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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-406, the Federal Communications Commission versus AT&T, and the consolidated case.

Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL
ON BEHALF OF AT&T, INC. AND
VERIZON COMMUNICATIONS INC.

MR. WALL: Mr. Chief Justice, and may it please the Court:

The FCC imposed more than \$100 million of civil penalties on AT&T and Verizon, and the companies had no way to demand a jury trial. That's a straightforward violation of the Seventh Amendment and this Court's decision in *Jarkesy*.

The government's only answer is that the penalties weren't binding. They were just invitations to pay \$100 million if you want. And that's wrong for at least four reasons.

First, the statute says that the FCC issues a charging document, considers the party's response, and then assesses and imposes

1 penalties. That's not voluntary language.

2 Second, it's the same language
3 Congress has used in many statutes, including
4 the SEC statute in Jarkesy, and the government
5 has never claimed it is voluntary.

6 Third, there's an alternative
7 procedure by which the Commission itself or an
8 ALJ can assess and impose penalties, the same
9 statutory language. The government appears to
10 accept that type of forfeiture order is
11 binding.

12 And, fourth, it's not how the FCC has
13 read the statute for decades. Its regulation
14 and guidance treat forfeiture orders as
15 binding. These orders are Exhibit A. In bold,
16 capital letters, they command payment by a
17 particular date.

18 If the government were right about the
19 statute, it would just walk them into a
20 constitutional problem. They want these
21 forfeiture orders because they know that
22 legitimate parties pay 100 percent of the time.
23 If your main regulator says that you are
24 violating the law, you can't let that hang over
25 your head indefinitely.

1 But, to guarantee any judicial review,
2 AT&T and Verizon have to give up the right to a
3 jury trial. It is hard to imagine a clearer
4 case of penalizing the exercise of a
5 fundamental constitutional right.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Well, Mr. Wall, if
8 the government has maintained the argument that
9 it did below, you would have a good point, but
10 the government seems to have walked away from
11 that argument.

12 If we assume that the government now
13 is taking a position that does not require
14 the -- does not involve the Seventh Amendment,
15 what do we do with your case, if we also think
16 that the approach that it took in your case did
17 involve the Seventh Amendment or implicate the
18 Seventh Amendment?

19 MR. WALL: So I would say a couple
20 things, Justice Thomas. First, I -- I think
21 you've got to agree with them on the statute.
22 You've got to agree that no matter what they
23 try to disclaim, that the statute actually
24 doesn't make these things binding, though it
25 uses binding language and though every statute

1 cited in Justice Sotomayor's Jarkesy dissent
2 uses the same language, "determine, assess, and
3 impose penalties." That language, which has
4 always been thought to be mandatory or
5 compulsory, you have to accept isn't.

6 But, if you agreed with that, then I
7 think you'd reach the question of whether these
8 orders were ultra vires. They clearly were.
9 They -- they do not speak in any voluntary
10 language. They ordered us to pay. The
11 government never took any -- never gave any
12 hint below that they weren't binding. And so,
13 at a minimum, we'd get our money back, and
14 going forward, the agency would have to issue,
15 you know, sort of non-binding orders.

16 But I will say that would carve a huge
17 hole in Jarkesy. That would mean tomorrow that
18 you could take every Jarkesy-like scheme and
19 the agency could issue these non-binding orders
20 that you, in fact, effectively have to comply
21 with because of their in terrorem effect, all
22 while the government sort of says, well,
23 technically, they're not binding.

24 And it -- it seems to me that's just a
25 way of dragging in through the back door what

1 in Jarkesy said you couldn't bring through the
2 front.

3 CHIEF JUSTICE ROBERTS: Counsel, I
4 wonder if, though, at the end of the day,
5 you're really just talking about a PR problem,
6 right? You're just saying there are big
7 letters, the language said we did something
8 bad, and that's -- and that's -- so everybody
9 has to pay so they don't get, you know, bad PR.
10 And I'm just wondering, in terms of the
11 substantive legal issue, though, you are not
12 obligated to pay until you get a jury.

13 MR. WALL: Well, Mr. Chief Justice, I
14 think we have to separate whether you owe
15 something from when you have to pay it. If I
16 get a parking ticket from the government, I can
17 ignore it and make them come after me, but I
18 still owe it.

19 So, if the obligation here was
20 binding, then it's -- I -- I don't take the
21 government to be trying to argue it's any
22 different than Jarkesy. It's the agency
23 adjudicating facts, finding liability, and
24 imposing a remedy.

25 So then the only question is, well,

1 okay, but if they say it's non-binding, but I
2 still think, Mr. Chief Justice, you've got an
3 order there that adjudicates you an egregious
4 law breaker, tells you you're violating the law
5 and that you owe a hundred million dollars, and
6 then you have to sit around for years to wait
7 to see if you have any opportunity to challenge
8 that in front of a jury.

9 CHIEF JUSTICE ROBERTS: Well, but -- I
10 understand your argument, you know, you're
11 ordered to pay and -- and payment shall be due
12 at a particular point. But, even with your --
13 your parking ticket, I mean, you don't have
14 to -- if you don't pay, you do get a legal
15 proceeding. Whether a jury trial is required
16 in that case or not, I don't know. But you
17 still -- it's just in your -- it's the same
18 issue. You just say this is a terrible thing.
19 I'm labeled a lawbreaker. They say I've got to
20 pay. I've got this parking ticket.

21 And -- and I guess I still wonder -- I
22 mean, if they change the language, would you be
23 all right? If it says now this is not to say
24 this isn't over, he could still seek a jury
25 trial, and, you know, his constitutional rights

1 will be respected, and he doesn't have to pay
2 until this or that, I mean, do you still have
3 the same case?

4 MR. WALL: I'd say a couple things.
5 No, I wouldn't be because it's not what the
6 statute says. The statute says they assess and
7 impose, like lots of statutes. That's a real
8 penalty. I don't think they can walk away from
9 it just because they're trying to avoid a
10 constitutional problem.

11 But, even if you agreed with them on
12 the statute, you'd have to say that the orders
13 going forward are really toothless, because I
14 don't think they can have their cake and eat it
15 too. And even -- you know, we can have a
16 debate about what they can use them for. I
17 look at the statute, 504, and -- and -- and --
18 and their own guidance, and I think they can
19 use it for lots of reasons.

20 They say in their brief, well, we can
21 only use it to look at the facts that we found.
22 That seems to me just a self-imposed limit as a
23 matter of grace. But, even if you bought that,
24 they can still use the facts for other
25 purposes. Even they acknowledge that.

1 Increasing a future forfeiture or in some
2 future license or -- or auction.

3 So I don't think, Mr. Chief Justice,
4 they can get out of the statutory problem, but
5 the only way they can get out of it, even
6 conceivably, I think, is if they really want to
7 say these orders are totally toothless.
8 There's nothing they can do with them going
9 forward.

10 And, of course, the reason they want
11 them is because that's not true. They know
12 these hang over everybody's head. They know
13 that for 50 years no one has ever sat or no
14 legitimate party has ever sat around and waited
15 to try to get a jury trial.

16 JUSTICE KAVANAUGH: How are they
17 different in effect from a notice of apparent
18 liability? Doesn't -- or a more formal notice
19 of apparent liability? That would hang over
20 your head too but not take away your right to
21 go to court for a jury trial.

22 MR. WALL: I mean, so too in Jarkesy,
23 Justice Kavanaugh, the SEC was free to tell
24 George Jarkesy they -- they thought he owed
25 some money, but once they pulled him inhouse

1 and they issued an order that found him a
2 lawbreaker and said he owed money to the
3 government, that's what the Seventh Amendment
4 says you have to do in front of a jury as long
5 as it's a claim at law and it falls outside the
6 public rights exception.

7 JUSTICE JACKSON: But wasn't that --

8 MR. WALL: And I think there's a world
9 of difference between the government telling
10 you we think you may owe something and in a
11 hundred-page order --

12 JUSTICE KAVANAUGH: Well --

13 MR. WALL: -- telling you you
14 absolutely do and you're an egregious
15 lawbreaker and, by the way, we admonish you
16 never to do it again.

17 JUSTICE KAVANAUGH: But don't you want
18 us going forward, putting aside what we do with
19 this case, Justice Thomas's question, but going
20 forward, don't you want us to construe the
21 statute that way, whether because of the
22 Constitution or otherwise, such that it is in
23 effect a notice of apparent liability?

24 MR. WALL: No. I -- I think you
25 should read the statute straight up and give it

1 its most natural meaning.

2 JUSTICE KAVANAUGH: And then say
3 what -- what else, that that --

4 MR. WALL: Say the statute makes these
5 no less binding than every other statute that
6 uses similar language, including the statute in
7 Jarkesy, and the government at that point does
8 not dispute that there is a Seventh Amendment
9 problem and it's indistinguishable from
10 Jarkesy.

11 JUSTICE KAVANAUGH: But then we
12 construe the statute or construe the Seventh
13 Amendment to require exactly what the
14 government is saying it will do going forward.

15 MR. WALL: I -- Justice Kavanaugh, I
16 honestly think it is no more complicated than
17 this: If you read this statute the way that it
18 naturally reads, it would be Jarkesy all over
19 again. So the government says, no, no, we're
20 out of the Jarkesy box because it's
21 non-binding. It's not like all those other
22 orders. I think, once the Court rejects that,
23 the case is simple.

24 If the Court agrees with the
25 government and gives this statute what I think

1 is a very unnatural reading, then the Court
2 would have to address the unconstitutional
3 conditions argument, which is we are put to an
4 incredibly difficult Hobson's choice.

5 We either pay the money and go to the
6 court of appeals under the deferential
7 standards of the APA, but we know we get
8 judicial review, or we sit around and wait to
9 see whether the government ever takes us to
10 court.

11 And that strikes me as -- as --
12 that -- that too significant a penalty for a
13 fundamental right.

14 JUSTICE KAVANAUGH: Is it really a
15 difficult choice going forward if we say that
16 the statute means what the government says
17 going forward?

18 MR. WALL: Again, Justice Kavanaugh,
19 only if notwithstanding all of the statutory
20 provisions they don't address in their brief
21 that allow the Commission to take into account
22 things like a regulated party's character or
23 their pattern of disregard for the law, only if
24 you say not just were these orders ultra vires,
25 but they can't use them for anything, they are

1 truly like nothing more than the agency's
2 advisory view.

3 But the agency wants these things
4 again, Justice Kavanaugh, because the agency
5 does not intend for these things to be nothing
6 more than pieces of paper that get thrown in a
7 black hole.

8 They intend for them to hang over
9 people's head. There are ways in which they
10 can use them. They have an in terrorem effect.
11 And that's why they're willing to accept
12 legally neutering this thing because they know
13 that in practical effect, they are far from
14 neutered.

15 JUSTICE BARRETT: Well, Mr. Wall, if
16 they are final and if they have like in your
17 view this effect, why do you have to pay them?

18 I understand that there's D.C. Circuit
19 precedent saying this. Do you agree with it?
20 Why can't you do Hobbs Act review without
21 paying? Why do you have this choice, not pay,
22 come and get me in court, or pay and get Hobbs
23 Act review? Why couldn't you get Hobbs Act
24 review even if you don't pay?

25 MR. WALL: Well, because, I mean, what

1 the D.C. Circuit said, and, certainly, the view
2 the government takes and has always taken, is
3 that there are just the two paths to review
4 that are laid out in the statute.

5 One is you pay, you go to the court of
6 appeals. That's in the statute. And the other
7 is you hold out and you make the government
8 come after you.

9 There isn't a third statutory route as
10 far as I can tell.

11 JUSTICE BARRETT: But it would
12 otherwise be subject to review under the Hobbs
13 Act. So we'd have to interpret the statute to
14 say that for some reason the statute forecloses
15 Hobbs Act review.

16 MR. WALL: I think that's right, but
17 it has been settled for a very long time that
18 where you don't pay the order, the enforcement
19 mechanism for that is the government coming
20 after you in the recovery suit and that 504 is
21 exclusive of the Hobbs Act.

22 JUSTICE SOTOMAYOR: But that's settled
23 only by the circuit courts. We've never said
24 that. And we have our McLaughlin decision
25 recently that calls that into question.

1 I mean, what you're complaining about
2 is that. You're not complaining about the fact
3 that the forfeiture order has no teeth and is
4 not enforceable until there's a trial de novo.
5 Both statutorily and in the order that was
6 issued to you, you were told that.

7 So, really, you're -- you're -- you're
8 complaining about something else. You're
9 complaining about the fact that you can't get
10 judicial review without paying it first, but
11 that's not what you're challenging.

12 MR. WALL: So, Justice Sotomayor, let
13 me say one thing, one more thing to you and
14 Justice Barrett, which is I -- I just think
15 then that puts us straight back into the
16 Seventh Amendment problem, which is Jarkesy
17 says you get a jury in the initial
18 adjudication.

19 If we're all now agreed that this is
20 an adjudication and the agency is telling you
21 you have to pay, but then, unlike here, you get
22 a statutory right, okay, it's Hof, you get a
23 right to go up, but it seems to me you've still
24 got a Seventh Amendment problem, which is you
25 might observe the Seventh Amendment in the

1 second proceeding when you actually get to go
2 to court and get the jury, but you don't get it
3 in the first proceeding, which is the initial
4 adjudication.

5 And that strikes me as a real -- I
6 will say, Justice Barrett, I thought that's
7 what this case was going to be about when the
8 Court granted cert. I thought that's the
9 debate we were going to have. But the
10 government, having seen our opening brief where
11 we tried to explain why there are two different
12 suits for Seventh Amendment purposes, hasn't
13 joined issue on that.

14 So it seems to me that would be an odd
15 way for the Court to go and resolve a
16 constitutional question they're no longer
17 contesting rather than just the statutory issue
18 that's in front of the Court.

19 JUSTICE BARRETT: But couldn't it be a
20 final order for purposes of Bennett even if --
21 if it was a notice of apparent liability, does
22 it have to be an adjudication in the sense of
23 imposing this final obligation on you to pay in
24 order to get Hobbs Act review?

25 MR. WALL: So I think it would be

1 tough if it were just a notice of apparent
2 liability to say it's final. And if we're
3 really going to treat the forfeiture order as
4 nothing more than a duplicative charging
5 document that puts you on notice of the
6 government's view, I'm not sure that it is
7 final agency action for purposes of Bennett.

8 I take the point that I guess we could
9 try to argue that, we could try to settle --
10 argue -- you know, our -- challenge the D.C.
11 Circuit case law, say that we have an
12 independent appeal path and all the rest, but I
13 will go ahead and tell you I don't think it
14 solves the problem. I'll be making the exact
15 same Jarkesy argument.

16 JUSTICE GORSUCH: Mr. Wall, can I ask
17 you a question about that?

18 So you -- you paid and -- and,
19 therefore, you have a right to appeal under the
20 D.C. Circuit precedent to move forward. But,
21 if we were to adopt the government's view and
22 take this as just a notice that we're coming
23 after you, an indictment, a charge, an
24 information, something like that, and there
25 isn't a final order compelling you, do we have

1 jurisdiction over this case?

2 MR. WALL: It's not clear to me that
3 you do. And, certainly -- I would imagine the
4 government would say a lot of things. I think
5 they'd challenge final agency action. I think
6 they'll make a ripeness argument. I think
7 they'll make a jurisdictional argument. There
8 are all sorts of things they haven't briefed
9 because they haven't made any of these
10 arguments.

11 JUSTICE GORSUCH: Well, I know the
12 D.C. Circuit has held, if you go ahead and pay,
13 you have jurisdiction, though that's -- I can't
14 find that in the statute.

15 MR. WALL: Right.

16 JUSTICE GORSUCH: And the government
17 used to take the position as far as I can tell
18 before the D.C. Circuit that there wouldn't be
19 jurisdiction in -- in these circumstances.

20 So I -- I guess I'm a bit at a loss,
21 if we buy the government's gloss on what this
22 document is, it doesn't mean what it says it
23 means, then I'm -- I'm -- I'm just not sure
24 what -- whether we've got a case or controversy
25 before us.

1 MR. WALL: So that seems to be a -- a
2 problem for the government's view of the
3 statute, which I think is wrong.

4 The only other thing I'll say, Justice
5 Gorsuch, is --

6 JUSTICE GORSUCH: Do you agree with
7 what I've just said or disagree or have any
8 thoughts about it, though? I'm -- I'm --
9 I'm --

10 MR. WALL: It's very hard for me to
11 imagine what then -- what space this order
12 would occupy, what is it the agency is telling
13 you? They've already given you a --

14 JUSTICE GORSUCH: Well, I'm -- I'm
15 asking you to assume that it's just a piece of
16 paper, okay, a notice, a charge, a serious
17 piece of paper, but it isn't a final
18 determination or adjudication of any liability.

19 Do you think, if that were true, we
20 would have jurisdiction?

21 MR. WALL: I -- I don't know, Justice
22 Gorsuch. I will say I think that leaves us in
23 the worst of all possible worlds. It means the
24 SEC --

25 JUSTICE GORSUCH: I know you don't

1 like it.

2 MR. WALL: No, no.

3 (Laughter.)

4 MR. WALL: I -- I just -- it's not
5 just that I don't like it.

6 JUSTICE GORSUCH: I don't like any of
7 it, but I -- I'm trying to figure it out.

8 MR. WALL: It -- it's -- it's not just
9 that I don't like it, Justice Gorsuch. It's
10 that it's not a notice of apparent liability.

11 JUSTICE GORSUCH: All right. Okay.

12 MR. WALL: Like, they went through an
13 entire process --

14 JUSTICE JACKSON: But can I -- can I
15 follow up --

16 JUSTICE KAGAN: Well, maybe -- maybe
17 it's -- it's something in between. You know,
18 it's more than a charge. It is the agency's
19 determination of liability. It is a
20 determination of liability, but it's the
21 agency's determination of liability.

22 And the thing that would make that
23 conclusive would be is if -- if all you had to
24 do was, like, to go get it enforced, and the
25 court that enforced the order didn't have the

1 right to look behind the order and decide for
2 itself whether it was true.

3 But that's not this case. This is the
4 agency's determination of liability, but then a
5 court can start all over again and say that it
6 was wrong and does so with a jury if you wanted
7 to.

8 So I don't see why you would think
9 that -- that the -- just the fact that the
10 agency has decided this makes it conclusive or
11 final in the relevant sense given that an
12 entire litigation of whether the agency is
13 right can occur and that that litigation can
14 occur with a jury.

15 MR. WALL: So, Justice Kagan, if they
16 had come back in their gray brief and said, no,
17 no, because you get to do it all over again de
18 novo, it's not a second -- Seventh Amendment
19 violation, it's two different suits or what
20 have you -- that's what I thought this was
21 going to be about -- I would have said, no,
22 Jarkesy requires it in the initial
23 adjudication, and not providing it in front of
24 the agency, just as with George Jarkesy, is the
25 constitutional problem.

1 They didn't want to take that on
2 because I -- I don't think they thought they
3 could win that fight. So now they're saying
4 okay --

5 JUSTICE KAGAN: Well, when you would
6 have said that -- I mean, I take it that
7 there's no independent Seventh Amendment
8 violation if there's -- if there's not an
9 Article III problem, right? So would you have
10 said that giving it to the agency to determine
11 liability in that fashion, given that there's
12 an -- you know, given that it's not conclusive
13 in the relevant sense, there's a whole new
14 litigation that happens before anybody can
15 enforce that agency decision, would you have
16 said that that's an Article III problem?

17 MR. WALL: I would have said it is a
18 Seventh Amendment violation and probably also
19 an Article III problem.

20 JUSTICE KAGAN: It can't be, I don't
21 think, unless your -- I mean, maybe you'll tell
22 me you have a different view. I don't think it
23 can be a Seventh Amendment violation unless
24 it's an Article III problem, right?

25 MR. WALL: Well, let me say this.

1 Jarkesy didn't reach the Article III question.
2 It decided it on Seventh Amendment grounds.

3 I would think that would -- I would
4 think Jarkesy would be no different if in the
5 statute that allows the DOJ to come after you
6 in a recovery suit if you don't pay an SEC
7 imposed penalty, it were a de novo standard of
8 review. Everything about this Court's
9 reasoning would have been exactly the same.

10 The agency can't haul you in and make
11 you pay a civil monetary penalty for something
12 that was an action at law and then say but you
13 eventually get to get in front of a jury.
14 Sure, the second proceeding respects the
15 Seventh Amendment, but the first doesn't.

16 JUSTICE JACKSON: Why doesn't --

17 JUSTICE KAGAN: Well, I would have
18 thought that this is just, you know, those two
19 cases that we have all over again. It's Hof.
20 It's Meeker. It's like, no, you don't -- you
21 don't need the jury and the, you know, full
22 hoopla the first time around as long as you get
23 it the second time around.

24 The agency can do what it wants as
25 long as that doesn't put you under any kind of

1 obligation to pay because you know that you'll
2 get, like, starting all over again, a
3 proceeding with a jury if you want it. It's
4 fine.

5 MR. WALL: So --

6 JUSTICE KAGAN: That's what both those
7 cases said.

8 MR. WALL: -- again, I thought that's
9 what this case was going to be about. I
10 thought that they were going to say it's
11 totally fine because of Hof, and then I was
12 going to say, no, Jarkesy requires an initial
13 adjudication and Hof is about small debts and
14 it's a historically grounded exception that
15 does not blow a hole through Jarkesy.

16 And they didn't join issue on the
17 constitutional question. All they're saying is
18 that the de novo standard of review is -- you
19 can draw a statutory inference that these
20 things are non-binding. And I think that has
21 to be wrong.

22 If you look at the Fish and Wildlife
23 Service example we gave in the brief, it's
24 clear as day those are binding and you have de
25 novo review. But even just more theoretically,

1 if Congress amended the APA tomorrow to say
2 that facts in APA actions are reviewed de novo
3 rather than substantial evidence, I don't think
4 anybody would think overnight that all agency
5 orders become non-binding.

6 The standard of review in the second
7 action is logically distinct from whether the
8 first thing is binding. And if the first thing
9 is binding, we have an agency adjudicating
10 liability and imposing a monetary penalty, and
11 that's Jarquesy. They can't do that.

12 JUSTICE JACKSON: Mr. Wall, maybe I
13 don't understand what you mean by the first
14 thing being binding, so can you help me to --
15 to parse that language?

16 I mean, to the extent that you don't
17 have to pay, that there would need to be a
18 subsequent enforcement action brought against
19 you if you said I'm not paying, I don't know
20 what you mean when you say that the first order
21 is binding.

22 MR. WALL: Justice Jackson, I mean two
23 things. One, it means it imposes a present
24 obligation to pay, and, two, that was equally
25 true in Jarquesy.

1 JUSTICE JACKSON: An obligation that
2 is not enforceable until -- unless and until
3 the agency takes the further step of bringing
4 this to court, and, as Justice Kagan points
5 out, you then have an opportunity in front of a
6 jury to say we don't have an obligation to pay.

7 So I don't -- it seems to me that the
8 Seventh Amendment right as in *Jarkesy*, as in
9 other cases, kicks in when your legal rights
10 and obligations are finally determined, that
11 it's not really turning on the characterization
12 of the order as being binding or not binding.
13 It is what is the point in which your legal
14 obligations are finally determined.

15 In a situation like *Jarkesy*, that
16 might be at the initial step. But, here, we
17 have a different structure. We have one in
18 which the agency is giving you essentially a
19 charge. This is what we have determined. You
20 brought up the traffic ticket scenario. I
21 think that's a very good analogy.

22 At the beginning, the government says
23 we've got this videotape and we believe that
24 you have engaged in this behavior, and so we
25 say pay this amount. But you do have, under

1 our system, the obligation or the opportunity
2 to contest that, and when you do, under this
3 structure, you get a jury trial.

4 So I guess I don't understand why you
5 suggest that that initial determination by the
6 agency is "binding," and to the extent it is,
7 it's somehow -- you had to have a jury trial
8 right before that happened.

9 MR. WALL: Justice Jackson, equally
10 true in Jarkesy, equally true in virtually
11 every penalty provision in the federal code,
12 you can decline to pay in Jarkesy. The DOJ
13 would have had to bring a recovery action.
14 With virtually every penalty provision, there
15 is a general 28 U.S.C. 2641, the government
16 brings a recovery suit to try to get the money
17 that they told you --

18 JUSTICE JACKSON: No, I understand,
19 but isn't this a different --

20 MR. WALL: -- you owe when you don't
21 pay.

22 JUSTICE JACKSON: -- isn't this a
23 different setup in the sense that -- I mean,
24 you can always decline to pay, but -- but,
25 under the Jarkesy rule, the legal obligation,

1 it was finally determined at the time the
2 agency imposed that initial order.

3 Here, no -- are you saying that it is
4 finally determined? I thought the way the
5 statute was set up, it was not.

6 MR. WALL: It is finally determined
7 for purposes of the agency. The agency has
8 done an adjudication. Yes, you can decline to
9 pay and they can pull you into court. That was
10 equally true in Jarkesy. It's equally true
11 with virtually every --

12 JUSTICE JACKSON: But I mean that's
13 part of the scheme. The scheme -- the --
14 the -- the choice that you say you get to make
15 is not paying and waiting for enforcement, and
16 at that point, whether or not you're obligated
17 to pay is then up to a jury in the context of
18 that subsequent proceeding. That is Meeker.
19 That's Hof. I don't understand why this is
20 different --

21 MR. WALL: Let me try to put it --

22 JUSTICE JACKSON: -- not those cases.

23 MR. WALL: Let me try to put it a
24 little differently, Justice Jackson. I think
25 that if we all acknowledge that these orders

1 actually required you to pay, I don't take the
2 government to be disputing that that type of
3 order entered by an agency would violate the
4 Seventh Amendment and Jarkesy. They haven't
5 made that argument in their brief.

6 The only argument for getting out of
7 the Jarkesy box is this isn't a real order, it
8 doesn't make you pay, it simply tells you what
9 we think that you owe. And what I would say is
10 you could say that about virtually every
11 penalty scheme if all you mean is you can
12 decline to pay and they have to take you to
13 court.

14 JUSTICE BARRETT: But you agree,
15 Mr. Wall, that if it's not binding, it can't
16 violate the Seventh Amendment?

17 MR. WALL: I don't agree with that,
18 Justice Barrett. I think it's a harder
19 question than what we have here.

20 I think that there would still be
21 arguments on -- you know, I think of this as
22 sort of a spectrum. Everybody agrees the
23 recommendations are fine, and everybody agrees
24 adjudications are covered by the Seventh
25 Amendment. If the agency does all of this,

1 walks right up to the line, and then says but
2 we're not telling you you have to pay, and we
3 have no right to go get a jury, we just have to
4 sit around and wait, that strikes me as deeply
5 problematic. It strikes me as the agency
6 effectively doing --

7 JUSTICE BARRETT: What if you could
8 seek review under the Hobbs Act without paying?

9 MR. WALL: Then I think it's a much
10 harder question if they say the order is
11 non-binding and we have a right of immediate
12 review. I would still be here saying I
13 think -- I think it is in substance the same as
14 Jarkesy, but it would be a harder case.

15 JUSTICE BARRETT: So what defines suit
16 at common law for purposes of the Seventh
17 Amendment?

18 MR. WALL: So I think it's an
19 adjudication of a claim at law rather than
20 equity. In other words, I think, when an
21 agency determines liability, that is the sort
22 of thing that triggers the Seventh Amendment.
23 And I don't think the agency then gets to say
24 but, look, it's just non-binding or advisory
25 and we'll let it hang out there.

1 I mean, these things have huge
2 consequences. We were branded an egregious
3 lawbreaker, a willful and repeat violator, and
4 told we had to pay the government a hundred
5 million dollars. That has a lot of
6 consequences in the real world.

7 I don't think they should be able to
8 just slap a non-binding label on the remedy and
9 somehow avoid the entire Seventh Amendment
10 analysis. But I -- I'll grant I think it is a
11 harder question, though I think we still win,
12 and it is harder still if we have a right of
13 appeal. We don't have either of those things
14 here.

15 And what's so odd to me is that we're,
16 like, straining to read the statute in a very
17 unnatural way, all for purposes of avoiding a
18 constitutional violation that the government
19 effectively acknowledges. And if we go that
20 route, the Court will have to decide the
21 unconstitutional conditions question, which, I
22 mean, I know that doctrine isn't often invoked
23 by the Court, but it seems to me, if -- if the
24 doctrine has sort of any teeth at all, it would
25 be this case, where we literally know for 50

1 years no one has ever not paid and tried to
2 hold out to see if they could get a jury at the
3 government's election.

4 I mean, you just -- in the real world,
5 you cannot do it. And so it seems to me like
6 we're avoiding what the government acknowledges
7 seems to be an easy constitutional question if
8 we're right about the statute to get to a
9 harder constitutional question and, again, all
10 by, like, mangling the terms. When it says
11 "assess or impose," "impose," if you look at
12 any dictionary definition at the time the
13 statute was enacted, means to levy as a charge
14 or to make compulsory.

15 Until the government's gray brief in
16 this case, it had occurred to no one for
17 decades that these orders were not binding.
18 It's not what their regulation says. It's not
19 what their guidance says. And it's not a
20 natural reading of the statute.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas, anything further?

24 Justice Alito?

25 JUSTICE ALITO: Do you think that a

1 scheme like this or, for that matter, the
2 scheme that was at issue in Meeker is
3 consistent with the original understanding of a
4 suit at common law?

5 It certainly seems to me quite
6 different from what anybody would have
7 understood a suit at common law to be when the
8 Seventh Amendment was adopted, but suits at
9 common law, legal -- suits asserting a legal
10 claim today in federal court don't look
11 anything like the -- what -- what those suits
12 would have looked like in 1791.

13 So how far is it permissible for the
14 government -- for a statute to depart from what
15 people would have understood a suit at common
16 law to be at that time?

17 MR. WALL: So I'd say a couple things,
18 Justice Alito. The first is I think the Court
19 crossed that bridge back in the Parsons
20 decision when Justice Story said it's not just
21 the particular kinds of common law suits that
22 existed in 1791, it is the various methods by
23 which we ascertain legal rights in the same way
24 we did in 1791.

25 And, two, even if you took a narrower

1 conception of it, I still think this does look
2 like a suit at common law. Granted, I know,
3 like, we didn't have sort of cell phones and
4 cell towers back in 1791, but if you had said,
5 look, that merchant is not safe -- we --
6 putting in place reasonable safeguards and it
7 harms their customers and that's the essence of
8 this claim, that's a straightforward negligence
9 claim at common law in 1791 and it would have
10 been handled in, you know, sort of a court at
11 law, not at equity, and you would have gotten a
12 Seventh Amendment right as long as the amount
13 in controversy exceeded \$20.

14 So it's -- I mean, I know we have to
15 kind of -- we have to accept the fact that
16 we're dealing with new technologies, but it's
17 not really a new claim. It's really just a
18 negligence claim that --

19 JUSTICE: Well --

20 MR. WALL: -- you know, we weren't --
21 we -- we didn't take care of our customers.

22 JUSTICE ALITO: Yeah, I -- I
23 appreciate that, Mr. Wall. That wasn't really
24 the thrust of what I was getting at.

25 What I was getting at is the question

1 whether -- when the claim is in substance a
2 claim to which there would have been a jury
3 trial right at the time of the adoption of the
4 Seventh Amendment, is it still consistent with
5 that jury trial right for Congress to concoct a
6 scheme that departs very radically from the --
7 the substance of the jury trial from the
8 protection that a jury would have provided in
9 1791?

10 MR. WALL: No.

11 JUSTICE ALITO: I understood what you
12 said before to be that there's a spectrum, and
13 that would put us in a position of trying to
14 figure out where on the spectrum to draw the
15 line. Am I correct in understanding your
16 argument?

17 MR. WALL: Well, a couple things. So
18 I don't think we're on the spectrum. I think
19 we're at the adjudication point because it's
20 binding, we don't have any right of appeal on
21 any measure, we have a Seventh Amendment
22 problem.

23 I do agree with you that even if you
24 read it in some more non-binding way, and this
25 was my answer to Justice Barrett, I still think

1 there are hard constitutional questions because
2 it still seems to me that you are coming
3 extremely close to doing something that
4 everybody would agree was an adjudication.

5 You are not calling it a binding
6 adjudication, only to avoid having to provide
7 the jury trial, even while you recognize that
8 the value of walking right up to the line is
9 that it forces the regulated party to do the
10 thing that you want.

11 That strikes me as a really serious
12 and hard constitutional question that,
13 fortunately, given the way the government's
14 litigated the case, the Court doesn't have to
15 answer.

16 But I will say one more thing, Justice
17 Alito. I want to be fair to Congress when --
18 for a long time, this really was advisory and
19 that was the way it worked, and they recognized
20 that there would be a Seventh Amendment problem
21 if they made it compulsory.

22 And then Atlas Roofing comes out in
23 1977, and I think Congress, thinking there's no
24 Seventh Amendment problem, converts it to
25 compulsory and thinks, like, well, we've just

1 given you optionality. I mean, you could go
2 straight up to the court of appeals if you
3 want, so what's the harm? And I don't think
4 that Congress understood then what we
5 understand now about the Seventh Amendment.

6 So the statute looks like a pretty
7 radical departure from the Seventh Amendment.
8 I agree with that. But I think it wasn't out
9 of step with where Congress believed the Court
10 was at the time given Atlas Roofing.

11 But it does -- look, if you had said
12 to the founders can you do this, you know, can
13 you have an executive branch official that
14 tells you inhouse that you owe a hundred
15 million dollars not in front of a jury and you
16 have no right to a jury, and then you wait
17 around for years to see if the government ever
18 comes after you, no, I think the founders would
19 have been aghast.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: That's why they
24 set forth statute of limitations. You often
25 don't have in the regular course a right to

1 demand that someone enforce the law right away.
2 Yes, in some criminal cases, you do, but that's
3 what statute of limitations, it gives the
4 persons with the legal right time to make the
5 claim. So I don't know what the problem with
6 that is.

7 But I want to answer or -- or go back
8 to Justice Gorsuch's question about whether
9 there's jurisdiction here and why this is
10 unusual. In *McLaughlin*, we recognized that
11 Congress often permits review of agency action
12 pre-enforcement and post-enforcement, and we
13 said that's perfectly natural.

14 I don't see why this scheme is not a
15 *McLaughlin*-like scheme with a pre-enforcement
16 right. 402(a) says any order of the Commission
17 shall be reviewed under the Hobbs Act, correct?
18 This is a -- forfeiture order is an order of
19 the Commission, correct?

20 MR. WALL: Unless some other scheme
21 provides otherwise.

22 JUSTICE SOTOMAYOR: Well, but the
23 problem is that this scheme doesn't provide
24 otherwise. It provides otherwise for an
25 enforcement action but not necessarily for an

1 order of the Commission.

2 So why isn't this two distinct routes,
3 a pre-enforcement review under a deferential
4 APA standard and an enforcement action for
5 collection that's de novo post-enforcement
6 or -- or when enforcement's being sought? So
7 what's wrong with that scheme?

8 MR. WALL: Those are the two routes in
9 the statute. You can pay and go to the court
10 of appeals or --

11 JUSTICE SOTOMAYOR: Well, you keep
12 saying we can pay. As Justice Barrett
13 questioned you, I'm not sure where they get
14 that from, because Hobbs Act doesn't require
15 payment. The Hobbs Act just says it's an order
16 of the agency, of the Commission. You can seek
17 review.

18 MR. WALL: Justice Sotomayor, let me
19 put it in a different way. Only for purposes
20 of our unconstitutional conditions argument am
21 I focused on the manner of review because,
22 there, it does matter. They put us to a choice
23 that penalizes taking the option that gives us
24 the jury trial right. But, for purposes of my
25 front-line --

1 JUSTICE SOTOMAYOR: Well, but
2 what's -- no, no, no, you get the jury right
3 regardless, meaning, if they seek to enforce
4 it, you get a jury right. There's no penalty
5 for that.

6 MR. WALL: I -- I under -- all I'm
7 saying, we don't have the right to invoke a
8 jury trial. We have to wait if we don't pay
9 and see if the government comes after us. But,
10 for purposes of my front-line argument, the
11 Seventh Amendment argument, I'm not relying on
12 the right of review at all, no more than --
13 than George Jarkesy was in Jarkesy itself,
14 which is to say the Seventh Amendment violation
15 occurs when the agency pulls us in front of it
16 and imposes civil monetary penalties for our
17 claim at law.

18 JUSTICE SOTOMAYOR: But you don't have
19 to pay -- pay it because what's different than
20 a running complaint? Prosecutors give running
21 complaints all the time where they say there's
22 probable cause to believe that this person has
23 committed this act and that they're liable to
24 us for X amount.

25 This forfeiture order is no different

1 than that. We believe that you've committed
2 this act, but we can't collect it unless
3 there's a jury trial and they tell you this de
4 novo that decides whether, in fact, you owe the
5 money or whether, in fact, you have to pay the
6 money.

7 MR. WALL: Justice Sotomayor, that
8 just seems to me an attack on Jarkesy in two
9 ways. One, the SEC could have put out a notice
10 of liability in Jarkesy itself and said here's
11 what we think George Jarkesy owes. That would
12 not have violated the Seventh Amendment. But,
13 once they --

14 JUSTICE SOTOMAYOR: Counsel, I just --
15 I'm going to end here because the problem with
16 your starting proposition is their findings
17 have no legal -- don't create a legal
18 obligation. The legal obligation is created
19 when a jury finds that you committed the act.

20 MR. WALL: And that's not true as a
21 statutory matter, Justice Sotomayor. When an
22 agency assesses and imposes penalties, it is no
23 different than when you place any other fine on
24 someone. It imposes a present obligation to
25 pay.

1 That's what the SEC did to George
2 Jarkesy. Now George Jarkesy could have not
3 paid. The government could have come after him
4 in a recovery suit, and none of that would have
5 changed the result in Jarkesy.

6 It is true of virtually every penalty
7 scheme I'm aware of, every one I know of on a
8 federal level. They all say that the agency
9 assesses and imposes penalties. We could go
10 through them one by one.

11 JUSTICE SOTOMAYOR: All right. Thank
12 you, counsel.

13 MR. WALL: But, if you don't pay, the
14 government has to come after you in a recovery
15 suit. No one thinks that makes them
16 non-binding, and no one should think it affects
17 the Seventh Amendment analysis.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 JUSTICE GORSUCH: Just -- just to
21 clarify your -- your -- if we were to have to
22 deal with what you thought the government's
23 arguments were going to be, the -- the Hof
24 point, I take it, is that it's different -- and
25 I just want to make sure I've got it, so tell

1 me if I've got it. It's different when the
2 government has inhouse adjudication for which
3 there's a right of a -- to a jury trial by
4 either party immediately without awaiting a
5 collection action.

6 Here, there is no right that you have
7 to seek a jury trial immediately. You have to
8 sit around and wait for a collection action.
9 Is that the gist of it?

10 MR. WALL: That is the first thing I
11 would say, Justice Gorsuch. The second --
12 so -- and that separates off this case.

13 The second thing I would say is it
14 seems to me then there's still a hard argument
15 that the Court would have to grapple with in
16 some future case, which is, when the agency
17 does the whole adjudication, like in Jarkesy,
18 but you do have the right to go to court later,
19 is that a problem because you didn't get it in
20 the initial --

21 JUSTICE GORSUCH: Is that an
22 unconstitutional conditions kind of problem or
23 a Seventh Amendment problem?

24 MR. WALL: Or a Seventh Amendment
25 violation, exactly. And the Court would have

1 to say, how do we reconcile Jarkesy and Hof?
2 Does Jarkesy not mean really initial
3 adjudication as long as there's a back-end
4 right, or does it mean it and Hof is a
5 historically grounded exception for small
6 debts? I think the latter is probably a more
7 satisfying intellectual answer, but, you know,
8 the Court could take either of those two paths.

9 JUSTICE GORSUCH: But, either way, we
10 wouldn't have to reach that second problem
11 because the first problem is fatal?

12 MR. WALL: Exactly.

13 JUSTICE GORSUCH: Yeah. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: When the
17 government seeks a penalty, it would seem that
18 so long as you get a de novo jury trial, that
19 the Seventh Amendment and Article III would be
20 satisfied, whether the agency process leading
21 up to that was skimpy or thorough, whether it
22 was one step or two steps. So long as you have
23 that de novo jury trial, it would seem -- and
24 no penalty from failure to pay, no extra
25 penalty from failure to pay the assessment

1 early on. Am I wrong about that?

2 MR. WALL: So, Justice Kavanaugh, I
3 tried to say this to Justice Barrett earlier.
4 If there were a right here to get the jury
5 trial, I think it would be a harder case. I'm
6 not sure that it should come out differently.

7 JUSTICE KAVANAUGH: But, if there were
8 a right, just assume, and I --

9 MR. WALL: Yeah.

10 JUSTICE KAVANAUGH: You're not
11 forfeiting an argument here. So just assume,
12 if there's a right to get a de novo jury trial
13 and there's no extra penalty from failing to
14 pay the assessment of the penalty -- you
15 understand that point?

16 MR. WALL: Yeah. Yeah.

17 JUSTICE KAVANAUGH: Then doesn't that
18 satisfy the Seventh Amendment and Article III?

19 MR. WALL: I'm not sure that Jarkesy
20 would or should have come out the same way
21 depending on the standard of review in the
22 back-end collection action. And if Congress
23 amended --

24 JUSTICE KAVANAUGH: Well, it seems
25 like the standard of review is critical

1 because, if you're getting de novo, then --

2 MR. WALL: Justice Kavanaugh, I think
3 it begs the question of, what does the Seventh
4 Amendment require?

5 JUSTICE KAVANAUGH: Well, you --

6 MR. WALL: Does it require that
7 you get a jury at some point or does it require
8 a jury in the initial adjudication?

9 JUSTICE KAVANAUGH: Well, you're
10 using --

11 MR. WALL: But I'll grant that it's
12 harder.

13 JUSTICE KAVANAUGH: Can -- can we just
14 pause on the word "adjudication"? As you're
15 well aware, the word "adjudication" covers a --
16 just oceanfront of different things that go on
17 in agencies. Some very informal things that go
18 on in agencies are called adjudications.

19 MR. WALL: So I'll pin it down further
20 and say where an agency is determining
21 liability and imposing a monetary penalty, in
22 that type of an adjudication, it's not obvious
23 to me that the Seventh Amendment analysis
24 should be controlled by just the standard of
25 review in some subsequent proceeding, but I

1 grant that it is a harder and different
2 question than here.

3 JUSTICE KAVANAUGH: But it's a -- it's
4 a labeling thing for what the final piece of
5 paper the agency gives you says, correct?

6 MR. WALL: Yes. And all I'm saying to
7 you is I read Jarkesy -- the reasoning of
8 Jarkesy doesn't have anything to do with the
9 back-end action. I take the reasoning of
10 Jarkesy to be that if the government wants
11 money from you on a claim at law, and it is a
12 monetary penalty and not something equitable,
13 that is the sort of thing that if the
14 government wants to do, it has to go to court
15 in front of a jury in the first instance.

16 The jury isn't -- like, the jury
17 sits --

18 JUSTICE KAVANAUGH: So, here, they --
19 if -- if the agency had done less process and
20 then given you the de novo jury, that would
21 have been better, you think?

22 MR. WALL: Oh, yeah. That argument by
23 the government I don't think holds up at all.
24 In Jarkesy, would it have been a different case
25 if they had just mailed out a letter and said

1 here's what you think you owe and then taken
2 him to court? Absolutely. No Seventh
3 Amendment problem at all.

4 JUSTICE KAVANAUGH: Got it.

5 MR. WALL: Form matters and forum
6 matters, and they can't say, well, we're just
7 layering on additional procedures where the
8 additional procedure is a binding adjudication
9 in front of the agency.

10 JUSTICE KAVANAUGH: And it depends on
11 the word "binding," but -- but let's move on
12 from that because I think I have your point on
13 that.

14 It seems like you've won on the law
15 going forward one way or the other. I mean,
16 your reply brief begins "the government's in
17 retreat." That's absolutely correct. I agree
18 with you, and we'll explore that in a moment.

19 But what you're complaining about, I
20 think, and concerned about, and it's
21 understandable, is you think you were misled
22 into paying the money without getting the jury
23 trial by what the government had in the orders.
24 And I think that's a serious problem. I just
25 want you to tell me how we should analyze that

1 if we think the law --

2 MR. WALL: Yes.

3 JUSTICE KAVANAUGH: -- gives you a de
4 novo jury trial. This whole misleading --
5 like, we were misled by the language, the bold,
6 and we were misled into giving up our rights,
7 is there something we can do about that?

8 MR. WALL: Yes. The government --

9 JUSTICE KAVANAUGH: What would that
10 look like?

11 MR. WALL: Well, the government -- so
12 two things, Justice Kavanaugh. The second's
13 actually more important than the first. The
14 government acknowledges in its brief that if
15 these orders actually commanded us to pay, they
16 were ultra vires and they exceeded its
17 authority. The Court should say that, and we
18 should get our money back.

19 JUSTICE KAVANAUGH: Right.

20 MR. WALL: But the second thing I want
21 to say is that's a pyrrhic victory in effect
22 unless you really say that the orders are
23 toothless because, if they get to do the same
24 thing going forward and just say, well, we're
25 not, like, commanding it --

1 JUSTICE KAVANAUGH: Well, if -- can
2 I --

3 MR. WALL: -- it's just --

4 JUSTICE KAVANAUGH: Sorry to
5 interrupt, but if we say the orders are
6 toothless and what they did here was mislead
7 you and it's ultra vires, you're good, correct?

8 MR. WALL: I -- I don't think it's a
9 natural reading of the statute, and whether I'm
10 good depends on whether they're really
11 toothless, because the government acknowledges
12 in its brief it can use the facts and it
13 acknowledges it can make law through these
14 things.

15 JUSTICE KAVANAUGH: But they're
16 toothless either because the statute is best
17 read that way or because the statute is best
18 read that way because of constitutional
19 considerations or because the Constitution
20 demands that, one of those three, right?

21 MR. WALL: All I would say, Justice
22 Kavanaugh, is, if the Court's going to go down
23 that road and give an unnatural reading to this
24 statute, it just needs to make clear there are
25 lots of provisions where the FCC can use these

1 orders, they can take them into account -- I
2 think, and the government doesn't disavow in
3 its brief -- every time it does any kind of a
4 license or a spectrum auction, because those
5 have provisions that say the Commission, among
6 lots of other factors, can consider the
7 regulated party's character or pattern of
8 disregard for the law.

9 JUSTICE KAVANAUGH: And then, in -- in
10 the licensing proceeding -- the last question,
11 sorry to prolong it -- but could they take into
12 account a notice of apparent liability?

13 MR. WALL: So, no, I think the -- the
14 statute puts out of bounds the notice of
15 apparent liability. I think we all agree on
16 that. The statute by -- doesn't say anything
17 about the forfeiture order. And their guidance
18 seems to suggest that they can use the
19 forfeiture order for various purposes.

20 Now, in their brief --

21 JUSTICE KAVANAUGH: In the -- in the
22 licensing proceedings, though.

23 MR. WALL: In anything. I mean, in
24 their brief, they say we just take into account
25 the facts. So even they acknowledge they have

1 to do that. So, for it to be really toothless,
2 you're going to have to tell them, okay, they
3 have to say that this is nothing more than,
4 like, our view of what you owe and you're not
5 required to pay it and you cannot use it for
6 any other purpose in front of the Commission.

7 You cannot take it into account
8 because, as soon as you do, then it seems to me
9 they've gotten their cake and eaten it too.

10 JUSTICE KAVANAUGH: Yeah.

11 MR. WALL: They've said, well, it's
12 not really binding, but, boy, you know, we
13 thought it was valuable and we could use it for
14 lots of other purposes. And that's the height
15 of unfairness. So --

16 JUSTICE KAVANAUGH: Thank you.

17 MR. WALL: -- you know, they're going
18 to have to really, you know, not use these
19 things. And -- and they don't come anywhere
20 near that in their brief.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: So, Mr. Wall, in
25 thinking about whether this order -- order is

1 final or not, how much of it rides on the
2 consequences? You know, the, man, this is a
3 lot of money at stake, that, you know, the
4 Commission can take it into account when making
5 later decisions about, you know, spectrum, et
6 cetera.

7 Is it the consequences that are
8 driving this?

9 MR. WALL: I don't think so. I mean,
10 even the government doesn't dispute that the
11 order is final. I'm just looking for the page
12 in its brief where it -- it explicitly says
13 that, Justice Barrett.

14 JUSTICE BARRETT: Well, I mean
15 "binding" in the sense of creating an
16 obligation to pay, because I guess this is
17 where I'm going.

18 MR. WALL: Oh.

19 JUSTICE BARRETT: I'm thinking, like,
20 if you have a criminal case and somebody is
21 indicted and the prosecutor comes and says,
22 hey, listen, you're facing a really long
23 sentence, but I really think you did this, so
24 you have a choice. You can roll the dice and
25 go and have a jury trial; otherwise, I'll give

1 you a sweetheart deal and you can forget all
2 that. Well, that's the same kind of choice in
3 some ways that the carriers are facing here.

4 MR. WALL: So, sorry, I didn't mean to
5 be confusing. Everyone here agrees that it's
6 final. A separate question whether it is
7 binding in the sense of --

8 JUSTICE BARRETT: Yeah.

9 MR. WALL: -- it imposes an obligation
10 to pay.

11 I think what separates it from the
12 sort of plea bargaining context is that there,
13 the criminal defendant has a right to go in
14 front of a jury but can choose to waive that
15 right if it wants to get other benefits from
16 the government. We don't have any right to go
17 in front of a jury and we can't waive it in
18 return for anything from the government.

19 The agency just pulls us into
20 adjudication over which we have no power. We
21 can't get a Seventh Amendment -- we can't get a
22 jury trial there. And we don't even have a
23 right to it on the back end if one assumes that
24 solves the Seventh Amendment problem and query
25 whether it really does.

1 So it seems to me very different from
2 a situation where a criminal defendant has a
3 right to say, no, before you can tell me that
4 I'm in trouble and you're sending me to jail or
5 before anyone civilly can say I owe money, I
6 get to be in front of a jury. And the
7 companies would love that right. They would
8 love to have invoke a right to go to a jury
9 rather than be in front of the agency, but as
10 they stand --

11 JUSTICE BARRETT: But you could.

12 MR. WALL: We can't. We don't have --

13 JUSTICE BARRETT: Why? Why can't you
14 just not pay, go in front of the jury?

15 MR. WALL: Because we don't have -- we
16 don't have the right, Justice Barrett. The
17 criminal defendant can say, you know what,
18 prosecutor, I'll take my chances in front of
19 the jury. We can't. We do not have a right to
20 go to a jury. We have an agency that tells us
21 we owe a hundred million dollars.

22 JUSTICE BARRETT: And then you just
23 have to wait for the agency to come after you.

24 MR. WALL: And we just have to wait to
25 see if they come after us. And if we don't, it

1 hangs over our head for years. And nobody ever
2 does that and nobody ever will because, when
3 your main regulator tells you you owe hundreds,
4 maybe even billions of dollars, you can't sit
5 around and do nothing.

6 JUSTICE BARRETT: Okay. Thanks.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So I've heard you
10 say many times that we don't have a right to go
11 to the jury. On the unconstitutional
12 conditions issue, I'm wondering why that
13 doesn't defeat your unconstitutional conditions
14 argument.

15 I mean, the traditional
16 unconstitutional conditions scenario is when a
17 person has a right and they are being coerced
18 into giving it up by the thing that the
19 government is requiring them to do.

20 So it seems to me that just on that
21 argument alone, the fact that you admit that
22 you don't have a right to a jury to start,
23 defeats that argument. Why am I wrong about
24 that?

25 MR. WALL: I think it's sort of one

1 degree worse, not better. In other words, if
2 we had a right to a jury, but let's say we had
3 to pay a lot of money to get there, everybody
4 would acknowledge that's an unconstitutional
5 condition.

6 JUSTICE JACKSON: Correct. That's the
7 classic scenario. But the fact that you don't
8 have a right would seem to me takes you outside
9 of the world of unconstitutional conditions.

10 MR. WALL: I think it's worse. Either
11 do the really penalty --

12 JUSTICE JACKSON: No, I'm not saying
13 worse or better. I'm just trying to understand
14 why there's a condition operating that forces
15 you to give up a right if you don't have the
16 right.

17 MR. WALL: Sorry. I think the
18 unconstitutional conditions doctrine must apply
19 not just to when one of your options, though it
20 is the far more onerous one, is to get the
21 right, but the far more onerous option is just
22 to have the opportunity to get the
23 constitutional right.

24 JUSTICE JACKSON: Do we have a case
25 that has ever said that? I see that as a

1 dramatic expansion or extension of the
2 unconstitutional conditions doctrine. I don't
3 think we've ever applied this to a scenario in
4 which you don't already have the right that
5 you're saying is being unconstitutionally
6 burdened in this way.

7 MR. WALL: No, I -- I think this
8 scheme is unusual in the sense that it is not a
9 direct penalty on choosing the right itself.
10 It is one degree removed and, as I say, I think
11 sort of constitutionally worse than that.

12 And so, no, I don't think a scheme
13 sort of this odd or that this far departs from
14 the Constitution in that exact way has come
15 before the Court that I know of.

16 JUSTICE JACKSON: All right. Let me
17 ask you another question about it because
18 it's -- in your conversation, I think, with
19 Justice Gorsuch, you made clear that the
20 gravamen of your argument is that you don't
21 have a right to invoke the jury trial unless
22 the government comes after you in terms of the
23 enforcement proceeding.

24 And I'm really struggling with why you
25 aren't happy that the government is not coming

1 after you. Like, I -- if the government is --
2 is abandoning its claim by not seeking
3 enforcement of it, I don't know why you would
4 need a right to a jury trial and why isn't --
5 why isn't that a good thing for you?

6 MR. WALL: Because, Justice Jackson,
7 when the agency issues these things, A, it
8 makes law that then binds the industry. B, it
9 finds facts that are often and, as here, very
10 negative. And, C, it pronounces you a
11 lawbreaker, not just a lawbreaker, a willful or
12 repeat lawbreaker.

13 And when you tell someone that they
14 owe the government millions because of a legal
15 rule you disagree with because you did a thing
16 that you think you don't do --

17 JUSTICE JACKSON: I understand. I'm
18 going back to --

19 MR. WALL: -- that imposes a real
20 injury.

21 JUSTICE JACKSON: -- that -- well, you
22 know, that -- that -- if we analogize back to
23 the traffic ticket scenario, that's what the
24 government does to start, and the question is
25 to what extent can it be challenged.

1 And if we had a traffic scenario
2 that -- that the government makes this charge,
3 but you don't actually have to pay, and if the
4 government comes after you for the money, you
5 have the ability to contest it, I'm still
6 struggling with why that's a problem for you.

7 If the government never comes after
8 you -- I understand they made this charge.
9 It's out there. But, under our system, as
10 Justice Sotomayor suggested, just that charge
11 is not establishing any legal obligation from
12 your perspective.

13 MR. WALL: I would say two things,
14 Justice Jackson. One, it's not just a charge.
15 It's a final order that tells us we owe. And,
16 two, it was the same in Jarkesy. The Court
17 could have said to Mr. Jarkesy, you know what,
18 you don't actually have to pay just because the
19 SEC thinks you owe it. Wait around and see if
20 the government comes after you.

21 JUSTICE JACKSON: No, I understand.
22 That always can happen in a penalty scheme.
23 But this one seems to be structured
24 differently.

25 If we believe, and this is sort of

1 what I thought Justice Alito might have started
2 to hint at, if we believe that the structure of
3 this system is that the agency order is just a
4 statutory prerequisite for the DOJ to bring an
5 enforcement action, to bring its lawsuit,
6 then -- then don't you lose?

7 In other words, I don't understand the
8 Seventh Amendment to be involved in that kind
9 of situation because, when DOJ brings its
10 lawsuit, you will have a jury trial.

11 Like, could -- could -- couldn't we
12 envision this differently --

13 MR. WALL: I --

14 JUSTICE JACKSON: -- that, in other
15 words, you know, what's happening here is that
16 the government has to make these charges in
17 this way in order to eventually be in a
18 position to have a cause of action against you,
19 but, really, the Seventh Amendment kicks in at
20 the point in which the government files its
21 enforcement action against you?

22 I don't -- it's very hard to
23 understand the -- the implication of your
24 saying that you have to have a jury trial at
25 the charging stage.

1 MR. WALL: Justice Jackson, I think
2 they're just two separate questions. The
3 Seventh Amendment kicks in when the federal
4 government wants to assess and impose civil
5 monetary penalties on somebody for a claim at
6 law.

7 It can label that however it wants.
8 It can label it non-binding. It can label it a
9 statutory prerequisite to a suit under any
10 penalty scheme that has a recovery action by
11 DOJ. It can label it however it wants.

12 The Seventh Amendment doesn't care
13 about any of those labels. The Seventh
14 Amendment asks, was it a suit at common law in
15 1791? And this one would have been.

16 So, if the agency wants civil monetary
17 penalties, we get a jury. And this statute
18 doesn't allow that.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Suri.

23 ORAL ARGUMENT OF VIVEK SURI
24 ON BEHALF OF THE FCC, ET AL.

25 MR. SURI: Mr. Chief Justice, and may

1 it please the Court:

2 I think it would be helpful if before
3 I invite the Court's questions I explain
4 exactly the sense in which we mean FCC
5 forfeiture orders are not binding, and I think
6 the best way to do that is to point out three
7 differences between FCC penalties and the SEC
8 penalties that were issued -- at issue in
9 Jarkesy.

10 The first difference is that although
11 the SEC could file a recovery action in order
12 to recover a penalty it had imposed, it didn't
13 have to do that. It also had its own
14 administrative tools with which to collect the
15 penalties. For example, it could ask the IRS
16 to deduct the amount of the penalty from your
17 tax refund or it could try to garnish your
18 wages. And, of course, there's no path to a
19 jury trial if it does that.

20 For the FCC, however, the only way it
21 can get to the penalties is to file this
22 collection suit where you do get a jury trial.

23 Second, if the SEC's administrative
24 collection mechanisms failed and it decided it
25 needed to go to court, you would get a trial,

1 but it would be limited to the issue of whether
2 you had paid the penalty. There would be no
3 review of whether the underlying order was
4 correct in the first place.

5 Under the FCC scheme by contrast,
6 there is a de novo jury determination of
7 whether you violated the law in the first
8 place.

9 And the third difference is that under
10 the SEC scheme, interest could accrue
11 immediately upon the SEC's imposition of the
12 penalty. By contrast, under the FCC scheme,
13 interest accrues only after the jury has made
14 its determination because that's when you owe
15 the money.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: So are you saying
18 that in the determination of liability, no jury
19 requirement, even if the penalty is at the back
20 end as a remedy, that that determination does
21 not require a jury?

22 MR. SURI: It requires a de novo jury
23 determination at the back end as to liability,
24 but the initial inconclusive determination by
25 the agency does not require a jury because it's

1 just a prerequisite to the suit. It's not the
2 suit itself.

3 JUSTICE KAGAN: If -- if I understand
4 the -- the real meat of Mr. Wall's argument,
5 what he's really complaining about is I don't
6 think he would have a complaint -- I think all
7 his arguments fall away if his client could
8 immediately go to court and get the jury trial.

9 And the thing he's really complaining
10 about is that his client has to sit around
11 waiting and maybe you'll bring it and maybe you
12 won't and maybe it will be tomorrow and maybe
13 it will be in five years.

14 So that seems to me the -- the -- the
15 real issue here, whether that itself creates a
16 problem for you.

17 MR. SURI: Okay. Two answers to that.
18 First, he doesn't have to sit around and wait.
19 He can file a declaratory judgment action and
20 initiate the proceedings himself, and if he
21 does that, he gets a jury trial in that
22 proceeding.

23 Second, even if he does have to sit
24 around and wait, what he's saying is sometimes
25 you have to sit around and wait for a lawsuit

1 to be filed. It is not a Seventh Amendment
2 violation that the government might take time
3 to file a lawsuit. The Seventh Amendment
4 simply requires that when the lawsuit is filed,
5 at that point, there is an entitlement to a
6 jury trial if it's a suit at common law. That
7 is consistent with the scheme here.

8 As for the unconstitutional conditions
9 argument, I'd just like to put that in a bit of
10 historical perspective. The FCC originally
11 took the position that the only way to
12 challenge an FCC forfeiture order is to decline
13 to pay and to wait for the agency to bring an
14 enforcement action. And that's what most
15 people thought the scheme worked like from 1978
16 to 2003. In 2003, however, AT&T persuaded the
17 D.C. Circuit that there was actually this
18 second path of paying and getting Hobbs Act
19 review.

20 So now what Mr. Wall is saying is that
21 the second path that AT&T has convinced the
22 D.C. Circuit to create has created an
23 unconstitutional conditions problem because --
24 because it is coercing people into giving up
25 their jury trial rights.

1 JUSTICE GORSUCH: Is that a thing? So
2 (b)(4) says you -- you get a jury trial, okay,
3 de novo, whatever that is. And (b)(3) says if
4 the -- if -- if the agency inhouse adjudicates
5 the matter, then you get Hobbs Act review in
6 the D.C. Circuit.

7 All right. The D.C. Circuit, you're
8 right, in 2003, said, ah, there's a third
9 option. You know, you pay the fine under --
10 even if it's a (b)(4), you know, jury trial
11 route one, you can pay the fine and -- and get
12 the (b)(3) Hobbs Act review. Is that a thing?

13 MR. SURI: Yes. We have acquiesced in
14 the D.C. Circuit's decision.

15 JUSTICE GORSUCH: Is it right? You --
16 you argued against it before --

17 MR. SURI: We -- yeah.

18 JUSTICE GORSUCH: -- and -- and your
19 brief was pretty compelling in front of the
20 D.C. Circuit, I thought.

21 MR. SURI: We -- we argued against it,
22 but since then, we have acquiesced in it. And
23 let me explain the -- why the Court doesn't
24 need to reach that issue.

25 There is certainly jurisdiction under

1 the Hobbs Act because the Hobbs Act says that
2 final orders of the FCC are reviewable. So the
3 only question is whether there is an implied
4 preclusion of review because of the
5 implications of (b)(3) and (b)(4). (b)(3) and
6 (b)(4) don't use the word "jurisdiction." So
7 it's just a question of an implied preclusion
8 of -- of review that is non-jurisdictional.

9 JUSTICE GORSUCH: So what's the final
10 order that would be reviewable if this is a
11 (b)(4) case? A (b)(3) case, I know what the
12 final order is. It's an order of you're
13 liable. What's the final order that we have
14 here, and is that in some tension with your
15 argument that -- that the notice you issued
16 is -- is -- is just a piece of paper?

17 MR. SURI: It's the order authorizing
18 the DOJ to bring the lawsuit. That is --

19 JUSTICE GORSUCH: Well, the only thing
20 (b)(4) requires is a notice of apparent
21 liability. That's it. Is that a final order?

22 MR. SURI: No, that is not a final
23 order because it does not consummate the FCC's
24 decision-making process.

25 JUSTICE GORSUCH: So what's the final

1 order?

2 MR. SURI: The final order is the
3 order issued at the end of that process where
4 the FCC says --

5 JUSTICE GORSUCH: Well, but there is
6 no -- that's not contemplated by the statute.
7 (b)(4) -- (b)(4) just talks about a notice of
8 liability. You invented this process. Can
9 you -- can you -- can you explain how it does
10 anything that is relevant to the statute?

11 MR. SURI: If you look to (b)(1), it
12 says that if the FCC determines that a person
13 has willfully and repeatedly violated the
14 statute, then that person shall be liable for a
15 forfeiture. Now we've interpreted "shall be
16 liable" to mean the DOJ can sue, but there
17 still needs to be that FCC determination, which
18 is reflected in the final order.

19 JUSTICE GORSUCH: So, really, the
20 notice -- you were just saying the notice of
21 apparent liability is a final order for
22 purposes of this statute. That's what I'm
23 hearing. What am I missing?

24 MR. SURI: What you're missing is the
25 notice of apparent liability simply says

1 respond to our charges. The final order says
2 we heard your response --

3 JUSTICE GORSUCH: No, I -- I --

4 MR. SURI: -- we're not convinced we
5 can -- DOJ can consider it.

6 JUSTICE GORSUCH: -- I understand
7 that, but that second piece isn't statutorily
8 provided for. There's no necessity for it.
9 There's no -- there's no authority for it.
10 You've just created that. The only thing that
11 (b)(3) -- (b)(4) speaks about is the notice of
12 apparent liability.

13 MR. SURI: Yeah. We think it is in
14 (b)(1).

15 JUSTICE GORSUCH: Okay.

16 MR. SURI: It is also in 504, which
17 says forfeitures imposed under the provisions
18 of this chapter are recoverable in the recovery
19 action in the de novo proceeding.

20 JUSTICE GORSUCH: Okay.

21 JUSTICE KAVANAUGH: Can I --

22 JUSTICE GORSUCH: I've got it. Go
23 ahead, please.

24 JUSTICE KAVANAUGH: You sure?

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: I understand your
3 system going forward and you've retreated in
4 multiple ways from the original position that
5 the government had. But I think another
6 concern is how this case proceeded and that the
7 Petitioners were misled by what was said and by
8 the government's position at that time into
9 paying the money without realizing that you
10 would switch positions later and say, oh, by
11 the way, you didn't have to pay, you could have
12 just waited for the charges to be brought and
13 to get your de novo jury trial right.

14 I think that's a problem for you, and
15 I think that's a concern I have about how this
16 has all unfolded. This does not seem regular
17 order to me at all. And I want to know how you
18 think we should deal with that and respond to
19 that concern.

20 MR. SURI: Could I first attempt to
21 say that that should not be a concern and then
22 say --

23 JUSTICE KAVANAUGH: Yeah.

24 MR. SURI: -- if it is still a
25 concern, then how you should deal with it?

1 JUSTICE KAVANAUGH: Yes.

2 MR. SURI: Okay. First, I don't think
3 AT&T was misled because the order was extremely
4 clear that it had a right to a jury trial
5 before it could be required to pay. Let me
6 read out four sentences from page 116a of the
7 AT&T petition appendix. This is in the AT&T
8 forfeiture order.

9 First, "After the Commission issues a
10 forfeiture order, AT&T is entitled to a trial
11 de novo in federal district court before it can
12 be required to pay the forfeiture." Second,
13 AT&T has a "statutory entitlement to a trial de
14 novo in federal district court to ultimately
15 adjudicate its obligation to pay a forfeiture."
16 Third, AT&T has a "statutory right to a trial
17 de novo before it can be required to pay the
18 forfeiture." And, fourth, "that AT&T
19 theoretically might elect to pay the forfeiture
20 voluntarily does not diminish its statutory
21 right to a trial de novo."

22 I can also prove that they knew this
23 was our understanding of the statute. Here's
24 what they said in their opening brief in the
25 Fifth Circuit, at page 33, before they had seen

1 any of our briefing when all they had was the
2 order. They said: "As the Commission sees
3 things, the Communications Act simply presented
4 AT&T with a choice, one, pay the \$57 million
5 penalty and appeal to this court, or, two,
6 refuse to pay and await the filing of a
7 collection proceeding."

8 So I don't think AT&T was misled.

9 Second, if you do have concerns about
10 whether AT&T was misled, we do think it's
11 important for the government to turn square
12 corners when it's dealing with the citizenry.
13 The government cannot mislead someone into
14 waiving his jury trial rights.

15 So what we would suggest is that the
16 Court should rule for us on the question
17 presented, which is just about the statute, and
18 then leave for remand disputes about whether
19 this particular waiver of the jury trial right
20 was knowing and voluntary or whether AT&T was
21 misled.

22 Alternatively, if you want to get into
23 the issues yourself and you disagree with the
24 points I've laid out, I suppose you could do
25 that and conclude that we did mislead AT&T.

1 Again, we don't think that's correct, but if
2 that's the conclusion the Court reaches, it
3 could certainly change the language of the
4 orders going forward.

5 JUSTICE GORSUCH: One --

6 JUSTICE KAVANAUGH: Your legal --

7 JUSTICE GORSUCH: I'm sorry. Please.

8 JUSTICE KAVANAUGH: Your legal
9 position, when you say rule for you on the law
10 going forward, what do you understand to be the
11 difference between your current understanding
12 of what the system should look like going
13 forward and Mr. Wall's?

14 MR. SURI: I think Mr. Wall is
15 suggesting that even if the FCC orders were
16 non-binding, there would be a Seventh Amendment
17 problem because the agency is labeling his
18 client a lawbreaker.

19 So, on that constitutional point, I
20 think he's simply wrong. There is no
21 constitutional problem with an agency saying
22 we've determined that you violated the law and,
23 therefore, the Department of Justice can now
24 sue you.

25 JUSTICE KAGAN: And the -- and the

1 "non-binding" word in what you just said, you
2 take that to mean what?

3 MR. SURI: We take it to mean a few
4 things. First, that the agency cannot start
5 collecting the money, as the SEC could in the
6 Jarkesy scheme. It has to go to court in order
7 to collect the money. Second, there's no
8 penalty or punishment for failing to pay that
9 order. And, third, that interest doesn't start
10 accruing until the penalty becomes binding.

11 JUSTICE GORSUCH: How about, you know,
12 collateral consequences to increase penalties
13 for subsequent violations?

14 MR. SURI: We do not believe the FCC
15 can use the orders themselves or the failure to
16 pay until a court orders payment against a
17 party. The only thing --

18 JUSTICE GORSUCH: Okay. So there are
19 no legal consequences that attach from --

20 MR. SURI: There's only -- there's
21 only one legal consequence that attaches, and
22 that is the Department of Justice can bring a
23 lawsuit.

24 JUSTICE GORSUCH: That's it?

25 MR. SURI: That's it.

1 JUSTICE GORSUCH: Okay.

2 JUSTICE BARRETT: So, Mr. Suri,
3 when --

4 JUSTICE GORSUCH: And one more
5 thing -- sorry. And a trial de novo is both of
6 fact and law, correct?

7 MR. SURI: Absolutely.

8 JUSTICE GORSUCH: All right. Sorry.
9 Thank you.

10 JUSTICE BARRETT: I just -- I just
11 wanted to follow up on Justice Gorsuch's point
12 to clarify. So, when Mr. Wall expressed
13 concern about the collateral consequences in
14 later proceedings, none of that? You just
15 disagree with his understanding?

16 MR. SURI: There -- there's one point
17 of disagreement between us on -- as to what the
18 FCC can do in future proceedings. Let's
19 suppose the FCC issues a penalty order and it
20 finds a particular fact. Let's say that AT&T
21 has 10 -- well, 20 million subscribers. And
22 let's say that fact is again relevant to some
23 future proceeding.

24 In our view, we can take that fact
25 into account in the future proceeding not by

1 giving preclusive effect to the original
2 adjudication but just by holding a new
3 adjudication and re-adjudicating it because it
4 is relevant to the second solution.

5 JUSTICE BARRETT: What about the fact
6 that he's a lawbreaker or that AT&T is a
7 lawbreaker?

8 MR. SURI: If -- if we -- if that is
9 relevant to a second adjudication, then we can
10 find it again, but then they get their de novo
11 jury trial in that proceeding as well.

12 JUSTICE GORSUCH: But does it have any
13 preclusive effect is, I think, the question
14 we're trying to get at or whether it's just
15 something that could be considered in the mix
16 but is -- is not given any special weight.

17 MR. SURI: It has no preclusive
18 effect. It has no special weight. It is
19 simply, if the same fact happens to be relevant
20 again, it can be tried again.

21 JUSTICE GORSUCH: Can it -- it -- it
22 can be tried again. But is it sort of like
23 a -- a fact like any other in the world that
24 can be contested, disputed, and -- and --
25 and --

1 MR. SURI: Yes.

2 JUSTICE GORSUCH: -- hauled into
3 question and -- and the Commission can't give
4 it any special legal weight?

5 MR. SURI: Yes, that's correct.

6 JUSTICE GORSUCH: All right.

7 JUSTICE KAVANAUGH: What about in a
8 license proceeding, you may have answered this,
9 but how does it work there?

10 MR. SURI: What would work -- what
11 would happen in that --

12 JUSTICE KAVANAUGH: Renewal or
13 licensing proceeding.

14 MR. SURI: What would happen in that
15 situation is, if the facts that were relevant
16 to the initial proceeding were relevant to the
17 second proceeding, there would be a fresh
18 opportunity for AT&T to put on its evidence
19 with respect to those facts, the Commission
20 would make a fresh determination, and you'd get
21 fresh round of judicial review. The one --

22 JUSTICE KAVANAUGH: That -- that
23 judicial review is -- is not de novo, correct?

24 MR. SURI: Because the licensing
25 proceeding is a public rights proceeding,

1 there's no jury trial right in that.

2 Now the one circumstance where I think
3 the first proceeding might affect the second is
4 let's say the first proceeding did end up in a
5 jury trial before the second proceeding
6 happened. Then the Court's decision might have
7 res judicata effect in the second proceeding.
8 But the Commission's decision would not have
9 any such preclusive effect.

10 JUSTICE KAGAN: Given what you think
11 the remaining distance is between the
12 government and Mr. Wall, of what relevance are
13 Hof and Meeker?

14 MR. SURI: Meeker is relevant because
15 it disposes of what remains of Mr. Wall's
16 argument once you accept that the orders here
17 are non-binding. There were a few questions to
18 Mr. Wall about whether there would still be a
19 Seventh Amendment issue if the orders were
20 non-binding and he wasn't willing to give that
21 up.

22 But I think Meeker resolves that. The
23 statute in Meeker allowed the ICC to issue
24 non-binding orders that could then be enforced
25 in jury trials, and that's exactly what's

1 happening here. Indeed, this case is easier
2 than Meeker because, in Meeker, the orders
3 served as prima facie evidence, and in this
4 case, it's not even that. It's completely de
5 novo.

6 Hof is just icing on the case. In
7 Hof, the initial order issued by the justice of
8 the peace was binding and the losing party had
9 the burden of appealing it to a jury. Here, by
10 contrast, as we see it, the FCC order is
11 non-binding and the government bears the burden
12 of seeking enforcement. That ought to be even
13 more clearly constitutional than the procedure
14 in Hof.

15 JUSTICE GORSUCH: One thing we talked
16 about a little bit with your friend on the
17 other side but not you yet is the government's
18 retreat on how it's interpreting this statute.

19 It does talk about assessing and
20 imposing liability, and that, you know, one --
21 one might normally think that that really does
22 have a legal consequence attached to it.

23 Now you're running as far and as fast
24 from that idea as you possibly can, and -- and
25 I would too. I -- I -- I -- I -- I get it.

1 But how -- how credible is that really?

2 MR. SURI: If you turn to page 13 and
3 14 of our brief --

4 JUSTICE GORSUCH: Okay.

5 MR. SURI: -- you'll see that we have
6 been saying this since the 1970s. You'll also
7 see that our position has been adopted by the
8 D.C. Circuit, including in opinions after the
9 1978 amendments.

10 JUSTICE GORSUCH: Yeah, no, I -- I --
11 I -- I appreciate all that.

12 MR. SURI: Yeah.

13 JUSTICE GORSUCH: But "assess" and
14 "impose," those are the words of the statute.
15 Suppose I care about words in the statute.
16 Help me with that.

17 MR. SURI: I'd give you two answers
18 about that. The first is that the word
19 "impose" appeared in the 1960 version of the
20 statute, which Mr. Wall has conceded is
21 non-binding.

22 The 1960 version of the statute said
23 that -- this is in Section 504(b) -- 504(a) --
24 any suit for the recovery of a forfeiture
25 imposed pursuant to the provisions of this

1 chapter shall be a trial de novo. And he says
2 that's non-binding.

3 What happened in 1978 is Congress took
4 the word "imposed" from 504 and repeated it in
5 503. We don't think repeating the same word
6 converts a non-binding order into a binding
7 order.

8 In addition --

9 JUSTICE GORSUCH: So you don't think
10 what happened in the '70s was influenced by
11 Atlas Roofing, for example?

12 MR. SURI: Oh, there was a different
13 part of the amendment that was influenced by
14 Atlas Roofing because Congress created a second
15 procedure where the ALJ could hold a hearing
16 and his determination would be binding even
17 without a de novo jury trial. So that's where
18 the problem came in because of Atlas Roofing.

19 The second answer to "imposed" is, if
20 it had just said imposed on its own, then
21 Mr. Wall might have a point, but the statute
22 says any suit for the recovery of a forfeiture
23 imposed shall be a trial de novo.

24 And I think the juxtaposition of
25 imposed and recovery in a trial de novo

1 suggests that the imposition is not the final
2 imposition. It's not conclusive.

3 JUSTICE GORSUCH: Do you think the
4 proper analogy between this notice of apparent
5 liability that the statute does speak of and
6 your process is -- is to something like an
7 indictment or an information or a complaint?

8 MR. SURI: Yes. Yes. We think that
9 this operates much like an indictment. It
10 authorizes a lawsuit to go forward. It does
11 not itself impose the final penalty. That is
12 done only after the jury trial.

13 JUSTICE GORSUCH: Thank you.

14 JUSTICE JACKSON: Mr. --

15 JUSTICE KAVANAUGH: If you could
16 rate -- go ahead. Go ahead.

17 JUSTICE JACKSON: Mr. Suri, I just
18 wanted to give you a chance to reflect on the
19 unconstitutional conditions doctrine argument.

20 You know, I expressed some skepticism
21 as to whether or not this scheme is actually
22 placing a condition on the exercise of a right
23 given that there is no jury trial right until
24 enforcement actions are initiated.

25 Am I off base, or is that how you see

1 it as well?

2 MR. SURI: No, you are correct about
3 that, Justice Jackson. For there to be an
4 unconstitutional condition, there must be a
5 right that is being improperly burdened. For
6 there to be a right to a jury trial, there must
7 be a suit at common law. And for there to be a
8 suit at common law, the Department of Justice
9 has to file a recovery suit.

10 Mr. Wall's entire case is premised on
11 the idea that the Department of Justice might
12 never file a suit. But, if that happens, then
13 there's no suit at common law. There's no
14 right to a jury trial, and you can't have an
15 unconstitutional condition on that.

16 JUSTICE JACKSON: So, if we accepted
17 his argument, it would be an expansion or a
18 different way of conceiving of unconstitutional
19 conditions?

20 MR. SURI: That's correct. And even
21 if you want to apply the unconstitutional
22 conditions framework, what the Court has
23 emphasized is that the question is whether the
24 government's condition is serving an improper
25 purpose. It's trying to coerce people into

1 giving up their rights.

2 That is not the purpose of this
3 scheme, as AT&T said in a brief that it filed
4 in the D.C. Circuit in 2002 and 2003. The
5 purpose of the Hobbs Act alternative mechanism
6 is not to coerce people to give up their jury
7 rights, it's just, if you have no factual
8 disputes, it speeds up getting to the court of
9 appeals.

10 JUSTICE JACKSON: Thank you.

11 JUSTICE KAVANAUGH: Why would you pay
12 and go to the court of appeals if the standard
13 of review there is more deferential?

14 MR. SURI: Two reasons. First, before
15 this Court's decision in McLaughlin, there was
16 uncertainty potentially about whether you could
17 get review of the law in district court.
18 That's been resolved now, but that explains
19 probably why carriers were going to the court
20 of appeals before McLaughlin because their
21 challenges involved legal issues.

22 The second reason that you might go to
23 the court of appeals is that it's just quicker
24 if there are no factual issues that need to be
25 resolved before the jury. You're going to end

1 up before the court of appeals anyway, might as
2 well do it as soon as possible.

3 JUSTICE KAVANAUGH: Regulated
4 entities, at least here Mr. Wall describe it,
5 haven't really understood this process the way
6 you're calmly describing it today. Why do you
7 think that is?

8 MR. SURI: I don't think --

9 JUSTICE KAVANAUGH: Or am I wrong
10 about that?

11 MR. SURI: I -- I -- I'm afraid
12 Mr. Wall is wrong about that because, in 2002,
13 AT&T filed briefs in the D.C. Circuit
14 describing how they thought the scheme worked,
15 and here's what they said.

16 First, they said, the act "allows the
17 carrier, A, to challenge the FCC's payment
18 order in the court of appeals or, B, to refuse
19 to pay and force a collection action in
20 district court."

21 Here's what they said in their reply
22 brief in the same case. A carrier that
23 "refuses to pay" makes a "choice that Congress
24 has permitted under the statutory scheme."

25 So this idea that the FCC orders are

1 binding is not something we've invented in this
2 litigation. It's something we've been saying
3 and regulated parties have been understanding.

4 JUSTICE KAVANAUGH: But people haven't
5 been choosing that option.

6 MR. SURI: Because of the McLaughlin
7 issue probably. There was some uncertainty
8 beforehand about whether you could get de novo
9 review on the law as well, and that's probably
10 why they decided to play it safe and go to the
11 court of appeals.

12 JUSTICE KAVANAUGH: Probably
13 collateral consequences too. Even if there are
14 not unconstitutional conditions, they were
15 probably worried about that, or do you not
16 acknowledge that?

17 MR. SURI: Whether or not they're
18 worried, they shouldn't have been worried
19 because the FCC has been saying that we cannot
20 consider either the forfeiture order or the
21 failure to pay the forfeiture order against
22 you. All we can consider are the facts and not
23 even by giving them preclusive effect.

24 JUSTICE SOTOMAYOR: The one step
25 missing here is why are they paying at all to

1 go to the court of appeals? You've admitted
2 it's a 402(a) final order, correct?

3 MR. SURI: Yes.

4 JUSTICE SOTOMAYOR: The statute
5 doesn't require them to pay before they
6 exercise that right. So it seems to have come
7 from a D.C. Circuit opinion that the Second
8 Circuit has endorsed as well. But where does
9 it come from?

10 MR. SURI: There are two reasons the
11 D.C. Circuit reached that conclusion which we
12 do agree with. The first is the statute sets
13 out a specific method for challenging orders
14 where they haven't been paid yet. And that is
15 waiting for the Department of Justice to sue
16 and allowing the suit to go forward in district
17 court, not in the court of appeals. So that
18 implicitly precludes review in the court of
19 appeals in cases where the orders haven't been
20 paid.

21 The other reason is --

22 JUSTICE SOTOMAYOR: But, no, because
23 pre-enforcement suits, McLaughlin says you can
24 have both. You can have a pre-enforcement
25 challenge and a post-enforcement challenge. So

1 --

2 MR. SURI: What McLaughlin says is you
3 can have a pre-enforce -- from the regulated
4 party's perspective, you can choose between a
5 pre-enforcement and a post-enforcement
6 challenge. You normally don't get to do both
7 at the same time. But one of the reasons the
8 D.C. Circuit gave for adopting its
9 interpretation was that the alternative reading
10 would give regulated parties two bites at the
11 apple; that is, you could first go to the court
12 of appeals and bring your challenge there, and
13 then after that fails, then wait for a de novo
14 jury trial where you again get to raise the
15 same issues once more. And the D.C. Circuit
16 thought that wouldn't make much sense.

17 JUSTICE SOTOMAYOR: But they don't get
18 second bite at the apple. You do. Meaning
19 it's the government's right to enforce, not
20 theirs. So I'm a little confused -- I'm still
21 confused about why the -- is it -- after
22 McLaughlin, is the obligation to pay an open
23 question?

24 MR. SURI: The Court does not need to
25 resolve that aspect of the case in order to

1 decide this case.

2 JUSTICE SOTOMAYOR: But it is an open
3 question?

4 MR. SURI: It -- it -- it's an open
5 question at this Court, not at the D.C.
6 Circuit.

7 JUSTICE SOTOMAYOR: Got it.

8 MR. SURI: I have nothing further.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas?

11 JUSTICE THOMAS: If the -- if the
12 order is non-binding, as you say it is, where
13 does that appear in the ordering set clause?
14 Is it -- as I read it, and I'm -- just two
15 paragraphs, 38 and 84, it says, "it is ordered
16 that AT&T is liable for monetary forfeiture of
17 57 million." And paragraph 84, it says,
18 "payment of the forfeiture shall be made in the
19 manner provided for," and it goes on.

20 I, again, admittedly just skimmed
21 that, but it doesn't appear to have any
22 disclaimer-type language that says it's
23 non-binding.

24 MR. SURI: You're correct, Justice
25 Thomas, that that language is not in the

1 ordering clauses. It is instead in page 116a
2 in the language I read to Justice Kavanaugh
3 earlier. Even if you don't agree with that,
4 the most that we would have to do is change the
5 language of the order.

6 I'd also add --

7 JUSTICE GORSUCH: Do you think you
8 should?

9 MR. SURI: I -- I think that we would
10 have avoided this litigation potentially if we
11 had done so. So it might be a good idea.

12 But -- but could I add just one more
13 point on that, Justice Thomas? If you look at
14 the ordering clauses in Meeker, the ICC orders
15 there, it said, "it is hereby ordered that the
16 railroad is authorized and required to pay."
17 Nevertheless, that was understood as a
18 non-binding order because that's how the
19 statutory scheme worked. And we'd make the
20 same argument here.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 Thank you, counsel.

4 Rebuttal, Mr. Wall?

5 REBUTTAL ARGUMENT OF JEFFREY B. WALL

6 ON BEHALF OF AT&T, INC. AND

7 VERIZON COMMUNICATIONS INC.

8 MR. WALL: So the most straightforward
9 way to resolve this case is to say that for 50
10 years, everyone, including the agency, has
11 understood these orders to impose a present and
12 binding legal obligation to pay. And if that's
13 what they do, as everyone has always thought up
14 until the government's brief in this case, even
15 the government does not contest there is a
16 Seventh Amendment violation.

17 That is the most natural meaning of
18 the words in the statute. It is what the reg
19 -- their own regulation is says, 1.80(g)(4),
20 page 22a of the appendix of our brief, says
21 "must be paid." And it has long been the
22 government's position.

23 Mr. Suri is right that for a long
24 time, the government has acknowledged that you
25 can decline to pay and it would -- would mean

1 the government has to take you to court. But
2 that is quite different from saying that you do
3 not actually owe the amount that the government
4 has assessed you. That position, the
5 government has not long taken, nor did AT&T,
6 which was a different company, not the present
7 AT&T, back in the day. That position didn't
8 emerge until the gray -- the gray brief in this
9 case.

10 I think also going that route allows
11 you to avoid some of the hard constitutional
12 questions that the Court has been asking this
13 morning about what happens if we say that it
14 doesn't impose a binding obligation to pay. Do
15 we still have a Jarkesy problem or is it Hof?
16 And do we have an unconstitutional conditions
17 problem? All of that is avoided by just giving
18 the statute its most natural meaning.

19 But if the Court decides to give this
20 statute what I think of as a quite unnatural
21 reading, then at least a few things need to
22 happen. My clients need to get their money
23 back because, whatever the scheme is the
24 government is defending now, it doesn't bear
25 any resemblance to the scheme everybody

1 understood in the lower courts.

2 These orders have to be truly
3 toothless. And I want to be clear that's not
4 what the statute says. 504(c) says they can't
5 use the notice of apparent liability.
6 Everything that Mr. Suri disclaimed may be at
7 the government's grace, but it's not in the
8 statute.

9 Though if this Court requires it, the
10 agency will have to abide it going forward, but
11 let's be clear, he says they can use the facts,
12 and presumably they can also use the fact that
13 we didn't pay and are a lawbreaker when it
14 considers character or persistent disregard of
15 the law, statutory circumstances that the
16 Commission can consider, under a host of
17 different provisions that deal with things like
18 licenses and spectrum.

19 Now, I understand Mr. Suri to say,
20 well, it's not preclusive, you can come in and
21 challenge it again. Of course, but now we've
22 just got a domino problem. We couldn't get a
23 jury in the first instance, so we had to pay or
24 hold out and not get a jury. Now you're going
25 to use it again in this order, and we won't be

1 able to get a jury there either. If you
2 disagree with us again, we'll have to sit and
3 wait. And then you'll take it into account in
4 a future adjudication where we again won't be
5 able to get a jury. And so on down the line,
6 and the problem just cascades. It doesn't get
7 better.

8 And I hear Mr. Suri to say we can
9 bring a declaratory judgment action. I'm not
10 entirely sure how that's consistent with Kesson
11 and -- McKesson and McLaughlin, but if the
12 government is conceding it, fair enough. Then
13 we get our money back, these orders are truly
14 toothless because otherwise their non-binding
15 argument falls apart, and we get to bring a
16 declaratory judgment action.

17 At the end of the day, I don't think
18 the scheme they're defending is anything like a
19 natural reading of this statute. It is not
20 what Congress created. It is not what the
21 agency and every regulated party has understood
22 for 50 years.

23 But if we are going to remake this
24 scheme, then let's remake it where it is not
25 even a paper tiger, it's truly just a piece of

1 paper. And if there's nothing more than the
2 agency's view, I still think that presents hard
3 constitutional questions about whether an
4 agency can walk you right up to the line,
5 consistent with the Seventh Amendment, and then
6 claim but it's no -- you know, there's no
7 Jarkesy problem here.

8 And I think the Court should avoid all
9 of those. But at a minimum, these orders
10 shouldn't be worth anything more than the paper
11 they're printed on, and we ought to get our
12 money back.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 11:28 a.m., the case
17 was submitted.)

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