Government's Proposed "Judge and Jury Later" Rule is Inconsistent with Article III and Does Not Meaningfully Preserve The Seventh Amendment.

The government's Petition asked this Court to grant certiorari to adopt a blanket rule, under which an agency can subject a regulated entity to a penalty scheme that concededly violates *Jarkesy*, so long as the agency holds out the possibility of a second adjudication that complies with constitutional guarantees. *See* Govt. Pet. 7–8. While the government offers that proposed rule in the context of a somewhat unusual regulatory scheme, the government does not cabin its proposal to the particular agency procedures here. Rather, the government proposes a blanket rule that would apply to a broader universe of regulated entities and procedures. Viewed in that broader context, the government's proposed rule would provide a roadmap to undermine *Jarkesy*, cannot be squared with the protections of Article III, and, in many cases, would fail to adequately "preserve" the Seventh Amendment jury right.

A. Many Regulated Entities Cannot Afford Two Rounds of Penalty Proceedings.

While the government argues that "judge and jury later" is constitutionally equivalent to "judge and jury now," the reality is that for many regulated entities it would in practice mean "judge and jury never." Many regulated entities—including many of the small businesses that IJ represents—cannot afford two separate penalty proceedings.

Small businesses often do not have bottomless litigation budgets to navigate multiple rounds of penalty proceedings. Research has found that 50% of small businesses operate with fewer than 15 "cash buffer days."[2] More than half of small employer firms report "paying operating expenses" (56%) and "uneven cash flow" (51%) as financial challenges.[3] And survey evidence also shows that 61% of small businesses worry about accidentally violating laws or regulations, yet 60% have avoided retaining lawyers due in part to the expense.[4]

Many agency penalty proceedings target precisely these types of small businesses. These include DOL adjudications that target small employers for alleged labor law violations;[5] OHSA adjudications that target small businesses for alleged safety violations;[6] and EPA adjudications that target small businesses for

---

[2] JPMorgan Chase, *Small Business Cash Liquidity in 25 Metro Areas* (Apr. 2020), https://bit.ly/4kOKCEw.

[3] Fed. Rsrv. Banks, 2025 Report on Employer Firms: Findings from the 2024 Small Business Credit Survey 4 (Mar. 2025), https://bit.ly/3MLJjcZ.

[4] BusinessWire, *New Legal Study: Legal Pitfalls Dent Small Business Owners' Bottom Line, Yet Most Forgo Counsel* (May 19, 2025) https://bit.ly/4s6HHJX.

[5] *See, e.g.*, *Adm'r, Wage & Hour Div. v. C.S. Lawn & Landscape, Inc.*, No. 2018-TNE-00023 (DOL Sept. 6, 2019) (almost $55,000 in penalties imposed on a small Maryland landscaping business for allegedly housing workers in an apartment located in a building zoned commercial, rather than residential).

[6] OHSA, *Department of Labor fines New Jersey bakery $385K after inspectors find workers still exposed to safety hazards at Paterson facility* (Nov. 19, 2024), https://perma.cc/BKV3-T57E.

alleged violations of the environmental laws.[7] And that is just the beginning of the alphabet soup.[8]

Agency proceedings can take years and often involve multiple rounds of internal agency procedures. Take IJ client C.S. Lawn & Landscape, Inc., a small Maryland landscaping business that was fined almost $55,000 in a Department of Labor agency adjudication. *See* Complaint, *C.S. Lawn & Landscape, Inc. v. DOL*, No. 23-1533 (D.D.C. May 30, 2023). After a two-year investigation into the company, DOL sent a determination letter instituting penalty proceedings against the company in February 2018. *Id.* ¶ 56. An ALJ held a three-day hearing in November 2018. *Id.* ¶ 60. Then, after the ALJ imposed penalties, C.S. Lawn appealed to DOL's in-house appellate court—the Administrative Review Board—which did not issue the agency's final decision imposing penalties until April 2022. *Id.* ¶ 80.[9] In all, the penalty proceeding took over four years.

---

[7] *See, e.g.*, *In re Vico Constr. Corp.*, No. CWA-05-01 (EPA Sept. 29, 2005) ($126,800 penalty for grinding tree stumps into wood chips); *In re VSS Int'l, Inc.*, No. CWA-20-02 (EPA Dec. 16, 2020) ($230,958 penalty for failure to complete paperwork); *In re Andrew B. Chase*, No. RCRA-13-04 (EPA Aug. 1, 2014) ($131,014 penalty for inadequate leak detection on an underground tank).

[8] *See, e.g.*, *In re Daphne France*, No. 20-J-0045 (USDA Feb. 13, 2023) ($22,448 penalty for entering sore horse in a championship show).

[9] This second round of agency procedures is not optional; DOL specifically instructs defendants that a "party seeking review of [an ALJ's] decision and order, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board." ALJ Decision and Order, *C.S. Lawn*, No. 2018-TNE-00023, at 40.

Or consider *Jarkesy*. There, the SEC initiated its enforcement action in 2013 and chose to proceed in-house rather than in federal court. *Jarkesy*, 603 U.S. at 141–42 (Gorsuch, J., concurring). An ALJ issued an initial decision in 2014, but the Commission did not issue its final order until 2020—six years later. *Id.* at 145. Other agency proceedings can be just as time-intensive, including, in some instances, FCC proceedings like those at issue here.[10]

Notably, agencies understand that lengthy proceedings impose costs, and agencies leverage those costs for purposes of settlement. Take IJ client ProCraft Masonry, an Oklahoma construction company that was threatened by the Department of Homeland Security ("DHS") with more than $31,000 in fines for alleged I-9 paperwork violations. *See* Complaint, *ProCraft Masonry LLC v. DOJ*, No. 23-cv-393 (N.D. Okla. Sept. 12, 2023). Seeking to wield the power of its in-house apparatus, DHS warned the company that contesting the allegations would trigger "full discovery" and "generally take a year or more" before the company would even "reach a point where a hearing on the merits can be scheduled at a later date." *Id.* ¶ 145 & Ex. B. The agency dropped the penalties after

[10] In one recent FCC forfeiture matter, the Enforcement Bureau issued an NAL on February 25, 2021, and did not issue its forfeiture order until December 30, 2024—nearly four years later—while still warning that nonpayment only *may* lead to DOJ enforcement. *See In re Ryan Root*, No. EB-IHD-21-00031877 (FCC Dec. 30, 2024). And the Government Accountability Office has likewise recognized that FCC enforcement matters can remain open "several years" from opening to closure. Gov't Accountability Office, *FCC Updated Its Enforcement Program, but Improved Transparency Is Needed* 7 (Sept. 2017), https://perma.cc/V46L-RRG7.

ProCraft sued in federal court, raising claims under the Seventh Amendment and Article III. But, of course, most parties do not have the resources of a public interest law firm, and, for many companies, settlement is the only option.[11]

Given that few companies can afford to litigate even ***once***, the government's suggestion that Article III and the Seventh Amendment can be meaningfully preserved through "de novo" review in a ***second*** penalty enforcement proceeding is fanciful.

Moreover, this concern is not redressed simply by providing a "statutory entitlement to appeal … to a court in which a jury is available," as the carriers suggest. Br. 37. To the contrary, such a rule would give agencies a roadmap to undermine *Jarkesy*, as agencies could comply with that decision by leaving all their existing proceedings in place and giving regulated entities a "right to appeal" to federal court at the end of years-long agency proceedings. For businesses without bottomless litigation budgets, the right to a judge and jury would always be one proceeding away, preserved in theory at the end of expensive and time-consuming procedures that companies cannot

---

[11] For this reason, most agency enforcement actions never see a courtroom, let alone a jury. For example, OSHRC reports 3,196 active cases in 2024, with 1,786 total ALJ dispositions, of which only 19 were "With Hearing" (≈ 1.1%). The remaining 1,767 dispositions (≈ 98.9%) were resolved without a hearing, including via settlement mechanisms (and other non-hearing resolutions). *See* U.S. Occupational Safety & Health Review Comm'n, *Performance and Accountability Report: Fiscal Year 2024*, at 10 (2024), https://perma.cc/DM2W-WM6T.

realistically afford to navigate multiple times through. *Jarkesy* would become little more than a dead letter.

B. The Government's Proposed Rule Does Not Adequately Respect the Structural Safeguards of Article III.

Turning from policy to doctrine, the government's proposed "judge and jury later" rule should be rejected as inconsistent with Article III. While juries are only empaneled at certain stages of a case, judges oversee the entire case. So, even if "jury later" may sometimes be permissible, a "judge later" rule gives short shrift to the judicial role.

1. The right to an independent judge preserved by Article III is, in significant respects, broader than the right to a jury under the Seventh Amendment. After all, a jury is only empaneled for part of a case, whereas judges oversee the entire case.

This Court has recognized that the judicial role begins before a jury is empaneled and continues after the jury's role is complete. So, for instance, in *Gomez v. United States*, 490 U.S. 858, 864 (1989), this Court held as a matter of constitutional avoidance that non-Article III judges cannot oversee *voir dire* without consent of the parties—noting the Article III problems that would otherwise result. *See Wellness Int'l*, 575 U.S. at 677–78 (discussing *Gomez*).[12] Article III

[12] In addition to preceding the jury, the judicial role also continues after the jury has retired. *See Tull v. United States*, 481 U.S. 412, 425–27 (1987) (jury decides liability facts for civil penalties, but court determines penalty amount); *Dimick v. Schiedt*,

judges manage the case from start to finish: They decide threshold legal questions, manage discovery, rule on privileges and admissibility, instruct the jury, and enter final judgment. All these stages of litigation are part of the judicial role.

When a case instead proceeds in agency court, judges cannot exercise that role. Again, the Court need look no further than *Jarkesy* for an example: There, in addition to adjudicating liability, the SEC also subjected Mr. Jarkesy to an arduous discovery process that the court highlighted as burdensome. *Jarkesy*, 603 U.S. at 117; *see also id.* at 144 (Gorsuch, J., concurring). And Justice Gorsuch highlighted unfairness at other stages of the proceedings as well: the ALJ gave Mr. Jarkesy inadequate time to prepare for the hearing, while granting the agency comparatively lengthy extensions, *id.*, and, while Mr. Jarkesy's internal appeal was pending, agency enforcement staff "accessed confidential memos by the Commissioners' advisors about his appeal," *id.* at 145; *see also id.* at 143 (explaining that Jarkesy "lost many of the procedural protections our courts supply in cases where a person's life, liberty, or property is at stake"). The government's "judge later" rule overlooks the importance of the judge's role supervising the full course of litigation to prevent just such unfairness.

2. Rather than grapple with the judge's separate role, the government largely ignores it.

The Question Presented in this case encompasses both Article III and the Seventh Amendment. *See*

---

293 U.S. 474, 486–88 (1935) (judge can, consistent with Seventh Amendment, grant "remittitur" to reduce amount of award).

Govt. Pet. i. Yet the primary authorities that the government cites in the Petition are Seventh Amendment cases that nowhere discuss or even mention Article III. *See Cap. Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) ("The decision of this case mainly turns upon the scope and effect of the seventh amendment of the constitution of the United States."); *Meeker v. Lehigh Valley R.R. Co*, 236 U.S. 412, 430 (1915) (addressing claim that scheme "infringes upon the right of trial by jury"). The government argues for "jury later" and seemingly assumes that "judge later" follows as a matter of course.

However, precisely because judges and juries serve different roles, Article III and the Seventh Amendment cannot be conflated. *See Jarkesy*, 603 U.S. at 20 (addressing the two separately); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *379 (contrasting the role of judges and juries). Article III is the antecedent guarantee to the Seventh Amendment because it allocates the "judicial Power of the United States" in the first instance, while the Seventh Amendment addresses how facts are established in a subset of cases once a court is properly exercising that judicial power. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989); *see also Stern v. Marshall*, 564 U.S. 462, 483–85 (2011); *CFTC v. Schor*, 478 U.S. 833, 850–51 (1986).[13]

[13] To be sure, there is significant overlap between the two rights, but that overlap should not be mistaken for congruence. The overlap arises because the Seventh Amendment by its terms applies to "Suits at common law," U.S. CONST. amend. VII, and this Court has likewise explained that the judicial power under

So, whereas the Seventh Amendment preserves the jury as the factfinding mechanism for a particular stage of a particular class of cases, Article III is comparatively broad: It "vest[s]" the "judicial Power of the United States" in "one supreme Court" and inferior courts staffed by judges with life tenure and salary protection. U.S. CONST. art. III, § 1. Inherent in this judicial power are those powers "necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Article III then extends that power to enumerated "Cases" and "Controversies," including "all Cases, in Law and Equity," arising under federal law. U.S. CONST. art. III, § 2. And when a matter is "the subject of a suit at the common law," it lies at the heart of Article III's domain, and the Constitution forbids Congress to "withdraw from judicial cognizance" any such dispute. *Jarkesy*, 603 U.S. at 132 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

Article III is implicated when any stage of adjudication is "withdraw[n] from judicial cognizance," *id.*, even if the Article III court has a role at some later stage. Of course, while a case is pending in Article III court, judges can call on non-Article III adjuncts (like magistrates, bankruptcy judges, and commissioners) to assist with stages of the litigation. But that is meaningfully different from allowing the case to

---

Article III includes (but is not limited to) "any matter which, from its nature, is the subject of a suit at the common law." *Stern*, 564 U.S. at 488 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)). However, although both rights apply to suits at "common law," the substance of the right at issue is distinct.

proceed in an entirely different agency forum: Judicial adjuncts are typically "appointed and subject to removal by Article III judges." *Wellness Int'l*, 575 U.S. at 677 (citation omitted). Plus, when making such referrals, the Article III judge retains supervisory responsibility. *See, e.g.*, 28 U.S.C. § 157(d) (referral to bankruptcy judge can be revoked "for cause shown"); *id.* § 157(c)(1) (bankruptcy judge submits findings and recommendations in non-core matters); 28 U.S.C. § 636(b)(1)(C) (similar procedure, involving findings and recommendations, for magistrates). And there are some stages of the case that cannot be referred without consent—even with supervision. *See Gomez*, 490 U.S. at 874–75. Article III judges do not need to personally handle every single part of the litigation, but the entire case must proceed under the auspices of an Article III court and under the ultimate control of an Article III judge.

2. This Court's due process cases confirm the point. While the Question Presented asks about Article III and the Seventh Amendment, those rights are inextricably intertwined with the broader right to due process of law. And, in the due process context this Court has held that the right to a neutral judge applies to the ***first*** adjudication of a person's rights—and is not satisfied by later "de novo" review.

Article III and the Seventh Amendment are, in this context, an aspect of the right to due process of law. The Founding-era understanding was that "it was 'the peculiar province of the judiciary' to safeguard life, liberty, and property," with the result that "due process often meant ***judicial*** process." *Jarkesy*, 603 U.S. at 150 (Gorsuch, J., concurring) (quoting 1

ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, Editor's App. 358 (1803)); *see also Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972); *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–36 (1897). When the federal government tries to take property, including by imposing monetary penalties, the necessary judicial process is defined by the safeguards set out in Article III.[14]

And in the due process context, this Court has already held that a later proceeding with a neutral decisionmaker does not cure the failure to provide a neutral judge the first time a case is tried. In *Ward v. Village of Monroeville*, when a plaintiff challenged a "mayor's court" procedure as unfairly biased, the government argued that any bias in the initial tribunal did not matter because any error "can be corrected on appeal ***and trial de novo*** in the County Court of Common Pleas." 409 U.S. 57, 61–62 (1972) (emphasis added). But the Court disagreed, holding that a litigant is "entitled to a neutral and detached judge ***in the first instance***." *Id.* (emphasis added); *see also id.* ("Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication."). The same reasoning should apply here.

Consistent with this principle, this Court just recently held that "being subjected to" an "unconstitutional agency authority" is a "here-and-now injury,"

---

[14] Relevant here, the need for neutral process also intensifies where "the Government has a direct pecuniary interest in the outcome." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55–56 (1993).

since it "is impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023); *see also Space Expl. Techs. Corp. v. NLRB*, 151 F.4th 761, 780 (5th Cir. 2025) ("[O]nce an unconstitutional proceeding begins, the damage is done. That is the essence of irreparability … . Waiting until the end would be no remedy at all."); *Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314, 1348 (D.C. Cir. 2024) (Walker, J., concurring in part and dissenting in part) (a party required to participate in an unconstitutional adjudication scheme "faces certain and imminent harm that cannot later be fixed"). Because later review cannot cure the injury of being forced to endure agency adjudication that violates Article III—indeed, courts may in fact prospectively enjoin such schemes—a "judge later" rule cannot cure the violation either.

C. The Government's Proposed Rule Also Will Not Adequately Preserve the Seventh Amendment Right to a Jury.

While the Seventh Amendment is narrower than Article III, and only requires that a jury be empaneled at some point in proceedings, the government's proposed "jury later" rule still goes too far. Under the government's blanket rule, "jury later" would always be good enough—without qualification. But, instead, courts must undertake a more nuanced inquiry to ask whether the jury right has been "***preserved***." U.S. Const. amend. VII (emphasis added).

As the carriers point out in their briefing, the government overreads its key Seventh Amendment

cases. *See* Br. 36–39. While *Hof* holds that the jury right can sometimes be postponed, *Hof* also explains that a scheme would violate the Seventh Amendment if it "produced a total prostration of the trial by jury or even involved the defendant in circumstances which rendered that right unavailing for his protection." 174 U.S. at 20 (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 243 (1819)).

Founding-era cases indicate that a "jury later" scheme may, in at least some circumstances, be insufficient to preserve the jury right. The clearest examples are the Ten Pound Act Cases, which rejected the same "jury later" theory offered by the government here.[15] At issue was New Hampshire's 1785 Ten Pound Act, which routed certain debt and trespass actions to a justice of the peace for adjudication without a jury—even though the State Bill of Rights guaranteed a jury trial in "all controversies concerning property." N.H. CONST. pt. I, art. XX; *see also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 475–76 (2005). Defenders of the Act pressed the familiar move: the Constitution did not require a jury "in the first instance," they argued, because the losing party could appeal to the Inferior Court of Common Pleas and obtain a jury there. Richard M. Lambert, *The "Ten Pound Act" Cases and the Origins of Judicial Review in New Hampshire*, 43 N.H. B.J. 37, 40–50 (2002). The New Hampshire court

[15] *See* PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 154 (2014) (citing *Macgregore v. Furber*, Certified Record of Judgment, Rockingham County Superior Court Record No. 9320, New Hampshire State Archives; *Macgregore v. Furber*, Rockingham County Inferior Court, Minute Book, New Entries, May term 1786, Case No. 113, New Hampshire State Archives).

rejected that logic and reversed. The court looked at the facts—such as all the cost and burden a party must bear in a juryless hearing—and it held that juries must be available ***in the first instance***.

For similar reasons, this Court has long held that the deprivation of the jury right "is an order that should be dealt with now, before the plaintiff is put to the difficulties" by a proceeding "that ultimately must be held to have been required under a mistake." *In re Simons*, 247 U.S. 231, 239 (1918) (Holmes, J.) (granting writ of mandamus); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959) ("[T]he right to grant mandamus to require jury trial where it has been improperly denied is settled."). Denial of a jury warrants immediate relief because a later jury does not always cure the injury of an unlawful proceeding.

Once again, consider how the government's proposed blanket rule would play out in *Jarkesy*: Imagine that, rather than proceed in federal court in the first instance, the SEC were to say, "we'll give you a jury, you just have to navigate six years of agency proceedings, including an appeal." For most litigants—who can hardly afford to litigate one round of penalty proceedings, much less two—such a scheme would not "preserve" the jury right, just as it would not comport with Article III. Instead, such a rule would relegate the rights to judge and jury to "second-class right[s]." *McDonald v. Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).

II. Agencies Can Adopt Voluntary Procedures, But The Parties Only Hint At The Standard For Voluntariness.

The above discussion comes with an important caveat: This Court has indicated that agencies can adjudicate cases that implicate Article III so long as they do so with the parties' voluntary consent. *See Schor*, 478 U.S. at 855. The standard for voluntariness, however, is demanding. At a minimum, a litigant must be "made aware of the need for consent and the right to refuse it, and still voluntarily appear[ ] to try the case." *Wellness Int'l*, 575 U.S. at 685 (citation omitted). Thus far, despite the importance of voluntariness under the Court's case law, neither party has squarely addressed that standard—though both sides seem to circle around the issue. Regardless, given that consent must be "knowing," it is hard to see how the standard could be met if the government will not expressly label its procedures voluntary.

A. If the limits of Article III seem uncompromising, consent creates flexibility. This Court has indicated that agencies are free to adjudicate issues of private right outside Article III so long as they do so with the parties' voluntary consent. *See Schor*, 478 U.S. at 855 ("the decision to invoke this forum is left entirely to the parties").[16]

---

[16] *But see Wellness Int'l*, 575 U.S. at 687–88 (Roberts, C.J., dissenting) ("Unfortunately, the Court … proceeds to the serious constitutional question whether private parties may consent to an Article III violation. In my view, they cannot.") *id.* at 707 (Thomas, J., dissenting) ("I agree … that individuals cannot consent to violations of the Constitution[.]"). If, contra *Schor* and

Voluntary process is commonplace. For example, agencies may meet with a regulated party to negotiate a penalty, request information, or invite an optional written response before initiating proceedings.[17] So long as it is voluntary, this type of negotiation does not implicate Article III (nor the Seventh Amendment). Similarly, this Court has said that it is "self-evident" that "Congress may encourage parties to settle a dispute out of court or [even] resort to arbitration without impermissible incursions on the separation of powers." *Schor*, 478 U.S. at 855.

Such voluntary process often benefits both sides. Regulated parties may want to avoid Article III courts for their own independent reasons, and in some circumstances agency proceedings may offer procedural advantages. *See* Christopher J. Walker & David T. Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO ST. L.J. 1, 24–27 (2024). And the government, for its part, may want to conserve its resources and preserve flexibility for repeat market participants.

Voluntary consent may even allow agencies to retain some of their current adjudicatory procedures following *Jarkesy*. For instance, scholars have proposed that agencies (or Congress) adopt procedures creating a "right to remove," which would allow regulated

---

Wellness, parties may not consent to an Article III violation (or may not waive their right to an Article III court, the flip side of the same coin), then the analysis in this case is even simpler. Under such a rule, cases to impose penalties must be adjudicated in Article III, full stop.

[17] This is akin to a prosecutor calling a defendant into the office for a pre-indictment discussion, which may result in a negotiated plea. Or, in the civil context, it is akin to the government negotiating a settlement before filing a complaint.

entities to remove agency adjudications that involve private rights to federal district court. *See* Walker & Zaring, *supra*, at 12–14, 18–20[18] Under this approach, regulated entities would have the choice to either proceed in the agency courts (thereby consenting to non-Article III adjudication) or to instead insist on an Article III forum. *Id.* at 13.

But for such procedures to survive constitutional scrutiny, they ***must remain subject to voluntary and knowing consent***. A party must be free to decline the agency's invitation without triggering a binding adjudication. An agency may not treat non-participation in agency procedures as an admission to the facts. Nor may it conduct its own proceedings, secure deferential review of its factfinding, and then leverage that record in later court proceedings. *Cf.* 5 U.S.C. § 706(2)(A), (E). And, of course, an agency may not collect civil penalties on its own say-so alone. If any of these consequences were on the table, the pre-Article III process would not be voluntary. And there can be no "purported waiver of the right to an Article III trial" if "the alternative to the waiver were the imposition of serious burdens and costs on the litigant." *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (en banc) (Kennedy, J.).[19]

---

[18] Congress has in fact recognized a right to remove in at least three instances. *See id.* at 19–20 (discussing the right to remove under the Federal Power Act, 16 U.S.C. § 823b(d), the Fair Housing Act, 42 U.S.C. § 3612(a), and the Energy Policy and Conservation Act, 42 U.S.C. § 6303(d)).

[19] *Cf. Schulz v. IRS*, 413 F.3d 297, 303 (2d Cir. 2005) (a "scheme that denies subjects the opportunity to seek judicial

The government's proposed "judge and jury later" rule, by contrast, evidently does not turn on voluntariness. "[S]o long as the parties may obtain de novo review in an Article III court with a jury," the government appears to believe that an agency may force regulated parties into illegitimate proceedings without recourse. *See* Govt. Pet. 2. So while voluntary consent is a powerful tool, it once again affords no reason to uphold the government's proposed blanket rule.

B. But even if the government's proposed blanket rule does not turn on voluntariness, might the proceedings here be deemed voluntary? Both sides in this case have made arguments that sound almost like arguments about voluntariness, but, thus far, neither side has squarely addressed the governing standard.

This Court has already said what is required for a party to voluntarily consent to non-Article III adjudication. The target of such an administrative proceeding must have the right to demand a jury trial in an Article III court and must "knowingly and voluntarily" waive that right and proceed before the agency. *Wellness Int'l*, 575 U.S. at 669; *United States v. Olano*, 507 U.S. 725, 733 (1993). And for a waiver to be knowing and voluntary, a litigant must be "'made aware of the need for consent and the right to refuse it, and still voluntarily appear[ ] to try the case' before the non-

---

review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties 'so heavy as to prohibit resort to that remedy,' runs afoul of the" Due Process Clause (quoting *Okla. Operating Co. v. Love*, 252 U.S. 331, 333 (1920)).

Article III adjudicator." *Wellness Int'l*, 575 U.S. at 685 (citation omitted).

Given the governing standard, the Court would need to answer a few key questions to determine whether these proceedings are voluntary. What happens if a carrier receives a notice of liability and simply declines to respond? Does a carrier have the option to entirely decline to participate in the FCC's penalty proceedings? Would such a refusal carry any legal or practical consequences? Further, assuming that carriers do have a right to decline to participate, does the government do anything to make them "aware of the need for consent and the right to refuse it"? *Wellness Int'l*, 575 U.S. at 685. Or does the government tell regulated entities that these procedures are mandatory?

The government—while it stresses the "de novo" nature of review—does not squarely address these critical questions in its Petition. The government emphasizes that a carrier could refuse to ***pay*** after being found liable, but it does not say whether a carrier could refuse to participate in the adjudication ***at all***. Nor does the government say whether it ever informs carriers whether its procedures are voluntary. If anything, the government suggests the contrary: If this scheme were truly voluntary, it is unclear how it could rank "among the agency's 'most important regulatory remedies,'" Govt. Pet. 17, much less why the FCC would spend years "adjudicating" its claims if its published orders were, essentially, useless for enforcement. Meanwhile, for their part, the carriers argue at length that the government's procedures are inherently coercive. *See* Br. 42–50.

Because the operation of this regulatory scheme is beyond *Amicus*'s expertise, this brief ultimately offers no opinion on whether these procedures are in fact voluntary. But *Amicus* will offer one observation: Given that a regulated entity must be "made aware of the need for consent and the right to refuse it," *Wellness Int'l*, 575 U.S. at 685, it is hard to see how the government can meet the relevant standard if it does not expressly label its procedures voluntary. And that makes sense. If the government truly thinks these procedures are voluntary, it should have to say so clearly and unequivocally—both in its briefing in this Court and, earlier, to the regulated entities facing enforcement. Moreover, on the flip side, if the government will not actually say the word "voluntary," then its procedures should be treated as mandatory—meaning the government should not be allowed to rely on intuitions about voluntary consent to escape the otherwise clear requirements of Article III.

CONCLUSION

The Court should reject the government's proposed "judge and jury later" rule.

Respectfully submitted,

Robert Johnson
Counsel of Record
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd. #256
Shaker Heights, OH 44120
(703) 682-9320
rjohnson@ij.org

Tahmineh Dehbozorgi
Carl Wu
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203

February 25, 2026

Counsel for Amicus Curiae