

Nos. 25-406, 25-567

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IN THE  
**Supreme Court of the United States**

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

*Petitioners,*

*v.*

AT&T, INC.,

*Respondent.*

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VERIZON COMMUNICATIONS INC.,

*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

*Respondents.*

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

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**BRIEF OF AMICI CURIAE FORMER FCC  
CHAIRS AND CONSUMER ADVOCACY GROUPS  
IN SUPPORT OF PETITIONERS IN NO. 25-406  
AND RESPONDENTS IN NO. 25-567**

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici include two former Federal Communications Commission (“FCC”) Chairs, Hon. Reed Hundt and Hon. Tom Wheeler, who dedicated their public service careers to protecting and promoting efficient communication services for all Americans, while maintaining consumer protections. The former FCC Chairs have particular on-the-ground knowledge of the FCC procedures at issue in this case, and the import of the FCC’s ability, in the first instance, to investigate and assess liability for violations of customer privacy laws. Amici also include six non-profit consumer advocacy groups committed to protecting the rights and interests of consumers, including their privacy rights in telecommunications. The consumer advocates have an interest in defending the FCC’s authority to regulate telecommunications providers, given that any impairment of that authority threatens harm to consumers’ privacy rights. Because this Court’s decision will affect the agency’s ability to protect and provide secure and efficient telecommunication services for Americans, amici collectively are invested in the outcome of this case. A full list and description of amici is attached as an appendix to this brief.

## **SUMMARY OF ARGUMENT**

AT&T and Verizon had the opportunity to seek a jury’s adjudication of the FCC’s claims. They chose, instead, to voluntarily forgo the jury process and to proceed directly to the court of appeals. Because the

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

carriers had an opportunity to contest the FCC's factual allegations before a jury, these consolidated cases do not implicate the Court's holding in *SEC v. Jarkesy*, 603 U.S. 109 (2024). The Seventh Amendment right to a jury trial may be—and routinely is—waived. All that is required is the opportunity to seek a jury's adjudication of facts; that opportunity was available here.

Under the FCC's forfeiture procedures, after a regulated entity under investigation receives notice and the opportunity to respond, the agency makes factual findings and determines an administrative penalty. Once the agency determines what penalty should apply, the regulated entity may elect to pay the penalty to avoid litigation; alternatively, if the regulated party opts not to pay, the government may enforce the penalty in district court proceedings for which a jury is available. That enforcement proceeding is not a separate proceeding but an opportunity for a district court—and a jury—to review the FCC's determinations de novo.

The forfeiture proceedings at issue here were spurred by public reports that the carriers had failed to safeguard customer location data and that third parties illegally misused those data to track locations of hundreds of the carriers' customers. The FCC's ensuing investigation uncovered that sensitive location information for tens of millions of the carriers' customers was made vulnerable. In accordance with the laws protecting against the disclosure of private customer data, 47 U.S.C. § 222, the FCC determined that the carriers were liable for forfeiture penalties. The carriers could have contested the underlying facts by insisting that the FCC prove its case to a jury. The carriers

chose instead to pay the penalties and seek review in the court of appeals.

Given the availability of the very thing the carriers complain is missing here—a jury trial—the carriers’ challenge has lost its signal. What the carriers are left to complain of, then, is that waiting for the jury trial caused them non-monetary harms. Those harms, however, do not give rise to a violation of the Seventh Amendment, which turns on monetary harm. Nor were those harms caused by the FCC’s forfeiture proceedings. The harms, instead, followed from the bad press coverage of the carriers’ underlying misconduct, before the FCC’s forfeiture proceedings even began. Moreover, the reputational harm that the carriers seek to shield themselves from would have attached even before the FCC assessed any penalties. The appearance of such reputational harm, even had it been established here, is not a litmus test for when a jury trial is required.

## ARGUMENT

### **I. The FCC’s Forfeiture Procedures Protect Customers and Promote Efficiency While Preserving the Right to a Jury Trial**

For years, the largest wireless carriers in the United States delegated to third parties their obligations under FCC rules to protect customer privacy. They often did so without adequate safeguards, to both dismaying and foreseeable results. In briefing in this Court, AT&T and Verizon do not dispute the unlawful disclosures of their customers’ data—or that they bear responsibility for those unlawful disclosures. The carriers’ principal defense, instead, is that a jury never

adjudicated them guilty before the FCC assessed penalties for the carriers' violation of law. In reality, however, the carriers opted not to wait for the jury trial that the FCC's procedures clearly make available.

### **A. The FCC's Forfeiture Proceedings Preserve the Right to a Jury Trial**

In the 1960s, Congress established FCC forfeiture procedures to penalize willful and repeated failures by regulated entities to operate in accordance with FCC rules. Commc'ns Act Amendments, 1960, Pub. L. No. 86-752, 74 Stat. 889; see *New Jersey Coal. for Fair Broad. v. FCC*, 580 F.2d 617, 619 (D.C. Cir. 1978). The forfeiture penalty determination was intended to be a streamlined process, resulting in penalties that were designed to be less costly than protracted litigation. *New Jersey Coal. for Fair Broad.*, 580 F.2d at 619. As the D.C. Circuit explained, “[t]here was a need in 1960 for such a swift, simple, comparatively temperate penalty procedure.” *Id.* The need for such procedures remains, as technology, including artificial intelligence, advances and permeates individuals' private lives.

Congress drafted the FCC forfeiture procedures against a backdrop of concern for the lack of efficiency and impartiality in administrative agency proceedings, H. Rep. No. 86-1258, at 5 (1960). The FCC's forfeiture procedures thus preserve the right to a jury trial while balancing efficiency and fairness. In the procedure at issue here, the Commission first issues a notice of apparent liability (“NAL”) to the regulated entity, after which the entity has the right to show why, in writing, the penalty should not be imposed. 47 U.S.C. § 503(b)(4). After considering any written response by the regulated entity, the Commission may

issue a forfeiture order, which directs payment of the proposed forfeiture, if any. See *AT&T Corp. v. FCC*, 323 F.3d 1081, 1083 (D.C. Cir. 2003) (citing 47 C.F.R. § 1.80).

Importantly, as the statute makes clear, an entity can refuse to pay the penalty and “[a]ny forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a).” 47 U.S.C. § 503(b)(4). That section, in turn, provides that the Commission must recover the penalty “in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs,” and that the suit “shall be a trial de novo.” 47 U.S.C. § 504(a). The legislative history for Section 504 reinforces that the enforcement action is not “merely a collection proceeding” but “one in which the person against whom the forfeiture is ordered is given an opportunity to contest on the merits the action of the Commission.” S. Rep. No. 86-1857, at 10 (1960). Per Congress’s intentional design, the FCC’s enforcement procedures allow the FCC to build a record prior to de novo enforcement in the district court. Indeed, Congress accounted for the right of regulated entities to contest the penalty through litigation when it drafted the forfeiture procedures. See generally *New Jersey Coal. for Fair Broad.*, 580 F.2d at 619.

No party disputes that at the culmination of the forfeiture process, in the de novo trial, the regulated entity has the right to a jury.

## **B. Congress Empowered the FCC to Protect Private Customer Data as It Did Here**

Wireless carriers can track the location of their customers because of the nature of wireless service: thanks to the constant connectivity wireless service provides, cellular towers regularly “ping” customers’ devices, thus generally enabling the carrier to always know where a customer physically is. See *Verizon Commc’ns, Inc. v. FCC*, 156 F.4th 86, 92 (2d Cir. 2025). That location information “provides an intimate window into a person’s life,” revealing not just physical movements, but also “familial, political, professional, religious, and sexual associations.” *Carpenter v. United States*, 585 U.S. 296, 310–11 (2018) (quoting *United States v. Jones*, 565 U.S. 400, 430 (2012) (opinion of Sotomayor, J.)) (explaining that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI [cell-site location information]”).

With the rise of cellular service, Congress acted to protect this private and sensitive data. See *Sprint Corp. v. FCC*, 151 F.4th 347, 353 (D.C. Cir. 2025) (“Congress recognized the highly sensitive nature of this data.”). Accordingly, it empowered the FCC to protect customer privacy in the landmark Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which set forth “a general duty requiring all telecommunications carriers to ‘protect the confidentiality of proprietary information of ... customers.’” *Ohio Telecom Ass’n v. FCC*, 150 F.4th 694, 702 (6th Cir. 2025) (citing 47 U.S.C. § 222(a)). Just a few years later, Congress spoke even more clearly, passing further legislation to make explicit that customer location data could

not be disclosed without “express prior authorization.” Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, § 5, 113 Stat. 1286, 1289.

The FCC heeded Congress’s clarion calls on consumer privacy. First, it set up a framework implementing Section 222 and clarifying requirements for carrier use and disclosure of what Section 222 termed “customer proprietary network information” (CPNI). See generally *Implementation of the Telecomms. Act of 1996: Telecomms. Carriers’ Use of Customer Proprietary Network Info. & Other Customer Info.*, 13 F.C.C. Rcd. 8061 (1998). Later, it adopted CPNI protections “in response to the rising incidents of data brokers obtaining unauthorized access to CPNI” by requiring, *inter alia*, that carriers obtain consent from their customers before CPNI could be disclosed, and annual certification by carriers that they complied with the FCC’s CPNI rules. *Ohio Telecom Ass’n*, 150 F.4th at 703; see also *Implementation of the Telecomms. Act of 1996: Telecomms. Carriers’ Use of Customer Proprietary Network Info. & Other Customer Info.*, 22 F.C.C. Rcd. 6927, 6929 (2007); 47 C.F.R. § 64.2009(e). The FCC has explicitly stated that a device’s location data constitutes CPNI and thus falls within Section 222’s protection. See *Telecomms. Act of 1996: Telecomms. Carriers’ Use of Customer Proprietary Network Info. and Other Customer Info.*, 28 F.C.C. Rcd. 9609, 9616 (2013) (“The location of a customer’s use of a telecommunications service also clearly qualifies as CPNI.”).

The FCC monitors compliance with these rules as Congress intended: a commonsense (and commonplace) process by which the agency investigates and releases preliminary findings, gives the implicated parties opportunities to respond, and concludes with a

finding of liability and possible penalties. See 47 U.S.C. § 503(b)(4). Pursuant to the applicable regulations, the FCC’s penalty calculation accounts for a number of factors, including the “extent and gravity of the violations” and the violator’s ability to pay. 47 C.F.R. § 1.80(b)(11). In accordance with Congress’s mandate, if the agency wants to enforce the penalties, it must do so through a civil suit in United States district court with a “trial de novo.” 47 U.S.C. § 504(a).

### **C. The Carriers Violated Their Duty to Protect Customer Location Data**

Until recently, the carriers sold access to customer location data and often contracted with location-information aggregators, who collected the data and then resold it to third parties. See *Verizon Commc’ns*, 156 F.4th at 92. Through this “location-based services’ program”—a web of contracts between the carriers and aggregators, and resulting contracts between the aggregators and third parties—the carriers shifted many of their obligations under the Telecommunications Act of 1996. *Id.* For example, carriers shifted to third-party contractors their legal obligation to obtain customer consent before sharing data. *Id.* While the carriers could audit the third parties that sought access to location information to ensure they were abiding by FCC rules, carriers often did so inadequately, sporadically, or not at all. See *Sprint Corp.*, 151 F.4th at 355 (outlining examples); *Verizon Commc’ns*, 156 F.4th at 99–100 (same).

In 2018, the very real consequences of this obligation-shifting and lax effort to protect consumer privacy came to light. The New York Times exposed how the carriers gave Securus Technologies customer location

data through a series of contracts involving an aggregator and an intermediary, and how that data was then misused by Missouri sheriff Cory Hutcheson to illegally track locations of numerous cell phone users—including a judge—without their knowledge or consent. See Jennifer Valentino De-Vries, *Service Meant to Monitor Inmates' Calls Could Track You, Too*, N.Y. Times (May 10, 2018), <https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html>; see also Jim Salter, *Former Missouri sheriff sentenced to 6 months in fed prison*, Assoc. Press (Apr. 29, 2019), <https://apnews.com/general-news-bb92210c8dd64deab08588292ae319bd>. More reports on the subject followed. See, e.g., Katie Canales, *A prison technology company has a way to track almost any cell phone in the United States – and it reportedly just got hacked*, Bus. Insider (May 16, 2018), <https://www.businessinsider.com/securus-prison-technology-location-tracking-hacked2018-5>; Morgan Chalfant, *Firm exposes cell phone location data on US customers*, The Hill (May 18, 2018), <https://thehill.com/policy/cybersecurity/388376-firm-exposes-cell-phone-location-data-on-us-customers/>.

The bad press from the carriers' failure to protect customer data was not enough to stop the activity. Indeed, eight months after these initial stories detailing easy and unauthorized access to carrier-sourced location data—which had already resulted in CPNI confidentiality violations for hundreds of customers—Vice published a follow-up article documenting how it could *still* use the same carrier-sourced location data to track down a phone through a bounty hunter for \$300. See Joseph Cox, *I Gave a Bounty Hunter \$300. Then He Located Our Phone*, Vice (Jan. 8, 2019), <https://www.vice.com/en/article/i-gave-a-bounty->

hunter-300-dollars-located-phone-microbilt-zumigo-tmobile/. And, as the FCC determined, “Verizon did not finally terminate its location-based service program until March 30, 2019, or 324 days from when the New York Times first reported” about the issue. *In re Verizon Commc’ns*, 39 F.C.C. Rcd. 4259, 4266 (2024).

#### **D. The Carriers Waived Their Right to a Jury Trial**

After nearly two years of investigation, in early 2020, the FCC proposed forfeiture penalties against the carriers for violating Section 222’s duty to take reasonable measures to protect CPNI. See Press Release, FCC, *FCC Proposes Over \$200 Million in Fines Against Four Largest Wireless Carriers for Apparently Failing to Adequately Protect Consumer Location Data* (Feb. 28, 2020), <https://docs.fcc.gov/public/attachments/DOC-362754A1.pdf>. The FCC did so in NALs to the carriers after it became clear that they had “failed to promptly take [reasonable] measures even after they became aware of serious abuses.” *Sprint Corp.*, 151 F.4th at 370.

The carriers availed themselves of their statutory right to contest the proposed penalties, see 47 U.S.C. § 503(b)(4)(C), and the FCC subsequently reduced its fines for T-Mobile and Verizon. See Press Release, FCC, *FCC Fines AT&T, Sprint, T-Mobile, and Verizon Nearly \$200 Million for Illegally Sharing Access to Customers’ Location Data* (Apr. 29, 2024), <https://docs.fcc.gov/public/attachments/DOC-402213A1.pdf>. Over the dissent of some Commissioners, the FCC ultimately chose *not* to investigate and quantify how many consumers were affected by the carriers’ mishandling of their data, even though this

could have served as the basis for higher penalties. See Statement of Commissioner Geoffrey Starks, *In re AT&T Inc.*, 35 F.C.C. Rcd. 1743, 1781 (2020); see also *Verizon Commc'ns*, 156 F.4th at 102 (“[W]e conclude, on *de novo* review, that the [FCC] has the authority to determine, within reasonable boundaries, what qualifies as a ‘single act or failure to act,’ for the purpose of [calculating penalties while] remaining within the statutory cap.” (citing 47 U.S.C. § 503(b)(2)(B))).

The carriers could have declined to pay the forfeiture penalties and availed themselves of jury trials if the FCC sought to enforce the penalties in court. See *Sprint Corp.*, 151 F.4th at 359; *Verizon Commc'ns*, 156 F.4th at 105. Instead, they sought review in different courts of appeals and thus waived their jury trial right.<sup>2</sup> See *Cap. Traction Co. v. Hof*, 174 U.S. 1, 21 (1899) (“What he has lost, he has voluntarily relinquished.”).

## **II. The De Novo Jury Trial Available to the Carriers Satisfies the Seventh Amendment**

The Seventh Amendment preserves a jury trial right in “Suits at common law, where the value in controversy shall exceed twenty dollars.” U.S. Const.

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<sup>2</sup> There is no merit to the claim by affected carriers that the “only statutory mechanism for petitioners to secure judicial review” was through an appeal under the Hobbs Act. Amicus Brief of T-Mobile at 7, *Verizon Commc'ns Inc. v. FCC*, (Nos. 25-406, 25-567), 2026 WL 604700, at \*7. The carriers here are sophisticated parties who can read the clear text of Section 504, which says in simple terms that “[t]he forfeitures ... shall be recoverable ... in a civil suit.” 47 U.S.C. § 504. Their argument that they were left with a Hobson’s choice given non-monetary, reputational harms that allegedly stemmed from waiting for the enforcement action also lacks merit for the reasons below. See *infra* at 17–20.

amend. VII. To be sure, trial by jury is “of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right ... should be scrutinized with the utmost care.” *Jarkesy*, 603 U.S. at 121. At the same time, the Constitution does not require an empaneled jury at some fixed point in a proceeding. See *Hof*, 174 U.S. at 23 (explaining that the Seventh Amendment “does not prescribe at what stage of an action a trial by jury must, if demanded, be had”). And because the plain text concerns the *preservation* of a *right*, a party may waive it. See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (emphasizing that the Seventh Amendment, as *lex pro se introducto*, preserves a “right,” the “benefit” of which may be relinquished). The carriers’ challenge to the FCC’s forfeiture procedures, on the ground that the jury trial right they waived was not available sooner, does not give rise to a Seventh Amendment violation.<sup>3</sup>

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<sup>3</sup> Because the Seventh Amendment is satisfied, amici do not address the threshold questions of whether the Seventh Amendment applies, or whether the public rights doctrine applies.

### A. Only One Jury Trial Is Required

Knowing that the option of a jury trial always existed, the carriers argue that their Seventh Amendment right was violated because they were not provided a jury trial at the administrative proceeding when the FCC first determined the forfeiture penalties. But, as this Court and others have made clear, “[n]othing in the Seventh Amendment requires that a jury make its findings at the earliest possible moment in the course of civil litigation; the requirement is only that the jury ultimately determine the issues of fact if they cannot be settled by the parties or determined as a matter of law.” *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1178 (5th Cir. 1979) (citing *In re Peterson (Ex Parte Peterson)*, 253 U.S. 300 (1920)); *Peterson*, 253 U.S. at 310 (“Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial, or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury.”).

Nor can the carriers’ argument be reconciled with the jury trial made available in Section 504. According to the carriers’ position, they would be entitled to a jury before the Commission first sends a forfeiture order and *another* jury if the carriers decide not to pay and the Commission must collect the penalty through a de novo Section 504 enforcement trial. Given that the Section 504 enforcement trial would involve a jury’s de novo review of the penalty, it is not clear how the earlier trial that the carriers ask for would not be encompassed by the Section 504 trial. That absurd result would render the Section 504 trial superfluous. See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (“we construe statutes, where

possible, so as to avoid rendering superfluous any parts thereof”).

To get around these issues, the carriers attempt to isolate the enforcement proceeding by dubbing it a “separate collection proceeding.” Br. 25.<sup>4</sup> That rebranding of the process, however, does not reflect the substance of the Commission’s forfeiture process, which leads to a finding that is helpful, but not binding. See Michael Asimow, *Greenlighting Administrative Prosecution*, 75 Admin. L. Rev. 227, 237 (2023) (“The FCC does not consider civil penalty determinations as adjudicatory because the agency lacks power to collect civil penalties. DOJ must enforce the penalty in federal district court, which provides a de novo hearing.”). This Court has upheld similar agency determinations of monetary liability in the first instance, even in cases where, unlike here and under the relevant law at issue there, the finding was final, and an Article III court could not review the facts de novo. *Crowell v. Benson*, 285 U.S. 22, 42–43, 51–54 (1932).

Courts often refer to the FCC’s forfeiture order as a finding, and the district court’s review as a “de novo determination.” *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 496 (5th Cir. 1980); see also *United States v. Rust Commc’ns Grp., Inc.*, 425 F. Supp. 1029, 1031 (E.D. Va. 1976) (“The defendant, electing to have the matter heard de novo in this Court, has refused to pay the assessment....”); *United States v. U.S. Telecom Long Distance, Inc.*, No. 2:17-cv-02917-JAD-NJK, 2018 WL 4566673, at \*1 (D. Nev. Sept. 24, 2018) (“To enforce this [forfeiture] order, the government must prove in a civil jury trial that UST committed these violations.”). The legislative history for Section 504

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<sup>4</sup> “Br.” refers to the carriers’ opening brief on the merits.

also reflects this qualification. S. Rep. No. 86-1857, at 10 (1960) (stating that Section 504’s proceeding is not “merely a collection proceeding” but “one in which the person against whom the forfeiture is ordered is given an opportunity to contest on the merits the action of the Commission”). And, many times, in that de novo review, courts invalidate the FCC’s forfeiture penalty finding. See, e.g., *United States v. Unipoint Techs., Inc.*, 159 F. Supp. 3d 262, 266, 273 (D. Mass. 2016) (denying government’s dispositive motion as to forfeiture amount on de novo review); *Rust Commc’ns*, 425 F. Supp. at 1030 (in de novo trial on forfeiture liability, court concluded that station was not liable for penalty).

The jury trial made available through Sections 503(b)(4) and 504 sets this case apart from *Jarkesy*, where the sanctioned party had no right to a de novo district court trial after the agency imposed a substantial monetary penalty. See 603 U.S. at 117. The law at issue in *Jarkesy* “gave the SEC’s Commissioners—the same officials who authorized the suit against Mr. Jarkesy—the power to preside over his case themselves and issue judgment.” *Jarkesy*, 603 U.S. at 142 (Gorsuch, J., concurring). And, even though a defendant before the SEC could seek further review in a court of appeals, that defendant would not ultimately find a “jury there, only a judge who must follow the agency’s findings if they are supported by more than a mere scintilla of evidence.” *Id.* at 145 (Gorsuch, J., concurring) (citation and quotation marks omitted). Given that the process at issue in *Jarkesy* was entirely in-house, and there was no “review de novo by a Federal district court,” *id.* at 156 (Gorsuch, J., concurring) (citing Final Report of Attorney General’s Committee on Administrative Procedure 147 (1941)), the Court held

that the law violated the Seventh Amendment, *id.* at 140–41. Because a jury can decide the FCC’s penalty determination de novo before the regulated entity must pay, this is not a case in which “the odds [a]re stacked against” the entity. *Id.* at 143 (Gorsuch, J., concurring).

The carriers retort that under the statutes at issue in *Jarkesy*, the SEC was required to refer the non-payment of the penalty to the Attorney General, who would then recover the penalty in district court. Br. 33. Those statutes, however, simply provide a mechanism for executing on a judicial decree that creates a legal obligation to pay, in proceedings that are not de novo. See 15 U.S.C. §§ 78u(d)(3)(A)-(C), 78u-1(a), (d). Nowhere in those statutes, unlike here, is there the provision of an opportunity to contest the penalty in a de novo proceeding.

It is also worth noting that the enforcement proceeding at issue in *Jarkesy* was novel, having been created by Congress in 2010 through the Dodd Frank Act. Prior to that, for most of the SEC’s “90-year existence, the Commission had to go to federal court to secure that kind of relief...” *Jarkesy*, 603 U.S. at 142 (Gorsuch, J., concurring). Here, by contrast, the FCC has proceeded by in-house penalty assessments followed by de novo enforcement actions for nearly fifty years. See, e.g., *WIYN Radio*, 614 F.2d at 496 (enforcement action under Section 504(a)); *United States v. Evergreen Media Corp. of Chi., AM*, 832 F. Supp. 1179 (N.D. Ill. 1993); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458 (8th Cir. 2000); *United States v. TravelCenters of Am.*, 597 F. Supp. 2d 1222 (D. Or. 2007); *United States v. Neely*, 595 F. Supp. 2d 662 (D.S.C. 2009); *United States v. Baxter*, 841 F. Supp. 2d 378 (D. Me. 2012).

**B. The Carriers' Claim of Reputational Harm is Both Irrelevant and Unfounded**

The carriers concede, as they must, that they face no monetary harm from electing not to pay the forfeiture penalty and waiting for the United States to bring an enforcement action. If the FCC declines to seek enforcement of the penalties it assessed in-house, “the proposed penalties would never be collected.” *Sprint Corp.*, 151 F.4th at 361. The carriers are thus left to argue that they will suffer non-monetary harm. But that harm does not implicate the Seventh Amendment. And, the carriers point to no historical precedent for requiring jury adjudication for claims of reputational harm. That makes sense given that the Seventh Amendment comes into play when there is a “value in controversy.” U.S. Const. amend. VII. If the FCC does not bring an enforcement action, no suit occurs at which the jury trial right would attach. *Jarkesy*, 603 U.S. at 133 (discussing “[a]ctions by the Government to recover civil penalties” (citation omitted)).

Moreover, each of the carriers’ reputational harms—harms that they have yet to substantiate—are not the byproduct of the FCC’s forfeiture proceedings. Indeed, before the FCC’s investigation, the New York Times report shed light on the carriers’ unlawful disclosure of customer location data. *See supra* at 8–9. If any notoriety attached to the carriers, it would have been from that press coverage, not the resulting investigation by the FCC in its efforts to protect customer data.

In any event, the potential for negative publicity is not a bellwether for whether a jury trial is required under the Seventh Amendment. Not only would that

standard be unwieldy, but it would also mean that any time an agency initiates an investigation that may become public, the regulated entity would be entitled to a jury trial. For example, negative scrutiny would have attached when the FCC first issued the public notices of apparent liability to the carriers. The carriers, however, do not take the position that a jury trial is required at the issuance of that notice. See Br. 8. Similarly, the carriers' position would require jury trials whenever the government seeks injunctive relief—which carries with it far greater negative implications than investigations alone. That would mean that injunctions, which are quintessentially equitable, could all of a sudden give rise to jury trials. But see *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43–44 (1989) (“[W]e contrasted suits at law with those where equitable rights alone were recognized in holding that the Seventh Amendment right to a jury trial applies to all but the latter actions.” (citation and quotation marks omitted)).

Given that the FCC's forfeiture procedures were not the root of the carriers' alleged reputational harms, their argument that the option of a jury trial was not a real option because it entailed accruing reputational harm, fails. Simply put, there is no “Hobson's Choice” dilemma, nor any unreasonable burden caused by the forfeiture proceedings. Relatedly, contrary to Verizon's and AT&T's assertion that no carrier has previously waited to be sued by the FCC in a forfeiture enforcement action, Br. 10, other carriers have, in fact, taken that route. See, e.g., *Unipoint*, 159 F. Supp. 3d at 270 (forfeiture enforcement proceeding against “a telecommunications carrier”); *United States v. Ne. Commc'ns of Wis., Inc.*, 608 F. Supp. 2d 1049, 1051 (E.D. Wis. 2008) (action by United States under

Section 504 “to enforce a \$75,000 forfeiture imposed by the Federal Communications Commission against Defendant Northeast Communications of Wisconsin”). Waiting for an enforcement action is not unusual; indeed, other FCC-regulated entities regularly choose to wait for the de novo trial. See, e.g., *United States v. Rhodes*, No. CV 21-110-M-DLC, 2024 WL 1269182 (D. Mont. Feb. 20, 2024); *United States v. Pennington*, No. 5:21-cv-198-REW-MAS, 2023 WL 2542594 (E.D. Ky. Mar. 16, 2023); *United States v. Hodson Broad.*, No. 2:11-cv-00332-APG-GWF, 2014 WL 4634282 (D. Nev. Sept. 15, 2014).

Nor can sophisticated parties like Verizon and AT&T credibly complain that they would be pressured into paying the penalty to avoid ill-will by the FCC, rather than waiting for a de novo trial at which a jury would be available. Br. 10. Carriers routinely litigate against the FCC, often at their own initiation. See, e.g., *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467 (2002); *Am. Tel. & Tel. Co. v. FCC*, 602 F.2d 401 (D.C. Cir. 1979); *Sprint Corp. v. FCC*, 331 F.3d 952 (D.C. Cir. 2003); *AT&T Corp.*, 349 F.3d 692 (D.C. Cir. 2003); *AT&T Corp. v. FCC*, 394 F.3d 933 (D.C. Cir. 2005); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007); *Verizon Commc’ns, Inc. v. FCC*, 770 F.3d 961 (D.C. Cir. 2014); *AT&T Corp. v. FCC*, 967 F.3d 840 (D.C. Cir. 2020). That the carriers frequently spar with the FCC belies the notion of specific ill-will incurred from their waiting for the FCC to enforce forfeiture penalties. And, to be clear, Congress forbids the FCC from using the issuance of an NAL to prejudice the NAL recipient in “*any other proceeding*” until the forfeiture is paid or a court has “ordered payment of such forfeiture, and such order has become final.” 47 U.S.C. § 504(c) (emphasis added).

As discussed above, Sections 503 and 504 provide in no uncertain terms that the carriers can choose not to pay the penalty and the FCC must then seek to recover the forfeiture penalty in a de novo district court trial. This statutory design “means that [forfeiture subjects] can control the forum of review by deciding whether or not to pay the penalty.” *AT&T*, 323 F.3d at 1085. Such “forum-controlling compliance choices” are common and routinely upheld, including in other agency contexts. See *id.*

Most notably, the carriers do not deny their wrongdoing here. Their desire to shield themselves from negative publicity that follows from their admittedly wrong actions does not give rise to a Seventh Amendment issue.

**CONCLUSION**

This Court should reverse the Fifth Circuit's judgment in *AT&T* and affirm the Second Circuit's judgment in *Verizon*.

Respectfully submitted.

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MARCH 27, 2026

# APPENDIX

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## LIST OF AMICI CURIAE

**The Honorable Reed Hundt** served as Chairman of the FCC from 1993 to 1997. He was the first Chair to bring FCC operations into the communications age and to make himself accessible to a wide audience by participating in open, online conversations with the public. He serves as the founder or co-founder of three nonprofits, the Coalition for Green Capital, Making Every Vote Count, and Refounding America.

**The Honorable Tom Wheeler** served as Chairman of the FCC from 2013 to 2017. Prior to working at the FCC, Chair Wheeler worked in the cable and wireless industry, and held positions including President of the National Cable & Telecommunications Association and CEO of the Cellular Telecommunications & Internet Association.

The **Benton Institute for Broadband & Society** is a 501(c)(3) private operating foundation that conducts research and engages in advocacy to bring “open, affordable, high-performance broadband to all people in the U.S. to ensure a thriving democracy.” Benton provides information and analyses about broadband policy, and regularly participates in FCC rulemakings and adjudicatory proceedings.

**Consumer Reports** is an independent, nonprofit member organization that works side by side with consumers for truth, transparency, and fairness in the marketplace, and is dedicated to independent product testing and rating, investigative journalism, consumer-oriented research, public education, and consumer advocacy.

The **Electronic Privacy Information Center** is a nonprofit organization whose mission is to secure the fundamental right to privacy in the digital age for all people through oversight and analysis of government activities that impact individual privacy. EPIC routinely participates as amicus curiae before federal and state courts in cases concerning the privacy and security of consumer data.

The **National Consumer Law Center** has used its expertise in consumer law to work for consumer justice and economic security for low-income and other disadvantaged people in the United States since its founding in 1969. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

The **National Consumers League** is a nonprofit, nonpartisan consumer advocacy organization representing consumers and workers on marketplace and workplace issues since its founding in 1899. NCL has served on the FCC's Consumer Protection and Accessibility Advisory Committee, formerly the Consumer Advisory Committee. Headquartered in the District of Columbia, NCL provides government, businesses, and other organizations with the consumer's perspective on concerns including aviation, child labor, food safety, healthcare, privacy, and telecommunications.

**Public Knowledge** is a nonprofit public interest organization that represents the interests of the public in communications policy before Congress, the FCC, and the courts. Public Knowledge has long advocated that the FCC hold carriers accountable for failures to protect customer proprietary network information.