No. 25-567

In the

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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December 12, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The FCC's Process for Imposing Penalties Contravenes the Seventh Amendment 5

A. At the Founding, the People Insisted on the Civil Jury Right to Check Governmental Power 5

1. The Seventh Amendment Arose Out of the Crown's Expansion of Juryless Admiralty Courts 6

2. At the Founding, the People Insisted on the Civil Jury Right's Inclusion in the Bill of Rights 8

B. The Seventh Amendment Gives Verizon a Right to a Jury Trial 10

C. The FCC's Peculiar Statutory Scheme Does Not Save It from Violating *Jarkesy* 13

1. The FCC's Order Is a Binding Legal Determination 13

2. Section 504 Does Not Remedy the Seventh Amendment Violation 15

3. A Post-Order Collection Action Cannot Cure Verizon's Immediate Harm 17

II. The FCC's Claimed Sweeping Authority to Determine Massive Civil Penalties Makes Trial by Jury All the More Necessary 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

AT&T, Inc. v. FCC,
149 F.4th 491 (5th Cir. 2025) 11-13

Blockburger v. United States,
284 U.S. 299 (1932) 22

Colgrove v. Battin,
413 U.S. 149 (1973) 8

FCC v. Fox Television Stations,
567 U.S. 239 (2012) 18, 19

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 10

Murphy v. Smith,
583 U.S. 220 (2018) 14

Murray's Lessee v.
Hoboken Land & Improvement Co.,
59 U.S. (18 How.) 272 (1856)..... 12

Parklane Hosiery Co., Inc. v. Shore,
439 U.S. 322 (1979) 3, 9

Reid v. Covert,
354 U.S. 1 (1957) 2

SEC v. Jarkesy,
603 U.S. 109 (2024) 3, 5, 10-13, 18

Tull v. United States,
481 U.S. 412 (1987) 10

United States v.
Any & All Radio Station Transmission Equip.,
207 F.3d 458 (8th Cir. 2000)..... 17

United States v. Dunifer,
219 F.3d 1004 (9th Cir. 2000) 17

United States v. Stevens,
691 F.3d 620 (5th Cir. 2012) 17

United States v. Sutton,
2024 WL 2926594 (W.D. Ark. Mar. 27, 2024) 17

United States v. WIYN Radio, Inc.,
614 F.2d 495 (5th Cir. 1980) 5, 22, 23

Constitutional Provisions

U.S. Const. amend. VII 1-6, 10-13, 15-18, 21, 23

U.S. Const. art. III, § 2, cl. 3 3

Statutes, Regulations, and Rules

28 U.S.C. § 2342(1) 13, 15, 16

28 U.S.C. § 2344 ..... 13, 15, 16

47 U.S.C. § 222(a) 11

47 U.S.C. § 402(a) 13, 15

47 U.S.C. § 503(b) 21

47 U.S.C. § 503(b)(1) 14

47 U.S.C. § 503(b)(1)(B) 21

47 U.S.C. § 503(b)(2)(B) 22

47 U.S.C. § 503(b)(3)(A) 4, 13

47 U.S.C. § 504(a) 3, 4, 15, 16, 19

47 U.S.C. § 504(c) 19

47 C.F.R. § 64.2010(a) 11

S. Ct. R. 37.2 1

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The Federalist No. 47 (James Madison) (Clinton Rossiter ed., 2003) 2

The Federalist No. 83 (Alexander Hamilton) (Clinton Rossiter ed., 2003)..... 9

Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996)..... 6

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Letter from John Adams to Ebenezer Thayer (Sept. 24, 1765), bit.ly/3zl0Ezn (last visited Dec. 12, 2025) 6

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Maryland Resolves, Sept. 28, 1765 7

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Resolutions of the Stamp Act Congress (Oct. 19, 1765) 7

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Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960)..... 6, 8

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Businesses, and corporate officers and directors, are frequent respondents in administrative enforcement actions brought by the Federal Communications Commission ("FCC"). The Chamber has a significant interest in ensuring that those proceedings respect the Constitution's structural limitations. Specifically, the Chamber submits this brief to ensure that respondents in FCC enforcement actions are afforded their Seventh Amendment right to a jury trial and that the agency follows orderly administrative processes subject to judicial review by the federal courts.

In the agency proceeding giving rise to Verizon's petition for review, the FCC exceeded its authority by

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel timely provided the notice required under Rule 37.2.

violating the company's Seventh Amendment jury trial right. To make matters worse, the FCC imposed a staggering penalty based upon a novel interpretation of the Communications Act and for conduct that was not at the time a violation of any agency rule or law. The Chamber submits this brief because the FCC's enforcement procedure is inconsistent with orderly administrative process, the Communications Act, and the Seventh Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Verizon's petition for certiorari demonstrates the perils of agency overreach before juryless tribunals. The FCC imposed a $46.9 million penalty on Verizon. And rather than make its case before an Article III judge and jury as the Constitution requires, the FCC made the case to itself, acting as the prosecutor, judge, and jury. That violates the Seventh Amendment.

The Framers recognized that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003). That is why they separated the legislative and executive powers from the judicial and granted the right to trial by jury as a further check against government overreach.

This "fundamental" right to trial by jury has long served as "one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9–10 (1957) (plurality op.). Indeed, the American people insisted upon the Seventh Amendment

precisely because they feared that the federal government might dispense with the jury in seeking to penalize them for violations of federal law.

Those fears were born from experience. As the Court recently observed in *SEC v. Jarkesy*, in the 1760s, British authorities expanded admiralty jurisdiction to enforce unpopular acts of Parliament without juries. *See* 603 U.S. 109, 121 (2024). The people were outraged by the denial of this "great and inestimable privilege." 1 *Journals of the Continental Congress, 1774–1789*, at 69 (Oct. 14, 1774) (W. Ford ed. 1904). And the Declaration of Independence identified the deprivation of the jury right among its grievances against the Crown. *See The Declaration of Independence* para. 20 (U.S. 1776). Soon after, the Constitution secured that right in criminal cases. *See* U.S. Const. art. III, § 2, cl. 3. But the people demanded more. They refused to tolerate the risk that the federal government might pursue enforcement actions for monetary penalties before juryless tribunals—just as the British had done in the past. Thus, the Seventh Amendment became "the price exacted in many States for approval of the Constitution." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 342 (1979) (Rehnquist, J., dissenting).

Here, Verizon properly seeks to assert its jury trial right to check the excesses of arbitrary government power. Yet the decision below sanctioned the FCC's juryless in-house proceeding because Verizon could avail itself of a trial by jury in a government action to "recover[]" the "forfeiture penalty" under Section 504(a) of the Communications Act. Pet.App.40a.

That peculiar statutory scheme is no substitute for a jury trial in the first instance. Under the Second Circuit's view, to exercise its Seventh Amendment right, a telecommunications carrier must default on the penalty imposed after the initial agency hearing. And after failing to comply, the carrier must wait for the DOJ to commence a collection action (which it may never do), leaving the carrier an adjudicated lawbreaker, laboring under a cloud of uncertainty and collateral consequences all the while.

It is unsurprising, then, that no Section 504(a) jury trial has occurred in fifty years. The FCC's forfeiture orders are final agency determinations on highly regulated carriers that compel payment. The FCC said as much in the forfeiture order, declaring Verizon "liable for a monetary forfeiture," which "shall be made . . . within thirty (30) calendar days." Pet.App.138a–39a. Verizon's right to petition for judicial review of the *final* agency order likewise depended upon payment. *See* 47 U.S.C. § 503(b)(3)(A). The FCC's statutory right to recover against a defaulting carrier does not substitute for the initial jury trial or make up for the immediate legal, economic, and reputational harm from the forfeiture order.

To make matters worse, the FCC claimed sweeping power to impose ruinous and unpredictable civil penalties, making the Seventh Amendment's protection all the more crucial. The FCC reads the Communications Act to grant it broad discretion to impose penalties that, in a case like Verizon's, could reach *$326 trillion*. *See* Pet.App.114a–116a. Lacking an independent check on agency discretion, the FCC's

asserted authority invites a "ludicrous . . . result[]" that permits the FCC to regulate in a "draconian fashion." *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497–98 (5th Cir. 1980). The FCC's claim to such arbitrary power makes Verizon's Seventh Amendment rights at the initial adjudication all the more necessary.

The Court should grant the petition for writ of certiorari and reverse.

ARGUMENT

I. The FCC's Process for Imposing Penalties Contravenes the Seventh Amendment.

The FCC may not impose civil penalties on Verizon without the protection of a trial by jury before an Article III court. This Court in *Jarkesy* made that clear. Examining the text, history, and precedent underlying the Seventh Amendment, the Court concluded that "the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." *Jarkesy*, 603 U.S. at 120. This case is no different.

A. At the Founding, the People Insisted on the Civil Jury Right to Check Governmental Power.

The Seventh Amendment was adopted specifically to check the government's power to impose penalties upon the people for civil violations. The Framers viewed Parliament's curtailment of that civil jury right as a chief grievance against the British Crown. And the FCC's effort to levy an in-house penalty here is strikingly similar to the juryless proceedings that our forebearers fought a revolution to abolish.

1. The Seventh Amendment Arose Out of the Crown's Expansion of Juryless Admiralty Courts.

As the American colonists' disagreements with England intensified in the 1760s, the Crown marginalized the jury system to bolster enforcement of unpopular parliamentary edicts. Parliament expanded the jurisdiction of the juryless admiralty courts—most notably through the Stamp Act—to a range of cases traditionally tried in common law courts. *See* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 12–13, 63, 145–46, 206–08 (1960). These proceedings deprived colonists of jury trials in cases where Crown prosecutors sought significant penalties, including monetary fines. *See* Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 151 n.28 (1996).

In response, the voters of Boston ranked "the Jurisdiction of the Admiralty"—next to taxation without representation—as their "greatest Grievance." 1 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 177 (1986) (citation omitted). John Adams similarly declared that "the most cruel" and "unjust Innovation" of the Stamp Act was "the alarming Extension of the Powers of Courts of Admiralty . . . . In these Courts, one Judge alone, presides. No Juries, have any Concern there." *Letter from John Adams to Ebenezer Thayer* (Sept. 24, 1765), bit.ly/3zl0Ezn (last visited Dec. 12, 2025).

Other colonial leaders harbored similar feelings toward the juryless tribunals. Pennsylvania's

Assembly protested that "the vesting and Authority in the Courts of Admiralty to decide in Suits relating to the Stamp Duty, and other Matters, foreign to their proper Jurisdiction, is highly dangerous to the Liberties of his Majesty['s] American Subjects . . . and destructive of one of their most darling and acknowledged Rights, that of Trials by Juries." *Resolves of the Pennsylvania Assembly on the Stamp Act*, Sept. 21, 1765, bit.ly/3ZJrjAp (last visited Dec. 12, 2025). Maryland's legislature echoed that view, declaring that the expansion of admiralty jurisdiction "render[ed] the Subject insecure in his Liberty and Property." Reid, *supra*, at 48–49 (quoting *Maryland Resolves*, Sept. 28, 1765). And the legislatures of New York and Virginia issued similar resolutions. *See id.* at 49.

In the first collective action against British policy, nine colonies formed the Stamp Act Congress of 1765 in protest. That Congress objected to the juryless admiralty courts, resolving that "trial by jury is the inherent and invaluable right of every British subject in these colonies" and that the Stamp Act and similar acts "have a manifest tendency to subvert the rights and liberties of the colonists." *Resolutions of the Stamp Act Congress* (Oct. 19, 1765).

The Crown's continued reliance on admiralty courts pushed the colonists toward declaring independence. The First Continental Congress raised formal objections to juryless tribunals. *See* 1 *Journals of the Continental Congress 1774–1789*, at 69 (Oct. 14, 1774). The Second Continental Congress did the same, complaining that colonists were deprived "of the accustomed and inestimable privilege of trial by jury,

in cases affecting both life and property." *The Declaration of the Causes and Necessity of Taking Up Arms* (1775), reprinted in *Select Charters and other Documents Illustrative of American history 1606–1775*, at 374, 376 (William MacDonald ed., 1904). And the Declaration of Independence identified "depriving [the colonists] in many cases, of the benefits of Trial by Jury," among its list of grievances against the King. *The Declaration of Independence* para. 20 (U.S. 1776). Early Americans thus understood the vital importance of the jury, and the Crown's decision to channel enforcement actions away from them served as a major catalyst for the Revolutionary War. *See* Ubbelohde, *supra*, at 209.

2. At the Founding, the People Insisted on the Civil Jury Right's Inclusion in the Bill of Rights.

Despite this history, the civil jury right was not initially included in the Constitution. While there was an effort to include such a provision at the Constitutional Convention, the effort failed because "proponents of a civil jury guarantee found too difficult the task of fashioning words appropriate to cover the different state practices." *Colgrove v. Battin*, 413 U.S. 149, 153 (1973).

The Constitution's omission of a civil jury right was a stumbling block to ratification. As Alexander Hamilton admitted, "[t]he objection to the plan of the convention, which has met with most success in [New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases." The Federalist No. 83, at 494 (Alexander Hamilton) (emphasis omitted).

The people recalled the Crown's circumvention of civil juries and feared that, without an express constitutional constraint, the new federal government might follow suit.

This concern over the lack of civil-jury protections rang loud in the Anti-Federalist charge. Before the Maryland House of Delegates, Luther Martin explained that jury trials had "long been considered the surest barrier against arbitrary power, and the palladium of liberty." Luther Martin, *Genuine Information* (1787), reprinted in 3 *The Records of the Federal Convention of 1787*, at 172, 221 (Max Farrand ed., 1911) (italics omitted). Martin was most concerned about civil disputes "between government and its officers on the one part, and the subject or citizen on the other," as these were the "very cases where, of all others, [the jury trial] was most essential for [the people's] liberty." *Id.* at 222. The pleas of Martin and other Anti-Federalists were persuasive. They "struck a responsive chord in the populace, and the price exacted in many States for approval of the Constitution was the appending of a list of recommended amendments, chief among them a clause securing the right of jury trial in civil cases." *Parklane Hosiery Co., Inc.*, 439 U.S. at 342 (Rehnquist, J., dissenting).

In introducing the Bill of Rights in the House, James Madison heeded those calls. He described the "[t]rial by jury" as equally "essential to secur[ing] the liberty of the people as any one of the preexistent rights of nature." 1 *Annals of Congress* 454 (1789) (Joseph Gales ed., 1834). Soon after, the First Congress proposed the Seventh Amendment and

submitted it to the States without debate. *See Heritage Guide to the Constitution* 464 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

B. The Seventh Amendment Gives Verizon a Right to a Jury Trial.

Because the Seventh Amendment was ratified chiefly to protect citizens against government actions, the FCC's effort to impose penalties on Verizon falls within the heart of that right.

This Court made that clear in *Jarkesy*, where it vindicated a similar challenge to the SEC's imposition of civil penalties in its in-house administrative tribunals. *See* 603 U.S. at 140. Along the way, this Court stressed that "whether [a] claim is statutory is immaterial" to the Seventh Amendment analysis. *Id.* at 122. Rather, "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *Id.* (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). And "[t]o determine whether a suit is legal in nature," the Court "consider[ed] the cause of action and the remedy it provides," noting that the remedy was the "'more important' consideration." *Jarkesy*, 603 U.S. at 122–23 (citation omitted). The "civil penalties in [that] case [were] designed to punish and deter, not to compensate," and they were accordingly "'a type of remedy at common law that could only be enforced in courts of law.'" *Id.* at 125 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

So too here. As in *Jarkesy*, the "remedy is all but dispositive" of Verizon's Seventh Amendment right to a jury trial. *Id.* at 123. The FCC, like the SEC, "seeks civil penalties" that are "designed to punish or deter

the wrongdoer." *Id.* And these remedies implicate the jury right and can "only be enforced in courts of law." *Id.*

The government itself has observed as much, stating that an FCC forfeiture penalty "is a civil penalty" that is "plainly punitive in nature." United States Br. 12, *United States v. Rhodes*, No. 21-cv-0110 (D. Mont. Mar. 1, 2024), ECF No. 108. It involves a "per-violation maximum penalty," and it "is designed to punish culpable individuals, rather than to extract compensation or restore the status quo." *Id.* (cleaned up). All this shows that the "civil penalties in this case are designed to punish and deter," which "effectively decides that this suit implicates the Seventh Amendment right" to a jury trial. *Jarkesy*, 603 U.S. at 125.

Jarkesy "confirm[ed] that conclusion" by identifying a "close relationship" between the securities fraud claim at issue there and common-law fraud. *Id.* That same type of "close relationship" exists here. As Verizon explains, the FCC's forfeiture order is analogous to common-law negligence. *See* Pet.16. Section 222 imposes a statutory "duty to protect the confidentiality" of customer proprietary network information. 47 U.S.C. § 222(a). And that duty requires carriers to "take reasonable measures to discover and protect against attempts to gain unauthorized access." 47 C.F.R. § 64.2010(a). That sort of "reasonableness" analysis is "a staple of the common law" tort of negligence. *AT&T, Inc. v. FCC*, 149 F.4th 491, 499 (5th Cir. 2025). Accordingly, the "substance" of the claim here "is closely analogous to a negligence action." *Id.*

And the FCC cannot find safe harbor within the Seventh Amendment's "public rights" exception. Indeed, "[i]f a suit is in the nature of an action at common law," as this one is, "then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Jarkesy*, 603 U.S. at 128. The government can rebut that presumption only by pointing to firmly rooted "background legal principles" that justify a departure from the text of Article III and the Seventh Amendment. *Id*. at 131; *see also id*. at 153 (Gorsuch, J., concurring) ("[T]raditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree."). That is true "[e]ven when [the] action 'originates in a newly fashioned regulatory scheme.'" *Jarkesy*, 603 U.S. at 134 (majority op.) (citation and brackets omitted).

This case does not involve any traditionally recognized public right, like the collection and disbursement of tax revenues from a customs agent, the granting of land patents, or immigration matters. See *id*. at 128–30; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 281–85 (1856). Nor is there any reason for this Court to expand the doctrine to this new context. "The public rights exception is, after all, an *exception*" that "has no textual basis in the Constitution." *Jarkesy*, 603 U.S. at 131. It thus must be applied "with care" and "close attention" to Founding-era history; otherwise, "the exception would swallow the rule." *Id*. The FCC can identify no such history on its side. Its proceeding thus contravenes Verizon's Seventh Amendment right to a trial by jury.

C. The FCC's Peculiar Statutory Scheme Does Not Save It from Violating *Jarkesy*.

The FCC's forfeiture order has all the hallmarks of a final agency action. The statute vests the agency with the power to conduct an agency adjudication and to issue a final order. 47 U.S.C. § 503(b)(3)(A). And then it provides that, if a carrier timely pays the penalty, the carrier may petition for review in the appropriate court of appeals. *Id.* § 402(a); *see* 28 U.S.C. §§ 2342(1), 2344. But seeking judicial review of the forfeiture in the court of appeals under the statute forces the carrier to forgo any chance at a jury trial. *See AT&T*, 149 F.4th at 495.

The Second Circuit held, however, that Verizon's jury trial right was preserved because Congress also provided that if the carrier fails to pay the penalty, the Department of Justice may choose to bring a collection action in federal district court, at which point the carrier could invoke the right to a jury for the first time. Pet.App.35a–36a. According to the court, "the government['s] need[] to initiate a collection action" in federal district court to enforce the FCC forfeiture order thus "create[s] no Seventh Amendment injury." Pet.App.36a. That conclusion is wrong several times over.

1. The FCC's Order Is a Binding Legal Determination.

The Second Circuit found no Seventh Amendment violation because "Verizon could have declined to pay the forfeiture and preserved its opportunity for a *de novo* jury trial if the government sought to collect," reasoning that "[t]he FCC's forfeiture order . . . does not, by itself, compel payment." *Id.* But nothing in

the Communications Act suggests that the forfeiture order is anything other than mandatory.

Section 503 of the Communications could hardly be clearer. The statute itself states that, "[a]ny person who is *determined by the Commission*, in accordance" with agency adjudication procedures, to have violated the Communications Act, "*shall be liable* to the United States for a forfeiture penalty." 47 U.S.C. § 503(b)(1) (emphasis added). Nothing in the statute suggests that Congress viewed the agency adjudication as anything other than the process by which the regulated party would be found liable for the forfeiture penalty.

Consistent with the statute, the forfeiture order itself does not suggest that the liability finding against Verizon is preliminary or renders payment optional. The forfeiture order's first paragraph declares that "Verizon Communications *is liable* for monetary forfeiture . . . in the amount" of $46,901,250. Pet.App.138a (emphasis added). The order also states that "[p]ayment of the forfeiture *shall be made* . . . within thirty (30) calendar days." Pet.App.139a (emphasis added); *see also Murphy v. Smith*, 583 U.S. 220, 223 (2018) ("the word 'shall' usually creates a mandate, not a liberty"). The forfeiture order's plain language leaves no doubt that the FCC viewed the order as imposing a mandatory obligation for payment.

There is likewise nothing in the statutory provisions for judicial review that suggests the forfeiture order is anything but final and binding. Section 402(a) provides that judicial review of the forfeiture order shall fall under chapter 158 of title 28,

which provides for petitions to review the legality of an agency order before the courts of appeals. *See* 28 U.S.C. §§ 2342(1), 2344. In other words, the statute provides that regulated carriers like Verizon do not receive any right to a jury trial before a determination of liability. They are instead channeled to seek judicial review only in the court of appeals.

2. Section 504 Does Not Remedy the Seventh Amendment Violation.

The Second Circuit evidently concluded that Verizon should have refused to pay the forfeiture and forced the FCC to bring a collection action. But that does not remedy the Seventh Amendment violation.

Section 504(a) empowers the DOJ to "prosecute for the recovery of forfeitures" through "a civil suit in the name of the United States brought in [federal district court]." 47 U.S.C. § 504(a). Thus, because a defendant in an FCC adjudication is not entitled to demand an Article III court and jury, its only opportunity to present its case to an impartial factfinder comes when *DOJ* sues for collection of its outstanding debt. The Second Circuit viewed this to be constitutionally permissible, because such a potential collection action down the road would be a "trial de novo." Pet.App.36a. Yet that theoretical right to a jury trial hardly vindicates the right in the first instance.

After all, the law gives Verizon no right to judicial review (or a jury) before the imposition of any penalty. Verizon's only right is to petition for review in the court of appeals *after* payment. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342(1), 2344. Yet the Second Circuit treated Verizon's act of paying this debt as a waiver of its Seventh Amendment right. Pet.App.36a. In the

Second Circuit's view, Verizon could only exercise its Seventh Amendment right by shirking payment to the federal government and being left to defend itself, if and when DOJ chose to bring a collection suit. Yet law-abiding, regulated parties are not in the habit of defaulting upon mandatory obligations to their regulator. The Second Circuit's effort to read the statute as preserving some belated version of the jury right requires contortions and defaults that result in no safeguard at all.

It is therefore no surprise that Section 504(a)'s alleged saving grace—the collections trial *de novo*—has not occurred in at least fifty years. The FCC has cited only one 1974 case in which a jury trial "was available" but was waived. Pet.App.125a. In fact, the FCC fails to point to a single Section 504(a) jury trial ever, and it is not clear that there has ever been one. Thus, any jury trial right emanating from Section 504(a) appears theoretical at best. This reality is no shock because telecommunications carriers like Verizon appear regularly before the FCC, including to obtain and transfer their licenses to do business. No carrier is likely to ignore an FCC order that requires paying the government millions of dollars. And it appears no carrier ever has.

Even if a theoretical Section 504(a) jury trial ever did occur, a defendant may not actually receive a *de novo* review of the law or facts. While the Second Circuit read a "trial *de novo*" under Section 504(a) to permit redetermination of all legal and factual determinations, Pet.App.36a, several courts have reviewed the FCC's factfinding deferentially, looking only for whether its determinations were reasonable.

See, e.g., *United States v. Sutton*, 2024 WL 2926594, at *12 (W.D. Ark. Mar. 27, 2024) (government's motion for judgment on the pleadings) ("[C]ourts have held that an FCC forfeiture penalty should be upheld where the amount is reasonable and consistent with the relevant FCC guidelines."). And several jurisdictions have held that challenges to the FCC's legal determinations are not available under Section 504. *See United States v. Stevens*, 691 F.3d 620, 622 (5th Cir. 2012) (bench trial) (affirming district court's "refus[al] to consider the Stevenses' legal arguments" because "its jurisdiction was limited to considering the factual basis for the agency action"); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000) (government's motion for judgment on the pleadings) (similar); *United States v. Dunifer*, 219 F.3d 1004, 1008 n.8 (9th Cir. 2000) (bench trial) (similar).

These lower court decisions, if correct, would only compound the constitutional violation arising from Verizon's loss of the jury trial right in the first instance. But even if they are erroneous, that would not save the statutory scheme.

3. A Post-Order Collection Action Cannot Cure Verizon's Immediate Harm.

The Second Circuit reasoned that had the "government declined to pursue the collection action within five years, Verizon would be under no obligation to pay and would suffer no Seventh Amendment injury." Pet.App.38a. But that ignores the immediate legal, economic, and reputational harms caused by the FCC's forfeiture order.

First, the forfeiture order constitutes an official government determination that Verizon violated the law and is liable for penalties. But Verizon had a right to have the judiciary—with a jury—make such a determination. The Executive may use administrative processes to determine whether to initiate an action against a defendant. But as *Jarkesy* explained with respect to "common law claims," "involvement by an Article III court in the initial adjudication is necessary." 603 U.S. at 128. That requirement was not satisfied here. And now, to the public and the FCC alike, Verizon has been determined to be a lawbreaker.

Second, the FCC's in-house determination carries significant legal consequences. Under FCC policy, the agency may "us[e] the underlying facts of a prior violation that shows a pattern of non-compliant behavior against a licensee in a subsequent renewal, forfeiture, transfer, or other proceeding." Commission's Forfeiture Pol'y Statement & Amend. of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order, 12 FCC Red 17087, ¶ 34 (1997) ("FCC Policy Statement"). The FCC thus could use the facts supporting an unpaid forfeiture "as a basis for higher forfeiture" in future cases. FCC Policy Statement, ¶ 35; *see also FCC v. Fox Television Stations*, 567 U.S. 239, 255 (2012) (noting the FCC's authority to take a "history of prior offenses" into account when setting a future forfeiture penalty, even where agency declines to impose forfeiture initially). Indeed, the FCC admits that such facts could serve as a basis for denying a request to renew a license for broadcast, mobile, broadband, or satellite services; to prevent consummation of a merger that involves the

transfer of FCC licenses; or to inform the FCC's determination of whether a company possesses the requisite character to hold licenses at all. *See* FCC Policy Statement, ¶ 34.

And Section 504(c) accords with the FCC's policy of using underlying facts of a prior violation in subsequent proceedings. The statute bars the FCC from using the "fact" that it has "issue[d] a notice of apparent liability looking toward the imposition of a forfeiture" "in any other proceeding before the [FCC]." 47 U.S.C. § 504(c). But Section 504(c) only limits the FCC from using the fact that it has issued a *notice of apparent liability* against the carrier—it does not prohibit the FCC from using a *final forfeiture order*, like the one Verizon received, against the carrier in future proceedings. *See id*. Nor does Section 504(c) prevent the FCC from using the facts underlying a final forfeiture order against carriers.

In short, after the FCC issues a forfeiture order, a carrier is marked by a scarlet letter that imposes vast legal uncertainty over its ongoing operations. A carrier finds it of little consolation that the facts adjudicated by the FCC might someday be the subject of a jury trial *if* the carrier violates the FCC forfeiture order by refusing to pay, and *if* the Executive Branch then elects to bring a collection action under Section 504(a).

Third, the pendency of a forfeiture order carries significant reputational and economic harms. This Court has recognized that FCC orders impose "reputational injury" in addition to "legal consequence." *Fox Television Stations*, 567 U.S. at 255. The FCC's "findings of wrongdoing can result in

harm to a broadcaster's reputation with viewers and advertisers," particularly given the "strongly disapproving terms" that "are contained in the permanent Commission record" and the fact that such findings are "widely publicized." *Id.* at 255–56 (internal quotations and citations omitted).

Meanwhile, enforcement targets are obliged to consider whether the forfeiture order and the findings contained must be further disclosed in SEC filings; or in applications for new government contracts, grants, or similar programs or benefits; or in applications for loans or new lines of credit. These reputational and economic harms exist regardless of whether the telecommunications carrier defaults on payment and DOJ decides to collect in federal court. And if DOJ chooses not to file suit to collect from the enforcement target, then the FCC's impugning allegations go unchallenged.

Fourth, the cost of even getting to hypothetical back-end review can be enormous for FCC enforcement targets. Unlike in federal court, which has established timeframes for responding to a complaint, and where an impartial Article III judge manages the time and scope of the litigation, the FCC has no similar safeguards. An FCC investigation and enforcement action can linger for years without resolution. And should an enforcement target get to federal court, it must start the process all over again, incurring duplicative costs and further drawing out resolution. Even then, the enforcement target is branded as a defendant in a "collection" action for a forfeiture already imposed and, as noted above, can be saddled with diminished procedural safeguards.

Because of the significant legal and real-world consequences, nonpayment is not a realistic option. These consequences further demonstrate that the FCC's imposition of a forfeiture order without the protections of an Article III court and jury violate the Seventh Amendment.

II. The FCC's Claimed Sweeping Authority to Determine Massive Civil Penalties Makes Trial by Jury All the More Necessary.

Although Verizon's petition for certiorari presents only the Seventh Amendment question, the FCC's interpretation of its statutory-penalty authority renders the need for the jury all the more apparent. Here, the FCC has imposed a penalty on Verizon of $46,901,250. Pet.App.43a. Yet the FCC views this as "eminently *conservative*." Pet.App.116a (emphasis in original). Apparently pleased by its magnanimity, the FCC claims that, under a dubious reading of the statute, "the Commission could well have chosen to look to the total number of Verizon subscribers when determining the number of violations." *Id*. If that were right, the FCC "could have ordered a final penalty of up to $236 *trillion*, or seven times the current GDP of the United States." Pet.32.

But that is not the law. Section 503(b) provides that a person may be liable for forfeiture for "willfully or repeatedly fail[ing] to comply with any of the provisions of" the Communications Act or rules promulgated by the FCC. 47 U.S.C. § 503(b)(1)(B). The Act then caps the total per-violation amount at approximately $200,000 for "each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed"

approximately $2 million, adjusted for inflation, "for any single act or failure to act" that violates the statute or FCC rules. *Id.* § 503(b)(2)(B). The import of this provision should be clear: while a "continuing violation" of FCC rules based on a "single act or failure to act" may increase a violator's penalties beyond a single forfeiture, the penalties for a single "continuing violation" may not in the aggregate exceed $2 million.

The continuing violation provision "subjects to separate liability the recurring daily episodes of a delictual pattern that might otherwise be treated in the aggregate"—such as operating a broadcast station each day for 14 consecutive days without a license. *WIYN Radio*, 614 F.2d at 497. It should not penalize, by mere passage of time, the "fail[ure] to fulfill . . . a single, pointed duty, admitting of only a single dereliction," even if "the effect of [the] failure to act within the prescribed period persists." *Id.* Nor, by extension, does it permit the agency to identify tens, hundreds, or even millions of separate continuing violations based on a single failure to perform a legal duty.[2]

But that is what the FCC claims the power to do, maintaining that it may impose penalties of up to $236 trillion, more than double the world's GDP, even though Congress placed a statutory *cap* on such

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[2] This reading also comports with this Court's precedents in other areas relating to what constitutes a "single act" when the proscribed behavior is continuing in nature. *See, e.g.*, *Blockburger v. United States*, 284 U.S. 299, 302 (1932) ("[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue." (internal quotations and citations omitted)).

penalties. The FCC claims this power by attempting to turn statutory ambiguity into authority. And the FCC can get away with regulating in such a "draconian fashion" because there is no impartial judge and jury in its enforcement proceedings to check its arbitrary exercises of power. *WIYN Radio*, 614 F.2d at 497–98.

* * *

Checking arbitrary exercises of government power, like the FCC's here, was precisely why the Founding generation felt it necessary to enshrine the Seventh Amendment's protections. Now Verizon seeks such protection. Verizon was found to be a lawbreaker by the government and subjected to a penalty of over $46 million without the opportunity to plead its case before a civil jury. This Court should grant certiorari to make clear that the Constitution does not permit that concentration of power.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 12, 2025