

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

BRIEF FOR THE FEDERAL PARTIES

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QUESTION PRESENTED

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, authorizes the Federal Communications Commission (FCC) to assess forfeiture penalties for certain violations by issuing a notice of apparent liability, giving a regulated party an opportunity to respond in writing, and issuing a decision. The party may lawfully decline to pay a forfeiture assessed by the FCC. If the party declines to pay, the government may recover the forfeiture by filing a civil suit in federal district court, where the party may demand a *de novo* jury trial. Alternatively, if the party pays the penalty, it may seek a refund by filing a petition for review in a court of appeals, where no jury is available. The question presented is as follows:

Whether the Communications Act provisions that govern the FCC's assessment and enforcement of forfeiture penalties are consistent with the Seventh Amendment and Article III.

PARTIES TO THE PROCEEDING

The Federal Communications Commission and the United States of America are petitioners in No. 25-406 and respondents in No. 25-567. AT&T, Inc. (T) is respondent in No. 25-406. Verizon Communications Inc. (VZ) is petitioner in No. 25-567.

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BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

In *AT&T*, the court of appeals' amended opinion and original opinion (*AT&T* Pet. App. 1a-22a, 23a-45a) are reported at 149 F.4th 491 and 135 F.4th 230. The Federal Communications Commission's order (*AT&T* Pet. App. 46a-145a) is reported at 39 FCC Rcd 4216.

In *Verizon*, the court of appeals' opinion (*Verizon* Pet. App. 1a-40a) is reported at 156 F.4th 86. The FCC's

order (*Verizon* Pet. App. 41a-151a) is reported at 39 FCC Rcd 4259.

JURISDICTION

In *AT&T*, the court of appeals issued its judgment on April 17, 2025. The court issued an amended opinion and denied a petition for rehearing on August 22, 2025. The petition for a writ of certiorari was filed on October 2, 2025. In *Verizon*, the court of appeals issued its judgment on September 10, 2025. The petition for a writ of certiorari was filed on November 6, 2025. This Court granted both petitions on January 9, 2026. The Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix. App., *infra*, 1a-9a.

INTRODUCTION

Certain violators of federal communications laws are subject to monetary forfeitures. To obtain a forfeiture, the Federal Communications Commission (FCC or Commission) issues a notice of apparent liability, gives the recipient an opportunity to respond in writing, and issues a forfeiture order. That order is a prerequisite to obtaining the forfeiture, but it does not require payment, create a debt, or trigger the accrual of interest. If the recipient declines to pay, the government may recover the forfeiture only by filing a civil suit in district court, where the recipient may demand a de novo jury trial.

That procedure satisfies the Seventh Amendment, which generally preserves a defendant's right to obtain a jury trial before being compelled to pay more than \$20 in damages or penalties. A party is not legally obligated to pay an FCC forfeiture unless and until the govern-

ment prevails in a de novo civil suit, where the party may demand a jury trial.

The carriers' contrary theory rests on the premise that an FCC forfeiture order creates an immediate legal obligation to pay the specified amount. That premise is wrong. No statutory provision requires payment before the de novo trial. The FCC orders in these cases recognize that a party is "entitled to a trial *de novo* in federal district court before it can be required to pay." *AT&T* Pet. App. 116a; *Verizon* Pet. App. 125a. The Commission and the D.C. Circuit have long read the statute in just that way.

Once the carriers' premise is rejected, their constitutional claim collapses. The Seventh Amendment preserves the right to jury trial only in suits at common law, not in non-binding agency adjudications that precede those suits. The carriers acknowledge (Br. 39-40) that, since the 19th century, Congress has authorized agencies to issue non-binding monetary awards that are enforced in de novo jury trials. In *Meeker v. Lehigh Valley Railroad*, 236 U.S. 412 (1915), this Court rejected a Seventh Amendment challenge to one such statute. Because the forfeiture procedure here is materially indistinguishable from procedures that Congress has long enacted and that this Court has upheld, the Court should reject the carriers' claim, affirm in *Verizon*, and reverse in *AT&T*.

STATEMENT

A. Legal Background

The Communications Act of 1934 (Communications Act or Act), ch. 652, 48 Stat. 1064 (47 U.S.C. 151 *et seq.*), established the FCC and empowered it to regulate communications services. In 1960 and 1978, Congress amended the Act to authorize the Commission to seek

monetary forfeitures for certain violations. See Communications Act Amendments, 1960, Pub. L. No. 86-752, § 7, 74 Stat. 894-895; Communications Act Amendments of 1978, Pub. L. No. 95-234, § 2, 92 Stat. 33-35.

Under the amended Act, anyone who “willfully or repeatedly fail[s] to comply” with the Act or FCC rules (or commits certain other violations) “shall be liable to the United States for a forfeiture penalty.” 47 U.S.C. 503(b)(1)(A). The Act provides two alternative paths for seeking forfeitures: (1) the notice-of-apparent-liability procedure, which Congress established in 1960; and (2) the formal-hearing procedure, which Congress added in 1978. See 47 U.S.C. 503(b)(3) and (4). These cases involve the first procedure.

1. Under the procedure that is relevant here, the FCC issues a “notice of apparent liability” and gives the recipient an opportunity to respond in writing. See 47 U.S.C. 503(b)(4). After reviewing any written response, the Commission issues an order that “determine[s]” whether the recipient is liable and, if so, “assesse[s]” the amount of the penalty. 47 U.S.C. 503(b)(1) and (2)(E).

Although the FCC order is a legal prerequisite to recovering the forfeiture, the order standing alone does not require payment, create a debt, or trigger the accrual of interest. If the recipient declines to pay, the Commission may refer the case to the Department of Justice, which may file a civil suit in district court to recover the forfeiture. See 47 U.S.C. 504(a). Such a suit “shall be a trial de novo.” *Ibid.* A recovery suit is more than “merely a collection proceeding”; it enables a party “to contest” “the merits” anew. S. Rep. No. 1857, 86th Cong., 2d Sess. 10 (1960) (Senate Report).

Any party to a recovery suit may demand a jury trial. Congress legislates “against a background of common-

law adjudicatory principles,” *Perttu v. Richards*, 605 U.S. 460, 468 (2025) (citation omitted), and under those principles, “there is a right of jury trial when the United States sues to collect a penalty, even though the statute is silent on the right of jury trial,” *United States v. J.B. Williams Co.*, 498 F.2d 414, 422-423 (2d Cir. 1974) (Friendly, J.) (citation and ellipsis omitted).

Alternatively, the recipient of a forfeiture order may pay the forfeiture and seek a refund by filing a petition for review in a court of appeals. See 28 U.S.C. 2342(1); 47 U.S.C. 402(a); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1083-1085 (D.C. Cir. 2003). The court, sitting without a jury, then reviews the order under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*

2. Under the formal-hearing procedure, the FCC issues a forfeiture order after the Commission (or an administrative law judge) holds a formal hearing. See 47 U.S.C. 503(b)(3). The order is reviewable in a court of appeals sitting without a jury. See *ibid.* The Act provides no mechanism akin to Section 504(a) by which the regulated party can obtain a de novo jury trial. That alternative procedure, which the FCC rarely uses, is not at issue here. Except where indicated, this brief’s references to forfeitures concern only forfeitures imposed through the notice-of-apparent-liability procedure.

B. Facts And Proceedings Below

1. Until 2019, AT&T and Verizon operated location-based-services programs. *AT&T* Pet. App. 5a; *Verizon* Pet. App. 6a. As part of those programs, the carriers tracked cellphone users’ locations and sold the location data (through intermediaries) to third parties, who used the data to provide services such as roadside assistance. *AT&T* Pet. App. 5a-6a; *Verizon* Pet. App. 6a-7a. But instead of verifying customers’ consent themselves, the

carriers relied on the service providers to do so. *AT&T* Pet. App. 55a; *Verizon* Pet. App. 50a-51a.

The service providers' consent-verification systems were far from robust. One such entity, Securus Technologies, offered a location-finding service to law-enforcement officials. See *AT&T* Pet. App. 7a n.2. To use that service, officials were required "to input the telephone number of the device they wanted to locate," to attach a document, and to "chec[k] a box" certifying that the document granted "permission to look up the location on this phone." *Id.* at 59a (citation omitted). Securus would then "*immediately* provide the requested location information," "regardless of the adequacy of the [attached] document." *Ibid.* *The New York Times* reported that one Missouri sheriff had exploited that service to obtain unauthorized access to data about hundreds of customers, including a local judge. See Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates' Calls Could Track You, Too*, *N.Y. Times*, May 10, 2018. Though the carriers terminated Securus's access to their programs, they did not promptly identify and correct the programs' vulnerabilities. See *AT&T* Pet. App. 88a-93a; *Verizon* Pet. App. 88a-99a.

In 2020, the FCC issued notices of apparent liability alleging that the carriers had repeatedly and willfully violated rules requiring them to take reasonable steps to protect the confidentiality of customers' location information. See 35 FCC Rcd 1698, 1712 (citing 47 U.S.C. 222; 47 C.F.R. 64.2010(a)); 35 FCC Rcd 1743, 1756 (same). After reviewing the carriers' written responses, the Commission found "no reason to cancel" the proposed forfeitures. *AT&T* Pet. App. 48a; *Verizon* Pet. App. 43a. Observing that the carriers' practices had compromised "highly sensitive location information" of "tens of mil-

lions of consumers,” *AT&T* Pet. App. 108a; *Verizon* Pet. App. 117a, the Commission assessed forfeitures of \$57,265,625 against AT&T, see *AT&T* Pet. App. 131a, and \$46,901,250 against Verizon, see *Verizon* Pet. App. 43a.

2. AT&T paid its forfeiture and filed a petition for review in the Fifth Circuit. *AT&T* Pet. App. 8a. The court granted the petition and vacated the order. *Id.* at 23a-45a. The court subsequently denied the government’s petition for rehearing but amended its opinion. *Id.* at 1a-22a. Except where noted, this brief cites and discusses the amended opinion.

The Fifth Circuit held that the Communications Act, as applied here, violates the Seventh Amendment and Article III. *AT&T* Pet. App. 9a-22a. The court first held that AT&T has a right to jury trial on the claims at issue, *id.* at 9a-14a, and that the public-rights doctrine is inapplicable here, see *id.* at 14a-20a. The court then concluded that the availability of a de novo jury trial in a Section 504(a) recovery suit—which, according to the court, occurs “after [the] agency has already found the facts, adjudged guilt, and levied punishment”—does not satisfy the Seventh Amendment. *Id.* at 21a. The court’s original opinion also construed Section 504(a) to allow a party to challenge only the FCC’s factual findings, not its legal conclusions. *Id.* at 43a-44a. But its amended opinion omitted that rationale, which had been “called into question” by this Court’s intervening decision in *McLaughlin Chiropractic Associates v. McKesson Corp.*, 606 U.S. 146 (2025). *AT&T* Pet. App. 21a n.16.

Judge Haynes concurred in the judgment without writing an opinion. *AT&T* Pet. App. 1a n.*.

3. Verizon paid its forfeiture and filed a petition for review in the Second Circuit. *Verizon* Pet. App. 10a. The court denied the petition. *Id.* at 1a-40a.

The Second Circuit rejected Verizon's Seventh Amendment challenge. *Verizon* Pet. App. 34a-40a. The court assumed without deciding that Verizon has a right to jury trial on the forfeiture assessment here. *Id.* at 35a. It then concluded that the Act preserves that right because "Verizon could have gotten such a trial" by declining to pay the forfeiture and awaiting a recovery suit. *Ibid.* Verizon argued that the de novo trial is inadequate because the forfeiture order causes "reputational and practical harms." *Id.* at 37a. But the court determined that such harms do not "implicate the Seventh Amendment," which requires a jury only for "an effort to collect payment of monetary damages." *Ibid.*

SUMMARY OF ARGUMENT

A. To judge the Act's constitutionality, this Court must first ascertain its meaning. Under the Act, a regulated party becomes legally obligated to pay a forfeiture only if and when the government prevails in a de novo trial. The FCC's issuance of the forfeiture order, standing alone, does not impose such a payment obligation. The Commission and the D.C. Circuit have long read the Act in that way. Principles of constitutional avoidance resolve any remaining ambiguity as to the non-binding character of FCC forfeiture orders.

B. The Seventh Amendment allows the FCC to issue non-binding forfeiture orders that become enforceable only after de novo trials. The Amendment guarantees a jury only in suits at common law where the amount in controversy exceeds \$20. An agency adjudication that cannot culminate in a binding award of legal relief is not a suit, is not a proceeding at common law, and is not for

more than \$20. The recovery suit, by contrast, *is* a suit at common law for more than \$20—but the regulated party has a right to jury trial in that suit.

Precedent confirms the Act’s validity. In *Meeker v. Lehigh Valley Railroad*, 236 U.S. 412 (1915), this Court upheld a statute that authorized an agency to issue non-binding damages awards that could be enforced after jury trials. And in three other cases, it held that non-jury factfinders could make initial decisions that could be appealed to juries. The statutory scheme here is materially indistinguishable from that in *Meeker* and is analogous to those in the other three cases.

History, too, supports the Act. Since before the founding, legislatures have authorized non-jury factfinders to decide civil cases in the first instance, subject to review by juries on appeal. And since 1889, Congress has authorized agencies to issue non-binding monetary awards that can be enforced through jury trials.

C. The carriers’ arguments lack merit. The carriers observe that FCC forfeiture orders contain formal findings of wrongdoing. But the Seventh Amendment’s applicability turns on whether a federal adjudicator is authorized to award legal relief worth more than \$20, not whether the adjudicator is authorized to find wrongdoing. The carriers also emphasize that, because the government may decline to sue under Section 504(a) after the FCC issues a forfeiture order, the recipient of the order may never obtain a jury trial. But if that sequence of events occurs, there is no suit at common law that could trigger the recipient’s jury-trial right.

D. Adoption of the carriers’ theory would seriously disrupt the Commission’s administration of the Act. Forfeitures are among the FCC’s most important enforcement tools. Eliminating them could mean that many

vital rules—such as those protecting privacy, combating robocalls, and regulating broadcasting—go effectively unenforced.

ARGUMENT

As the Second Circuit held in *Verizon* and the D.C. Circuit held in *Sprint Corp. v. FCC*, 151 F.4th 347 (2025), the forfeiture scheme challenged here complies with the Seventh Amendment. The Fifth Circuit’s contrary decision in *AT&T* is incorrect.

A. A Regulated Party Has No Legal Obligation To Pay An FCC Forfeiture Unless And Until The Government Prevails In A Recovery Suit

To judge the Act’s constitutionality, this Court must first determine its meaning. In the government’s view, a regulated party may lawfully decline to pay a forfeiture assessed by the FCC and will become legally obligated to pay only if the government prevails in a Section 504(a) recovery suit. In the carriers’ view (Br. 10, 32-33), by contrast, forfeiture orders standing alone create “binding legal obligations” to pay money, and those who “defy” such orders are “scofflaws.” The government’s interpretation is correct.

1. An FCC forfeiture order standing alone does not obligate the recipient to pay the forfeiture

Sections 503 and 504 nowhere require a regulated party to pay an FCC forfeiture before the government prevails in a recovery suit. This Court “do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.” *Jama v. ICE*, 543 U.S. 335, 341 (2005); see Antonin Scalia & Bryan A. Garner, *Reading Law* 93 (2012). The Act does not impose any criminal or civil penalties for refusing to pay. That matters because a penalty depends on viola-

tion of a legal duty. See *Harris v. Runnels*, 12 How. 79, 83 (1851); Scalia & Garner 295. Nor does the Act empower the FCC to command payment or punish non-payment. That is significant because an agency “has no power to act” “unless and until Congress authorizes it to do so.” *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022) (citation omitted).

Several aspects of the statute confirm that reading. First, Section 503 allows the Commission to issue a forfeiture order after giving notice and providing an opportunity to respond in writing. See 47 U.S.C. 503(b)(4). The Commission need not hold a hearing in which the party may submit evidence, call witnesses, or cross-examine Commission witnesses. It is unlikely that Congress empowered the Commission to impose binding obligations to pay multimillion-dollar penalties based on such paper procedures.

Second, Section 503 states that a “forfeiture penalty determined [through the notice-of-apparent-liability procedure] shall be recoverable pursuant to section 504(a).” 47 U.S.C. 503(b)(4). Section 504(a), in turn, states that a forfeiture “shall be recoverable” “in a civil suit” brought by the Justice Department. 47 U.S.C. 504(a). A “recovery” is “[t]he obtaining in a suit at law of a right to something by a verdict, decree, or judgment of court.” *Webster’s New International Dictionary of the English Language* 2081 (2d ed. 1958). By making forfeitures “recoverable” in civil suits, the Act indicates that the government must prevail in those suits to obtain a legal right to collect forfeitures.

Third, a “suit for the recovery of a forfeiture” “shall be a trial de novo.” 47 U.S.C. 504(a). A “trial de novo” enables a party to contest the merits anew, before a neutral judge and impartial jury. It would make little

sense for Congress to guarantee de novo jury trials, yet to allow parties to obtain such trials only by defying legally binding forfeiture orders. Congress usually does not require people to violate the law in order to exercise their procedural rights. See *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 490-491 (2010).

Fourth, the FCC may not use a forfeiture proceeding to a person's prejudice "unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final." 47 U.S.C. 504(c). By preventing the agency from penalizing a party until the party chooses to pay or a court orders payment, the Act implies that the agency order, by itself, does not require payment.

This Court has treated agency orders issued under similar statutes as non-binding. One statute authorized the Interstate Commerce Commission (ICC) to issue reparation orders "directing" railroads "to pay" damages to shippers, who could enforce the orders after jury trials where the orders would serve as prima facie evidence. Hepburn Act, ch. 3591, § 5, 34 Stat. 590-592. The Court read that statute to mean that reparation orders were "not final or binding" on railroads. *United States v. ICC*, 337 U.S. 426, 435 (1949). Another statute authorized the Secretary of the Interior to assess civil penalties in agency proceedings and then to recover the penalties in civil suits. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 109(a), 83 Stat. 756-757. The Court read that statute to mean that a party could "obtain *de novo* judicial review of the amount of the penalty by refusing to pay it and awaiting the Secretary's enforcement action." *NICOA v. Kleppe*, 423 U.S. 388, 396 (1976); see *Kleppe v. Delta Mining, Inc.*, 423 U.S. 403, 409 (1976).

The Communications Act operates in the same way. Senator John Pastore, the architect of the 1960 amendments, sought to ensure that a person “doesn’t have to pay [a forfeiture] until he has had his day in court.” *Proposed Amendments to FCC Act of 1934: Hearing before the Communications Subcomm. of the Senate Commerce Comm.*, 86th Cong., 2d Sess. 98 (1960); see *id.* at 100. He therefore crafted legislation that guarantees an “opportunity to contest” “the merits” in a de novo trial before the Commission can recover the forfeiture. Senate Report 10.

The FCC has long read the Act to mean that parties may lawfully “take no action” after receiving forfeiture orders. *In re Liability of Dickenson County Broadcasting Corp.*, 68 F.C.C.2d 1510, 1515 (1977). For example:

- “[S]everal” FCC decisions have concluded that a person “need not pay a forfeiture until * * * a trial de novo.” *In re AM Broadcast Station KTNC*, 15 FCC Rcd 19,114, 19,114-19,115 (2000); see, e.g., *In re NECLEC, LLC*, 17 FCC Rcd 8402, 8403 (2002); *In re Associated Broadcasters, Inc.*, 12 FCC Rcd 3324, 3327-3328 (1997); *In re Liability of WIYN Radio, Inc.*, 59 F.C.C.2d 424, 425 (1976).
- FCC guidance advises regulated parties that a person may lawfully “[d]o nothing” “[i]n response to a forfeiture order.” Enforcement Bureau, FCC, *Enforcement Overview* 17 (Apr. 2020).
- FCC debt-collection procedures make clear that forfeitures become “debts owed to the United States” only when “a court” “order[s] payment” and “such order is final.” *In re Amendment*, 19 FCC Rcd 6540, 6542 n.16 (2004); see *In re Amendment*, 4 FCC Rcd 441, 441 (1988). Until then, the

agency will not “pursue collection” and forfeitures do not accrue interest. FCC, FCC INST 1157.5, *Forfeiture Tracking, Collections and Follow-up Systems* 3 (May 22, 2023); see *id.* at 1-3.

- Briefs filed by the Commission and the Justice Department explain that “a party does not have to pay a forfeiture assessed by the Commission” until “the district court, after conducting a trial *de novo*, orders payment.” 92-1321 Resp. Br. at *3-*4, *United States Telephone Ass’n v. FCC*, No. 92-1321, 1994 WL 16777178 (D.C. Cir. Jan. 28, 1994); see, *e.g.*, Resp. Br. at *6, *Dougan v. FCC*, No. 92-70734, 1993 WL 13098737 (9th Cir. May 3, 1993).

The agency’s longstanding and consistent view provides strong evidence of the Act’s meaning. See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 385-386 (2024).

The D.C. Circuit likewise has stated that recipients of forfeiture orders “need do nothing at all,” *Action for Children’s Television v. FCC*, 59 F.3d 1249, 1261 (1995), cert. denied, 516 U.S. 1072 (1996), and that forfeitures “are recoverable, absent voluntary payment, only in civil proceedings,” *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 498 (1977). Scholars have similarly explained that an FCC forfeiture proceeding is a “legally inconclusive adjudication,” Louis L. Jaffe, *Judicial Control of Administrative Action* 113 (1965), and that parties “can either pay the fine or decline to do so,” Milagros Rivera-Sanchez, *How Far Is Too Far?*, 49 Fed. Comm. L.J. 327, 328 n.3 (1997).

AT&T previously agreed. In a 2002 appellate brief, AT&T explained that the Act “allow[s] the carrier (a) to challenge the FCC’s payment order in the courts of appeals, or (b) to refuse to pay and force a collection action in district court.” AT&T Br. at *22-*23, *AT&T Corp. v.*

FCC, No. 01-1485, 2002 WL 34244542 (D.C. Cir. Dec. 20, 2002) (AT&T Br.) (citation omitted). A carrier that “refuse[s] to pay,” AT&T stated, makes a “choice that Congress ha[s] permitted under the statutory scheme.” *Id.* at *25 (emphasis omitted). AT&T’s reply brief in the same case explained that the Act “allows forfeiture subjects to make forum-controlling compliance decisions.” AT&T Reply Br. at *16 *AT&T, supra*, No. 01-1485, 2002 WL 34244543 (D.C. Cir. Dec. 20, 2002) (AT&T Reply Br.). At oral argument, AT&T explained that Congress often grants a party the “right to choose between complying” and “provoking an enforcement action” and that, “if [the FCC] never tr[ies] to collect,” “then arguably you are not hurt.” Oral Argument Tr. at 14-15, *AT&T, supra*, No. 01-1485 (D.C. Cir. Feb. 19, 2003).¹ AT&T’s litigation interests may have changed since then, but the statute has not.

2. *The carriers misread the Communications Act*

The carriers identify no sound reason to construe the Act as requiring parties to pay forfeitures upon assessment by the FCC. They quote (Br. 29) statutory provisions stating that, once the Commission “determine[s]” that a person has violated the law, the person “shall be liable to the United States for a forfeiture penalty.” 47 U.S.C. 503(b). But “to say that A shall be liable to B is the express creation of a right of action,” not the imposition of a duty to pay. *Key Tronic Corp. v. United States*, 511 U.S. 809, 822 (1994) (Scalia, J., dissenting in part) (emphasis omitted); accord *id.* at 818 n.11 (majority opinion). When Congress provides that a state actor who violates federal rights “shall be liable to the party injured,” 42 U.S.C. 1983, it means that the injured party

¹ <https://docs.fcc.gov/public/attachments/DOC-419519A1.pdf>

may sue the state actor. And when it provides that a patent infringer “shall be liable” to the patent owner, 35 U.S.C. 271(b), it means that the owner may sue the infringer. Here, the phrase “shall be liable” means that the government may file a recovery suit, not that a person must pay the forfeiture before that suit is resolved.

The carriers argue (Br. 30) that the Commission’s forfeiture assessment is binding because it is a final order. But an “order” is the disposition of “a matter other than rule making,” 5 U.S.C. 551(6), and an order is “final” if it marks “the ‘consummation’ of the agency’s decisionmaking process” and carries “legal consequences,” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). An FCC forfeiture assessment disposes of a matter other than rulemaking; it consummates the Commission’s decision-making process; and it carries legal consequences because it is a statutory prerequisite to the Justice Department’s commencement of a recovery suit. The carriers equate “carrying legal consequences” with “commanding payment,” but enabling a recovery suit is itself a legal consequence. Cf. *ibid.* (deeming agency action to be final where it “alter[ed] the legal regime to which [another] agency [wa]s subject” but did not require a specific result).

Contrary to the carriers’ assertion (Br. 35), this reading does not make forfeiture orders “meaningless.” By making an FCC adjudication a prerequisite to a Section 504(a) recovery suit, Congress ensured that, before a regulated party may be sued to collect a forfeiture, that party will have an opportunity to persuade the FCC that no forfeiture should be imposed or that the amount of the forfeiture should be reduced. Here, Verizon persuaded the Commission to “reduce the proposed penalty by \$1,417,500.” *Verizon* Pet. App. 43a. The agency

process therefore serves a meaningful function even though the order issued at the end of that process does not compel payment.

3. The carriers misread the FCC's orders

The carriers argue (Br. 30) that the “specific orders here” purport to compel payment. But these cases present the question whether the “Communications Act” violates the Seventh Amendment. *AT&T* Pet. I; *Verizon* Pet. I. That question does not encompass disputes about specific orders. If a particular order purports to compel payment, a court should hold that the order exceeds the FCC’s authority under the Act, not that the Act violates the Constitution.

In any event, the carriers misread the orders. Each order explains that the carrier may “elect to pay the forfeiture voluntarily” but is “entitled to a trial *de novo* in federal district court before it can be required to pay.” *AT&T* Pet. App. 116a & n.223; *Verizon* Pet. App. 125a & n.268, 126a. And while the orders provide that each carrier “**IS LIABLE FOR A MONETARY FORFEITURE**,” *AT&T* Pet. App. 131a; *Verizon* Pet. App. 138a, the term “liable” indicates that the government may sue to recover the forfeiture, not that a recipient has an immediate duty to pay the specified amount. See pp. 15-16, *supra*. A court should also read the orders against the backdrop of the Act as a whole and the Commission’s longstanding regulatory practice, which confirm that recipients of forfeiture orders may lawfully decline to pay.

Although the orders state that “[p]ayment of the forfeiture shall be made * * * within thirty (30) calendar days,” *AT&T* Pet. App. 131a; *Verizon* Pet. App. 139a, that language means only that, if a carrier wishes to forestall a recovery suit by voluntarily paying the forfeiture, it has 30 days to do so. The statute governing

removal of civil suits from state to federal court similarly provides that the notice of removal “shall be filed within 30 days,” 28 U.S.C. 1446(b)(1), and this Court’s Rules provide that an application to extend the deadline for a petition for a writ of certiorari “must be filed with the Clerk at least 10 days before the date the petition is due,” Sup. Ct. R. 13.5. Those provisions do not require the filing of notices of removal or extension applications; instead, they set deadlines for those optional actions. The orders here likewise set deadlines for voluntary payment.

Reinforcing that reading, the orders continue: “If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to section 504(a).” *AT&T* Pet. App. 132a; *Verizon* Pet. App. 139a. Where, as here, a legal text pairs the word “shall” with an explanation of the consequences of failing to take the specified action, courts need not construe the word “shall,” “alone and in isolation, as a command.” *New York v. United States*, 505 U.S. 144, 169-170 (1992). Such a text is instead often best read to offer a choice between the action and the consequences. See *ibid.* The orders here offer such a choice: Pay in 30 days or face potential litigation.

4. Constitutional-avoidance and severability principles require treating FCC forfeiture orders as non-binding

A court interpreting a legal text should “prefe[r] the meaning that preserves to the meaning that destroys.” *Hopkins Federal Savings & Loan Ass’n v. Cleary*, 296 U.S. 315, 334 (1935); see Scalia & Garner 66. A court interpreting a statute should strive to avoid even “grave doubts” about its validity. *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); see Scalia & Garner 247.

Under those principles, the question here is whether the government’s reading of the Act is “‘fairly possible,’” not whether it is “the best.” *United States v. Hansen*, 599 U.S. 762, 781 (2023) (citation omitted). It is at least fairly possible to read the Act and the forfeiture orders to mean that a party need not pay a forfeiture until the government prevails in a recovery suit.

If this Court disagrees with that reading and holds the Act unconstitutional, it should “limit the solution to the problem.” *United States Trustee v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487, 494 (2024) (citation omitted). If the Court concludes that some provision of the Act makes FCC forfeiture orders binding, it should—consistent with the Act’s severability clause, 47 U.S.C. 608—sever and invalidate that provision, leaving the Commission free to issue non-binding orders that can be enforced in recovery suits. Similarly, if the Court concludes that the orders here improperly commanded the carriers to pay, it should make clear that the agency may lawfully issue forfeiture orders so long as it changes their wording.

B. The Seventh Amendment Allows The FCC To Issue Non-Binding Forfeiture Orders That Become Enforceable After De Novo Jury Trials

The Seventh Amendment permits the Commission to issue orders that serve as predicates for recovery suits but do not compel immediate payment. That conclusion follows from the Constitution’s text, this Court’s precedents, and founding-era and post-ratification history.

1. The Seventh Amendment does not require a jury trial before an agency issues a non-binding order

a. The Seventh Amendment provides: “In Suits at common law, where the value in controversy shall ex-

ceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. Amend. VII. Although the government argued below that the Amendment does not entitle the carriers to a jury trial at any stage of the forfeiture proceedings, it does not advance that theory here. See *AT&T* Pet. 7. For purposes of these cases, the government accepts that a Justice Department recovery suit under Section 504(a) is a suit at common law for more than \$20; that the suit does not involve public rights; and that the Seventh Amendment therefore gives the defendant a right to jury trial in that suit. But contrary to the carriers’ claim (Br. 25-31), the antecedent FCC adjudication is not a distinct common-law suit for which the Seventh Amendment provides a right to trial by jury.

An FCC forfeiture adjudication is not a “suit.” A “suit” or “lawsuit” is a “process for the recovery of a right or claim” or a “process in law instituted by a party to compel another to do him justice.” 2 Noah Webster, *An American Dictionary of the English Language* (1828). The Commission’s adjudication does not fit those definitions because the Commission cannot order recovery or compel payment.

An FCC forfeiture adjudication is instead a discrete agency process that precedes a suit. Many statutes require such pre-suit administrative proceedings. For example, prisoners must exhaust administrative remedies before suing about prison conditions, see 42 U.S.C. 1997e(a); plaintiffs must present tort claims to agencies before suing the United States, see 28 U.S.C. 2401(b); and employees must obtain right-to-sue letters from the Equal Employment Opportunity Commission before

suing about workplace discrimination, see 42 U.S.C. 2000e-5. This Court has described such agency proceedings as “prerequisites to suit” or “‘condition[s] precedent’” to suit, *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486-487 (2015) (citation omitted), and no one supposes that a right to jury trial exists in those proceedings. An FCC forfeiture adjudication is likewise a prerequisite to suit, not the suit itself.

Even if the Seventh Amendment term “suit” were construed expansively, as encompassing every agency adjudication that produces a decision with operative legal effect, the FCC adjudication here would not be a suit “at common law” for which the “value in controversy” “exceed[s] twenty dollars.” U.S. Const. Amend. VII. A suit is one at common law if the cause of action and remedy are “legal in nature.” *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024). Damages and civil penalties are both legal remedies. See *id.* at 123. The Commission, however, cannot issue a binding order requiring a party to pay damages or penalties. The only legal effect of the FCC’s initial assessment is to allow the Justice Department to commence suit under Section 504(a). The FCC assessment therefore is not analogous to a damages or penalty award, under which the plaintiff “instantly acquires, and the defendant loses at the same time, a right to that specific sum.” 2 William Blackstone, *Commentaries on the Laws of England* 438 (10th ed. 1787). And because the Commission cannot compel a party to pay a single dime, the “value in controversy” in the agency adjudication is zero. U.S. Const. Amend. VII.

Finally, if the FCC adjudication and a subsequent Justice Department recovery action are viewed as constituent parts of a single common-law suit, the Act “preserve[s]” the jury-trial right “[i]n” that suit. U.S. Const.

Amend. VII. When a suit is “brought in one [tribunal]” but “carried by legal process to a supervising Court,” the review proceeding is “a continuation of the same suit,” not a distinct suit. *Cohens v. Virginia*, 6 Wheat. 264, 409 (1821). A statute can preserve the jury-trial right by providing a jury in a review proceeding rather than the first-instance tribunal. See pp. 25-26, *infra*. Here, the Act provides a jury trial in the recovery suit.

b. The Seventh Amendment’s Re-Examination Clause confirms that the FCC may make initial findings before the de novo jury trial. That Clause provides that facts generally may not be “re-examined” *after* they are “tried by a jury.” U.S. Const. Amend. VII. But nothing in the Amendment prohibits preliminary factfinding by other adjudicators *before* the jury trial.

Common sense supports that interpretation. Consistent with the Seventh Amendment, Congress could have authorized the Justice Department—on its own, without the FCC’s involvement—to file civil suits seeking monetary forfeitures for Communications Act violations. The Act instead authorizes the Department to sue only after the Commission issues a notice of apparent liability, provides an opportunity to respond, and determines that a penalty is warranted. See 47 U.S.C. 503(b)(4). Those extra layers of procedure cannot render the statute unconstitutional. Congress “does not violate the [Constitution] by providing alternative or additional procedures beyond what the Constitution requires.” *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 853 (1977).

The fact that no jury was available in the court-of-appeals proceedings in these cases does not render the statutory scheme infirm. Like other constitutional rights, the right to jury trial can be waived. See *Duignan v.*

United States, 274 U.S. 195, 198-199 (1927). Section 504(a) entitled AT&T and Verizon to de novo jury trials before they could be compelled to pay the forfeitures. By choosing instead to pay the specified amounts and to seek review in the Fifth and Second Circuits, the carriers waived their Seventh Amendment rights. The Amendment’s “object was to secure a right to the individual,” and here, “that right has been tendered to [the carriers] and declined.” *Parsons v. Armor*, 3 Pet. 413, 425 (1830).

c. “The Seventh Amendment’s jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property.” *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring). Those cognate provisions confirm that a party has no right to a jury in the Commission’s initial adjudication.

Article III vests “[t]he judicial Power” in the federal courts. U.S. Const. Art. III, § 1. “[A] ‘judicial Power’ is one to render dispositive judgments”—judgments that are “conclusive upon the rights of the parties.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219, 226 (1995) (citations omitted). A decision that is “not obligatory,” and that “might be acted upon or disregarded” as the parties please, “could not be deemed an exercise of judicial power.” *In re Sanborn*, 148 U.S. 222, 224 (1893).

While only federal courts may exercise federal judicial power, other entities may issue initial, non-binding decisions, even in cases involving private rights. Magistrate judges may make recommendations, see *United States v. Raddatz*, 447 U.S. 667, 681-683 (1980); bankruptcy courts may propose findings of fact and conclusions of law, see *EBIA v. Arkison*, 573 U.S. 25, 36 (2014);

and executive agencies may issue initial orders that courts then enforce, see *Crowell v. Benson*, 285 U.S. 22, 51-54 (1932). An FCC forfeiture order imposes no binding legal obligations on private parties and is an exercise of executive power—a part of the process that the Act requires the Executive Branch to follow before taking the “quintessentially executive” step of filing a civil suit to recover monetary penalties. *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020). If the non-binding character of this and similar decisions is sufficient to avoid any violation of Article III, it is likewise sufficient to avoid any Seventh Amendment violation. Cf. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 584 U.S. 325, 345 (2018) (Where Article III allows Congress to assign a matter to an executive agency, “the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.”) (citation omitted).

The Due Process Clause provides that no person may “be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V. By its terms, that Clause applies only to proceedings that result in deprivations of “life, liberty, or property.” See *Paul v. Davis*, 424 U.S. 693, 712 (1976). The FCC’s penalty assessment does not deprive anyone of those interests; it simply lays the foundation for a potential deprivation of property in a future recovery suit. The Constitution therefore does not require any process at all for that decision. Congress went beyond the constitutional minimum by directing the Commission to issue a notice of apparent liability and provide an opportunity to respond in writing. See 47 U.S.C. 503(b)(4). Congress did not have to go further and provide a jury trial at that initial stage.

2. Precedent confirms that the availability of a de novo jury trial satisfies the Seventh Amendment

a. In four previous cases, this Court upheld enforcement schemes in which non-jury adjudicators could make factual findings that juries could then re-examine de novo. One case, *Meeker v. Lehigh Valley Railroad*, 236 U.S. 412 (1915), involved a statute that is materially indistinguishable from the Act. The other three cases—*Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), *Ex parte Peterson*, 253 U.S. 300 (1920), and *The Lessee of Edward Livingston v. Moore*, 7 Pet. 469 (1833)—involved statutes that are closely analogous to the Act.

The federal statute at issue in *Meeker* authorized the ICC to determine that a railroad owed damages to a shipper, who could then file a civil suit in which a jury would be empaneled and the ICC order would serve as prima facie evidence of the relevant facts. See Hepburn Act § 5, 34 Stat. 590-592. The Court rejected a Seventh Amendment challenge to that statute. See *Meeker*, 236 U.S. at 430-431. It explained that, because the statute “t[ook] no question of fact” from the jury, it “d[id] not abridge the right of trial by jury or take away any of its incidents.” *Id.* at 430.

Hof involved a federal statute that allowed justices of the peace in the District of Columbia—sitting with panels of “special commissioners,” 174 U.S. at 38—to issue initial decisions in civil cases worth up to \$300, subject to review by juries on appeal. See Act of Feb. 19, 1895, ch. 100, §§ 1-2, 28 Stat. 668. This Court held that the statute complied with the Seventh Amendment, which applies in the District of Columbia. See *Hof*, 174 U.S. at 5. The Court noted that the Amendment “does not prescribe at what stage of an action a trial by jury must, if demanded, be had.” *Id.* at 23. The Court there-

fore recognized Congress's power to direct "that the trial by jury should not be had in the tribunal of first instance, but in an appellate court only." *Id.* at 19.

In *Peterson*, a district court directed an auditor to examine evidence, hear witnesses, and write a report, which would serve as prima facie evidence before the jury. See 253 U.S. at 306-307. The Court upheld that procedure. See *id.* at 309-312. Citing *Meeker* and *Hof*, the Court explained that "[n]o incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put," because the jury retained responsibility for "the ultimate determination of issues of fact." *Id.* at 310-311.

The final case, *Livingston*, involved a Pennsylvania law that authorized the state comptroller to adjudicate liability for debts to the State, subject to review by a jury. See Act of Feb. 18, 1785, ch. 1133, §§ 1, 5, reprinted in 11 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 436-438 (James T. Mitchell & Henry Flanders eds., 1906). After explaining that the Seventh Amendment does not bind the States, the Court held that the law complied with the state constitution's jury-trial provision. See *Livingston*, 7 Pet. at 551-552. The Court explained that "appeal to a jury" preserves "the right of trial by jury." *Id.* at 552. Though that case arose under a state constitution, the Court relied on it when interpreting the Seventh Amendment in *Hof*. See 174 U.S. at 21-22.

This Court's precedents thus establish that a non-jury adjudicator may make findings that a jury then re-tries de novo. The initial decision may be made by an agency (*Meeker* and *Livingston*), a justice of the peace (*Hof*), or a court-appointed auditor (*Peterson*). A stat-

ute may make the initial decision non-binding and permit the winning party to commence suit in court (*Meeker*), or it may make the initial decision binding and permit the losing party to appeal (*Hof* and *Livingston*). And the initial decision may serve as prima facie evidence (*Meeker* and *Peterson*), or the jury may decide the facts entirely afresh (*Hof* and *Livingston*).

b. The forfeiture procedure here substantially tracks the procedure in *Meeker* and is analogous to the procedures in the other three cases. As in *Meeker*, Congress has empowered an agency to issue non-binding decisions that can serve as the predicates for subsequent court suits in which juries may be empaneled. And as in the other cases, Congress has authorized an entity other than a jury to make preliminary factual findings that juries may then retry.

These cases are indeed easier than *Meeker* and *Peterson*. The ICC's decision in *Meeker* and the auditor's report in *Peterson* served as prima facie evidence of the facts in later jury trials. See *Meeker*, 236 U.S. at 430; *Peterson*, 253 U.S. at 307. The Communications Act, by contrast, entitles a party to a "trial de novo" and does not require the jury to treat the FCC's findings even as prima facie evidence. 47 U.S.C. 504(a). If the procedures in *Meeker* and *Peterson* complied with the Seventh Amendment, then the procedure here is likewise constitutional.

The carriers contend (Br. 38-39) that the Court in *Meeker* addressed the lawfulness of using the ICC's decision as prima facie evidence, not the lawfulness of the agency decision itself. That distinction is illusory. The ICC's decision could have been used as evidence only if the adjudication that led to that decision was lawful. Even if the carriers are correct that the railroad in

Meeker never thought to challenge the underlying ICC adjudication, that would just show that the lawfulness of the adjudication was beyond doubt. *Peterson* confirms, in all events, that the jury-trial right is not violated “*either* by the preliminary, tentative hearing before the [non-jury factfinder] *or* by the use to which [its] report may be put.” 253 U.S. at 311 (emphases added).

Turning to *Hof*, the carriers emphasize (Br. 36-37) that the justice of the peace’s initial order was binding and that the losing party bore the burden of appealing. Here, by contrast, the FCC’s order is not binding, and the government must sue to recover any forfeiture. But that difference weighs in the Act’s favor. The power to issue “binding orders” is *more* significant than the power to issue non-binding decisions that “‘could be enforced only by order of [a] district court.’” *Stern v. Marshall*, 564 U.S. 462, 500-501 (2011) (citation omitted). It would make little sense to hold that the Seventh Amendment allows an agency to issue self-enforcing orders that private parties must appeal but not orders that take effect only if enforced by courts at the government’s behest.

Finally, the carriers note (Br. 36) that the procedure used in *Hof* applied only to debts of \$300 or less. But the Seventh Amendment preserves the same jury-trial right in all suits at common law for more than \$20; it does not distinguish between suits for \$300 and suits for \$3 million. The *Hof* Court based its decision not on the amount of the claim, but on the principle that Congress may provide a jury trial in “an appellate court.” 174 U.S. at 19. And while *Hof* involved a small debt, the other cases did not. *Peterson* involved a claim of \$21,014.43, see 253 U.S. at 304; *Meeker*, an award of \$109,280.17, see 236 U.S. at 422; and *Livingston*, claims of up to \$110,390, see 7 Pet. at 541.

3. Providing a jury in a reviewing court comports with founding-era practice

Founding-era practice confirms the Act’s validity. In the 17th, 18th, and 19th centuries, many American legislatures enacted statutes that empowered justices of the peace to decide civil cases in the first instance, subject to review by juries on appeal.² In 1823, Congress enacted such a statute for the District of Columbia. See Act of Mar. 1, 1823, ch. 24, §§ 1, 7, 3 Stat. 743-744.

Pennsylvania law aptly illustrates that practice. In the 18th century, Pennsylvania authorized justices of the peace to decide “civil proceedings in debt to enforce penalties” for at least 30 offenses. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 955 (1926). “[T]hese debt recoveries were subject to an appeal to trial by jury in the county courts.” *Ibid.* That procedure remained in use even after the 1776 state constitution guaranteed jury trials in civil cases. See *id.* at 956 & n.201.

² See, e.g., *The Public Statute Laws of the State of Connecticut*, Tit. 2, §§ 23, 35 (1821); Act of Feb. 4, 1792, ch. 250, §§ 1, 12, reprinted in 2 *Laws of the State of Delaware* 1046-1047 (1797); Act of Jan. 30, 1812, ch. 342, § 4, 1812 Ky. Acts 113; Act of 1791, ch. 68, § 4, reprinted in 1 *The General Public Statutory Law and Public Local Law of the State of Maryland* 279 (Clement Dorsey ed., 1840); Act of June 18, 1697, ch. 8, § 1, 1 *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay* 282-283; Act of Dec. 27, 1814, § 3, 1814 Miss. Acts 57-58; Act of 1794, ch. 414, § 1, 1 *Laws of the State of North-Carolina* 746-747 (Henry Potter et al. eds., 1821); Act of Mar. 7, 1746, ch. 365, §§ 2, 4, reprinted in 5 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 23-26 (James T. Mitchell & Henry Flanders eds., 1888); Act of Dec. 21, 1799, §§ 11-12, 1799 S.C. Acts 51; Act of Oct. 23, 1799, ch. 1, § 1, 1 *Laws of the State of Tennessee* 629 (Edward Scott ed., 1821).

State courts upheld such statutes in a “long line of judicial decisions.” *Hof*, 174 U.S. at 23. During the 19th century, many state courts determined that, “[s]o long as the trial by jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the legislature.” *Id.* at 25 (citation omitted).³ Summing up those decisions, scholars wrote that a legislature may deny a jury trial “in a court of first instance, provided the right is allowed on appeal.” Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 513 (4th ed. 1878); see John F. Dillon, *Treatise on the Law of Municipal Corporations* § 367, at 361 (1872); 6 Nathan Dane, *A General Abridgment and Digest of American Law* 442 (1823).

The Act differs from those founding-era statutes in one respect, but that difference weighs in the Act’s favor. Under the founding-era statutes, a justice of the peace’s initial decision was self-enforcing, and the losing party bore the burden of appealing. Here, by contrast, the Commission’s decision imposes no legal obligations, and the government bears the burden of filing

³ See, e.g., *Beers v. Beers*, 4 Conn. 535, 540 (1823); *Wilson v. Oldfield*, 1 Del. Cas. 622, 628 (Del. Ct. Com. Pl. 1818); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 208 (1848); *Norristown, Hope & St. Louis Turnpike Co. v. Burket*, 26 Ind. 53, 61-64 (1866); *State v. Beneke*, 9 Iowa 203, 207 (1859); *Randall v. Kehler*, 60 Me. 37, 44-45 (1872); *Steuart v. Mayor*, 7 Md. 500, 512 (1855); *Hapgood v. Doherty*, 8 Gray 373, 374 (Mass. 1857); *Keddie v. Moore*, 2 Mur. 41, 45 (N.C. 1811); *Norton v. McLeary*, 8 Ohio St. 205, 208-209 (1858); *Biddle v. Commonwealth*, 13 Serg. & Rawle 405, 410 (Pa. 1825); *State v. Fitzpatrick*, 11 A. 773, 774-775 (R.I. 1887); *Morford v. Barnes*, 16 Tenn. 444, 445-446 (1835); *Cockrill v. Cox*, 65 Tex. 669, 674 (1886); *Lincoln v. Smith*, 27 Vt. 328, 360-361 (1855); *Moundsville v. Fountain*, 27 W. Va. 182, 205-206 (1885); *Gaston v. Babcock*, 6 Wis. 503, 507-508 (1857).

a recovery suit. As explained above, the power to issue a binding order is more significant than the power to issue a decision that serves only as a predicate for a subsequent lawsuit. See p. 28, *supra*. Because the Act involves a more modest power than its founding-era counterparts, it passes constitutional muster.

4. Congress has long authorized agencies to assess civil penalties that can be recovered in de novo jury trials

Post-ratification history can “reinforce our understanding of the Constitution’s original meaning” or “liquitate ambiguous constitutional provisions.” *United States v. Rahimi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring) (citation omitted). Here, post-ratification history confirms the Act’s constitutionality. For more than a century, Congress has authorized agencies to issue monetary awards that can then be enforced in de novo jury trials. Commentators have long understood that the de novo trials dispel any constitutional objections to the initial agency adjudications.

a. In 1887 Congress established the first modern regulatory agency, the ICC. See Interstate Commerce Act, ch. 104, § 11, 24 Stat. 383. Congress authorized the ICC to issue reparation orders directing railroads to pay damages to shippers. See § 15, 24 Stat. 384. At first, such orders were enforceable in equity, where no jury trials were available. See § 16, 24 Stat. 384-385. The ICC declined to issue reparation orders, concluding that enforcing them without jury trials would violate the Seventh Amendment. See ICC, *First Annual Report of the Interstate Commerce Commission* 27 (Dec. 1, 1887).

In 1889, Congress amended the statute to address that problem. See Act of Mar. 2, 1889, ch. 382, 25 Stat. 855. The amendment allowed a shipper to enforce a reparation order in a civil suit tried by a jury, with the

ICC's findings serving as prima facie evidence. See § 5, 25 Stat. 859-861. Congress re-enacted that scheme in 1906, see Hepburn Act § 5, 34 Stat. 590-592, and this Court upheld it in *Meeker*, see p. 25, *supra*. After *Meeker*, Congress replicated that approach in other statutes. Laws enacted in the early 20th century authorized several agencies, including the FCC, to order regulated entities to pay damages to other private parties, who could enforce the awards after jury trials.⁴

Congress soon extended that model to civil penalties. In 1935, it authorized the Securities and Exchange Commission (SEC) to assess forfeitures that the Justice Department could recover in civil suits. See Public Utility Act of 1935, ch. 687, § 315, 49 Stat. 861-862. In 1938, it similarly authorized initial assessment of civil penalties by the Secretary of Agriculture and the Civil Aeronautics Authority. See Agricultural Adjustment Act of 1938, ch. 30, §§ 372(b), 376, 52 Stat. 65-66; Civil Aeronautics Act of 1938, ch. 601, §§ 901(a), 903(b)(1), 52 Stat. 1015, 1017. In 1944, it empowered agencies to assess penalties against war contractors and directed courts to treat agencies' findings as prima facie correct. See Contract Settlement Act of 1944, ch. 358, §§ 8(d), 13(c)(3), 58 Stat. 656, 661-662.

Although the specific penalty schemes discussed in the preceding paragraph have been superseded, many

⁴ See Shipping Act, 1916, ch. 451, §§ 22, 30, 39 Stat. 736-738 (Shipping Board); Packers and Stockyards Act, 1921, ch. 64, § 309(e) and (f), 42 Stat. 166 (7 U.S.C. 210(e) and (f)) (Secretary of Agriculture); Perishable Agricultural Commodities Act, 1930, ch. 436, § 7, 46 Stat. 534-535 (7 U.S.C. 499g) (same); Communications Act §§ 209, 407, 48 Stat. 1073, 1095-1096 (47 U.S.C. 209, 407) (FCC); Act of June 21, 1934, ch. 691, § 3, 48 Stat. 1189-1193 (National Railroad Adjustment Board).

current statutes follow the same model. Today, at least five agencies (apart from the FCC) administer at least eleven statutes under which the agency may assess civil penalties that are recoverable in de novo civil suits:

- The Department of Energy initially assesses penalties for violations of nuclear-safety rules, 42 U.S.C. 2282a(c)(3)(B); rules safeguarding classified data about nuclear weapons, 42 U.S.C. 2282b(e); energy-conservation standards, 42 U.S.C. 6303(d)(3)(B); and industrial fuel-use standards, 42 U.S.C. 8433(d)(3)(B).
- The Department of Health and Human Services initially assesses penalties for violations of requirements for employee-health-benefits plans. 42 U.S.C. 300e-9(d)(3).
- The Customs Service initially assesses penalties for introducing merchandise through false statements, 19 U.S.C. 1592(e)(1), and for false refund claims, 19 U.S.C. 1593a(i)(1).
- The Fish and Wildlife Service initially assesses penalties for unlawful transactions involving fish, wildlife, or plants. 16 U.S.C. 3373(e).
- The Federal Energy Regulatory Commission initially assesses penalties for certain violations of the Natural Gas Policy Act of 1978, 15 U.S.C. 3414(b)(6)(F), and the Federal Power Act, 16 U.S.C. 823b(d)(3)(B), 825o-1(b).

The availability of de novo jury trials has long been understood to dispel any constitutional objections to such laws. In 1941, a committee overseen by Attorney General Robert Jackson explained that, where the “power to impose fines” is “initially exercised” by an

agency, “review de novo” in federal court would “meet possible constitutional objections” and “resolve any doubts concerning the constitutionality of the procedure.” *Final Report of the Attorney General’s Committee on Administrative Procedure* 147, 175 (1941). And in 1965, Professor Louis Jaffe explained that the FCC’s forfeiture scheme “avoid[s] all constitutional doubts.” Jaffe 114.

b. In the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, Congress went a step further by empowering an agency to impose civil penalties subject only to deferential review by a panel of appellate judges. In *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), this Court upheld that statute under the public-rights doctrine.

Though *Atlas Roofing’s* public-rights analysis has proved controversial, see *Jarkesy*, 603 U.S. at 138 n.4, no one appears to have seriously disputed that the statute at issue there would have been constitutional had it provided a de novo jury trial. The challengers in *Atlas Roofing* acknowledged that “the Seventh Amendment would be satisfied” “if a jury trial were provided either to try the original assessment of the penalty or by *de novo* review later, at the end of the proceeding.” Oral Argument Tr. at 11, *Atlas Roofing, supra* (No. 75-746); see Pet. Br. at 15, *Atlas Roofing, supra* (No. 75-746). The Chamber of Commerce filed an amicus brief arguing that the Seventh Amendment requires only “*de novo* jury review upon completion of the administrative procedure.” Chamber of Commerce Amicus Br. at 8, *Atlas Roofing, supra* (No. 75-746). That brief observed that “a procedure like that advocated here is employed under the Federal Communications Act, 47 U.S.C. § 503-504.” *Id.* at 17 n.34. The dissenting judge in the court

of appeals, who concluded that the challenged statute violated the Constitution, accepted the validity of statutes such as “47 U.S.C. §§ 503 & 504,” under which civil penalties “could be proposed by an agency but recovered in a civil suit.” *Frank Irely, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1214 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting), aff’d, 430 U.S. 442 (1977).

Justices who have criticized *Atlas Roofing* have not questioned initial agency adjudications followed by de novo jury trials. Justice Thomas has expressed “grave doubts” about the constitutionality of statutes that empower agencies “to adjudicate core private rights *with only deferential judicial review on the back end.*” *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 196 (2023) (Thomas, J., concurring) (emphasis added); see *id.* at 202-203. Justice Gorsuch has likewise suggested that, when Congress empowers an agency “to assess civil penalties,” “‘the aggrieved person’ should at least ‘be permitted review de novo’” in an Article III court. *Jarkesy*, 603 U.S. at 156 (Gorsuch, J., concurring) (citation omitted). The scholarship criticizing *Atlas Roofing* reflects similar views.⁵

Since 1889, Congress thus has repeatedly authorized agencies to issue monetary awards that may be enforced in de novo jury trials. The validity of that practice has been accepted by Congress, the Executive

⁵ See, e.g., Roger W. Kirst, *Administrative Penalties and the Civil Jury*, 126 U. Pa. L. Rev. 1281, 1310, 1340 (1978) (criticizing *Atlas Roofing*’s “assault on the seventh amendment” but noting that “enforcement by *de novo* civil action” would “comply with the seventh amendment”); Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 578, 604 (2007) (arguing that agencies may not “conclusively” act on private rights and criticizing *Atlas Roofing*’s holding that “Congress need not permit de novo reexamination of the agency’s conclusions”).

Branch, this Court in *Meeker*, scholars, and even the challengers in *Atlas Roofing*. That historical practice confirms the Act's constitutionality.

C. The Carriers And The Fifth Circuit Have Identified No Sound Reason To Hold That Non-Binding Forfeiture Orders Violate The Seventh Amendment

Most of the carriers' arguments rest on the premise that FCC forfeiture orders impose binding obligations to pay forfeitures. As discussed above, that premise is wrong. See pp. 10-19, *supra*. The carriers further argue that, even if forfeiture orders do not require payment, the Act still violates the Constitution. That alternative theory is also incorrect.

1. *The Seventh Amendment does not require a jury trial before an agency finds wrongdoing*

The carriers contend that, because FCC forfeiture orders contain "formal" "findings of wrongdoing," they violate the Seventh Amendment even if they inflict no "pocketbook injury." Br. 35 (citation omitted). The Amendment, however, guarantees a jury only in suits at common law for more than \$20, not in all proceedings that culminate in findings of wrongdoing. For instance, a court sitting without a jury may find wrongdoing before issuing a civil penalty of \$20 or less. A court may also find wrongdoing before granting equitable relief, such as an injunction prohibiting further violations of the law. An agency may find wrongdoing in adjudicating public rights. A justice of the peace may find wrongdoing in the first instance, subject to appeal to a jury. See pp. 25-26, *supra*. And most relevant here, an agency may find wrongdoing before issuing a non-binding order that can serve as the predicate for a subsequent enforcement suit in which a jury is available. See pp. 31-36, *supra*.

The carriers contend (Br. 35) that the Seventh Amendment requires a jury trial “even where no money is at stake”—a theory that is in some tension with the textual limitation of the right to cases “where the value in controversy shall exceed twenty dollars.” U.S. Const. Amend. VII. The carriers’ examples do not support that theory. The Amendment protects both plaintiffs and defendants (Carriers Br. 35), but only when the defendant stands to lose and the plaintiff stands to gain more than \$20 in legal relief. The Amendment applies to defamation cases (*ibid.*), but only when such cases can result in damages awards of more than \$20. And the Amendment applies to eviction disputes (*ibid.*), but only when the property interest at issue is worth more than \$20. Because the Commission cannot compel any payment of money damages or restore any person to the possession of real property, the Amendment does not require a jury in the agency adjudication.

This Court’s due-process precedents confirm that the reputational harm caused by findings of wrongdoing does not trigger the right to trial by jury. Under those cases, the infliction of “a ‘stigma’ to one’s reputation” is not a deprivation of life, liberty, or property and so does not require due process. *Paul*, 424 U.S. at 699. If the official infliction of reputational harm does not require any process at all, it does not require a jury trial.

2. *The Act does not improperly burden jury-trial rights*

The carriers argue (Br. 42-50) that the Act imposes an unconstitutional burden on the exercise of the right to trial by jury. They observe (Br. 24-25) that, if a person declines to pay a forfeiture assessed by the FCC, the Justice Department might never file a recovery suit and the person might never receive a jury trial. They add (Br. 44-50) that a party can suffer harmful collateral

consequences while awaiting such a suit. In their view (Br. 44-45), those consequences invariably lead parties to give up their jury-trial rights, pay the forfeitures, and seek review in the courts of appeals. That argument is wrong on multiple levels.

a. The carriers' reasoning is legally unsound. The Seventh Amendment applies only in suits at common law for more than \$20. If the government does not seek recovery under Section 504(a), no such suit ever occurs and the right to jury trial never attaches in the first place. The government does not violate the Seventh Amendment by declining to file the type of suit to which the Amendment would apply.

The same conclusion follows even if the Commission's initial adjudication is viewed as the first stage of a (potential) common-law suit that culminates in a Section 504(a) enforcement action. The Seventh Amendment allows a plaintiff to abandon an ongoing civil suit, even though doing so prevents the jury from rendering a verdict. From the founding until the adoption of the Federal Rules of Civil Procedure, a plaintiff could take a "nonsuit"—*i.e.*, unilaterally dismiss his case without prejudice—at any time before the verdict. See *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 397 (1990); 3 Blackstone 376-377. Today, a plaintiff may unilaterally dismiss a suit before the defendant serves an answer or motion for summary judgment. See Fed. R. Civ. P. 41(a)(1)(A)(i). If the Commission's initial adjudication were viewed as the first stage of a suit, the Seventh Amendment likewise would allow the government to abandon the case by declining to proceed to the next stage (the commencement and prosecution of a Section 504(a) recovery action).

b. Contrary to the carriers' contention (Br. 43-44), the Act does not impose an unconstitutional condition by offering parties a choice between (1) declining to pay forfeitures and awaiting recovery suits, and (2) paying forfeitures and filing petitions for review in courts of appeals.

A condition on the jury-trial right is unconstitutional if it serves an illegitimate "purpos[e]"—*i.e.*, if its "only objective" is "to discourage" the exercise of the right. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n.20 (1973); see *Hof*, 174 U.S. at 28 ("intention of annihilating or impairing the trial by jury"). As AT&T once recognized, the Act serves no such improper purpose. By allowing a party to forgo a jury trial, pay the forfeiture, and proceed to the court of appeals, the statutory scheme avoids "pointless delay" when "the FCC's factual findings are not in dispute." AT&T Br. at *18. That "sensible" scheme avoids "the burdens of district court litigation" and "conserves judicial resources" in cases involving undisputed facts. AT&T Reply Br. at *16.

Instead of focusing on the Act's purpose, the carriers object (Br. 44-50) to its effects on regulated parties. But a "government-imposed choice" is not unconstitutional simply because it "has the effect of discouraging" parties from exercising jury-trial rights. *Chaffin*, 412 U.S. at 30. Plea bargaining, for instance, remains lawful even though the choice between pleading guilty and risking higher sentences can prompt criminal defendants to forgo their trial rights. See *id.* at 30-31.

The carriers in any event overstate the Act's effects. In "many instances" regulated parties have declined to pay forfeitures assessed by the Commission, prompting the government to file recovery suits. *In re Connect*

America Fund, 33 FCC Rcd 2540, 2546 n.55 (2018).⁶ The carriers contend (Br. 10) that no *carrier* has ever pursued that course, but carriers form a small subset of the parties regulated by the Commission. Carriers such as AT&T and Verizon may well believe that they would fare better before panels of appellate judges than before juries of ordinary citizens.

The carriers similarly overstate the consequences of declining to pay forfeitures. They express concern (Br. 46-49) that the FCC might use unpaid orders against them in other proceedings, but the Act prohibits it from doing so. Section 504(c) of the Act provides:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

47 U.S.C. 504(c). Section 504(c) “prevent[s] the mere existence of an order of forfeiture (that had not yet been confirmed after trial in a Federal district court) from being used against” a party. Senate Report 11. The

⁶ See, e.g., *United States v. Hodson Broadcasting*, 666 Fed. Appx. 624, 626 (9th Cir. 2016); *United States v. Sutton*, No. 23-cv-2100, 2024 WL 2926594, at *2 (W.D. Ark. Mar. 27, 2024); *United States v. Rhodes*, No. 21-cv-110, 2024 WL 1269182, at *8 (D. Mont. Feb. 20, 2024); *United States v. Pennington*, No. 21-cv-198, 2023 WL 2542594, at *2-*3 (E.D. Ky. Mar. 16, 2023); *United States v. Polynice*, No. 21-cv-24243, 2022 WL 860381, at *1 (S.D. Fla. Mar. 23, 2022); *United States v. Net One International, Inc.*, No. 18-cv-1346, 2021 WL 7502539, at *1 (M.D. Fla. Feb. 25, 2021).

carriers contend (Br. 48) that Section 504(c) refers solely to the notice of apparent liability, not the forfeiture order, but the phrase “notice of apparent liability looking toward the imposition of a forfeiture” encompasses both. The provision as a whole also makes clear that the Commission may penalize a party only after “the forfeiture has been paid” or “a court” orders payment—not after the Commission issues its decision.

The FCC, in all events, is “free to grant additional procedural rights” beyond those required by Congress. *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 524 (1978). The FCC has made clear that, unless and until a court has ordered payment of a forfeiture, the Commission “will not” use a “failure to pay” against a party, *In re The Commission’s Forfeiture Policy Statement*, 12 FCC Rcd 17,087, 17,103 (1997), and will “not penalize” a party for contesting a forfeiture “rather than paying,” *In re The Commission’s Forfeiture Policy Statement*, 15 FCC Rcd 303, 304 (1999). The carriers speculate (Br. 48) that the agency might someday abandon that policy, but “[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.” *United States v. Raines*, 362 U.S. 17, 22 (1960). In any event, this Court can pretermit any such risk by adopting the government’s construction of Section 504(c).

The carriers correctly observe (Br. 47) that, although the FCC does not use the forfeiture order or the refusal to pay in a manner that would prejudice the recipient, it does consider the facts underlying the order when they are relevant to other adjudications. For example, the Commission might consider certain facts when issuing a forfeiture order and then consider the same facts

again when reviewing a license application. See Senate Report 11; *Forfeiture Policy*, 12 FCC Rcd at 17,103. Even then, the FCC does not accord preclusive effect to the findings in the unpaid forfeiture order. Instead, as the carriers acknowledge (Br. 47), the adjudicator assesses the facts afresh, after allowing the party to “present evidence.” That practice raises no constitutional concerns. An agency adjudication does not violate the Seventh Amendment simply because the facts found by the agency might someday be relevant to another agency adjudication.

c. The carriers suggest (Br. 19) that the Constitution entitles them to a “guaranteed path within the [private party’s] control” to obtaining a jury trial. But as explained above, the Seventh Amendment provides a right to trial by jury only in *actual* “Suit[s] at common law.” U.S. Const. Amend. VII. No Seventh Amendment right is triggered simply because the government takes preliminary steps that might, but ultimately do not, culminate in the filing of a common-law suit.

In many circumstances, moreover, a potential defendant need not wait for a potential plaintiff to sue it, but may file its own suit under the Declaratory Judgment Act, 28 U.S.C. 2201, seeking a declaration that it is not liable. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-137 (2007). If the Seventh Amendment would apply in the conventional suit, a jury will be available in the mirror-image declaratory-judgment action as well. See 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2769, at 650-653 (4th ed. 2016).

The D.C. Circuit has suggested that the recipient of an FCC forfeiture order could bring such a declaratory-judgment suit if it faces “adverse consequences from government delay in initiating the collection proceed-

ing.” *Pleasant Broadcasting*, 564 F.2d at 502. That suggested procedure raises questions under the Hobbs Act, 28 U.S.C. 2342, which generally precludes courts from issuing declaratory judgments concerning the validity of agency actions that are reviewable under that statute. See *McLaughlin Chiropractic Associates v. McKesson Corp.*, 606 U.S. 146, 160-162 (2025). Because the Communications Act’s validity does not depend on whether the carriers have “a guaranteed path” to a jury trial, Carriers Br. 19, this Court need not resolve those issues here. But if the Court concludes that the Seventh Amendment does require such a guaranteed path, the appropriate solution would be to hold (as a matter of either constitutional avoidance or severability) that the Declaratory Judgment Act provides that path.

3. *Other objections to the Act lack merit*

The carriers argue (Br. 33) that the Act resembles the statute held unconstitutional in *Jarkesy*. That is incorrect. Under the Act, a party is entitled to a de novo jury trial before it can be required to pay a forfeiture. See 47 U.S.C. 504(a). In *Jarkesy*, by contrast, the SEC could impose civil penalties based on agency factual findings that were subject to deferential review by a court of appeals sitting without a jury. See 603 U.S. at 117. The laws at issue in *Jarkesy* contained no analogue to Section 504(a)’s provision for a “trial de novo” if the recipient of a penalty assessment declines to pay.⁷

⁷ The carriers cite (Br. 33) statutes that allow the government to file collection suits against persons who fail to pay penalties for securities violations, but those statutes concern penalties imposed by judicial decree, which create a legal obligation to pay. See 15 U.S.C. 78u(d)(3)(A)-(C), 78u-1(a) and (d). In any event, none of those statutes provides for a trial de novo.

Jarkesy therefore does not imply that the Communications Act forfeiture mechanism is similarly infirm.

The carriers observe (Br. 10) that “no Section 504(a) jury trial has occurred” since the 1978 amendments to the Act and that recovery suits “are normally resolved through summary judgment or default judgment.” But that pattern is hardly unusual. In the 12-month period ending on September 30, 2025, district courts resolved 407,379 civil cases, of which only 1182 (0.3%) culminated in jury trials. See Admin. Office of the U.S. Courts, *Caseload Statistics Data Tables*, Tbl. C-4, at 1 (Sept. 30, 2025). More importantly, that pattern has no bearing on the Seventh Amendment issue. The Amendment preserves the right to jury trial but does not guarantee some minimum frequency of jury trials.

The Fifth Circuit’s initial opinion in *AT&T* concluded that the defendant in a Section 504(a) suit may contest only the FCC’s factual findings, not its legal conclusions. See *AT&T* Pet. App. 43a-44a (citing *United States v. Stevens*, 691 F.3d 620, 622 (5th Cir. 2012), cert. denied, 568 U.S. 1090 (2013)). That holding—which the court abandoned in its amended opinion, see *id.* at 21a n.16, and which the carriers do not invoke—is incorrect. First, in a decision issued after the Fifth Circuit’s initial opinion, this Court held that the Hobbs Act “does not preclude district courts” “from independently assessing whether an agency’s interpretation of the relevant statute is correct.” *McLaughlin*, 606 U.S. at 152. Second, under the principle that the specific governs the general, Section 504(a)’s specific requirement of a “trial de novo” in recovery suits takes precedence over the Hobbs Act provisions that generally govern review of FCC orders. 47 U.S.C. 504(a). The ordinary meaning

of “trial de novo” requires a fresh determination of both the facts and the law. See *Verizon* Pet. App. 38a.

D. Adoption Of The Carriers’ Theory Would Substantially Disrupt The FCC’s Enforcement Of The Act

Forfeitures are among the FCC’s most important and frequently used enforcement tools. The Commission relies on forfeitures to ensure compliance with (for example) privacy rules, robocalling rules, and rules against pirate radio broadcasting. See FCC, *Fiscal Year 2024 Annual Performance Report* 19, 22-27. A ruling for the carriers could deprive the Commission of that vital tool (at least in applications of the Act that fall outside the public-rights doctrine). In contrast to the statute in *Jarkesy*, which allowed the SEC to seek civil penalties in either administrative proceedings or civil suits, see 603 U.S. at 116, the Act does not authorize the FCC to bypass administrative proceedings and seek forfeitures directly in court.

The FCC’s other enforcement tools—such as license revocation and suspension, see, *e.g.*, 47 U.S.C. 312—are significantly less flexible (and less frequently used) than forfeitures. Revocation “amounts to a death sentence” and can “have a serious effect upon the community served by the licensee.” H.R. Rep. No. 1800, 86th Cong., 2d Sess. 16 (1960). Congress enacted the Act’s forfeiture provisions to provide the Commission “with an effective tool in dealing with violations” where “revocation or suspension [of licenses] does not appear to be appropriate.” *Id.* at 17. Depriving the Commission of its authority to seek forfeitures would encourage increased reliance on license revocation or suspension—all-or-nothing remedies that would fall within the public-rights doctrine (see *Oil States*, 584 U.S. at 337) and would not implicate the Seventh Amendment (because

they do not involve legal relief), but would affect regulated parties far more substantially than forfeitures.

Eliminating the FCC's main enforcement tool would also risk opening a significant gap in federal oversight. Based on the understanding that the FCC is best positioned to regulate common carriers, Congress has removed many common-carrier activities from the regulatory oversight of other agencies. See, *e.g.*, 15 U.S.C. 45(a)(1) and (2) (exempting common carriers from the Federal Trade Commission's authority over unfair or deceptive acts or practices). If the FCC cannot pursue forfeitures against carriers, and no other agency can perform that role, significant rules concerning matters ranging from privacy to national security might go effectively unenforced.

CONCLUSION

This Court should reverse the Fifth Circuit's judgment in *AT&T* and affirm the Second Circuit's judgment in *Verizon*.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 47 U.S.C. 503 provides:

Forfeitures

(a) Rebates and offsets

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

(1a)

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

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

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

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

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

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

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II, part II or III of subchapter III, or section 507 of this title.

(2)(A) If the violator is (i) a broadcast station licensee or permittee, (ii) a cable television operator, or (iii) an applicant for any broadcast or cable television oper-

ator license, permit, certificate, or other instrument or authorization issued by the Commission, the amount of any forfeiture penalty determined under this section shall not exceed \$25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$250,000 for any single act or failure to act described in paragraph (1) of this subsection.

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

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

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

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

(ii) determined by the Commission under paragraph (1) to have broadcast obscene, indecent, or profane language,¹ the amount of any forfeiture penalty determined under this subsection shall not exceed

¹ So in original. Following provision probably should be set flush with subpar. (C).

\$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.

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

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

(F) Subject to paragraph (5) of this section, if the violator is a manufacturer or service provider subject to the requirements of section 255, 617, or 619 of this title, and is determined by the Commission to have violated any such requirement, the manufacturer or provider shall be liable to the United States for a forfeiture penalty of not more than \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a

hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

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

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

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

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

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

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

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in the case of violations of section 303(q) of this title, if the person in-

volved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

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

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

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

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

whichever is earlier; or

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

For purposes of this paragraph, “date of commencement of the current term of such license” means the date of commencement of the last term of license for which the licensee has been granted a license by the Commission. A separate license term shall not be deemed to have commenced as a result of continuing a license in effect

under section 307(c) of this title pending decision on an application for renewal of the license.

2. 47 U.S.C. 504 provides:

Forfeitures

(a) Recovery

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

(b) Remission and mitigation

The forfeitures imposed by subchapter II, parts II and III of subchapter III, and sections 503(b) and 507 of

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

(c) Use of notice of apparent liability

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.