

Nos. 25-406 & 25-567

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.
AT&T, INC.,
Respondent.

VERIZON COMMUNICATIONS, INC.,
Petitioner,

v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

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

**BRIEF OF CITIZENS UTILITY BOARD OF
ILLINOIS AS AMICUS CURIAE IN SUPPORT OF
THE FEDERAL COMMUNICATIONS COMMISSION**

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INTEREST OF AMICUS CURIAE

The State of Illinois established the Citizens Utility Board (CUB) as a nonprofit public body empowered to “[r]epresent and protect the interests of the residential utility consumers of [the] State,” including by “participat[ing] on behalf of utility consumers in any proceeding which affects [their] interest.” 220 Ill. Comp. Stat. § 10/5(1)(a) & (2)(d); *see also id.* § 10/2.¹ CUB submits this brief because it is an intervenor in a pending suit in which a regulated entity has advanced a similar Seventh Amendment challenge to the enforcement authority of another agency, the Federal Energy Regulatory Commission (FERC). That challenge is equally meritless. *See American Efficient LLC v. FERC*, No. 1:25-cv-68, 2025 WL 3268367, at *12 (M.D.N.C. Nov. 24, 2025) (finding no likelihood of success).

The *American Efficient* case arises out of FERC’s notice to a participant in a FERC-regulated market seeking more information about the participant’s possible violations of the Federal Power Act, FERC rules, and FERC-approved tariffs. 2025 WL 3268367, at *1. Specifically, FERC staff has alleged that the respondent, American Efficient LLC, extracted payments from wholesale-electricity capacity markets in exchange for purported energy-efficiency projects that did not actually cause reductions in energy use.

¹ No counsel for a party authored this brief in whole or in part, and no such counsel, party, or any other person or entity—other than amicus curiae and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

See D. Ct. Doc. 19-1, at 13-14, 16 in *American Efficient*, *supra* (M.D.N.C. Mar. 3, 2025). Because American Efficient’s projects did not reduce energy demand “by a single [megawatt],” its scheme amounted to a “‘wealth transfer’ from [utility] ratepayers to the Company”—to the tune of hundreds of millions of dollars. *Id.* at 67 n.215, 116. FERC’s notice anticipates that the agency will seek civil penalties along with disgorgement. See 16 U.S.C. § 825o-1(b).

As detailed further below, in response to FERC’s notice, American Efficient had the option to require FERC to issue a written order assessing penalties, should the Commission determine they are warranted. See 16 U.S.C. § 823b(d)(1) & (d)(3)(A). FERC would then be obligated to go to an Article III district court to obtain those penalties. See *id.* § 823b(d)(3)(B). Instead, American Efficient filed its own suit to prevent FERC from moving forward in any way on its charges, claiming a Seventh Amendment violation. The district court denied a preliminary injunction, relying on this Court’s decisions in *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915), and *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899). See *American Efficient*, 2025 WL 3268367, at *12.

The Federal Power Act’s enforcement scheme is similar in many respects to the Communications Act procedures challenged here. As a result, this Court’s decision will likely have significant bearing on the constitutionality of FERC’s own authority.² CUB

² CUB has also argued that FERC’s charges against American Efficient do not implicate the Seventh Amendment at all because they adjudicate matters falling within the public-

accordingly submits this brief to highlight other agencies whose crucial enforcement authorities may be called into question by a decision in the carriers' favor—and to explain why that result would not further the aim of procedural fairness to respondents in agency proceedings.³

INTRODUCTION AND SUMMARY OF ARGUMENT

The carriers' Seventh Amendment challenge to Sections 503 and 504 of the Communications Act of 1934 is meritless. Under those provisions, the Federal Communications Commission (FCC) initially assesses a civil penalty in a non-binding order and then, if the respondent elects not to pay, files a recovery action in district court. That district-court suit “shall be a trial de novo,” 47 U.S.C. § 504(a), where the respondent may request a jury if it wishes. If the Seventh Amendment applies here at all, *see* U.S. Br. 20, it requires nothing more.

In addition to being perfectly constitutional, this two-stage framework is common. At least eleven

rights doctrine. *See* D. Ct. Doc. No. 22-6, at 2, 10-17, in *American Efficient*, *supra* (M.D.N.C. Mar. 4, 2025); *see also SEC v. Jarkesy*, 603 U.S. 109, 128 (2024) (this Court has recognized “a class of cases” concerning “‘public rights,’” which “historically could have been determined exclusively by the executive and legislative branches” (brackets and citation omitted)); *Crowell v. Benson*, 285 U.S. 22, 58 (1932) (adjudications involving “the rates and practices of interstate carriers” fall within the public-rights doctrine). The United States has not asked the Court to consider the public-rights doctrine in this case. *See AT&T* Pet. 7.

³ This brief uses “respondent” to refer to entities responding to an agency’s charges in an enforcement action, not to the respondent in No. 25-406 or respondents in No. 25-567.

other statutes—covering agencies such as FERC, Customs and Border Protection, the Department of Energy, and the Fish and Wildlife Service—require the agency to first conduct administrative assessment proceedings before the government sues the violator in a trial court. Those schemes enforce important federal priorities like the integrity of interstate energy markets, nuclear-weapon safety, honest reporting of imported merchandise, and wildlife trafficking. They are the product of longstanding and widespread consensus, reflected in this Court’s precedent and elsewhere, that the Seventh Amendment is satisfied so long as a defendant may obtain a jury verdict before he is legally compelled to pay a money judgment. A sudden rejection of that consensus in this case would thus have ripple effects across the U.S. Code, potentially invalidating multiple agencies’ ability to seek *any* civil penalties under those statutes. The Court should decline the carriers’ invitation to bring about that profoundly destabilizing result.

The carriers’ various policy objections to this kind of two-stage enforcement scheme are not convincing. The possibility that agency assessment orders may cause reputational harm is not constitutionally significant: Comparable risks could arise from agency notices of proposed charges and final orders of nonlegal remedies, yet the Seventh Amendment does not require a jury verdict before such things occur. The carriers also fail to support their contention that agencies will unduly delay filing recovery suits essential to fulfilling their statutory mandates.

On the other side of the ledger, pre-suit penalty-assessment procedures *benefit* respondents by forcing

agencies to proceed carefully in their enforcement actions; to show their work; and to meaningfully consider the respondent's evidence and arguments before going to court. In this respect, such procedures are akin to a target sitting down with the agency to persuade it not to file a complaint—except that the safeguards here are formal and statutorily mandated. Congress thus has had good reason to repeatedly rely on two-stage enforcement schemes, which maintain a role for agency expertise and policy judgment while preserving fairness to regulated entities.

ARGUMENT

I. Congress Has Replicated The Challenged Agency-Enforcement Scheme Across The U.S. Code

a. The United States has explained why the agency-enforcement scheme at issue—where a non-Article III decisionmaker determines whether penalties are warranted in the first instance, with a jury trial available afterward—fully accords with the text, purpose, and original understanding of the “right of trial by jury” that the Seventh Amendment preserves. U.S. Const. amend. VII; *see* U.S. Br. 19-24, 29-31. The United States has also correctly described how this Court's decisions, including *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915), *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), *Ex Parte Peterson*, 253 U.S. 300 (1920), and *Lessee of Edward Livingston v. Moore*, 32 U.S. (3 Pet.) 469 (1833), control the analysis here and plainly establish that the FCC's two-stage enforcement structure is constitutional. *See* U.S. Br. 25-28.

As this Court has explained, the only “limitation” the Seventh Amendment imposes on Congress is “that enjoyment of the right of trial by jury be not obstructed” and “the *ultimate* determination of issues of fact by the jury be not interfered with.” *Ex parte Peterson*, 253 U.S. at 310 (emphasis added). Empowering an agency to assess penalties in the first instance, with a jury trial available afterward, “cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.” *Meeker*, 236 U.S. at 430. This framework thus “does not abridge the right of trial by jury, or take away any of its incidents.” *Id.*

CUB agrees with the United States’ legal arguments and will not rehash them here. Instead, CUB underscores Congress’s extensive reliance on this Court’s precedent and established consensus in creating multiple agency enforcement schemes that are materially similar to the FCC’s under Sections 503 and 504 of the Communications Act. As a result of that congressional practice, a decision from this Court declaring the FCC scheme unconstitutional would call into question numerous other agency-enforcement provisions, creating profound disruption and destabilization threatening a wide array of federal priorities.

b. In addition to the Communications Act, at least eleven other federal statutes currently authorize agencies to obtain civil penalties for violations of federal law by (1) issuing an assessment order, and then (2) seeking the penalties in a *de novo* district-court action. This brief refers to that basic framework

as a “two-stage” structure.⁴ Under some of those statutes, the respondent has an initial choice between formal adjudication before the agency (with judicial review available afterward) and the two-stage structure. Under all of them, the respondent retains the option of demanding a jury trial in district court before paying any penalties. All of these enforcement schemes therefore comply with the Seventh Amendment and Article III.

FERC, Federal Power Act Part I, hydropower authority. Part I of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*—which concerns hydropower operations—authorizes FERC to seek civil penalties to address violations of FERC orders or any term or condition of a license or permit. 16 U.S.C. § 823b(c). FERC must first provide notice of the proposed penalty, at which point the respondent may choose between two alternative pathways. *See id.* § 823b(d)(1).

Under the first pathway, the respondent may contest the charges in a formal adjudication before the agency, with judicial review available afterward in a court of appeals under the standards of the Administrative Procedure Act. *See* 16 U.S.C. § 823b(d)(2)(B). Under the second pathway, the respondent may contest the charges in writing, and FERC thereafter may issue a penalty-assessment order. *See id.* § 823b(d)(1) & (d)(3)(A); 18 C.F.R. § 385.1507. If the respondent does not pay the

⁴ As the United States explains (Br. 31-32), Congress first began authorizing agencies to issue monetary awards under this two-stage framework in 1889. This brief focuses on statutes currently in effect.

assessed amount within 60 days, FERC “shall institute an action” in federal district court, where the court “shall have authority *to review de novo the law and the facts involved*, and shall have jurisdiction to enter a judgment *enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art, such assessment.*” 16 U.S.C. § 823b(d)(3)(B) (footnote omitted; emphasis added).⁵ Under either pathway, FERC retains the power to lower or fully compromise the penalty amount at any time before the respective court issues a final judgment. *Id.* § 823b(d)(4).

FERC, Federal Power Act Part II, electricity authority. Part II of the Federal Power Act authorizes FERC to regulate the transmission and wholesale sale of electricity in interstate commerce. *See* 16 U.S.C. § 824b. The Act also authorizes FERC to seek civil penalties for statutory violations or violations of FERC rules or orders, including FERC-approved tariffs. *Id.* § 825o-1.⁶ Part II of the Act cross-references the enforcement procedures in Part I. *Id.* § 825o-1(b) (citing *id.* § 823b(d)). Thus, respondents in Part II proceedings likewise have a choice between formal adjudication before the agency

⁵ Reinforcing that the de novo district-court action is designed to enable *review* of the assessed penalty—not just its collection—the Federal Power Act separately provides for a district-court collection action if the respondent fails to pay following final judgment in the de novo suit. *See* 16 U.S.C. § 823b(d)(5).

⁶ This is the enforcement authority at issue in *American Efficient*; FERC staff has alleged that American Efficient violated tariffs governing regional capacity markets, as well as FERC’s market-manipulation rule, to unlawfully extract millions of dollars from electricity ratepayers. *See supra* at 1-2.

or the two-stage pathway, and in the latter, “de novo” district-court review is available before penalties must be paid. *Id.* § 823b(d)(3)(B).

FERC, Natural Gas Policy Act. The Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.*, authorizes FERC to seek civil penalties for violations of the Act’s provisions or implementing rules, including rules and orders governing participation in natural-gas markets. 15 U.S.C. § 3414(a) & (b)(6). The Act authorizes the two-stage pathway only: after providing notice to the respondent, either FERC or the President (for certain kinds of violations) may issue a penalty-assessment order, and if the respondent does not pay, FERC must institute a “de novo” district-court action. *Id.* § 3414(b)(6)(A) & (b)(6)(F).

Department of Energy, Atomic Energy Act, nuclear-safety violations. The Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, authorizes the Department of Energy (DOE) to seek civil penalties against government contractors who violate nuclear-safety rules and whistleblower protections. 42 U.S.C. § 2282a(a). The Act’s enforcement procedures largely replicate the Federal Power Act’s alternative-pathway scheme described above: the respondent has a choice between formal agency adjudication (with subsequent judicial review), or it can elect to have DOE issue an assessment order and recover unpaid assessed penalties in a “de novo” district-court action. *Id.* § 2282a(c)(1)-(3).

DOE, Atomic Energy Act, security violations. DOE also has authority to seek civil penalties for contractors’ violations of rules protecting restricted,

sensitive, or classified information about nuclear weapons. 42 U.S.C. § 2282b(a). This authority uses the same alternative-pathway procedures as 42 U.S.C. § 2282a. *See supra* at 9.

DOE, Energy Policy and Conservation Act. The Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201 *et seq.*, authorizes DOE to seek civil penalties against manufacturers who sell a covered product in violation of the agency’s energy-efficiency standards or labeling requirements. 42 U.S.C. §§ 6302(a), 6303. Once again, the DOE enforcement procedures mirror the Federal Power Act’s alternative-pathway scheme: the respondent can choose agency adjudication or the two-stage pathway, with the latter obligating DOE to institute a “de novo” district-court action if the respondent does not pay the assessment. *Id.* § 6303(d)(1)-(3).

DOE, Powerplant and Industrial Fuel Use Act. The Powerplant and Industrial Fuel Use Act of 1978, as amended, 42 U.S.C. §§ 8301 *et seq.*, authorizes DOE to seek civil penalties to enforce the Act’s provisions concerning the alternate-fuel capability of electric power plants.⁷ *See* 42 U.S.C. §§ 8411, 8433. Here again, the enforcement structure mirrors the Federal Power Act’s alternative-pathway scheme. *See id.* § 8433(d)(1)-(3).

Fish and Wildlife Service, Lacey Act. The Lacey Act of 1900, as amended, authorizes the Fish

⁷ Although certain provisions of the Fuel Use Act have been repealed, *see* Pub. L. No. 100-42, 101 Stat. 310 (1987), other provisions remain in effect, along with the enforcement structure. *See, e.g.*, 42 U.S.C. § 8311; *see also* 24 Fed. Proc., L. Ed. § 56:1070 (Feb. 2026 update).

and Wildlife Service (FWS) within the Department of the Interior to seek civil penalties to enforce prohibitions on trafficking of wildlife, fish, and plants. 16 U.S.C. § 3373. Under the current provisions, FWS must provide the respondent with notice and a hearing before assessing penalties. *Id.* § 3373(a)(4) & (b). Post-assessment, FWS may still decrease the penalty amount. *Id.* § 3373(a)(5). The respondent may seek judicial review of the assessed penalty by filing its own action. *Id.* § 3373(c). Even after that, the respondent may still decline to pay, in which case the Attorney General must “institute a civil action” in “district court,” where “such court shall have authority to review the violation and the assessment of the civil penalty de novo.” *Id.*

Customs and Border Protection, Tariff Act of 1930, false-statement violations. Under Section 1592 of the Tariff Act of 1930, as amended, Customs and Border Protection (CBP) is authorized to seek civil penalties for making false statements in importing goods. 19 U.S.C. § 1592(a)(1).⁸ CBP must provide the respondent with notice of the proposed penalty and a hearing; afterward, CBP must issue a “written penalty claim” and provide the respondent with an opportunity to seek remission or mitigation of the penalty. *Id.* § 1592(b)(1)-(2). The government must seek the “recovery” of the penalty in the Court of International Trade, in which “all issues, including the amount of the penalty, shall be tried de novo.” *Id.* § 1592(e)(1).

⁸ Under 6 U.S.C. § 203(1), statutory functions previously assigned to the Customs Service have been transferred to CBP.

CBP, Tariff Act, false drawback claims. The Tariff Act also authorizes CBP to seek civil penalties enforcing the Act’s prohibition on making false drawback claims (*i.e.*, false claims of entitlement to a refund on duties for imported goods). 19 U.S.C. § 1593a(b). The procedures replicate those under 19 U.S.C. § 1592, including the requirement for the agency to bring a “de novo” recovery action before the Court of International Trade. *Id.* § 1593a(i).

Department of Health and Human Services, Public Health Service Act. The Department of Health and Human Services (HHS) is authorized to seek civil penalties for violations of requirements applicable to employers’ offerings of health maintenance organization plans. *See* 42 U.S.C. § 300e-9(d). Following notice and a hearing, HHS may assess penalties against knowing violators. *Id.* § 300e-9(d)(1)-(2). The Attorney General obtains the assessed penalties by filing a district-court action, where “the court shall, at the request of any party to such action, hold a trial de novo on the assessment of such civil penalty.” *Id.* § 300e-9(d)(3).⁹

⁹ In addition to the list above, other statutes include essentially the same two-stage scheme except that the respondent is the one that files the post-assessment district-court action. That is true of the Department of Agriculture’s authority to seek civil penalties against retailers that commit fraud in accepting Supplemental Nutrition Assistance Program benefits. *See* 7 U.S.C. § 2023(a)(13) & (a)(15). It is also true of the Controlled Substances Act’s civil-penalty scheme for possession offenses. *See* 21 U.S.C. § 844a(g). As discussed further in the United States’ brief and below, the carriers fail to establish that this distinction should make a constitutional difference. *See* U.S. Br. 37-40, 42-43; *see also infra* at 25-26.

c. Unsurprisingly, Congress has settled on this two-stage framework to promote fairness to respondents in enforcement proceedings. When Congress originally designed the Lacey Act’s civil-penalty scheme, for instance, House legislative counsel explained to lawmakers that “[c]ivil penalties are traditionally assessed by the agency” with a recovery suit to follow, and described this two-stage procedure as “established” across other agencies. *Endangered Species: Hearings on S. 335, S. 671, & S. 1280 before the Subcomm. on Energy, Natural Res., & the Env’t of the S. Comm. on Commerce*, 91st Cong. 63-64 (1969) (statement of David Finnegan). The Senate added the specification that district-court review would be “de novo” in order to “provide protection for private persons who fear arbitrary action by the Secretary [of Interior] in a penalty proceeding.” S. Rep. No. 91-526, at 7 (1969); *see also* 115 Cong. Rec. H11181 (daily ed. Nov. 20, 1969) (statement of Rep. Dingell) (de novo review provision intended to “serve as a check on arbitrary action by the Secretary”).

Available legislative history likewise confirms the plain import of the provisions’ language: that respondents may lawfully decline to pay assessed penalties as a means to obtain trial-court review of the agency’s determination.

- The Senate Report for Communications Act Section 504 explained that the “de novo” district-court suit “would not be merely a collection proceeding,” but rather would give the respondent “*an opportunity to contest . . . the merits*” of the FCC’s assessment decision. S. Rep. No. 86-1857, at 10 (1960) (emphasis added).

- In drafting what became Section 504, the chairman of the Senate communications subcommittee explained that “[the FCC] could levy the fine, but the licensee could refuse to pay it, and that is what we have been talking about here: *setting up some sort of procedure whereby he could have his day in court.*” *Proposed Amendments to FCC Act of 1934: Hearing on S. 1898 before the Commc’ns Subcomm. of the S. Comm. on Interstate & Foreign Commerce, 86th Cong., 2d Sess. 90-91 (1960) (statement of Sen. Pastore) (emphasis added); see also U.S. Br. 13.*
- The Senate Report accompanying the Tariff Act’s enforcement provision explained that the statute “provides procedural rules for [agency] consideration of penalty cases” while also “providing for *a trial in the Federal district courts on all issues* if the matter is not resolved administratively.” S. Rep. No. 95-778, at 3 (1978) (emphasis added).
- The House Report accompanying the relevant amendment to the Public Health Service Act explained that “[i]n any civil action brought to *review* [HHS’s] assessment of a civil penalty,” “the district court is, at the request of any party to the action, to hold a trial de novo on the assessment.” H.R. Rep. No. 94-518, at 29 (1975) (emphasis added).
- The Conference Report for the National Gas Policy Act explains that respondents in such proceedings “*may obtain review* of [FERC’s] assessment” of penalties “through a trial *de*

novoo in Federal district court.” H.R. Rep. No. 95-1752, at 121 (1978) (Conf. Rep.) (emphasis added).

Nor was this understanding limited to members of Congress. For instance, in attempting (unsuccessfully) to convince lawmakers to change the Lacey Act’s provision for *de novo* review of FWS civil-penalty assessments, the Department of Justice complained that under the existing procedures, “a person can simply ignore the findings of [FWS], demand a new trial in District Court and relitigate the issue.” *Fish & Wildlife Coordination Act: Hearings on H.R. 5604 Before the H. Subcomm. on Fisheries & Wildlife Conservation & the Env’t*, 96th Cong. 159 (Oct. 17, 1979) (statement of John L. Murphy and G. Kent Edwards). In another example, Professor Louis Jaffe described the FCC’s assessment of a penalty under Section 504 as a “legally inconclusive adjudication.” Louis L. Jaffe, *Judicial Control of Administrative Action* 113 (1965). This Court reached the same conclusion with respect to another then-extant statute with a similar two-stage structure, the Federal Coal Mine Health and Safety Act of 1969. *See Kleppe v. Delta Mining, Inc.*, 423 U.S. 403 (1976); 30 U.S.C. § 819(a) (1976). As the Court explained, “if [a mine] operator wishes to contest the amount of the penalty without a hearing, *that can be done by refusing to pay the penalty, thus invoking the right to a de novo trial in the district court, with a jury if desired.*” *Delta Mining*, 423 U.S. at 409 (emphasis added).

d. Declaring “an Act of Congress” unconstitutional is “the gravest and most delicate duty that this Court is called on to perform.” *Blodgett v. Holden*, 275 U.S.

142, 147-48 (1927) (Holmes, J., concurring). Here, if the Court accepts the carriers' theory, it may not just be one Act. When the dust settles, the number could reach a dozen or more.

The consequences, moreover, may not be limited to a mere shift in procedures going forward. If some or all of the above agencies' current statutory pathways are found unconstitutional, that may leave them without any valid statutory authority to seek civil penalties at all, unless and until Congress steps in and enacts new laws. This may be true of the FCC. As the government has warned, the Communications Act "does not authorize either the FCC or the Department of Justice to seek monetary penalties in court without an antecedent administrative proceeding in which the Commission formally determines that a regulated party has violated the law." *AT&T* Pet. 18; *see also* U.S. Br. 45-46. That may also be true of FERC. Neither the United States (in defending the FERC enforcement scheme) nor the plaintiff in *American Efficient* have identified any other way that FERC could obtain civil penalties under the Federal Power Act. *Cf. FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 898-99 (4th Cir. 2020) ("Congress plainly conditioned FERC's right to bring an action in federal district court on the occurrence of a number of statutorily-mandated events.").

It is thus evident that the end game of the carriers' Seventh Amendment challenge, and other challenges like it, is not merely to force agencies to follow different procedural routes. It is to kneecap agency enforcement more fundamentally. *See* U.S. Br. 45-46

(explaining the importance and unique role of civil penalties as an enforcement remedy).

The Court should decline the carriers' invitation to enable that result. The enforcement schemes listed above are necessary to deter and remedy significant harms to the public. In the FERC context, for instance, the agency relies on civil-penalty actions to safeguard market integrity, protect ratepayers, ensure grid reliability, and address threats to the Nation's energy infrastructure. *See* FERC Office of Enforcement, *2025 Report on Enforcement* 5 (Nov. 20, 2025), <https://perma.cc/2U2D-8D5L>. Similarly, Congress gave DOE penalty authority to address leaks of restricted information about nuclear weapons in response to "lax management" that had "increased risks to U.S. national security." H.R. Rep. No. 106-301, at 913 (1999) (Conf. Rep.); *see also Procedural Rules for the Assessment of Civil Penalties for Classified Information Security Violations*, 70 Fed. Reg. 3599, 3600 (Jan. 26, 2005) (explaining that contractors' work involves "highly classified information regarding atomic weapons and other weapons of mass destruction" and that DOE "must take all prudent steps to prevent enemies of this nation from gaining access to work that could be used to the detriment . . . of vital national security interests"). Taking the respective agency's civil-penalty authority off the table would inevitably undermine those crucial statutory mandates.

II. The Carriers' Policy Objections To The Two-Stage Enforcement Structure Are Meritless

a. Congress has had good reason to repeatedly

select the two-stage agency-enforcement structure.

To begin with, the congressional practice reflects longstanding acceptance of the premise that “the Seventh Amendment’s demands can be met . . . by providing a de novo jury trial in an Article III court after[]” some form of agency proceeding. Richard Lorren Jolly, *The Administrative State’s Jury Problem*, 98 Wash. L. Rev. 1187, 1187 (2023); *see also id.* at 1257; U.S. Br. 33-36. In 1941, for example, the Attorney General’s Committee on Administrative Procedure advised the President and Congress that where an agency adjudicates or assesses a penalty in the first instance, “review de novo by a Federal district court” would “resolve any doubts concerning the constitutionality of the procedure.” *Final Report of the Attorney General’s Committee on Administrative Procedure III*, 147 (1941) (AG Comm. Report); *see also id.* at 174-75 (similar).

A quarter century later, Professor Jaffe observed that “when a person is the object of an administrative order which will be enforced by” a money judgment, “he is *at some point* entitled to a judicial test of legality.” Jaffe, *supra*, at 384 (emphasis added). And when this Court later heard *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), both the challengers to the administrative-enforcement scheme and the Chamber of Commerce assured the Court that providing de novo review after the agency proceeding would address their constitutional concerns. *See* U.S. Br. 34 (citing briefs and oral argument); *cf.* Roger W. Kirst, *Administrative Penalties and the Civil Jury*, 126 U. Pa. L. Rev. 1281, 1340 (1978) (criticizing *Atlas Roofing*

but acknowledging that “enforcement by *de novo* civil action in a . . . federal court” would “comply with the seventh amendment”).

More recently, scholars have described this kind of two-stage structure as a “right to remove” system of administrative enforcement, in that the respondent has a right to remove the action to an Article III trial court. See Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 Ohio St. L.J. 1, 3 (2024). Notably, Professors Walker and Zaring include FERC’s Federal Power Act enforcement scheme as a statute embodying a constitutional right-to-remove structure, even though (as with the FCC here) FERC is the entity that files the district-court action. *Id.* at 19-20; *see also id.* at 20 (noting that the FERC scheme “has a historical pedigree”).¹⁰

To be sure, providing respondents in enforcement proceedings with the *option* to seek a jury trial in district court may be “more efficient and effective than a rule that civil penalties . . . can *only* be brought in federal court.” Walker & Zaring, *supra*, at 4. It is well established that Congress may provide an alternative dispute-resolution mechanism where a party may waive an Article III adjudicator and a jury. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-49 (1986); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015); *cf. Henderson’s Distilled Spirits*, 81 U.S. 44, 53 (1872) (noting that

¹⁰ Indeed, one of the carriers’ own amici appears to agree with Professors Walker and Zaring that both the FERC and DOE schemes are permissible, notwithstanding this feature. See IJ Br. 22-23 & n.18.

although “the claimant was entitled to a trial by jury,” the parties “waive[d] a jury and submitted the case to the court upon an agreed statement of facts, as they had a right to do”).

As one of the carriers’ amici acknowledges, “[r]egulated parties may want to avoid Article III courts for their own independent reasons,” including because “agency proceedings may offer procedural advantages.” IJ Br. 22; *cf.* Jaffe, *supra*, at 99 (observing that de novo trials may be “seldom sought” when more efficient agency proceedings are available). Indeed, one of the carriers themselves previously told the D.C. Circuit that the Communications Act’s option of paying and seeking review in a court of appeals helps respondents avoid “pointless delay and costs” when “the FCC’s factual findings are not in dispute.” AT&T Br. at *15, *18, *AT&T Corp. v. FCC*, No. 01-1485, 2002 WL 34244542 (D.C. Cir. Dec. 20, 2002).

b. Respondents also enjoy substantial benefits under the two-stage framework. Most significantly, those statutorily mandated procedures force the agency to engage with the other side’s evidence and arguments and show its hand before the parties actually go to court (if they do). In both the FCC scheme and the FERC scheme, for instance, the agency is required to issue a charging document (a “notice of apparent liability” for the FCC and a “notice of proposed penalty” for FERC); provide the respondent with an opportunity to respond to the charges or ask for a lesser penalty; and afterward issue a written order explaining what violations

occurred and what penalties are appropriate.¹¹ “Those extra layers of procedure” before the agency decides to pursue its charges in court, U.S. Br. 22, cannot sensibly be viewed as a constitutional defect.

Indeed, the process leading up to the agency’s assessment order is analogous to a target in a federal investigation meeting with the government to persuade it not to file an enforcement action. See Gerald Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2126 (1998) (drawing similar analogy). For instance, as any experienced white-collar-defense attorney knows, “[i]n modern corporate investigations, prosecutions rarely proceed without pre-charging negotiations between the U.S. Department of Justice and defense counsel.” Scott Brady et al., *White Collar Defense Do’s and Don’ts For Meeting with DOJ* 1 (June 18, 2021), <https://perma.cc/8JUR-ZN5A>. Those efforts may be aimed at learning more about the government’s case, persuading it not to file charges, pushing back on the sufficiency of the evidence, or arguing for a particular disposition. Lynch, *supra*, at 2126.

Here, the two-stage framework compels an enforcing agency to conduct that kind of process in every case, to do so on-the-record, and to actually reveal details of its factual and legal theories to the respondent—all before filing a complaint in court. It is not hard to see why formalizing that process is a boon to respondents. In fact, scholars have advocated for these administrative safeguards to be carried over

¹¹ For FCC, see 47 U.S.C. § 503(b)(1) & (b)(4); 47 C.F.R. § 1.80(g). For FERC, see 16 U.S.C. § 823b(d)(1) & (d)(3); 18 C.F.R. §§ 385.1505-1506, 385.1509.

to the prosecution context. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 905 (2009).

In addition, the penalty-assessment process requires the agency to proceed with appropriate caution in enforcement actions and check its work. Take the Federal Power Act's two-stage scheme, which is "responsive to the complicated nature of the activities the statute regulates, namely the actions of sophisticated traders in complex [energy] markets." *Powhatan Energy*, 949 F.3d at 904 (internal quotation marks and citation omitted). FERC's enforcement of the Act's market-manipulation rule, for instance, involves careful parsing of technical financial transactions in highly complex energy markets. Ensuring that FERC "thoroughly vet[s] each alleged instance of market manipulation before filing suit" thus can be "of benefit to the regulated party." *Id.* at 901. And because the resulting assessment order has no determinative effect in a district court or before a jury, it essentially gives the respondent a preview of the agency's case at trial with no strings attached. *Cf. Ex parte Peterson*, 253 U.S. at 310 (concluding that "[n]o incident of the jury trial is modified or taken away" by a "preliminary, tentative hearing before [an] auditor").

The Seventh Amendment's "aim is not to preserve mere matters of form and procedure, but substance of right." *Walker v. New Mexico & Southern Pac. R.R.*, 165 U.S. 593, 596 (1897). Here, the right is preserved because carriers cannot be made to pay a dime in legal penalties until a jury in an Article III court finds

disputed facts supporting their liability. If that trial does not take place, it is only because the agency abandoned its enforcement effort or the carrier opted to forgo that path.

c. The carriers nonetheless protest that an agency's penalty-assessment order has "real-world impacts" even before a district court's final judgment. Carriers Br. 4 (citation omitted). But there can be no meaningful dispute that a carrier may lawfully decline to pay an assessed penalty. *See* U.S. Br. 10-18. Were it otherwise, the provision for a de novo trial would make little sense—why would Congress require the respondent to violate the law to exercise a statutorily conferred procedural right?

The carriers identify no way in which the assessed penalty can be legally enforced *other* than in the statutorily prescribed de novo action. Indeed, in both the FCC and FERC contexts, an assessed penalty that goes unpaid cannot even accrue interest until a court enters final judgment. *See, e.g., In re Amendment*, 19 FCC Rcd. 6540, 6542 n.16 (2004) (FCC); *see also* 18 C.F.R. §§ 385.1509, 385.1511 (FERC).¹²

The carriers accordingly fall back on an assertion that "[i]n the real world, no business can afford to thumb its nose at its principal regulator by defying an order to pay." Carriers Br. 50. Specifically, they suggest that the FCC might hold a failure to pay against that business, formally or informally, in

¹² Even where an agency has not disclaimed the ability to seek interest on unpaid assessed penalties, CUB is aware of no authority holding that the availability of pre-judgment interest creates a Seventh Amendment violation.

taking future regulatory action. *Id.* at 49. But a similar argument could be made with respect to the business’s failure to accept an agency’s post-notice settlement offer—yet no one would claim that the business was entitled to have a jury decide issues of fact before the agency extends such a proposal. And even if the agency considers the facts underlying an assessment order in making other enforcement decisions down the line, that is still not a Seventh Amendment problem until a respondent is made to pay a monetary award based on such findings. So long as a jury trial is available at that point, the agency’s earlier consideration of those findings is of no moment.

The carriers also frequently refer to the “reputational harm[]” they might suffer after the FCC issues an assessment order but before a jury issues a verdict. Carriers Br. I; *see also id.* at 4, 15, 19, 35. But again, this argument proves too much. A risk of such harm could arise following an agency’s issuance of a notice of proposed penalty or even its initiation of an investigation. No one would contend that a respondent has a right to a jury trial before either of those things occur.¹³ The same risk of reputational harm could likewise follow from an agency proceeding

¹³ The carriers additionally argue (Br. 46) that they must “at least consider” whether to disclose assessment orders in securities filings. But the cited regulation requires reporting certain “[a]dministrative or judicial *proceedings*” in which the government is seeking “*potential* monetary sanctions.” 17 C.F.R. § 229.103(c)(3)(iii) (emphasis added). That language suggests that any reporting obligation would be triggered by the initiation of the penalty proceeding (*i.e.*, by the FCC’s filing of a notice of apparent liability), not by the assessment order per se.

finding wrongdoing but ordering a non-monetary remedy, like disqualification or license revocation. *Cf.* AG Comm. Report 33, 145-46 (characterizing license revocation as more severe than a fine). Yet the law is clear that the Seventh Amendment has no application in proceedings seeking only equitable relief. *See Curtis v. Loether*, 415 U.S. 189, 198 (1974); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

d. Finally, the carriers claim to fear agency sandbagging. They note (Br. 34) that post-assessment district-court actions are subject to a five-year statute of limitations. *See* 28 U.S.C. § 2462. And they assert that respondents may be stuck in a “waiting game,” where they can only “hope” that the agency will follow through and try to obtain the penalties it assesses. Carriers Br. 37-38.

As an initial matter, a respondent that gets off the hook because an agency abandons its enforcement effort would more likely celebrate than rue its missed opportunity to push the case to trial. Consistent with that intuition, Congress has specifically allowed agencies to grow more lenient after assessing penalties; several statutes authorize agencies to drop or lessen penalties before a court enters final judgment. *See, e.g.*, 16 U.S.C. § 823b(d)(4); 47 U.S.C. § 504(b). Neither the initial penalty assessment nor the possibility of leniency afterward causes respondents any cognizable harm. *See supra* at 23-24.

In any event, this Court has been clear that a “delay in reaching [a desired] jury trial” is constitutionally immaterial so long as that trial occurs before final judgment on a legal cause of action. *Ex parte Peterson*, 253 U.S. at 310. And the carriers have

provided no reason to believe that undue delays have occurred or will occur under two-stage enforcement schemes. Agencies are entitled to a presumption of regularity. *See FDA v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 577 (2025). As Judge Wilkinson observed on behalf of the Fourth Circuit—in rejecting a similar contention about FERC’s supposed incentive to postpone filing recovery suits—there is no basis to “assume” that agencies are “determined to delay the expeditious prosecution” of actions that are “essential to fulfilling [a] statutory mandate.” *Powhatan Energy*, 949 F.3d at 904. That is “especially true” because “footdragging would tend to reduce the [agency’s] chances of proving its case and collecting monetary sanctions,” *id.* (citation omitted; brackets in original); as with most lawsuits, the passage of time makes it more likely that evidence becomes lost, memories go stale, and witnesses disappear. There is no basis to suspect that agencies will risk an enforcement action’s ultimate success merely to aggravate the respondent.

* * *

Precedent and logic foreclose the constitutional claim in this case. The carriers had the option to obtain a jury trial in an Article III court. And Congress was well within its prerogative to rely on a tried-and-true enforcement scheme that prioritizes agency expertise, policy judgment, and deliberation while preserving that constitutional safeguard.

CONCLUSION

The Court should reverse the judgment in No. 25-406 and affirm the judgment in No. 25-567.

Respectfully submitted,

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