

No. 25-739

IN THE

Supreme Court of the United States

HERBERT HIRSCH, BONITA HIRSCH,
HARVEY BIRDMAN, AND DIANE BIRDMAN,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, petitioners submit this supplemental brief to address this Court’s decision in *FCC v. AT&T, Inc.*, No. 25-406 (June 4, 2026). *AT&T* confirms that the jury-trial questions presented in this case warrant the Court’s review.

A. *AT&T* involved a Seventh Amendment challenge to an FCC enforcement scheme for seeking monetary forfeitures for violations of the communications laws. Slip op. at 1-3. Under that scheme, the FCC can institute an “informal proceeding” by issuing a “notice of apparent liability” to a regulated party. *Id.* at 2 (quoting 47 U.S.C. § 503(b)(4)(A)). After providing the party an opportunity to respond, the FCC “determine[s]” whether the party is liable and “assess[es]” a penalty if it is. *Id.* (quoting 47 U.S.C. §§ 503(b)(1), (b)(2)(E)). Once the FCC issues such an order, the recipient has the “option . . . to do nothing.” *Id.* at 3. If the recipient does not “pay the forfeiture voluntarily,” the FCC may refer the case to the Department of Justice to bring a collection action in which a jury is available and the recipient’s liability is adjudicated in “a trial *de novo*.” *Id.* (quoting 47 U.S.C. § 504(a)). “Absent a successful enforcement suit (and resulting court order), the statute provides no other mechanism for the Commission to collect the forfeiture.” *Id.*

This Court held that the FCC forfeiture scheme does not violate the Seventh Amendment, applying reasoning that bears directly on the questions presented here. In particular, the Court emphasized that “*before* the Government can collect a penalty, it must prove its case to a jury in a trial *de novo*.” Slip op. at

1 (emphasis added); *see id.* at 9. Indeed, the statute does not authorize the FCC to “execute on a forfeiture order”—the agency “cannot, for example, seize [regulated parties’] assets or obtain liens on their property.” *Id.* at 7; *see id.* at 10 (contrasting *SEC v. Jarkesy*, 603 U.S. 109 (2024), because the SEC’s imposition of civil penalties “were immediately enforceable,” as “the SEC could garnish the recipient’s wages or deduct a portion of the forfeiture from his tax return”). Moreover, “[a] recipient of a[n] [FCC] forfeiture order incurs no penalties for nonpayment, and interest does not accrue on the sum.” *Id.* at 7.

B. *AT&T* demonstrates why none of the three pathways that the government identifies for a taxpayer to challenge tax fraud penalties in this case vindicates the taxpayer’s jury-trial rights. *See* Br. in Opp. 2-3.

1. A taxpayer may, without paying the penalties, “file a petition in the Tax Court”—but the government acknowledges that “[n]o jury is available” in that proceeding. Br. in Opp. 2. And unlike an FCC forfeiture order, which imposes no “obligation to pay,” Slip op. at 7, a Tax Court’s juryless adjudication of fraud penalties authorizes the IRS to immediately levy a taxpayer’s assets, Social Security benefits, and retirement income, and to seize and sell the taxpayer’s property to satisfy the debt—all while interest accrues. *See* Pet. Reply 9 (citing 26 U.S.C. §§ 6321-6326, 6331(a)-(b), 6601).

2. The taxpayer’s second option in response to a notice of deficiency is to “do nothing”—but as the government observes, the government may then collect the “penalties through administrative proceedings” with no jury adjudication. Br. in Opp. 3. If the taxpayer does not petition for redetermination in Tax Court

within ninety days, the penalty “shall be assessed.” 26 U.S.C. § 6213(a), (c). At that point, the assessment triggers powerful administrative enforcement tools for the IRS—including wage garnishment, bank account levies, and the seizure of property. *See* 26 U.S.C. § 6331(a), (b); *see also id.* § 6601 (interest).

Accordingly, whereas the “do nothing” option in *AT&T* carried no consequences for regulated parties, who could never “be made to pay” before the Department of Justice initiated a collection action, Slip op. at 8, a taxpayer who does nothing in response to a notice of deficiency can be made to pay fraud penalties through the IRS’s administrative enforcement powers, *supra* at 2-3. Indeed, those powers often suffice for the IRS to collect the full penalty (with interest), obviating the need for the government to pursue a collection suit and eliminating the taxpayer’s ability to ever access a jury. The IRS’s assessment of penalties is thus a sharp departure from an FCC forfeiture order, the “only legal effect” of which “is to enable the Department of Justice to file a suit.” Slip op. at 9.

The government notes that if administrative enforcement “efforts fail, the government may file a collection suit in district court,” where the taxpayer “may demand a jury trial.” Br. in Opp. 3. But even then, a collection suit does not offer a “trial de novo,” in contrast to an enforcement suit under the FCC forfeiture scheme. Slip op. at 8. If the government files a collection suit after the taxpayer has already challenged the penalty in Tax Court, the taxpayer is precluded from relitigating his underlying liability as part of the collection suit. *See United States v. Shanbaum*, 10 F.3d 305, 308, 313-14 (5th Cir. 1994). In those cases, the Tax Court—not a jury—makes the “ultimate determinations” of fact. Slip op. at 9 (citations and alterations

omitted). If instead the taxpayer forgoes a Tax Court petition, the IRS's assessment is presumptively valid in any subsequent collection suit, and the taxpayer bears the burden of "prov[ing] that the assessment is erroneous in order to prevail." *United States v. White*, 466 F.3d 1241, 1248 (11th Cir. 2006); *cf. Welch v. Helvering*, 290 U.S. 111, 115 (1933) (holding that Commissioner's evaluation of payments was entitled to "presumption of correctness"). Thus, the collection suit in those situations does not proceed "*as if no trial whatever had been had.*" Slip op. at 8 (citation omitted).

3. The final option for a taxpayer is to pay fraud penalties based on the IRS's notice of deficiency and then seek a refund to challenge the imposition of those penalties. *See* Br. in Opp. 3. But *AT&T* confirms that a refund suit that is available only after payment has been made is not a constitutionally adequate alternative to a jury trial. *Contra id.* at 3, 23; *see* Pet. Reply 8.

As the Court observed in *AT&T*, "the Government may not effectively deny constitutional rights by making it too costly to exercise them." Slip op. at 12. The unconstitutional conditions doctrine was a "poor fit" in the context of the FCC's order because it imposed no obligation to pay and thus did not implicate the jury-trial right at all. *Id.* at 12-13. But that is not true when the IRS assesses a fraud penalty, given the IRS's ability to enforce the penalty through administrative proceedings. And whereas *AT&T* held that the regulated parties' asserted "risk of reputational harm" there did not "exact an unduly high cost," an obligation to pay millions of dollars in fraud penalties to secure a jury trial here is precisely the sort of "high cost" the

government may not impose on the exercise of a constitutional right. *Id.* at 13-14.

* * *

The analysis in *AT&T* makes clear that the juryless adjudication of tax fraud penalties violates the Seventh Amendment and Article III. This Court should grant review to ensure that before “the Government can collect a penalty” in this context, “it must prove its case to a jury in a trial *de novo*.” Slip op. at 1.

Respectfully submitted,

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June 9, 2026