

Nos. 25-406 and 25-567

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA, PETITIONERS,

v.

AT&T, INC.

VERIZON COMMUNICATIONS INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA

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

**REPLY BRIEF FOR AT&T, INC. AND
VERIZON COMMUNICATIONS INC.**

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AT&T, Inc. (T) certifies that it is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of AT&T, Inc.'s stock.

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INTRODUCTION

The federal government is in retreat. Over six years ago, the FCC issued notices of apparent liability to AT&T and Verizon. Those notices alleged that both carriers had violated the Communications Act by failing to reasonably safeguard customer data. Four years later, the FCC issued final “Forfeiture Orders” holding that both carriers had “willfully and repeatedly violated” the Act and were “liable for a monetary forfeiture” of over \$100 million between them. The

orders commanded that “payment of the forfeiture shall be made” within 30 days. AT&T Pet. App. 131a; Verizon Pet. App. 138a-139a. The carriers paid the fines under protest and sought review in the courts of appeals, arguing that the Seventh Amendment prohibited the FCC from adjudicating legal claims without a jury.

In its orders, the Commission had argued—citing *Atlas Roofing*—that the Seventh Amendment does not apply to agency adjudications at all. This Court rejected that argument in *Jarkesy*. So the Commission pivoted below, arguing that its claims do not implicate the Seventh Amendment because they (i) are not legal in nature and (ii) fall within the public-rights exception. After the Fifth Circuit rejected those arguments, the government dropped them too. In its petition for certiorari in *AT&T*, the government finally agreed that the Seventh Amendment applies. But it claimed that the Amendment is nevertheless satisfied here because the defendant carriers can have a “jury trial . . . before the monetary penalty [can] be collected.” AT&T Pet. 7.

In its merits brief, the government has shifted once again and ceded the entire constitutional ground. It accepts that if the FCC adjudicates liability and issues a real payment order, that violates the Seventh Amendment, notwithstanding the right to a jury in a later debt-collection suit. Now, the government rests entirely on a *statutory* defense. According to the government, the Commission’s final “Forfeiture Orders” are nothing more than paper tigers. They merely “set deadlines for [an] optional action” of “voluntary payment”—here, an “optional” \$50 to \$60 mil-

lion per company—and allow DOJ to pursue an actual payment order by filing a new civil suit. Br. 18.

The government’s last line of defense is no better than the others. It ignores the language of the Communications Act, which authorizes the FCC to “determine[]” that a carrier “shall be liable” for a “forfeiture penalty,” and then “assess[]” and “impos[e]” that remedy. 47 U.S.C. § 503(b). It flouts the Commission’s rules, which state that forfeiture orders “requir[e]” the penalty to “be paid in full” and set a date by which that penalty “must be paid.” 47 C.F.R. § 1.80(g)(4). It is an especially implausible reading of the orders here, which “**ORDERED**” that AT&T and Verizon were “**LIABLE FOR A MONETARY FORFEITURE**” and that “payment shall be made . . . within thirty (30) calendar days.” AT&T Pet. App. 131a; Verizon Pet. App. 138a-139a. And it is a bizarre view for the United States to take: that when agencies finally adjudicate violations and impose penalties, regulated parties may simply ignore them.

The government is wrong on the statute, which is enough to resolve this case. But its position raises the obvious question: why fight so hard to preserve the FCC’s authority to issue these orders, if they do nothing? The answer is: even if forfeiture orders are just paper, they are still tigers. Such orders brand carriers as willful, repeat, “egregious” lawbreakers. AT&T Pet. App. 106a-107a; Verizon Pet. App. 121a-123a. They make factual findings that the FCC may use to the carriers’ detriment in subsequent proceedings, including license renewals and transfers without which carriers cannot operate. And they are often how the FCC makes law, announcing new statutory

and regulatory interpretations (as here) that rewrite the rules going forward.

Carriers cannot risk allowing such orders to remain on the books without challenging them. Carriers thus cannot ignore an FCC order and wait to be sued to have their day in court—in a collection action that DOJ can wait up to five years to bring, and may never bring at all. That is why, as the government does not deny, legitimate regulated companies *never* defy FCC forfeiture orders. So even if the government were right that such orders do not legally compel carriers to pay without seeing a jury, they practically force carriers to pay without seeing a jury. That is the type of extraordinary “coercion that the unconstitutional conditions doctrine prohibits.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

ARGUMENT

I. THESE FCC FORFEITURE ORDERS VIOLATE THE SEVENTH AMENDMENT.

Everyone now appears to agree that, because the dispute here is legal in nature, a binding agency payment order carries with it a Seventh Amendment right to a jury. The government instead contends (at 17) that the entire FCC process produces a non-binding determination that does not itself “compel payment,” but rather unlocks DOJ’s ability to seek a binding payment order in court. Not so. Like the agency orders in *Jarkesy* and *Atlas Roofing*, final FCC forfeiture orders create binding legal obligations to pay. That is the only plausible reading of the statutory text. And even if the government were right on the statute, the orders the FCC issued here were

payment commands, not payment invitations. Either way, the forfeiture orders are unlawful, and the government must repay the carriers.

A. FCC Forfeiture Orders Impose Binding Obligations And Thus Violate The Seventh Amendment.

1. *Under the Communications Act, FCC forfeiture orders create legal obligations to pay.*

The Court can begin and end with the meaning of the Communications Act. Under that statute, final FCC orders imposing civil penalties unsurprisingly obligate their recipients to pay those penalties. The government’s contrary argument is mistaken.

a. Start with the text of Section 503. That provision states that the Commission may use the notice-of-apparent-liability (NAL) procedure here to issue a final forfeiture order in which it “determine[s]” that a carrier “shall be liable to the United States for a forfeiture penalty,” “assess[es]” the “amount of such forfeiture penalty,” and “impose[s]” that penalty. 47 U.S.C. § 503(b)(1), (2), (4).

When Congress uses that sort of language—“determine,” “assess,” “impose”—in the context of administrative adjudications, it authorizes the agency to issue binding orders that create legal obligations. *See* Black’s Law Dictionary (4th ed. 1968) (defining “assess” to mean “ascertain; fix the value of” and “[t]o impose a pecuniary payment upon persons”); *ibid.* (defining “impose” to mean “[t]o levy or exact as by authority; to lay as a burden, tax, duty or charge”); *Bull v. United States*, 295 U.S. 247, 253, 260 (1935) (when tax liability is “determined” and “assessed” by

IRS, the “assessment is given the force of a judgment”); *cf.* Administrative Conf. of the U.S., *Agency Assessment & Mitigation of Civil Money Penalties*, 44 Fed. Reg. 38,824 (1979) (noting “advantages” of “‘administrative imposition system’ in which the agency would be empowered to adjudicate the violation and impose the penalty” compared to “system of imposing civil money penalties by a court in a civil action”). The language that a carrier “shall be liable” in the determined amount underscores the point. That “mandatory” word *shall* “normally creates an obligation impervious” to any modification. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

Most of this Court’s Seventh Amendment cases have involved similar agency authority. The SEC civil-penalty statute in *Jarkesy*, for example, authorized the SEC to “assess” and “impose a civil penalty.” 15 U.S.C. § 78u-2(a)(1). The statute in *Atlas Roofing* similarly gave the Occupational Safety and Health Review Commission (OSHRC) “authority to assess . . . civil penalties.” 29 U.S.C. § 666(i) (1976). No one disputed that both schemes resulted in binding obligations to pay. Justice Sotomayor’s *Jarkesy* dissent collected many other examples of statutes that use the same kind of language to authorize agencies to “assess” or “impose civil penalties in administrative proceedings.” *SEC v. Jarkesy*, 603 U.S. 109, 199-200 (2024).¹ It would be remarkable if none of those stat-

¹ *See, e.g.*, 5 U.S.C. § 1215(a)(3)(A) (Merit Systems Protection Board “may impose” “an assessment of a civil penalty”); 7 U.S.C. § 9(10)(C) (Commodity Futures Trading Commission may “assess”

utes actually authorized the agencies to issue binding commands.

By contrast, where Congress intends an agency to render a decision that carries no legal force of its own, it uses different language. The government itself points to an example (at 20-21): “right-to-sue letters from” the Equal Employment Opportunity Commission. The EEOC “makes [a] determination” only whether “there is *reasonable cause to believe* that the [discrimination] charge is true.” 42 U.S.C. § 2000e-5(b) (emphasis added). If so, then either the Commission or DOJ “may bring a civil action”; if not, the complainant may file. *Id.* § 2000e-5(f). The EEOC’s determination thus functions more like the FCC’s initial notice of apparent liability than a final forfeiture order.

The government has little to say about the operative text. It ignores Section 503’s use of the words “assessed” and “imposed.” It does contend (at 15) that the phrase “shall be liable” merely “creat[es] . . . a right of action.” That may be true of the government’s two statutory examples (at 15-16): both only describe prohibited conduct. But it is completely different where “shall be liable” describes what happens when the Commission makes a “determin[ation]” of wrongdoing “in accordance with paragraph (3) or (4)” —that is, *after* the NAL procedure or an ALJ hearing. 47 U.S.C. § 503(b). The statute thus sets forth not only the conduct that gives rise to liability,

a “civil penalty”); 20 U.S.C. § 1082(g) (Department of Education “may impose a civil penalty”).

but also who will make that determination and how it will do so.

The structure of the Communications Act confirms that final FCC forfeiture orders are binding. First, Section 503(b) sets forth two alternative ways that a “forfeiture penalty shall be determined or imposed” by the Commission. 47 U.S.C. § 503(b)(6). Under paragraph (4), the FCC may use the NAL procedure it employed here; under paragraph (3), it may use an ALJ. Critically, both provisions use identical language to describe the FCC order that results from each procedure: the order “determine[s],” “assesse[s],” and “impose[s]” the forfeiture. 47 U.S.C. § 503(b)(3)-(4). Yet the FCC appears to accept (at 5) that a forfeiture order issued through the ALJ pathway is a binding obligation, rather than a mere recommendation. If the ALJ procedure results in an order that “determines,” “assesses,” and “imposes” a binding forfeiture payment obligation, then the NAL procedure must as well. There is no textual basis to treat the two orders differently.

Second, the NAL process itself involves multiple steps, culminating in an effective agency order. The FCC must first issue the carrier a “notice” identifying its “apparent” violations. 47 U.S.C. § 503(b)(4)(A). Then, after considering the carrier’s response, the Commission may issue a separate order that “determine[s]” and “impose[s]” the “forfeiture penalty.” *Id.* § 503(b)(4); *see* 47 C.F.R. § 1.80(g) (contrasting “Notice of apparent liability” with “Forfeiture order”). In the Commission’s own words, the NAL “is the FCC’s charging document, akin to the filing of a complaint in a civil action,” and the subsequent “Forfeiture Order” is “a final FCC action” “finding liability

and requiring payment.” Enforcement Bureau, FCC, *Enforcement Overview* 15-16 (Apr. 2020) (Enforcement Overview). The government now implausibly treats that subsequent order as effectively a duplicative charging instrument.

b. The government’s few textual arguments do not support a different conclusion. The government rests mainly on the fact that an FCC forfeiture order issued using the NAL process “shall be recoverable” “in a civil suit in the name of the United States,” brought by DOJ. 47 U.S.C. § 504(a). By “making forfeitures ‘recoverable’ in civil suits,” the government argues (at 11), Congress indicated that “the government must prevail in those suits to obtain a legal right to collect forfeitures.”

That does not follow. Congress routinely uses identical “recovery” language to describe a collection action triggered by a defendant’s failure to comply with a binding payment obligation. The statutes in *Jarkesy* and *Atlas Roofing* had such language. See 15 U.S.C. § 78u(d)(3)(C) (SEC) (Attorney General may “recover such penalty by action in the appropriate United States district court”); 29 U.S.C. § 666(k) (1976) (OSHRC) (“Civil penalties owed under this chapter . . . may be recovered in a civil action in the name of the United States.”). The “recover[]” language does not even distinguish NAL-based FCC forfeiture orders from those issued after an ALJ hearing. The Attorney General may likewise “recover” the ALJ-ordered amounts if the defendant “fails to pay.” 47 U.S.C. § 503(b)(3)(B).

To be sure, a Section 504 suit to collect on an NAL-based forfeiture order involves a “trial de novo.” 47 U.S.C. § 504(a). But the standard of review applied

in a collection action has no logical relationship to whether the underlying FCC payment order is binding or merely advisory. Congress is free to provide additional procedures in a collection action, including a chance to adjudicate a debt anew. Indeed, the government points to a statute that features both binding civil penalties *and* “de novo” review in the “civil action” that must be filed to “collect th[at] penalty” if the defendant “fails to pay.” 16 U.S.C. § 3373(a)-(c) (Fish and Wildlife Service penalties for illegal trafficking).

The government finds it “unlikely” (at 11) that Congress would have empowered the FCC to “impose binding obligations to pay multimillion-dollar penalties based” only on “paper procedures.” Perhaps the size of these penalties is reason to be suspicious of the FCC’s sweeping reading of its penalty authority—and all the more reason why juries are needed. *See* Chamber of Commerce Amicus Br. 24-27. But Congress regularly authorizes the imposition of penalties without any statutory hearing right. *See, e.g.*, 7 U.S.C. § 2023(a)(9)-(10); 19 U.S.C. § 1641(d); 50 U.S.C. § 1705(b). And even when statutes refer to a hearing, agency rules often permit the agency to resolve the case at the equivalent of summary judgment. *See, e.g.*, 17 C.F.R. § 201.250.

The government also notes (at 10) that the Communications Act does not specifically provide “any criminal or civil penalties for refusing to pay” an FCC forfeiture order. But again, that is nothing unusual. Statutes often make someone subject to fines, without specifying an additional layer of penalties for refusing to pay the fines ordered. *See, e.g.*, 7 U.S.C. § 136l(b) (Environmental Protection Agen-

cy); 15 U.S.C. § 2069(a)(1) (Consumer Product Safety Commission); 50 U.S.C. § 1705(b) (Office of Foreign Asset Control). That does not make the initial fine any less real.

c. Moving beyond the text of the Communications Act, the government points (at 12) to two supposedly “similar statutes” that purportedly authorize “non-binding” agency payment orders. Neither supports its position. The first is the 1906 Hepburn Act, which addressed the authority of the Interstate Commerce Commission. It made certain ICC orders binding, even absent judicial enforcement. *See* Pub. L. No. 59-337, § 4, 34 Stat. 584, 589 (1906). But as AT&T and Verizon previously explained (at 40), the text of the Hepburn Act expressly carved out “orders for the payment of money.” *Ibid.* The Act thus kept those orders non-binding, as all ICC orders had been before the Act’s enactment. *See Interstate Com. Comm’n v. Illinois Cent. R.R. Co.*, 215 U.S. 452, 469-470 (1910). There is no such language in or history behind Sections 503 and 504.

The government next invokes the Federal Coal Mine Health and Safety Act of 1969. But it is far from clear that the civil penalties assessed under that statute were actually non-binding. If a defendant “fail[ed] to pay the penalty within the time prescribed in [the agency] order,” Pub. L. No. 91-173, § 109(a)(4), 83 Stat. 742, 757 (1969), an ensuing collection action would involve “de novo” review of “issues relevant to the amount of the penalty.” *NICOA v. Kleppe*, 423 U.S. 388, 393 (1976). As this Court explained, the statute did not make “trial de novo . . . available *on the factual basis of the violation.*” *Id.* at 393 n.3 (emphasis added). So the agency order was plainly bind-

ing, even if collection actions allowed review of the penalty amount.

d. The government next invokes (at 13) legislative history: a statement by the “architect of the 1960 amendments” claiming that no person “ha[s] to pay” a forfeiture until after a Section 504 action. Even if the Court were inclined to consider that single-legislator brand of legislative history, the government is focused on the wrong year and the wrong amendments.

As AT&T and Verizon explained in their opening brief (at 8), the 1978 amendments to Sections 503 and 504—not the 1960 amendments—shaped the FCC administrative scheme into what it is today. Enacted one year after *Atlas Roofing*, the 1978 amendments for the first time empowered the *Commission*, rather than courts, to “impose,” “determine,” and “assess” forfeiture penalties using the NAL or ALJ procedures. Earlier iterations of the statute, including the 1960 version, did not have that language. *See* Communications Act Amendments, Pub. L. No. 86-752, § 7(a), 74 Stat. 889, 894 (1960). Before 1978, the courts decided liability and imposed forfeiture penalties in civil actions brought by DOJ. That a legislator said as much in 1960 is unsurprising.

The government makes the same basic mistake in citing (at 13-14, 34-35) lower-court cases, scholarly articles, and litigation assertions referring to FCC forfeiture payments as “voluntary.” Nearly all of those sources pre-date Congress’s 1978 amendments. *See, e.g., Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 498 (D.C. Cir. 1977); Louis L. Jaffe, *Judicial Control of Administrative Action* 113 (1965). Even the one case and one post-1978 article relied on the

D.C. Circuit’s pre-1978 *Pleasant Broadcasting* decision, without accounting for the later amendments.

The government’s retelling of its own supposedly “longstanding” view suffers from the same defect. Almost all the statements it invokes (at 14) are either (i) pre-1978 or (ii) refer to *Pleasant Broadcasting*’s pre-1978 description of the statute without any further analysis. Those statements are not evidence of an “Executive Branch interpretation” “issued roughly contemporaneously with enactment of the statute” at issue here. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024). At any rate, the FCC has not taken a consistent stance on the matter. The orders here are a prime example—as discussed below (at 17-19), they unambiguously compel payment. The FCC’s main forfeiture regulation likewise states that its final orders “*requir[e]* that [the forfeiture] be paid in full and stat[e] the date by which [it] *must be paid.*” 47 C.F.R. § 1.80(g)(4) (emphases added).

e. Finally, the government retreats (at 18-19) to constitutional avoidance. But that canon is not a license for atextual and implausible dodges. It applies only when a statute is genuinely ambiguous “after the application of ordinary textual analysis.” *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018). Here, the text and structure of Section 503(b) do not treat final FCC forfeiture orders as expert reports or right-to-sue letters that create no legal obligation. And as discussed below (at 14), the government’s statutory reading would require the Court to confront a different constitutional question—so avoidance actually cuts against the government here.

The government alternatively requests severance (at 19), but it cannot identify any text to strike—

unsurprisingly, since Section 503 is shot through with language confirming that FCC forfeiture orders are binding. What the government is really asking the Court to do is return to the pre-1978 regime. That is not limiting the statute to constitutional applications; it is rewriting the provision as a whole.

2. *The government lacks any support for its reading of the FCC scheme.*

The government devotes the bulk of its brief to arguing (at 19-37) that non-binding forfeiture orders do not violate the Seventh Amendment. The Court does not need to address that issue because FCC forfeiture orders are binding. But there are two points that bear mention.

a. First, the government's late-breaking position is dubious. The Seventh Amendment applies to any formal process the federal government uses "to settle legal rights"—that is, any "proceeding[] . . . in which *legal* rights [are] to be ascertained and determined." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830). Here, the government acknowledges that FCC forfeiture orders "carry[] legal consequences" by adjudicating liability and thus "enabling a recovery suit" by DOJ. That legal effect should be enough to trigger the right to a trial by jury. *See* Opening Br. 27-29, 35-36. Put simply, the Seventh Amendment attaches at the liability stage, before an agency "formally determines that a regulated party has violated the law." AT&T Pet. 18. For present purposes, however, the Court can and should avoid answering that constitutional question by rejecting the government's novel statutory reading.

b. The government also provides (at 25-36) a long list of cases and supposedly analogous statutes. It is unclear what the government thinks that history teaches. None of the cited precedents allowed agencies to issue *binding* penalty orders without a jury—so if the carriers are right about the Communications Act, that is the end of the matter. Moreover, none of the government’s authorities supports the constitutionality of this scheme even assuming that FCC forfeiture orders are *non-binding*. The cases and statutes that the government invokes are distinguishable in critical ways.

The government first argues (at 25-31) that FCC forfeiture proceedings are “analogous to the procedures” at issue in small-debts cases like *Hof*. But as AT&T and Verizon explained (at 36-38), those cases upheld the initial adjudication of legal actions by a justice of the peace because the statutes gave “either party the right of appealing” to a jury. *Capital Traction v. Hof*, 174 U.S. 1, 25 (1899) (emphases added). The Communications Act does not guarantee that right to a carrier. So unlike the statute in *Hof*, the Act does not “preserve[]” “the right of trial by jury” in suits at common law. U.S. Const. amend. VII.² That central point distinguishes all but one of the government’s cases and statutes (at 25-30).

That one exception is the ICC reparations regime in *Meeker*, which did not guarantee a defendant rail-

² The government half-suggests (at 42-43) that a carrier could bring a declaratory judgment action and get a jury that way. But as the government all but admits, the Hobbs Act, 28 U.S.C. § 2342, would preclude such a suit. See *McLaughlin Chiropractic Assocs. v. McKesson Corp.*, 606 U.S. 146, 160-162 (2025).

road an appeal to a jury but rather made a jury available if the railroad was sued in court. This Court in *Meeker* never addressed whether the Seventh Amendment prohibited the ICC from finally adjudicating railroads' liability or compelling railroads to pay. See Opening Br. 38-39. The government does not claim otherwise. Instead, it argues (at 27-28) that the railroad in *Meeker* probably would have pressed that argument if it was right. That speculation is a whisper-thin reed on which to base an entire constitutional doctrine. Regardless, the railroad's lawyers might have concluded that the argument was a non-starter for at least two reasons that also make *Meeker* inapposite here.

First, unlike the FCC after 1978, the ICC in 1915 had no power to issue a final, immediately appealable decision with *any* legal force or effect. Instead, as the government acknowledges (at 28), ICC reparation decisions were "preliminary" and "tentative" recommendations to be used only as evidence in court. Second, the dispute in *Meeker* may not have implicated the Seventh Amendment for an additional reason. In a separate part of the opinion addressing a statute-of-limitations question, the Court noted that the monetary relief sought by the plaintiff shipper was not a "punitive" "penalty or forfeiture," but rather was "strictly remedial." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915). That remedy likely fell on the equitable side of the law/equity line: "equity could order a defendant to return unjustly obtained funds," but could not "issue[] monetary penalties to punish." *Jarkesy*, 603 U.S. at 123 (citation omitted).

Finally, the government points (at 31-35) to other twentieth-century statutes that supposedly inform the Seventh Amendment's meaning. Even granting their constitutional relevance, many of the government's examples are pre-*Atlas Roofing* statutes that, like the ICC Act, did not authorize the agency itself to adjudicate liability, let alone compel payment. Instead, like the pre-1978 FCC, the agency was limited to "propos[ing]" a penalty to be adjudicated by a court and a jury. See *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1214 (3d Cir. 1974) (Gibbons, J., dissenting). The government also cites a few more recent statutes (at 33) that bear some resemblance to the FCC scheme. It is not clear whether those penalty regimes are similar in all relevant respects or whether they implicate the public-rights exception, and thus whether they comply with the Seventh Amendment. If a handful of other possible violations exist, that does not support the constitutionality of the statute here, just as it did not in *Jarkesy*. See 603 U.S. at 199-200 (Sotomayor, J., dissenting).

B. At A Minimum, The Orders Here Unlawfully Compel Payments That Should Be Refunded.

At the very least, if the FCC now wants this Court to declare that its final forfeiture orders are not really orders at all, then AT&T and Verizon should be entitled to refunds. Both orders under review unambiguously purport to impose an immediate and binding legal obligation to pay. As a result, both exceed the Commission's authority on the government's newly adopted view. The appropriate remedy is thus a decree that both vacates those *ultra vires* agency orders and requires the FCC to return the penalties paid.

1. The challenged orders compel payment of the assessed forfeiture amount. In capital letters and bold font, each “**ORDER[S]**” that AT&T or Verizon “**IS LIABLE FOR A MONETARY FORFEITURE.**” AT&T Pet. App. 131a; Verizon Pet. App. 138a. Each states that “payment of the forfeiture *shall be made* . . . within thirty (30) calendar days after the release of [the] Forfeiture Order.” AT&T Pet. App. 131a; Verizon Pet. App. 139a (emphasis added). Each instructs that the defendant carrier “*shall* send electronic notification of the payment” to certain FCC officials. AT&T Pet. App. 131a; Verizon Pet. App. 139a (emphasis added). And each specifies how and where to send the money. AT&T Pet. App. 131a; Verizon Pet. App. 139a. No ordinary citizen would read those documents as a friendly invitation to pay—but no pressure, and totally lawful to ignore it.

The government only half-heartedly contests the point. It first claims (at 17-18) that the orders’ requirement that payment “shall be made” “within thirty (30) days” merely “set [a] deadline for voluntary payment.” Come on. The orders demand payment in 30 days, and there is nothing voluntary about either the demand or the deadline. The government cites (at 18) several statutory and judicial timing rules that provide a date by when certain documents “shall be filed.” Of course, a filing deadline does not compel any party to file. But that kind of provision uses the word “shall” in an obviously distinguishable context. When used in a governmental order stating that a party “shall” take some action, the word “creates a mandate, not a liberty.” *Murphy v. Smith*, 583 U.S. 220, 223 (2018). One doubts that the FCC expects noncompliance when it “**ORDER[S]**” that a regulated

party “shall cease” certain conduct. *E.g.*, *In re KASA(AM)*, 39 F.C.C. Rcd. 4624, 4630 (2024).

The government next points to a single sentence (buried deep in the forfeiture orders here) mentioning a carrier’s “statutory right to a trial *de novo* before it can be required to pay.” AT&T Pet. App. 116a; Verizon Pet. App. 126a. In context, that lone statement could mean only that *de novo* review is available in a judicial action to collect from delinquent defendants. It could not plausibly mean that the order’s otherwise-compulsory language should not be taken at face value.

2. Given the orders here, both AT&T and Verizon are entitled to a refund if this Court adopts the government’s new FCC-as-special-master reading of the statute. The government acknowledges (at 17) that, if the orders here “purport[] to compel payment,” then they “exceed[] the FCC’s authority.” It follows that the carriers are entitled to judgment on their petitions for review of those unlawful agency orders. Such relief entails a return of the penalties paid “under protest . . . pursuant to” those orders. Dkt. 1-1 at 1 n.1, *AT&T Inc. v. FCC*, No. 24-60233 (5th Cir. May 9, 2024); *see* Dkt. 1.1 at 1, *Verizon Commc’ns Inc. v. FCC*, No. 24-1733 (2d Cir. June 25, 2024).

II. THE FCC FORFEITURE SCHEME IMPOSES AN UNCONSTITUTIONAL CONDITION.

Even if the FCC forfeiture orders here are formally non-binding, the FCC scheme still practically eliminates carriers’ ability to invoke their Seventh Amendment rights in a later collection proceeding. If Congress is free to redesign every administrative penalty scheme in the image of the FCC regime here,

then this Court's decision in *Jarkesy* can easily be circumvented.

Under the Communications Act, a carrier that wants a jury to adjudicate its liability must ignore the FCC's forfeiture order and wait to be sued by DOJ. Opening Br. 44-50. But that means giving up the carrier's *only guaranteed* path to judicial review of the FCC's order. As this Court has recognized, the Commission's "findings of wrongdoing" inflict serious and immediate harms on carriers, whether they formally require payment or not. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 256 (2012). Rather than risk leaving such findings on the "permanent Commission record," *ibid.*, legitimate businesses give up their right to a jury 100% of the time.³ That is powerful evidence that the FCC scheme places too high a price on the right. The government has no good answer.

A. The government starts by rewriting the unconstitutional-conditions doctrine itself. It claims (at 39) that the doctrine turns on whether Congress had an impermissible "purpose," rather than on the statute's potential "effects on regulated parties." That is wrong. This Court's decisions routinely consider whether the challenged regulation "*in effect*" "severely penalizes exercise of [a] right." *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974)

³ The government's short list (at 40 n.6) of Section 504 collection actions confirms that legitimate repeat players always pay. Four were against individuals for running unlicensed radio or television broadcasts. The fifth was an individual making auto-dialed calls with fake Caller ID. The last was against a scam company that defaulted in federal court.

(emphasis added); see *United States v. Jackson*, 390 U.S. 570, 581 (1968) (looking to law’s “inevitable effect” on defendants’ “assertion of” jury right); *Koontz*, 570 U.S. at 605 (considering whether citizens are “likely to accede to the government’s demand”).

The government’s two citations are not to the contrary. True, *Hof* explains that Congress may not act with the “intention of annihilating or impairing the trial by jury.” 174 U.S. at 28. But *Hof* also notes that a law that “unreasonably obstructs the right of trial by jury” must likewise be set aside. *Id.* at 45. Similarly, in *Chaffin v. Stynchcombe*, the Court first observed that a law would be “patently unconstitutional” “if [its] only objective [was] to discourage the assertion of constitutional rights.” 412 U.S. 17, 32 n.20 (1973) (citation omitted). But *Chaffin* then considered whether the challenged scheme was “a deterrent of any significance” to the “exercise of [the petitioner’s] right[s].” *Id.* at 33. The effect of the rule is what matters—and although it may often reveal a pernicious purpose, it need not.

The government observes (at 39) that criminal defendants can be forced to choose between greater potential sentencing exposure and “forgo[ing] their trial rights.” But that plea-bargaining analogy quickly breaks down. A criminal defendant who waives the right to a jury does so as part of admitting guilt on the charge. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (defendants with proper procedural protections are “unlikely to be driven to false self-condemnation”). By contrast here, carriers must give up on a jury if they want to ensure the chance to *contest* liability. The government has no legitimate interest in creating that dilemma.

B. Next, the government unconvincingly minimizes (at 39-42) the immediate harms from unpaid forfeiture orders. For starters, the government does not deny that such orders cause significant “adverse impact[s]” on carriers’ reputations with partners and customers. *Fox*, 567 U.S. at 256. Here, the orders publicly concluded that AT&T and Verizon had willfully disregarded customer privacy, endangered public safety and national security, and deserved an eye-popping penalty for their “egregious” misbehavior. AT&T Pet. App. 106a-107a; Verizon Pet. App. 121a-123a. Paying and appealing is a carrier’s only surefire path to clearing its name in court.

The government responds (at 38) that the Seventh Amendment does not prevent a plaintiff from “abandon[ing] an ongoing civil suit, even though doing so prevents the jury from rendering a verdict.” But if a plaintiff drops its case, there is no “finding[] of wrongdoing” enshrined in a “permanent [governmental] record.” *Fox*, 567 U.S. at 256. And the fact that the plaintiff has given up goes a long way to vindicating the defendant. But here, a federal adjudicator has definitively found wrongdoing. The fact that DOJ has not yet come to collect does not diminish the reputational hit.

C. The government also offers little to dispel the harmful effects of unpaid forfeiture orders before the Commission—whether on the record or behind the scenes. *See* Opening Br. 46-50. It mostly falls back on Section 504(c) of the Act. But as AT&T and Verizon explained (at 48), the most natural reading of that provision is that it limits only what the FCC may do with the initial “notice of apparent liability” itself, not with a final forfeiture order. The government

answers briefly (at 40-41) with legislative history and a sense of the “provision as a whole,” which is just an admission that it does not have the plain text. The FCC’s own enforcement manual embraces the more limited NAL-only view. Enforcement Overview, *supra*, at 15-16 (“Neither the fact that the NAL was issued nor the target’s failure to pay the forfeiture [in response to the NAL] can be used against the target unless . . . *the FCC later issues an order finding liability.*”) (emphasis added).

At any rate, the government admits (at 41-42) that Section 504(c) does not prevent the Commission from “consider[ing] the facts” found in an unpaid forfeiture order “when they are relevant to other adjudications.” As multiple amici confirm, the FCC routinely uses such “facts” in detrimental ways, including to increase penalties and even to “pause consideration of applications to renew licenses,” putting “billions of dollars” at risk. CTIA Amicus Br. 9-10; *see* Manhattan Institute Amicus Br. 11. The government asserts (at 42) that the Commission “does not accord preclusive effect” to the earlier decision. That misses the point. In practice, the FCC will never go back on its previous findings of wrongdoing. It will have already rejected the carriers’ arguments and evidence. If the carrier wants its chance at preventing future harm from erroneous FCC findings, it must go straight to court.

That is equally true of *legal* conclusions first announced in forfeiture orders. Those rulings become enforceable Commission precedent whether or not the forfeitures are paid. The FCC regularly uses forfeiture orders to announce important new statutory or regulatory interpretations, which are then applied

against carriers in subsequent proceedings. *See* Opening Br. 48-49. Indeed, the orders here adopted a novel and expansive view of carriers' duties regarding customer-location data—effectively establishing a very expensive new rule that all carriers must now follow. *See* T-Mobile Amicus Br. 19-22. For carriers, insisting on a jury means surrendering control over whether that rule will see a courtroom. Especially when combined with the harms discussed above, that is far too great a “condition [to] impose[] upon the demand” of a jury “consistently with preserving the right.” *Hof*, 174 U.S. at 23.

CONCLUSION

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

Respectfully submitted.

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