

NOS. 25-406 and 25-567

In the
Supreme Court of the United States

AT&T, INC., *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Petitions for Writs of Certiorari to
the United States Courts of Appeals for the
Second and Fifth Circuits

**BRIEF OF VAPING INDUSTRY
STAKEHOLDERS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICI CURIAE*¹

Amici represent stakeholders in the vaping product industry's manufacturing, distribution, and specialty retail sectors.² These stakeholders are regulated by the United States Food & Drug Administration (FDA) pursuant to the Family Smoking Prevention and Tobacco Control Act (TCA).³ FDA enforces the TCA's against vaping industry stakeholders through the imposition of civil money penalties. The Food, Drug and Cosmetic Act (FDCA),⁴ of which the TCA is a part, provides a non-Article III adjudication of facts underlying the imposition of punitive monetary penalties and the quantification of those penalties in an administrative tribunal. *See* 21 U.S.C. § 333(f)(9).

FDA's penalty scheme closely parallels the scheme at issue here. the constitutionality of the latter is of interest to *Amici* given the recent decision in *Wulferic, LLC v. FDA*, 793 F. Supp. 3d

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part or made any monetary contribution. Pursuant to Supreme Court Rule 37.2, written notice to file was given to counsel for all parties more than 10 days in advance of this filing.

² *Amici* are listed in the Appendix.

³ PUB. L. 111-31, 123 STAT. 1776, codified as 21 U.S.C. § 387, *et seq.*

⁴ PUB. L. 75-717, 53 STAT. 1040, codified as 21 U.S.C. §§ 300, *et seq.*

830 (N.D. Tx. 2025) which found FDA’s parallel scheme was unconstitutional. *Wulferic* relied upon the Fifth Circuit’s finding in *AT&T, Inc. v. FCC*, 149 F.4th 491 (5th Cir. 2025) that the FCC’s scheme was unconstitutional. 793 F. Supp.3d at 852. *Amici* have a unique perspective—they represent the baseline collective experience of many regulated parties across the administrative ecosphere. The Court should consider the *Amici*’ perspective and experience when adjudicating the constitutionality of the FCC penalty scheme.

Amici have witnessed from the luxury boxes the decimating market impacts of FDA punishing violations of Article III-protected questions in a non-Article III forum. *Amici* seek a determination that the “public rights” exception does not apply to challenges to federal regulatory schemes involving subject matters which the Tenth Amendment reserves to the several states.

SUMMARY OF ARGUMENT

Amici support AT&T’s and Verizon’s positions on the merits. *Amici* urge the Court to go a step farther by:

- (1) holding the “public rights” exception is inapplicable to federal civil penalty schemes concerning subject matters the Tenth Amendment reserved to the states and
- (2) addressing the boundaries and scope of the “public rights” exception *vis-à-vis*

the adjudication of Article III-protected questions in non-Article III forums.

Such boundaries will ultimately determine the future viability of federal health agencies, like FDA, using in-house monetary penalty schemes when enforcing public health statutes.

First, the form and nature of FCC forfeiture proceedings are indistinguishable from FDA’s penalty scheme routinely pursues against the vaping industry. Both proceedings share historic links to the elements of at least one analogous common law “suit.” They also share another the commonality—both schemes seek punitive monetary penalties paid to the Treasury. *SEC v. Jarkesy*, 603 U.S. 109 (2024) holds that the form of the remedy matters. The Seventh Amendment introduced a constitutional promise into our social compact—regulated parties have the right to insist on the adjudication of Article III-protected questions by a jury in an Article III forum.

Jarkesy narrowly defined the “public rights” exception in finding that it did not apply to the SEC enforcement scheme because the elements thereof cited to justify the sanction had historic links to English common law actions that afforded *Wulferic* extended the Fifth Circuit’s opinion in *AT&T*, which itself relied upon *Jarkesy*, to find that the “public rights” exception does not apply to FDA’s enforcement of public health laws like the FDCA and TCA. This Court should clarify *Jarkesy*’s categorical exclusion of “public health” when defining “public rights.” This Court has consistently held that matters relating to the

regulation of public health are state police powers. *Amici* advocate for a definitive holding that the “public rights” exclusion does not apply to subject matters the Tenth Amendment reserves to the states—particularly concerning matters related to the regulation of public health.

Second, the Communications Act, PUB. L. 73-416, 48 STAT. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.*) assigns the adjudication of Article III-protected questions to non-Article III forums. It offers the hollow consolation of a later jury trial “*de novo*” in an Article III forum. The elements of the Act’s scheme are analogous to the scheme which *Jarkesy* struck down.

The adage “you can’t put the genie back in the bottle” precisely explains the constitutional injury resulting when regulated parties are subjected to the adjudication of Article III questions in a non-Article III forum. Size does not discriminate when it comes to the reach and impact of agency monetary penalty schemes. The type of penalty schemes akin to those at issue here target an eye-popping number of regulated parties.

Large companies (AT&T and Verizon) and small companies (like *Amici*) suffer the same “here-and-now” constitutional injury. Article III and the Seventh Amendment do not countenance the first-order adjudication of Article III-protected questions in a non-Article III forum. An agency cannot un-ring the bell after a non-Article III tribunal makes factual findings, legal conclusions, adjudges guilt, and levies punishment. The second-order jury trial afforded by the FCC

penalty scheme cannot remedy the underlying constitutional violation.

Third, the “public rights” exception does not apply to ordinary enforcement actions rooted in negligence (*AT&T* and *Verizon*) or the marketing of adulterated or misbranded vaping products (*Wulferic*). The core elements of both penalty schemes have historical roots in English common law actions which adjudicated “private rights.” English courts were no strangers to modern legal concepts like negligence, fraud, adulteration, misbranding and analogous torts. English courts were also no strangers to the concept that jury verdicts decided liability and the imposition of penalties in such actions.

How narrowly or broadly this Court interprets the “public rights” exception impacts industry stakeholders, both large and small. It will also impact a broad array of agency monetary penalty schemes. *See 603 U.S.* at 199 – 200 (identifying two dozen agencies with administrative civil monetary penalty schemes). This Court should cast a narrow shadow when defining the scope of the “public rights” exception and cast an even narrower shadow when determining if “public health” regulatory schemes adjudicate a “public right.” The Tenth Amendment illuminates any narrow shadow because matters related to the public health are powers reserved to the states. The Court should find the “public rights” exception does not apply when federal agencies seek to impose civil monetary penalties concerning subject matters which the Tenth Amendment reserves to the states. The Tenth Amendment’s text and

structure command such a limited interpretation as an effective guardrail which constrains federal agency monetary penalty schemes.

Finally, a clear delineation of the boundaries and scope of the “public rights” exception will have substantial systemic consequences across the administrative ecosphere. Striking down the FCC’s penalty scheme on Article III and Seventh Amendment grounds would immediately loosen the ground beneath the numerous administrative adjudication schemes noted in both *Jarksey* and Section III, *infra*. *Amici* have an interest in ensuring that punitive monetary penalty schemes like those at issue here are not classified as the adjudication of a “public right.”

Strike down the FCC penalty scheme will restore the historic check which juries have on the imposing of punitive monetary sanctions. *Amici* advocate for this check on behalf thousands of small vaping businesses—a check which stands between FDA and its ruinous, one-sided penalties.

ARGUMENT

I. THE FCC AND FDA PENALTY SCHEMES ARE BOTH INDISTINGUISHABLE AND ANALOGOUS TO SUITS AT COMMON LAW WHICH SEEK PROTOTYPICAL LEGAL REMEDIES

Jarkesy confirmed the protection afforded by Article III and the Seventh Amendment is the constitutional guaranty of a jury trial when administrative agencies seek to impose civil monetary penalties. That right arises if: (1) the

penalty scheme’s elements are analogous to a common-law claim and (2) the scheme seeks a legal remedy (*i.e.* damages and penalties) rather than equitable remedies like restitution.

A. AT&T CORRECTLY RECOGNIZED THAT THE REMEDY IS “ALL BUT DISPOSITIVE” IN DETERMINING THE APPLICABILITY OF THE SEVENTH AMENDMENT

AT&T correctly recognized that FCC forfeiture penalties are a “prototypical common law remedy:” money damages designed to punish and deter, calculated according to a violation’s gravity, culpability, and violation history. 149 F.4th at 498. That scheme also pays money damages recovered into the Treasury rather than to any victim. *IBID.*

Those features match the SEC penalty scheme struck down in *Jarkesy*—one which this Court held required jury trials. Those features also match the FDA scheme which *Wulferic* held required Article III jury trials. Both penalty schemes: (1) employ the same punitive and non-remedial structure;⁵ (2) consider culpability, prior violations, and ability to pay;⁶ and (3) funnel

⁵ Compare 15 U.S.C. § 78u-2 [Securities Act]; 47 U.S.C. § 503(b) [Communications Act], 21 U.S.C. § 333(f) [FDCA].

⁶ Compare 5 U.S.C. § 77t(d)(2) [Securities Act]; 47 U.S.C. § 503(b) [Communications Act], and 21 § 333(f)(5)(B) [FDCA].

all monetary penalties to the Treasury.⁷ Both schemes are cut from the same cloth for purposes of Article III and the Seventh Amendment.

**B. THE FCC AND FDA SCHEMES
RESPECTIVELY MIRROR THE
ELEMENTS OF ANALOGOUS COMMON
LAW ACTIONS**

AT&T held that FCC’s enforcement of Section 222 of the Communications Act⁸ was closely analogous to the elements of a common law negligence action. 149 F.4th at 498 – 99. The FCC’s scheme evaluated whether a carrier took “reasonable measures” when seeking to safeguard customer data. *IBID.* at 494, citing 47 C.F.R. § 64.2010(a). The FCC scheme seeks to punish unreasonable failures of those “reasonable measures” which create an “unreasonable risk of harm to another.” *IBID.* at 499, citing Restatement (Second) of Tort § 302B (2024). The core of the FCC scheme is “a staple of the common law.” *IBID.*

Wulferic likewise analogized the elements of the FDA penalty scheme to common law licensing or adulteration regimes that target conduct historically adjudicated in common law actions for debt, fraud, negligence or related torts. The FDA scheme adjudicates penalties for the sale of adulterated or misbranded products in the same way juries adjudicated liability in English common

⁷ Compare 15 U.S.C. § 77t(d)(3)(C) [Securities Act], 47 U.S.C. § 504(a) [Communications Act] and 21 CFR § 17.54 [FDCA].

⁸ 47 U.S.C. § 222.

law courts concerning analogous legal concepts at the time of the Seventh Amendment's adoption.

The English common law treated the sale of adulterated and misbranded products as a misdemeanor. Blackstone recognized that treatment: selling "unwholesome provisions"⁹ was a "common nuisance"¹⁰ and selling misbranded products was a "cheat."¹¹ Like the FDA scheme, the common law imposed graduated penalties for selling adulterated or misbranded products.¹²

The Magna Carta (1215) introduced the concept of jury trials for public harms:

"[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

⁹ Hutt, P., *Criminal Prosecution for of Food at Common Law: Adulteration and Misbranding Law*, FOOD, DRUG, COSMETIC LAW J., 15(6), 382, 383-84 (1960).

¹⁰ William Blackstone, *Commentaries on the Laws of England*, Vol. 4, CH. 13, p. 93 (1769) (Jones 1823 translation).

¹¹ *IBID.*, at CH. 13, p. 90.

¹² *IBID.*, at CH. 13, p. 93.

Magna Carta, ¶39. English commentaries do not suggest that adjudications in “unwholesome provision” or “cheat” cases are exempted from the right to the “judgment of his equals.”

i. COMMON LAW ANALOGUE OF
SELLING ADULTERATED PRODUCTS

Nearly 550 years after the Magna Carta, *Treewe’s Case*, 2 East P.C. 821 (1796) upheld the common law misdemeanor conviction of a brewer who provided unwholesome provisions (*i.e.* knowingly delivering bread that was unfit for food). *Treewe’s* embodied the same “marketplace protection” theory embodied in the SEC scheme stricken in *Jarkesy*, the both the FCC and FDA schemes.¹³ Similarly, *Rex v. Dixon*, 4 Camp. 12, 171 Eng. Rep. 5, *aff’d*, 3 M. & S. 11, 106 Eng. Rep. 516 (1814) treated the provision of adulterated food as a common law misdemeanor. Jury trials were the common law’s method for adjudicating the offense of selling both adulterated and misbranded consumable products.

¹³ A “market protection” concept underlies the securities laws at issue in *Jarkesy*. See *Axon Enter. v. FTC*, 598 U.S. 175, 180 (2023) (SEC protects securities markets). The “public rights” exception perhaps lacks a constitutional foundation. English common law courts afforded jury trials in suits brought to protect the marketplace. The Seventh Amendment thus incorporated a jury trial right in marketplace protection actions which arise from a common law analogue.

Blackstone termed the right to jury trial as the:

“glory of the English law and necessary for [t]he impartial administration of justice, which, if entirely entrusted to the magistracy, a select body of men, would be subject frequently [to] an involuntary bias towards those of their own rank and dignity.”

William Blackstone, *Commentaries on the Laws of England*, Vol. 3, p. 379 (1778).

Common law principles relating to adulterated consumable products found their way into American jurisprudence. *State v. Norton*, 24 N.C. (2 Iredell) 40 (1841) involved the appellate review of a disputed jury instruction which predicated guilt upon knowingly selling meat:

“in such a state as to render it unfit to be eaten according to the usages of decent and Christian people.”

IBID., at 40-41. *Norton* articulated a marketplace protection theory—like that Blackstone proposed, *ibid.*, at 41, but did so without repudiating the propriety of a jury deciding disputed facts-to-law issues.

Another example is *Goodrich v. People*, 3 Park CR. 622 (N.Y.S. Ct. 1858), *aff'd* 19 N.Y. 574, 580 (1859) which upheld a jury’s conviction for “selling unwholesome beef.” *Goodrich* was rooted in a market protection theory which banned “the sale of unwholesome provisions.” English courts employed this same market protection legal theory in *Queen v. Jarvis*, 3 F. & F. 108, 176 Eng. Rep. 49

(1862), a prosecution for selling unwholesome meat that was not fit for food where a jury was left to decide the question.

ii. COMMON LAW ANALOGUE OF
SELLING MISBRANDED PRODUCTS

The Magna Carta set standards for certain consumable products in providing:

“[t]here is to be a single measure for wine throughout our realm, and a single measure for ale, and a single measure for Corn, that is to say the London quarter, and a single breadth for dyed cloth, russets, and haberjects, that is to say two yards within the lists. And it shall be the same for weights as for measures.”

Magna Carta, ¶25. The common law treated what we now call “misbranded” in reference to a consumable product as a false representation or a “cheat” because the disputed product was allegedly something “other than what it actually was.”¹⁴

Blackstone described a “cheat” as an offense:

“against public trade: as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man.”¹⁵

¹⁴ Hutt, *supra.*, at 382, 390.

¹⁵ William Blackstone, *Commentaries*, Vol. 4, at 156.

Cheats involved prosecutions of sellers of products which did not meet prevailing standards or were not as advertised. For instance, a cheat occurred when selling a quantity of wine or grain which deviated from the Magna Carta's standard measure. The retail response has survived into modernity—a “baker's dozen” originated from a 13th century English practice calculated to avoid prosecution.¹⁶ Like the sale of unwholesome provisions, the common law prosecuted cheats as a misdemeanor, tried to a jury,¹⁷ when the offense “affected the public as a whole”¹⁸ and was “calculated to . . . deceive the people in general.”¹⁹

iii. CONGRESS FULLY INCORPORATED
COMMON LAW CONCEPTS INTO THE
MODERN PUNISHMENT VIS-À-VIS
THE SALE OF ADULTERATED AND
MISBRANDED PRODUCTS

Congress substantially incorporated well-understood common law concepts of adulteration and misbranding into the FDCA and TCA.²⁰ It did

¹⁶ Fernando, D., *The Medieval History Behind A Baker's Dozen*, TASTING TABLE (Jul. 11, 2023).
<https://www.tastingtable.com/1332008/medieval-history-bakers-dozen/>

¹⁷ *Rex v. Wheatly*, 2 Burr. 1124, 97 Eng. Rep. 746 (1761).

¹⁸ Hutt, *supra.*, at 390.

¹⁹ *East's Commentaries*, 2 East's P.C. 816-817 (1803).

²⁰ Hutt, *supra.*, at 382.

so in a way that mirrors Blackstone’s “marketplace protection” theory²¹—one which recognized the right to a jury trial. It is presumed that Congress does not intend to *infringe upon constitutional rights or usurp power*. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trade Counsel*, 485 U.S. 568, 575 (1988). Congress thus understood that the existence of a right to jury trial concerning the provision of adulterated or misbranded consumable products which existed at common law carried over into modern regulatory regime concerning analogous legal concepts.

Wulferic noted a useful point—when the scheme seeks punitive monetary relief that is paid to the Treasury, the inability to precisely fit the elements of a modern regulatory scheme within an English common law analogue does not defeat the jury trial right arising under the Seventh Amendment. 793 F. Supp.3d at 847 - 48.

C. THE FCC AND FDA PENALTY SCHEMES ARE INDISTINGUISHABLE FROM THE SEC PENALTY SCHEME STRICKEN BY *JARKESY*

Jarkesy held the SEC penalty scheme triggered the Seventh Amendment’s jury trial right because it seeks punitive monetary sanctions for prototypical common law wrongs. The FCC and FDA penalty scheme share key features with the stricken SEC penalty scheme. The three: (1) seek to impose civil penalties which punish or deter conduct rather than compensate for harm; (2) are

²¹ William Blackstone, *Commentaries*, VOL. 4, CH. 12 at p. 154 – 159; Vol. 4, Ch. 13 at 161 – 162.

calibrated based on evidence of a regulated party's culpability and prior violations; and (3) channel collections to the Treasury.²²

The FCC scheme mirrors the SEC and FDA scheme. *Jarkesy* thus negates the FCC's and FDA's respective schemes *ipso facto*. The FCC's civil forfeiture proceedings brought against AT&T and Verizon and the penalty proceedings which FDA brings against vaping industry stakeholders are each a "suit at common law" that must be tried to a jury in an Article III court.

II. A SECOND-ORDER TRIAL *DE NOVO* DOES NOT REMEDY THE CONSTITUTIONAL HARM OF BEING SUBJECTED TO AN UNCONSTITUTIONAL PROCESS.

The government's central defense of the FCC penalty scheme is that 47 U.S.C. § 504(a) affords regulated parties purportedly have the option of refusing to pay and insisting on a "trial de novo" in district court. *Wulferic* squarely rejected the concept that a back-end judicial review process saves unconstitutional front-end administrative adjudications. This Court should do the same.

A. REGULATED PARTIES ARE INJURED THROUGH SUBJECTION TO AN UNCONSTITUTIONAL PROCEEDING

Wulferic applies *Axon* and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) in holding that ongoing

²² See notes 5, 6 and 7, *supra*.

second-order agency adjudications present a “here-and-now” injury, 793 F. Supp.3d at 840.

Wulferic focused on the harm resulting from compelling regulated parties to litigate Article III questions in a non-Article III forum. *IBID.* at 840 - 41. The constitutional entitlement to a jury trial includes not having to undergo a non-Article III adjudication. *IBID.* at 842. The same logic applies to FCC’s and FDA’s penalty schemes. Both investigate regulated parties, make factual findings, declare liability, and set significant monetary penalties. *Jarkesy* struck down a scheme which operated on the same paradigm.

**B. A SUBSEQUENT JURY TRIAL CANNOT
RETROACTIVELY VALIDATE A PRIOR
UNCONSTITUTIONAL ADJUDICATION**

Wulferic emphasizes the difficulty remedying a constitutional violation: “a proceeding that has already happened cannot be undone.” 793 F. Supp. at 840. Thus, a second-order judicial review is a hollow consolation as it comes only after a non-Article III adjudication yields factual findings, legal conclusions and an adjudication of liability and penalties. A second-order judicial review “would come too late to be meaningful” as to the structural injury. *Ibid.* *AT&T* echoes that insight, noting the absence of any legal authority:

“supporting the proposition that the constitutional guarantee of a jury trial is honored by a trial occurring after an agency has already found the facts, interpreted the law, adjudged guilt, and levied punishment.”

149 F.4th at 503.

Non-Article III adjudications of private rights have immediate reputational and regulatory consequences. Agencies often make their penalty orders public²³ and prior adjudications are considered in future proceedings.²⁴ This alters a regulated party's risk profile in the marketplace. This happens before any Article III court adjudication. The Constitution does not permit agencies to impose punitive consequences *via* non-jury adjudications and then claim that a later trial retroactively cures the defect.

Further, Article III and the Seventh Amendment do not contemplate a promise of a second order "trial de novo" as a substitute for a first-order Article III adjudication. The constitutional promise of Article III which the Seventh Amendment spatially set, ultimately lacks meaning if the Court does not disavow any contrary chatter that there is any constitutional basis exists for agency punitive monetary penalty schemes to subject regulated parties to first-order adjudications of Article III-protected questions in a non-Article III forum.

Amici propose the following test:

Must agency monetary penalty
schemes involving Article III-

²³ FDA publishes a link to a spreadsheet of TCA violations and identifies civil monetary penalty impositions. See <https://timp-ccid.fda.gov/>. FCC publishes violation cases in its Daily Digest found on its website. See <https://www.fcc.gov/proceedings-actions/daily-digest>

²⁴ See note 6, *supra*.

protected questions conduct first-order adjudications in an Article III forum?

Such test parallels the respective analysis of the schemes at issue in *Jarkesy*, *AT&T* and *Wulferic*. Monetary penalty schemes which do not pass those parallel tests are contrary to Article III and the Seventh Amendment if they adjudicate Article III-protected questions in a non-Article III forum.

That guardrail is important. The government will likely argue here²⁵ that a regulatory scheme's assurance of second-order Article III adjudications remedies all first-order constitutional violations. To the contrary, that argument ignores why a guardrail is needed—SEC, FCC or FDA-type penalty schemes produce constitutional harms without meaningful remedies. Offering regulated parties an Article III adjudication of an Article III-protected dispute only after being subjected to an unconstitutional adjudication does not erase the underlying constitutional harm. Regulated parties should not be forced to litigate Article III-protected questions in a non-Article III forum.

The Seventh Amendment operates in tandem with Article III to ensure that the litigation of common law actions occur in a judicial forum. *Wulferic* correctly confirmed that Congress lacks the constitutional authority to subject Article III-protected questions to non-Article III tribunals

²⁵ *Amicis'* prediction is warranted given the question which the government presented when seeking review. *See* Gov't Pet. at 1.

while relegating the judiciary to a secondary, optional role. *IBID.* at 842, citing *Jarkesy* at 127.

This is not a hypothetical question for *Amici*. FDA has brought numerous monetary penalty actions against industry stakeholders through a model materially indistinguishable from the FCC penalty scheme. If the Court accepts the government's "trial de novo cures all" theory, agencies will invoke that theory to preserve the very regulatory enforcement structures which *Jarkesy*, *AT&T* and *Wulferic* rightly found to be unconstitutional.

III. THE PUBLIC RIGHTS EXCEPTION DOES NOT APPLY TO THE FCC OR FDA PENALTY SCHEMES

AT&T and *Wulferic* conducted detailed analyses and concluded the subject penalty schemes targeted private rights which must be litigated through Article III jury trials. This Court should endorse those conclusions.

A. THE SCOPE OF THE PUBLIC RIGHTS EXCEPTION IS NARROW

Wulferic observed that the Constitution countenances a narrow category of non-Article III adjudications: revenue collection, immigration, tariffs, public lands, public benefits, patents, and the like. 793 F. Supp. at 848. *AT&T* viewed the scope of the public rights exception through the same historic lens as *Jarkesy*. *AT&T* also analyzed the depth of the historic roots which the FCC's negligence-based penalty actions share with analogous ordinary English common law actions.

FDA's monetary penalty scheme enforced against vaping-product stakeholders fits the same mold as the FCC scheme at issue here and the SEC scheme stricken in *Jarkesy*. FDA's penalty scheme is equally punitive and targets the conduct of private actors. That scheme, like the respective FCC and SEC penalty schemes did not involve the administration of a uniquely federal sovereign function like veterans' benefits or customs duties.

B. "PUBLIC HEALTH" AND "PUBLIC INTEREST" ARE NOT FREESTANDING PUBLIC RIGHTS CATEGORIES

FDA argued in below its penalty scheme enforces "public rights." 793 F. Supp.3d at 849. *Wulferic*, relying on *Jarkesy* rejected the correlation of "public health" to "public rights." Regulating the former is a classic state police power reserved by Tenth Amendment, not a distinctive federal prerogative. *IBID.* at 850. *Wulferic* astutely warned that including "public health" as a category of public rights would "blow a hole" in Article III's narrow exception. *IBID.* at 849, citing *AT&T, Inc. v. FCC*, 135 F.4th 230, 239 (5th Cir. 2025).

AT&T similarly rejected the government's argument that any public benefit of enforcing the Communications Act was a "public interest." 149 F.4th at 502, citing *Jarkesy* at 135. *AT&T* also rejected the argument that the Act was a licensing scheme which Congress could use to siphon routine private-rights disputes away from Article III courts. *IBID.* The same reasoning forecloses any attempt to classify FDA's penalty scheme as public rights simply because it protects public health.

**C. THE “PUBLIC RIGHTS” EXCEPTION
DOES NOT APPLY TO PENALTY
SCHEMES WHICH CONCERN POWERS
THE TENTH AMENDMENT RESERVED
TO THE STATES**

The Tenth Amendment commands a narrow interpretation of the “public rights” exception. The Tenth Amendment provides that:

“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

U.S. CONST, AMEND X. The Framers designed a system of limited federal power and broad state powers. Madison expressed in Federalist No. 45 (Madison (C. Rossiter ed. 1961) at 289 that the federal government’s powers are “few and defined” and that states have “numerous and indefinite” powers. This Court has long recognized that matters relating to public health and morals are subjects which the Tenth Amendment reserved to the several States. *See, e.g., U.S. v. Daugherty*, 269 U.S. 360 (1926); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Child Labor Tax Case*, 259 U.S. 20 (1922); *Hill v. Wallace*, 259 U.S. 44 (1922); *Linder v. U.S.*, 268 U.S. 5 (1925); and *U.S. v. One Ford Coupe*, 272 U.S. 321, 350 (1926).

This Court has previously observed that the Constitution withheld plenary police powers from Congress. *U.S. v. Lopez*, 514 U.S. 549, 566 (1995). The power to regulate public health is a quintessential state police power the Tenth Amendment reserved to the states. Regulating the

public health conversely has never been a distinctive federal prerogative. *Wulferic* at 850, citing *Lane v. U.S.*, 612 F. Supp. 3d 659, 665 (N.D. Tex. 2020). General police powers, and particularly regulating the public health, are not among the enumerated powers found in U.S. CONST, ART I, § 8. The Tenth Amendment thus reserves police powers to the states

U.S. v. Darby, 312 U.S. 100, 124 (1941) addresses the scope of Tenth Amendment-reserved power—“all is retained which has not been surrendered.” *Darby* further explained that the constitution’s text and structure “yield no indication the federal government has the police power” to matters relating to public health. *IBID.* at 124. The fact that the United States or one of its agencies prosecutes a civil monetary penalty scheme which parallels a reserved police power is insufficient to claim the existence of a “public right.”

Jarkesy reaffirmed that point in holding that enforcement actions brought in the name of the government involve private rights which require jury adjudications when they seek punitive monetary sanctions for common-law-type wrongs. 603 U.S. at 113, citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Company*, 458 U. S. 50, 69 n. 23 (1982) (plurality opinion). The “public rights” exception does not apply to causes of action arising when federal agencies enforce penalty schemes that mirror analogous state schemes rooted in the Tenth Amendment’s reservation of police powers. The Court should accordingly affirm the Fifth Circuit’s opinion in *AT&T* and reverse and remand the Second Circuit’s opinion in *Verizon*.

IV. CLARIFYING THE LIMITED SCOPE OF THE PUBLIC RIGHTS EXCEPTION WILL HAVE A BROAD SYSTEMIC IMPACT

From the *Amicis'* perspective, this case presents an ideal opportunity for the Court to clarify the scope of the “public rights” exception. Such clarification would broadly and immediately impact the administrative ecosphere.

The state police powers granted by the Tenth Amendment are broad. This Court has previously held that such powers include regulating sanitary conditions at slaughterhouses, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); regulating grain elevators, *Munn v. Illinois*, 94 U.S. 113 (1877); regulating alcohol manufacture and sales, *Mugler v. Kansas*, 123 U.S. 623 (1887); imposing a vaccine mandate, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); regulating milk prices, *Nebbia v. New York*, 291 U.S. 502 (1934); regulating opticians, *Williamson v. Lee Optical*, 348 U.S. 483 (1955); regulating the provision of healthcare, *NFIB v. Sebelius*, 567 U.S. 519 (2012).

A ruling which excludes police powers the Tenth Amendment reserved to the states from the scope of the “public rights” exception will broadly affect how federal agencies enforce parallel penalty schemes, particularly within federal health agencies. Such a ruling will perhaps have its greatest impact upon small businesses subject to agency monetary penalty cases.

AT&T, Verizon and legacy tobacco companies can easily absorb a multi-million-dollar penalty and never miss that money. Vaping industry stakeholders, however, are almost exclusively

small, privately-owned businesses unable to absorb even a 5-figure monetary penalty. FDA monetary penalties are often financially-crippling for vaping industry stakeholders. The structure of that penalty scheme thus gives FDA immense leverage. 793 F. Supp. 3d at 836. That leverage vanishes if the FDA penalty scheme is not subject to the “public rights” exception.

Ensuring that federal agencies impose civil monetary penalties only through a jury verdicts rendered in Article III courts is critical to ensuring the preservation of the constitutional equilibrium envisioned by the Framers. Not only did the Framers envision the existence of a constitutional equilibrium between the three branches of federal government,²⁶ they also envisioned an equilibrium which balanced power between state and federal authority.²⁷ Limiting the universe of civil penalty schemes subject to the “public rights” exception will require Congress to recalibrate how agencies enforce their enabling statutes as a part of ensuring the continuity of that equilibrium.

Amici advocate for such a check on agency power—a check which stands between FDA and the ruinous, one-sided administrative monetary penalties it imposes. The Court should accordingly articulate a simple, administrable rule: when an agency’s punitive monetary penalty scheme concerns Article III-protected questions, the Constitution requires an initial adjudication in an Article III court with a jury. The “public rights”

²⁶ THE FEDERALIST NO. 51, p. 319 (C. Rossiter ed. 1961) (Madison).

²⁷ See Federalist 45, *supra*.

exception should only encompass a very narrow array of categories. Administrative agencies may investigate the conduct of regulated parties, promulgate rules and regulations, and adjudicate factual and legal conclusions in appropriate public rights contexts. However, these agencies may not sit as courts of first instance when imposing legal penalties when the underlying enforcement scheme concerns an analogous common law action. That rule would invalidate the FCC's scheme at issue and, *ipso facto*, likewise invalidate the FDA's civil monetary penalty scheme.

On the core plotlines of the movie *Hidden Figures*²⁸ focused on the team of NASA scientists tasked with making the mathematical calculations necessary to plot the coordinates of the landing zone for John Glenn's Mercury capsule. Here, the Constitution plots the coordinates of the landing zone of this case: Article III defines the forum; the Seventh Amendment defines the scope of the right to an adjudication by jury trial in that forum, and the Tenth Amendment defines the limits of the "public rights" exception to Article III as a forum.

CONCLUSION

For the above reasons, the Court should affirm the Fifth Circuit's opinion in *AT&T* and reverse and remand the Second Circuit's opinion in *Verizon*. This Court's opinion here should affirm the proposition that agencies civil monetary penalty schemes violate U.S. CONST, ART. III and the Seventh Amendment. The Court should appropriately cabin agency power to subject

²⁸ *Hidden Figures*, Twentieth Century Fox, 2016.

regulated parties to unconstitutional non-Article III adjudications.

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Respectfully submitted,

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APPENDIX
NAMES OF INDIVIDUAL *AMICI*

Carnahan & D'Sylva Enterprises, LLC

DerbyECigs Indiana, LLC.

DerbECigs Kentucky, LLC.

Fatboy Vapors, LLC

Fatboy Vapors Alaska, LLC

Fatboy Vapors Oregon, LLC

Freedom Vapes, LLC.

Gorilla Vapes, LLC

Kentucky Vaping Retailers Association, Inc.,
d/b/a Kentucky Smoke Free Association

Michigan Vape Shop Owners, Inc.

Montana Smoke Free Association, Inc.

Pettee & D'Sylva Enterprises, LLC

Texas Tobacco Barn LLC,
d/b/a TxVapeBarn

United Vapers Alliance

VDX Distro, Inc.

Virginia Smoke Free Association, Inc.