Nos. 25-406 and 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 UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SECOND CIRCUITS

BRIEF OF *AMICUS CURIAE* NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF AT&T, INC. AND VERIZON COMMUNICATIONS INC.

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February 25, 2026

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INTEREST OF *AMICUS CURIAE*

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,035 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.[1]

Since its founding in 1944, NRB has worked to protect its members against efforts to infringe on their constitutional rights. Many of NRB's members are regulated by the Federal Communication Commission (FCC) and believe that it is important to preserve the rights of broadcasters to have any potential fines imposed by the FCC be determined by an Article III tribunal and consistently with the right of trial by jury.

SUMMARY OF ARGUMENT

An in-depth look at the two paths for FCC enforcement makes clear that 47 U.S.C. §§ 503 and 504 deprive affected parties of their Article III and jury rights. First, under 47 U.S.C. § 503(b)(3)(a), the Commission may choose to provide notice and an opportunity for a formal hearing before the FCC or an administrative law judge. Such decisions are only appealable to a federal Court of Appeals under a

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief.

"deferential" "reasonableness" standard. If a party fails to pay a forfeiture penalty, Section 503(b)(3)(B) allows the Justice Department to initiate collection proceedings, again with a statutory proviso that precludes de novo review. Alternatively, the FCC may choose the second path found in Section 503(b)(4), issuing a notice of apparent liability (NAL), offering one opportunity to oppose the imposition of any penalty in writing, and then finalizing the NAL. From here, courts have ruled that the only way a party may unilaterally seek review of a NAL is by prepaying the penalty and appealing to a federal Court of Appeals under 47 U.S.C. § 402(a).

An aggrieved party never has the *right* to appeal any form of an FCC decision, formal or informal, to a district court for a de novo trial. Only if the forfeiture is not paid, and only if the FCC and Justice Department choose to pursue collection, the Justice Department may file a recovery action in federal district court under Section 504(a). Under the widespread practice of district courts, the FCC determination of the amount of the penalty—or its imposition of a penalty at all—does not, and cannot, receive a de novo review in this new action.

All variants for FCC forfeiture imposition and collection violate both Article III and the Seventh Amendment. The government concedes that, like in *SEC v. Jarkesy*, the imposition of forfeiture penalties under Section 503 constitutes a suit at common law that is subject to the Seventh Amendment and Article III, and thus that the current action is unconstitutional. The mere possibility of a de novo

debt recovery trial if the communications companies did not comply with the FCC's forfeiture order and the government chose to file a separate collection action does not transform an unconstitutional proceeding into a constitutional one for two reasons. First, Article III prevents punitive fines from being imposed by an executive agency, and this jurisdictional matter cannot be waived. Second, any argument that Article III rights are waived fails because a defendant does not ever have a unilateral right to demand a true de novo proceeding. Moreover, the cases cited by the government are so different from this case as to further reinforce the controlling nature of *Jarkesy*.

ARGUMENT

I. AN IN-DEPTH LOOK AT THE PATHS FOR FCC ENFORCEMENT

There are two different paths for the determination of forfeitures imposed for violations by the Federal Communications Commission, but there are various alternatives for ultimate resolution for each path.

Formal hearing. First, under 47 U.S.C. § 503 (b)(3)(A), "[a]t the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge." The Commission has two forms of discretion for this path. First, it can decide whether to grant a hearing at all. Second, it can decide whether to hear the matter itself or to assign it to an administrative law judge.

The decision from such a hearing may be appealed to a United States Court of Appeals under 47 U.S.C. § 402(a) under a "deferential" standard where a "court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

If, after such a hearing (whether appealed to a court of appeals or not), a person fails to pay the forfeiture penalty, Section 503(b)(3)(B) expressly provides that the matter shall be turned over to the Justice Department for collection. That section limits the scope of review in collection proceedings: "In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review."

Thus, if the FCC uses its unfettered discretion to give a person a formal hearing, said person never gets a trial—jury or non-jury—on the merits in an Article III court.

Informal determination. The second path is found in Section 503(b)(4). Again, the Commission has total discretion to use this path in lieu of the hearing alternative already discussed. Here the process is informal and there is no hearing of any kind. The FCC issues a notice of apparent liability (NAL). The person may respond once in writing as to "why no forfeiture penalty should be imposed." *Id.*

After receiving any one-time input from the affected party, the Commission ultimately finalizes the NAL. This determination may be appealed to a

court of appeals, although this appellate path is not enumerated in this section. Indeed, the FCC once contended that the only method for judicial review was for the affected party to commence an action in a district court under Section 504(a). The FCC raised this previous view despite the fact that the plain language of this section only gives authority to the Justice Department to commence litigation on behalf of the Commission. The FCC argued that there was an implied right for an aggrieved party to likewise initiate litigation under Section 504(a).

For a season, the FCC was successful in getting the District of Columbia Circuit and the Ninth Circuit to adopt its preferred "implied right" reading of Section 504. *Dougan v. FCC*, 21 F.3d 1488, 1491 (9th Cir. 1994) ("We hold that 47 U.S.C. § 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits by the government, and suits by private individuals seeking to avoid enforcement."); *see also Pleasant Broadcasting v. FCC*, 564 F.2d 496, 500 (D.C. Cir. 1977).

However, in *AT&T Corp. v. FCC*, 323 F.3d 1081, 1084 (D.C. Cir. 2003), the D.C. Circuit rejected the FCC's reading of the statutory scheme. Instead, the D.C. Circuit concluded that the general provision of 47 U.S.C. § 402(a) was the only available path for an aggrieved party to unilaterally seek review of an NAL. Section 402(a) permits an aggrieved party to commence a "proceeding to enjoin, set aside, annul, or suspend any order of the Commission" in a court of appeals under 28 U.S.C. § 2342(1).

It is now an accepted practice that in order to seek review of an NAL, the aggrieved party must pay the

full amount of the forfeiture. This prepayment requirement is not set out in the statute; rather, it has arisen as a result of judicial interpretation. Initially, the FCC objected to the availability of this means of review even with prepayment. But the D.C. Circuit rejected the FCC's position, creating both the path for review and the prepayment requirement:

> Because section 504(a) says nothing about district court jurisdiction where the forfeiture has already been recovered, it appears to leave court of appeals jurisdiction intact where, as here, the forfeiture subject has paid the assessed penalty.

AT&T Corp., 323 F.3d at 1084.

An aggrieved party never has the *right* to appeal any form of an FCC decision, formal or informal, to a district court for a de novo trial. That option is left entirely to the executive branch's discretion. Only when a forfeiture has not been paid is there any opportunity, should the FCC and Justice Department decide to pursue the matter, for a trial in a federal district court. Section 504(a) authorizes United States Attorneys to "to prosecute for the recovery of forfeitures under this chapter." This section further specifies "[t]hat any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo."

However, in actual practice—especially in more recent years—the proceedings that take place under Section 504(a) are not truly de novo on the key questions for the purposes of determining the Article III and Seventh Amendment questions presented in

this case—the liability of the affected party and the amount of the penalty. The practice of district courts is to review, under a deferential standard, the reasonableness of the forfeiture amount imposed by the FCC—essentially the same "deferential" standard recited by this Court in *FCC v. Prometheus Radio Project* where FCC decisions are reviewed on appeal for "reasonableness":

> Hodson also challenges the amount of the forfeiture. The determination of the amount of a forfeiture is committed to the discretion of the FCC. See 47 U.S.C. § 503(b)(2)(E). Review of a forfeiture amount is limited to whether it reflects a reasonable application of the statute and the "adjustment criteria" set out in § 1.80(II) of the FCC's rules. See *Grid Radio v. FCC*, 278 F.3d 1314, 1322–23 (D.C. Cir. 2002). . . . The FCC's decision not to adjust downward was reasonable and not an abuse of discretion.

United States v. Hodson Broadcasting, 666 F. App'x 624, 628 (9th Cir. 2016). The Ninth Circuit specifically rejected the idea that summary judgment in a Section 504 proceeding was inappropriate even though the statute called for a trial de novo. *Id.* at 627. Thus, it is clear that any review—whether under Section 503 or 504—of the amount of forfeiture is under a deferential appellate standard and not an independent determination of the appropriate amount of the penalty to be imposed. *Hodson*, 666 F. App'x at 627; *see also, e.g., United States v. Neely*, 595 F. Supp. 2d 662, 667 (D.S.C. 2009) (holding in Section 504 recovery action that forfeiture amount was "reasonable on its face."); *United States v. Baxter*, 841

F. Supp. 2d 378, 392 (D. Me. 2012), *aff'd*, No. 12-1196, 2012 WL 13228558 (1st Cir. Sept. 10, 2012) (same); *United States v. Sutton*, No. 2:23-CV-02100-SOH-MEF, 2024 WL 2926594, at *11 (W.D. Ark. Mar. 27, 2024), *report and recommendation adopted*, No. 2:23-CV-02100, 2024 WL 2922991 (W.D. Ark. June 10, 2024) (holding, in a Section 504 recovery action, that summary judgment was appropriate, saying: "The Court assumes the truth of these statements but concludes that they do not create a material issue of fact about the reasonableness of the amount of the forfeiture."); *United States v. Ne. Commc'ns of Wisconsin, Inc.*, 608 F. Supp. 2d 1049, 1060 n.4 (E.D. Wis. 2008) (discussing, in a Section 504 recovery action, the "soundness" of the FCC's forfeiture amount); *United States v. Dean*, No. 3:06CV543/LAC/MD, 2008 WL 795307, at *4 (N.D. Fla. Mar. 24, 2008) (holding, in a Section 504 recovery action, that "[t]he findings and reasoning of the Forfeiture Order support the forfeiture and the amount thereof."); *United States v. Rhodes*, No. CV 21-110-M-DLC, 2024 WL 1174510, at *3 (D. Mont. Mar. 19, 2024) (following the Ninth Circuit in *Hodson* in a Section 504 recovery action); *United States v. WHAS, Inc.*, 385 F.2d 784, 786 (6th Cir. 1967) (affirming ruling in Section 504 recovery action, relying on "the facts as the Commission represents them to be" and finding FCC interpretation "permissible"); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 461 (8th Cir. 2000) (affirming the district court's ruling that district courts lack "jurisdiction to determine the validity of all final orders of the FCC").

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Only a few district courts have found, in "de novo" proceedings under Section 504, that they had the authority to determine the amount of the forfeiture award. *United States v. Daniels*, 418 F. Supp. 1074, 1080–81 (D.S.D. 1976); *United States v. Rust Commc'ns Group, Inc.*, 425 F. Supp. 1029, 1031 (E.D. Va. 1976); *United States FCC v. Summa Corp., Las Vegas, Nev.*, 447 F. Supp. 923, 927 (D. Nev. 1978); *United States v. Evergreen Media Corp, of Chicago, AM*, 832 F. Supp. 1183, 1184 (N.D. Ill. 1993); *Peninsula Commc'ns, Inc.*, 335 F. Supp. 2d 1013, 1017 (D. Alaska 2004); *United States v. Mapa Broadcasting, LLC*, No. CIV.A. 03-2149, 2004 WL 1146063, at *6 (E.D. La. May 17, 2004); *United States v. Metzger*, No. 6:07-cv-1815-Orl-22KRS, 2008 WL 10671229, at *4 (M.D. Fla. Apr. 6, 2009); *United States v. Unipoint Techs., Inc.*, 159 F. Supp. 3d 262, 273 (D. Mass. 2016); *United States v. Dudley*, No. 4:18-cv-1756-ACA, 2020 WL 4284052, at *4 (N.D. Ala. July 27, 2020); *United States v. Pennington*, No. 5:21-CV-198-REW-MAS, 2023 WL 2542592, at *3 (E.D. Ky. Mar. 16, 2023).

The bulk of the cases have gone the other direction, refusing to make a true de novo determination of the amount of the penalty in Section 504 cases. In fact, one district court complained that its hands were tied in assessing forfeiture amounts.

> Any doubts the Court has about the reasonableness of the forfeiture penalty stem from its belief $10,000 is too low in light of Frank's willful and continuous violation of the law. This Court would have imposed a significantly greater penalty if it had the discretion to do so; as the Court suspects a jury

> would, if asked to decide the issue. However, as it does not appear to be within the Court's power to increase the size of the FCC's requested forfeiture penalty, the Court is constrained merely to conclude the penalty amount is not unreasonably high.

United States v. Frank, No. A-10-CA-957-SS, 2011 WL 13185993, at *3 (W.D. Tex. June 23, 2011), *aff'd*, 487 F. App'x 931 (5th Cir. 2012).

A discernable pattern has developed. The outlier cases which treat the determination of the amount of forfeiture as a de novo matter in Section 504 cases are few in number and of older vintage. Most of the few cases where district courts found that they had the duty to make an independent determination of the forfeiture amount were decided in 2009 or earlier. Moreover, *Peninsula Communications* from Alaska and *Summa Corp.* from Nevada must be disregarded because the Ninth Circuit subsequently adopted the opposite conclusion in *Hodson.* And other cases rely on these out-of-date cases without addressing more recent authority, *see, e.g.*, *Pennington*, 2023 WL 2542592, at *4 (citing *Peninsula Commc'ns*), or cite no cases at all, ignoring other binding, conflicting authority, *see e.g., Evergreen Media*, 832 F. Supp. at 1184 (overlooking *WHAS, Inc.*, 385 F.2d at 786). Moreover, aside from two cases where the court vacated the FCC order in its entirety, *Metzger* and *Rust*, even these district courts never deviated from the forfeiture amount determined by the FCC.

The cases that use the deferential standard of reasonableness are more numerous and generally more recent, dating from 2004 to 2024. They also

include the only court of appeals decision directly on the issue of the forfeiture amount's standard of review, *Hodson*, decided in 2016. The prevailing current practice is that while the collection action may perhaps proceed as a trial de novo as to the timeliness of the collection action or other elements unique to debt recovery, the FCC determination of the amount of a penalty does not, and cannot, receive a de novo review.

The very name of the proceeding, "recovery of a forfeiture penalty," highlights the constitutional problem in the scheme. The government treats these proceedings as "seeking recovering [*sic*] of the debt owed by [the defendant] to the Government." *United States v. Rowland*, No. 603-CV-106-ORL-31DAB, 2003 WL 22319074, at *3 (M.D. Fla. July 8, 2003). Debt recovery is a radically different kind of trial than a de novo determination of underlying liability and the amount of the penalty to be imposed. The amount of the forfeiture is set by the FCC in all the various forms of proceeding. In the usual and modern approach, there is never a de novo determination of the amount of the fine imposed. Indeed, suits under Section 504(a) are, in the words of the statute, merely suits for the "recovery of a forfeiture imposed pursuant to the provisions of this chapter."

II. ALL VARIANTS FOR FCC FORFEITURE IMPOSITION AND COLLECTION VIOLATE BOTH ARTICLE III AND THE SEVENTH AMENDMENT.

In *SEC v. Jarkesy,* 603 U.S. 109, 125 (2024), this Court held that when "civil penalties . . . are designed to punish and deter, not to compensate," the matter

must be decided by an Article III court. The controlling statute here, Section 503, repeatedly refers to the imposition of a "forfeiture penalty."

The plain facts of this case are that the FCC has imposed a penalty on AT&T for $57,307,307 and upon Verizon for $46,901,250 through an informal process where the Commission alone has determined the amount of the penalty. As things stand at the moment, the Commission is seeking to collect over $100 million in a manner that is facially unconstitutional. In fact, the United States has admitted as much.

> The government does not seek review of the Fifth Circuit's holdings that (a) a case in which the FCC seeks a forfeiture penalty to enforce Section 222 of the Act is a suit at common law and (b) such a suit falls outside the public-rights exception to the Seventh Amendment and Article III. But contrary to the decision below, the statutory review scheme here satisfies the Seventh Amendment and Article III because Section 504(a) entitled respondent to a de novo jury trial in district court before the monetary penalty could be collected.

FCC's Pet. for Cert. at 7, *FCC v. AT&T*, No. 25-406.

This is an admission that the current action is unconstitutional. However, the government claims that the mere possibility of a de novo trial excuses an otherwise unconstitutional action. This assumes that *if* the communications companies had *refused to comply with the FCC's final order*, and *if* the Justice Department and FCC had decided to file a separate

debt recovery action, then this somehow transforms an unconstitutional proceeding into a constitutional one. This argument fails because Article III prevents fines from being imposed by a federal agency. This is a jurisdictional matter and cannot be waived. In addition, the government's waiver argument fails because a defendant does not have, at any point, the unilateral right to demand a true de novo proceeding. The cases cited by the government as purported proof of the propriety of this approach are so different from this case that, rather than help the government, they reinforce the applicability of *Jarkesy*'s reasoning here.

A. The communications companies' Article III rights are not waivable because the statutory scheme implicates structural interests.

"A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217–18 (1980). "Basic to the constitutional structure established by the Framers was their recognition that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'" *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–58 (1982) (quoting The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison)). As Alexander Hamilton wrote in The Federalist Papers, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, at 466

(quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)) (quoted by *Jarkesy*, 603 U.S. at 127).

To maintain the judiciary's independence and prevent "the encroachment or aggrandizement of [the legislative or executive branches] at the expense of the [judiciary]," *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*), the Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855). Such suits must be decided by an Article III court if "brought within the bounds of federal jurisdiction," and the power to hear and decide such cases "cannot be shared with the other branches." *Jarkesy*, 603 U.S. at 127 (quoting *Stern v. Marshall*, 564 U. S. 462, 484 (2011)). Indeed, "the presumption is in favor of Article III courts." *N. Pipeline*, 458 U.S. at 69, n. 23 (plurality opinion) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 548–549, and n.21 (1962)).

Article III, § 1 serves a structural purpose as "an inseparable element of the constitutional system of checks and balances." *N. Pipeline*, 458 U.S. at 58*; Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850 (1986). "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts." *Schor*, 478 U.S. at 851 (cleaned up).

"To the extent that this structural principle is implicated in any given case, the parties cannot by

consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850–51 (citations omitted). Rather, the Article III limitations "serve institutional interests that the parties cannot be expected to protect," *id.* at 851, and which are "not [theirs] to waive." *Waldman v. Stone*, 698 F.3d 910, 918 (2012); *see also Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 698 (2015) (Roberts, J., dissenting) ("*Schor* forbids a litigant from consenting to a constitutional violation when the structural component of Article III is implicated.") (cleaned up); *In re BP RE, L.P.,* 735 F.3d 279, 287 (5th Cir. 2013) (following *Waldman*). And "[p]arties by their consent do not transform the function of adjudicating controversies into the functions of creating rules or enforcing judgments." *Wellness Int'l*, 575 U.S. at 710 (Thomas, J., dissenting). In other words, a separation-of-powers constitutional violation remains a constitutional violation and an existential threat to the stability of our tripartite government, regardless of whether a party can be convinced to overlook it in a given case.

"In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch," the Court weighs a number of factors. *Schor*, 478 U.S. at 851. Among these factors are "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and

powers normally vested only in Article III courts" and "the concerns that drove Congress to depart from the requirements of Article III." *Id.* Looking at each of these factors makes clear that Section 503 impermissibly arrogates judicial power to the executive branch and violates an unwaivable structural right.

First, as explained in Section I, *supra*, Section 503 gives the FCC sole authority to direct the adjudicatory process, choosing whether to grant the opportunity for a hearing or reach its determination on the papers, entirely usurping the traditional role of an Article III judge to oversee and direct the proceedings. The FCC also makes findings of fact and conclusions of law, acting as judge and jury in addition to prosecutor. No Article III judge ever revisits these findings and conclusions *de novo*—at most, they are reviewed for reasonableness, and indeed, there is no guarantee that they would come before a district court judge in any capacity. Moreover, as the Fifth Circuit ruled and as the government has conceded, the proceedings constitute a suit at common law, *AT&T, Inc. v. FCC*, 149 F.4th 491, 498–99 (5th Cir. 2025), *cert. granted sub nom. FCC v. AT&T, Inc.*, No. 25-406, 2026 WL 73092 (U.S. Jan. 9, 2026); FCC's Pet. for Cert., *supra*, at 7, the end result of which is a binding order issuing a penalty, a legal remedy that historically lay within the sole purview of courts of law. *Jarkesy*, 603 U.S. at 125; *AT&T*, 149 F.4th at 498. Thus, the non-Article III forum exercises the full "range of jurisdiction and powers normally vested only in Article III courts." *Schor*, 478 U.S. at 851. And unlike in *Schor*, where "the power of the federal judiciary to take jurisdiction

of [the] matters is unaffected," district courts here are powerless to assert their rightful jurisdiction. 478 U.S. at 855. These concerns go beyond mere potential infringement of personal rights, constituting nonwaivable structural concerns more akin to those implicated in questions of subject matter jurisdiction.

Second, the government's departure from Article III's requirements serves no identifiable purpose beyond expediency. But expediency is not enough to justify an incursion by the legislative and executive branches into the judiciary's core powers, and this Court has rejected such attempts at justification on multiple occasions. *See*, *e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, n.7 (1977); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). A desire for specialization cannot be permitted to supplant our constitutional system of adjudication. *N. Pipeline*, 458 U.S. at 73.

Because the right to an Article III adjudication is necessary to maintain the constitutionally mandated separation of powers, it cannot be waived here.

B. Even if the parties' Article III and Seventh Amendment rights were waivable, the FCC's forfeiture collection scheme does not allow for waiver because it denies private parties their rights in the first instance without an opportunity to consent or refuse.

Even if the FCC's forfeiture proceedings implicated only personal rights, not the structural principle outlined above, the FCC's arguments would

still fail because waiver of the personal right to an Article III adjudication and jury trial is not possible under Section 503.

While personal rights may be waivable, waiver of these rights requires consent by the party to whom the right belongs. Thus in the context of special masters and magistrate judges, the Court approved delegation by an Article III court to a non-Article III adjudicator with the consent of the parties, not simply by statutory authorization. *See Schor*, 478 U.S. at 848–49 (citing *Kimberly v. Arms*, 129 U.S. 512 (1889); *Heckers v. Fowler*, 69 U.S. 123 (1864)). In *Schor*, Schor had also "indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court" by "expressly demand[ing] that Conti proceed on its counterclaim in the reparations proceeding, rather than before the District Court." 478 U.S. at 849. And in *Northern Pipeline*, the Court noted approvingly that before the Bankruptcy Act was passed, "the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court," 458 U.S. at 80 n.31, ultimately ruling, as the Court later characterized it, that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 584 (1985).

But here, there is no opportunity for parties like Verizon and AT&T to refuse consent to the FCC's alternative forum and proceed in district court.

Section 503 gives two alternative paths, both of which are in-house FCC adjudications, and the FCC maintains total discretion over that decision. The statute leaves no room for the other party to move the proceedings to court. Therefore, there is no possibility for consent here, unlike in *Schor* and other cases where this court has approved alternative non-Article III fora. Parties like AT&T and Verizon never waive their right to an Article III forum or jury trial—the statute deprives them of their right *in toto*.

C. The early cases relied on by the government are inapposite.

Neither of the early cases cited by the government in its petition for certiorari and response to Verizon's petition for certiorari bless the FCC's encroachment on the judiciary's jurisdiction. This case is far more analogous to *Jarkesy*, which should control the outcome here.

Capital Traction Co. v. Hof. The earlier of the FCC's two cited precedents, *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), involved a statute that, in small disputes involving between $5 and $50, guaranteed a full-fledged jury trial presided over by an Article III judge at either party's election after a first pass review by a justice of the peace. Act to Extend the Jurisdiction of Justices of the Peace in the Recovery of Debts in the District of Columbia, 3 Stat. 743, § 1 (Mar. 1, 1823) (Rev. Stat. D.C. §§ 997, 1006); *id.* § 7 (Rev. Stat. D.C. §§ 1027, 775, 776). For disputes involving less than $50 but more than $20, either party could also elect to have a twelve-member quasi-jury participate in the first-pass review with the justice of the peace. *Id.* §§ 15–16 (Rev. Stat. D.C. §§

1009–17). Regardless of whether the justice of the peace reviewed the matter alone or with a quasi-jury, the first-pass proceedings had neither binding nor persuasive effect on the subsequent trial. *Hof*, 174 U.S. at 31–33. The jurisdictional maximum was raised to $100 in 1867, Act of Feb. 22, 1867, c. 63, § 1 (14 Stat. 401), and again to $300 in 1895. Act of Feb. 19, 1895, c. 100 §§ 1, 2 (28 Stat. 668).

There are at least three significant differences between *Hof* and this case. First, as the Court explained, jurisdiction over *de minimis* debts had historically been vested in justices of the peace, with the potential for appeal to a court of record or with jury of six presided over by a justice of the peace. *Hof*, 174 U.S. at 18. The plaintiff in *Hof* also sought to collect only what he was owed, not a punitive penalty. In other words, these *de minimis* suits were not the sort of suit at common law that had long been within the sole purview of the judiciary. By contrast, Section 503 authorizes the FCC to issue massive penalties ranging from tens of thousands of dollars to $3 million per "act or failure to act," putting this matter squarely and undisputedly within the suits at common law guaranteed an Article III court and jury trial by the Constitution.

Second, under the statutory scheme in *Hof*, either party could appeal and obtain a trial by a common-law jury overseen by an Article III judge. Therefore, as the Court explained, "the *right* of trial by jury" was preserved. *Hof*, 174 U.S. at 23, 32; *see also id.* at 28 (quoting *Beers v. Beers*, 4 Conn. 535, 538–40 (1823) ("I am satisfied that the liberty of appeal preserves the right of trial by jury inviolate, within the words and fair intendment of the constitution . . . ."")). By

contrast, in actions arising under the FCC's purview, the private party has no path to a hearing at its own election in front of a district court. *See* Section I, *supra*. The government holds all the cards. Only if the private party does not comply with the binding final order and a different executive branch department decides to seek to collect does the private party find itself in front of a district court judge under Section 504. Therefore, the private party enjoys no right to *choose* an Article III trial, much less a trial by jury of its peers, unlike in *Hof*.

Third, the statutory scheme in *Hof* guaranteed actual *de novo* review as to both law and facts. "In all acts of congress regulating judicial proceedings, the very word 'appeal,' unless restricted by the context, indicates that the facts, as well as the law, involved in the judgment below, may be reviewed in the appellate court." *Hof*, 174 U.S. at 37, 39, 45. Not so here. Even if a private party finds itself before a district court at the government's option under Section 504, that trial is a new, separate collection suit, and district courts do not relitigate the facts and law to determine whether a penalty should be levied and if so, in what amount. *See* Section I, *supra*. And if the private party pays the penalty in order to enable an appeal to a circuit court, the order below is still generally reviewed only for reasonableness; the appellate court does not take new evidence and reach new factual findings. *Id.*

Thus, unlike in *Hof*, the right of trial by jury—and the right to an Article III trial—is "unreasonably obstruct[ed]" by Section 503 at every turn. *Hof*, 174 U.S. at 45. "[I]t must for this reason be held to be unconstitutional and void." *Id.*

Meeker v. Lehigh Valley Railroad Co. The FCC also relies on *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915), as proof that Section 503's usurpation of judicial authority is constitutional. This case is even less helpful to the government than *Hof*, if such a thing is possible.

First, like *Hof* and unlike Section 503 actions and those at issue in *Jarkesy*, *Meeker* involved a suit for "reparation" or actual damages, calculated as the difference between the unreasonable higher rate charged one coal shipper by the carrier and the "reasonable" lower rate charged another shipper. *Meeker*, 236 U.S. at 419–20, 429; *compare Jarkesy* at 124; 47 U.S.C. § 503. The reparations were to be paid directly to the shipper who had paid the unreasonable higher rate, not into some executive agency fund. *Meeker*, 236 U.S. at 419–20. Therefore, the Court ruled that "[h]ere the liability sought to be enforced was not punitive, but strictly remedial, as is shown by §§ 8, 9, 14, and 16 of the act to regulate commerce." *Id.* at 423. The Court explained that as a result, the statute of limitations provision at issue, which applied to "penalt[ies] or forfeiture[s]," did not apply here, "to a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such." *Id.*

Second, the suit filed by the plaintiff in *Meeker* in district court after the commission proceedings did not simply seek to recover on an untouchable final order. Rather, the plaintiff set out afresh "the causes for which he claimed damages" in addition to providing the commission's report and order, and the defendant denied the claims, raised statute of limitations and jurisdictional defenses, and alleged

"there was before the Commission no substantial evidence to sustain said findings and said order." *Id.* at 422. At trial, plaintiff submitted the Commission's report and orders as evidence, and the defendant, by its own volition, produced no evidence. *Id.* But as promised by the statute, the suit "proceed[ed] in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated." *Id.* at 426 (citing Section 16 of the act at issue). As this Court explained, the statute simply created a "rule of evidence" regarding the Commission's order, but a "prima facie" evidence rule necessarily implies that the parties are expected to submit additional evidence to facilitate *de novo* factual findings by the district court. *Id.* at 430; *see also Lehigh Valley R. Co v. Meeker*, 211 F. 785, 791 (3d Cir. 1913), *rev'd on other grounds*, 236 U.S. 412 (1915), and *rev'd on other grounds*, 236 U.S. 434 (1915) (citation omitted) ("The constitutional guaranty relative to trial by jury in the courts of the United States does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."). And defendants further muddied the waters of their appeal by waiving objections relating to the manner in which the report was presented to the jury by failing to raise contemporaneous objections. *Meeker*, 236 U.S. at 427. Thus, the Court held, "The provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence." *Id.* at 430. Unlike here, *Meeker* did not consider whether the proceedings violated Article III,

since the proceedings did in fact provide a full Article III trial on the underlying questions of liability and damages.

***Jarkesy* should control.** The parallels between this case and *Jarkesy* are undeniable. As in *Jarkesy*, "the remedy is all but dispositive." *Jarkesy*, 603 U.S. at 123. Both statutory schemes involve punitive penalties pocketed by their respective agencies with no required showing of harm to any party, not remedial restitution. Moreover, while "the remedy is the 'more important" consideration,' *Jarkesy*, 603 U.S. at 123 (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)) (cleaned up), both statutory schemes involve underlying causes of action that draw on common law fraudulent practices as the trigger for a penalty. 47 U.S.C. § 503(b)(1)(C)–(D) and (b)(2)(E) (incorporating 47 U.S.C. § 509(a), 18 U.S.C. § 1343). Just as the FCC controls the forum and path of proceedings here, the SEC had sole control over its enforcement forum, including the freedom to choose to "adjudicate[] the matter in-house" without *de novo* review and factfinding by an Article III court. *Jarkesy*, 603 U.S. at 115, 117. Thus, just as in *Jarkesy*, the statutory scheme here impermissibly "withdraw[s a suit at common law] from judicial cognizance." *Id.* at 134 (quoting *Murray's Lessee*, 59 U.S. at 284). This must end.

CONCLUSION

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

Respectfully submitted,

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February 25, 2026