

Nos. 25-406 and 25-567

In the Supreme Court of the United States

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

v.

AT&T, INC.

VERIZON COMMUNICATIONS INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

On Writ of Certiorari Before Judgment to the United States
Court of Appeals for the Fifth and Second Circuits.

**BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE,
NATIONAL ASSOCIATION OF WHOLESALER-
DISTRIBUTORS, AND NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS
LEGAL CENTER, INC. AS *AMICI CURIAE* IN
SUPPORT OF AT&T, INC. AND VERIZON
COMMUNICATIONS INC.**

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INTERESTS OF *AMICI CURIAE*¹

1. The New Civil Liberties Alliance (“NCLA”) is a nonpartisan, nonprofit civil-rights group devoted to defending constitutional freedoms from violations by the administrative state. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as jury trial, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—because Congress, administrative agencies, and courts have neglected them for so long.

NCLA defends civil liberties—primarily by asserting constitutional constraints on the administrative state in the courts. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution’s United States is the focus of NCLA’s concern.

NCLA is especially troubled by deprivations of jury trial rights and efforts to relocate judicial power from Courts—in which Article III solely vests such power—to administrative agencies. Congress lacks any judicial power

¹Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

whatsoever, so it cannot delegate that power to any other branch of government. It resides in the courts by the Constitution's very terms. *See generally* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 396-98 (Univ. of Chicago Press 2014).

2. The National Association of Wholesaler-Distributors (NAW) is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct-member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size closely held businesses. As an industry, wholesale distribution generates more than \$8 trillion in annual sales volume, providing stable and well-paying jobs to more than 6 million workers. NAW members are subject to a wide array of regulatory regimes overseen by numerous federal administrative agencies.

3. The National Federation of Independent Business Small Business Legal Center, Inc. (the “Legal Center”) is a nonprofit public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association.

NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C., and all fifty state capitals. The small businesses for which NFIB and its Legal Center advocate for are subject to daily regulation by administrative agencies and are influenced by how these agencies interpret laws and adjudicate disputes.

SUMMARY OF THE ARGUMENT

The purpose of this brief is to alert the Court to certain questionable premises embedded in the decisions below and in the parties' briefing thus far in this Court. The first such premise is that the Communications Act is somehow unusual in requiring the Federal Communications Commission ("FCC") to obtain a subsequent court order to enforce its administratively imposed penalties. Such a requirement is commonplace in administrative law, including the administrative scheme the Court addressed two terms ago in *SEC v. Jarkesy*, 603 U.S. 109 (2024).

A second questionable premise is that in any subsequent court proceeding to enforce FCC's administratively imposed penalties, the defendants would invariably get a jury trial. Courts have uniformly (although perhaps erroneously) held otherwise when the Securities and Exchange Commission ("SEC") has sought and obtained judicial enforcement of its administratively imposed penalties. Thus, unless the Court makes clear that those SEC cases were wrongly decided, this Court should not lightly assume that lower courts would invariably require jury trials in cases brought to enforce FCC-imposed penalties such as those at issue here.

ARGUMENT

I. AN AGENCY'S NEED TO SEEK JUDICIAL ENFORCEMENT OF ADMINISTRATIVE PENALTIES IS COMMONPLACE AND CONSTITUTIONALLY REQUIRED

The parties and the decisions below imply that the Communications Act is somehow unusual in requiring FCC to obtain a subsequent court order to enforce and collect its administratively imposed penalties. Far from being unusual, this need for judicial enforcement of administrative penalties is commonplace throughout the administrative state. That is the bare minimum the Constitution demands, because the Framers understood and intended that only courts could lawfully issue such binding orders. *See generally* Philip Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?* 176-77 (Univ. of Chicago Press 2014) (“[A]t law, only judges had a power to issue orders or warrants that constrained subjects,” and “[a]fter 1641, orders and warrants that bound subjects had to be issued by regular judicial officers. ... There thus was no room for administrative orders or warrants.”); *id.* at 272-74 (criticizing modern practice whereby courts largely “rubber-stamp” agency penalties). Indeed, in this regard, FCC’s statutory penalty regime is materially indistinguishable from the statutory scheme that governed the SEC administrative penalty the Court set aside in *Jarkesy*.

The SEC respondent in *Jarkesy*, just like Verizon and AT&T here, had the option of simply refusing to pay the administrative penalty SEC imposed against him. Indeed, it is unclear whether he ever paid the penalty. If he refused to pay it, the SEC would have needed to seek judicial assistance to collect it, by convincing a federal court to

convert SEC’s penalty order into an enforceable court judgment. *See* 15 U.S.C. §§ 80b-3(i)(1)(A) (authorizing SEC to order imposition of administrative penalties); *id.* § 80b-9 (authorizing SEC to bring federal court action to “enforce compliance” with, among other things, its administrative “order[s]”); *cf. id.* § 80b-9(e)(3)(B) (even where penalty is initially imposed by a federal court judgment in a plenary action, rather than by SEC itself in an administrative proceeding, if the defendant refuses to pay it, SEC may enlist the Attorney General to commence a subsequent court action to collect the penalty).

Yet neither this Court nor the parties in *Jarkesy* ever suggested that SEC’s need to seek subsequent judicial enforcement of any assessed administrative penalty negated Mr. Jarkesy’s prior right to insist on a jury trial in an Article III court *before* SEC assessed any penalty. Indeed, had SEC’s need to seek subsequent judicial enforcement been enough to “cure” SEC’s deprivation of a jury trial and an Article III forum, the case could easily have been dispensed with on that ground. Of course, it was not.

II. PREVAILING CASELAW CASTS SUBSTANTIAL DOUBT ON THE PREMISE THAT A DEFENDANT FACING AN AGENCY PENALTY ENFORCEMENT LAWSUIT WOULD INVARIABLY GET A JURY TRIAL

The parties also presume that in any subsequent court action to enforce FCC’s administrative penalties, the defendant would invariably be entitled to a trial by jury. In this regard, however, FCC would need to distinguish *Jarkesy* by asserting that, when SEC seeks judicial enforcement of its administrative penalties under the federal securities statutes, the defendant is *not* entitled to a jury trial. But any

such distinction would rest on two additional mistaken premises.

The first of these mistaken premises is that lower courts have been correct in holding—apparently uniformly—that SEC penalty collection cases in federal court can be decided in summary proceedings without jury trials. *See, e.g., SEC v. McCarthy*, 322 F.3d 650, 655 (9th Cir. 2003); *SEC v. Vindman*, No. 06-CV-14233, 2007 WL 1074941, at *1 (S.D.N.Y. Apr. 5, 2007) (citing *McCarthy*); *SEC v. Gerasimowicz*, 9 F. Supp. 3d 378, 381 (S.D.N.Y. 2014); *SEC v. Pinchas*, 421 F. Supp. 2d 781, 783 (S.D.N.Y. 2006); *cf. FERC v. Powhatan Energy Fund, LLC*, 286 F. Supp. 3d 751, 758 n.17, 771 (E.D. Va. 2017) (interpreting statutory provision for de novo judicial review of administrative penalty as requiring a trial, but declining to rule on defendant’s request for a jury trial); *FERC v. City Power Marketing, LLC*, 199 F. Supp. 3d 218, 232-33 (D.D.C. 2016) (deferring ruling on defendant’s right to a jury trial). *But see FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 197 (D. Mass. 2016) (holding that court’s de novo review of administrative penalty order “culminates, if necessary, in a jury trial”). The holdings that permitted non-jury summary collection proceedings were questionable even before *Jarkesy*, but *Jarkesy* has likely rendered them entirely untenable. *But see SEC v. Mackle*, No. 24-MC-00489, 2025 WL 671072 (S.D.N.Y. Mar. 3, 2025) (summarily enforcing

SEC administrative penalty without jury trial notwithstanding *Jarkesy*).²

The parties appear to agree that, contrary to this prevailing practice in SEC penalty-enforcement cases, the statutory provision for a “trial de novo” in FCC penalty-enforcement lawsuits, 47 U.S.C. § 504(a), would invariably require a jury trial. While that may be true—and should be, especially in light of *Jarkesy*—the statute is conspicuously silent on whether “trial de novo” requires a *jury* trial, and any assumption that it does runs headlong into the above-cited cases in which courts have consistently held that SEC penalty-enforcement cases can be summarily decided by judges *without* jury trials. Thus, unless this Court expressly rejects those SEC-related holdings, the Court should not uncritically accept the parties’ shared assumption that lower courts would invariably require jury trials in FCC penalty-enforcement cases.

CONCLUSION

(1) FCC’s need to seek judicial enforcement of its administrative penalties in a subsequent action is neither unusual nor unique in administrative law; (2) *Jarkesy* is materially indistinguishable because, just like the FCC here, the SEC would have had to seek judicial enforcement in order to collect the administrative penalties it imposed in that case; and (3) although *Jarkesy* likely requires a jury trial in any judicial proceeding brought by FCC to collect its administrative penalties, the governing statute contains no

² *Amici* have been unsuccessful in identifying any example of this type of administrative penalty-enforcement action in which a jury trial has actually occurred.

explicit jury-trial requirement, and any presumption of such a requirement would conflict with prevailing caselaw involving SEC penalty-enforcement cases in federal court.

Respectfully submitted,

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