

No. 24-60223

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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AT&T INC.,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of an Order of  
the Federal Communications Commission

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RESPONDENTS' PETITION FOR REHEARING EN BANC

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## **CERTIFICATE OF INTERESTED PERSONS**

No. 24-60223, *AT&T Inc. v. Federal Communications Commission and United States of America*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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**STATEMENT REGARDING NECESSITY OF EN BANC  
REHEARING**

The panel decision conflicts with prior decisions of this Court and the Supreme Court, and presents “questions of exceptional importance.” FRAP R. 40(b)(2). Specifically, the panel’s decision is contrary to this Court’s decision in *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1178–79 (5th Cir. 1979); and the Supreme Court’s decisions in *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899), and *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. ---, 2025 WL 1716136 (June 20, 2025).

The exceptionally important issues presented are:

1. Whether the Federal Communications Commission’s statutory process for assessing a monetary forfeiture against AT&T, under which AT&T was entitled to a de novo jury trial in federal court, satisfies the Seventh Amendment.
2. Whether the Commission’s enforcement proceeding against AT&T, a telecommunications carrier and wireless spectrum licensee, falls within the “public rights” exception to the Seventh Amendment.
3. Whether this Court should vacate the panel opinion because it relied upon *United States v. Stevens*, 691 F.3d 620 (5th Cir. 2012), which

has been effectively abrogated by *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. ---, 2025 WL 1716136 (June 20, 2025).

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**INTRODUCTION**

The panel's decision conflicts with the precedent of this Court and the Supreme Court, effectively holds unconstitutional an Act of Congress, and has far-reaching implications that could hamstring the government's ability to ensure compliance with the Communications Act.

After AT&T sold access to its wireless customers' location information without ensuring customer consent, in violation of 47 U.S.C. § 222, the Federal Communications Commission investigated and ultimately assessed a monetary forfeiture against the company under 47 U.S.C. § 503(b)(4).

On direct review, the panel held that the Commission’s “in-house adjudication violated the Constitution by denying [AT&T] an Article III decisionmaker and a jury trial.” Op. 1–2. That holding disregards the provision for a de novo jury trial under Section 504(a) of the Communications Act, contradicts this Court’s and the Supreme Court’s holdings that a de novo trial following an initial determination satisfies the Seventh Amendment, and does not faithfully apply the Seventh Amendment’s public rights exception. What is more, in holding that AT&T’s Seventh Amendment rights were violated, the panel relied heavily on Circuit precedent that has since been effectively abrogated by the Supreme Court.

This Court should grant rehearing *en banc*.

### **STATEMENT OF THE ISSUES**

1. Whether the Federal Communications Commission’s statutory process for assessing a monetary forfeiture against AT&T, which included the availability of a de novo jury trial in federal court, satisfies the Seventh Amendment.

2. Whether the Commission’s enforcement proceeding against AT&T, a telecommunications carrier and wireless spectrum licensee, falls within the “public rights” exception to the Seventh Amendment.

3. Whether this Court should vacate the panel opinion because it relied upon *United States v. Stevens*, 691 F.3d 620 (5th Cir. 2012), which has been effectively abrogated by *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. ---, 2025 WL 1716136 (June 20, 2025).

## STATEMENT OF THE CASE

1. Section 222 of the Communications Act imposes on every telecommunications carrier “a duty to protect the . . . proprietary information of” its “customers.” 47 U.S.C. § 222(a). One form of data protected by the statute is “customer proprietary network information,” or CPNI, which includes “information that relates to the . . . location . . . of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship.” *Id.* § 222(c), (h)(1)(A).

Under the Commission’s rules, “[t]elecommunications carriers must take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI.” 47 C.F.R. § 64.2010(a).

2. Section 503 of the Communications Act provides that “any person who willfully or repeatedly fail[s] to comply with” any provision of the Act or the Commission’s rules “shall be liable to the United States for a [monetary] forfeiture penalty.” 47 U.S.C. § 503(b)(1).

Under § 503(b)(4), the Commission may assess a penalty in a written forfeiture order after first issuing a notice of apparent liability

and allowing the apparent violator to respond in writing. If the apparent violator declines to pay, the forfeiture “shall be recoverable pursuant to section 504(a),” *id.* § 503(b)(4), which requires the government to bring “a civil suit in the name of the United States” in district court and provides that “any [such] suit . . . shall be a trial de novo,” *id.* § 504(a). An aggrieved party may forgo such a trial court proceeding by paying the forfeiture and seeking review in a court of appeals under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). *See AT&T Corp. v. FCC*, 323 F.3d 1081, 1084 (D.C. Cir. 2003).

3. Until March 2019, AT&T ran a “location-based services program” that sold access to its wireless customers’ location data to various third parties. *In re AT&T, Inc.*, Forfeiture Order, 39 FCC Rcd 4216, 4219 at ¶8 (2024) (“Order”). AT&T eventually shut down this program after the *New York Times* revealed serious vulnerabilities that allowed malicious actors to track the location of any AT&T customer without authorization or consent. Order ¶14.

On February 28, 2020, the Commission proposed a \$57,265,625 forfeiture for AT&T’s apparent violations of Section 222 of the Communications Act and Section 64.2010 of the Commission’s rules. *See*

*AT&T Inc.*, Notice of Apparent Liability, 35 FCC Rcd 1743 (2020) (“Notice”). After considering AT&T’s responses, the Commission found that AT&T repeatedly “disclos[ed] its customers’ location information, without their consent, to a third party who was not authorized to receive it,” and penalized AT&T for “continu[ing] to sell access to its customers’ location information under (for all intents and purposes) the *same system*” for nearly a year after these serious vulnerabilities became public. Order ¶1, ¶44.

4. AT&T did not wait for the government to bring suit to recover the forfeiture under Section 504(a), which would have provided for a de novo jury trial in district court. Instead, it paid the forfeiture and sought direct review in this Court. *See AT&T v. FCC*, No. 24-60223, No. Dkt. 1-1 (May 9, 2024).

On appeal, AT&T raised numerous issues, including statutory objections to the Commission’s authority to regulate location data, its provision of fair notice, and its forfeiture calculation. *See AT&T v. FCC*, No. 24-60223, No. Dkt. 30 (July 29, 2024) (“AT&T Br.”). AT&T also argued, relying on *SEC v. Jarkesy*, 603 U.S. 109 (2024), that “the

Commission’s adjudication of common law private rights violates the Seventh Amendment.” AT&T Br. 29.

5. On April 17, 2025, a panel of this Court vacated the forfeiture order, concluding that “the [Commission’s] in-house adjudication violated the Constitution by denying [AT&T] an Article III decisionmaker and a jury trial.” Op. 1–2. The panel declined to “reach the other issues AT&T raise[d].” Op. 8. Judge Duncan authored the opinion, which was joined by Judge Wilson. Judge Haynes concurred in the judgment only.

The panel first concluded that the “the Commission’s enforcement proceeding qualifies as a ‘suit at common law,’” subject to the Seventh Amendment. Op. 9. It next concluded that the AT&T forfeiture proceeding did not fall within the “public rights” exception to the Seventh Amendment, which permits Congress to channel adjudication of certain matters “to agencies instead of courts.” Op. 13. Because private negligence suits against common carriers “have been routinely adjudicated in state and federal courts,” the panel thought “it would be bizarre to situate a negligence action against carriers within the ‘historic categories of adjudications’ falling outside Article III.” Op. 15. While the panel acknowledged “that federal agencies like the Commission have

long had regulatory authority over common carriers,” it nonetheless concluded that the public rights exception did not apply. *See* Op. 16 & n.12.

Finally, the panel rejected the Commission’s lead argument that the Seventh Amendment was satisfied by the availability of a de novo jury trial under Section 504(a). Op. 18. By the time such a jury trial took place, the panel wrote, “the Commission would have already adjudged a carrier guilty of violating section 222 and levied fines,” leading to “real-world impacts,” such as “reputational harm” from bad publicity, and unspecified pre-trial “risks.” Op. 18–19. The panel also concluded that the Court’s prior decision in *United States v. Stevens*, 691 F.3d 620 (5th Cir. 2012)—which prohibited “a defendant [from] challeng[ing] a forfeiture order’s legal conclusions” in trial court—created a Seventh Amendment problem by forcing AT&T to choose between giving up its legal arguments in district court and making those arguments in the court of appeals without a jury trial. Op. 19–20.

## ARGUMENT

### I. THIS COURT SHOULD REHEAR THE PANEL'S DETERMINATION THAT THE COMMISSION'S STATUTORY ENFORCEMENT PROCESS IS UNCONSTITUTIONAL

#### A. The Availability Of A De Novo Jury Trial In Section 503(b)(4) Forfeiture Proceedings Satisfies The Seventh Amendment

1. The panel's decision fails to account for the availability of a de novo jury trial in Section 503(b)(4) forfeiture proceedings, and it conflicts with decisions of this Court and the Supreme Court holding that the Seventh Amendment can be satisfied by a jury trial following an initial determination by another tribunal. The availability of a de novo jury trial should have resolved AT&T's Seventh Amendment objections, and rehearing *en banc* is warranted.

The panel was concerned that, before any jury trial, "the Commission would have already adjudged a carrier guilty of violating section 222 and levied fines." Op. 18. But that misses the relevant Seventh Amendment question: whether a defendant in Commission enforcement proceedings can obtain a jury trial before the government imposes an obligation to pay a monetary penalty. The answer here is yes. *See* 47 U.S.C. § 504(a). The Commission's initial determination that AT&T violated the statute and should pay a penalty does not change that.

Indeed, the Commission cannot recover a monetary forfeiture or use the existence of a forfeiture proceeding to a party's prejudice unless a court—after the opportunity for a de novo trial—has ordered payment (or the forfeiture is voluntarily paid). *Id.* § 504(a), (c).

The Supreme Court has long recognized that the availability of a jury trial satisfies the Seventh Amendment even when the trial follows an initial determination by a different tribunal. The Seventh Amendment “does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it.” *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899). For example, in *Capital Traction*, the Supreme Court held that an initial liability determination by a justice of the peace was consistent with the Seventh Amendment so long as a subsequent “trial [anew] by jury” was available. *Id.* at 4, 37–39, 45–46; *see also Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430 (1915) (statutory scheme in which the Interstate Commerce Commission awarded damages to shippers, who could then recover the damages in a civil suit where the agency's findings were treated as evidence but were not conclusive, “does not abridge the right of trial by jury”). Similarly, this Court has upheld liability findings by medical

liability mediation panels as a precondition to a jury trial because the Seventh Amendment requires “only that the jury [u]ltimately 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, 1178–79 (5th Cir. 1979); *see also Seoane v. Ortho Pharms., Inc.*, 660 F.2d 146, 149 (5th Cir. 1981). The panel’s decision contradicts binding precedent that holds the availability of a de novo jury trial, provided in this case under Section 504(a), satisfies the Seventh Amendment.

The panel’s concerns about “reputational harm” or unnamed “risks” while parties await trial, Op. 18–19, are misplaced. Because the Seventh Amendment concerns only “[s]uits at common law, where the value in controversy shall exceed twenty dollars,” it is only implicated by proceedings that result in monetary penalties. U.S. Const. amend. VII. If the Commission had issued AT&T a cease and desist order rather than a monetary penalty premised on an agency finding of statutory violations, the same “reputational harm” could occur, but the Seventh Amendment would not come into play.

To be sure, in the proceeding before the Commission, AT&T may have incurred “the expense and disruption of defending itself.” *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980) (internal quotation

marks omitted). But “the expense and annoyance of litigation is part of the social burden of living under government.” *Ibid.* And such practical (rather than legal) consequences are merely “the burdens abided by any respondent in an enforcement proceeding or any criminal defendant who must wait for vindication.” *Jarkesy v. SEC*, 803 F.3d 9, 28 (D.C. Cir. 2015). Even then, a carrier facing “demonstrably adverse consequences” pending a trial court proceeding could, if necessary, bring a declaratory action to address the forfeiture order. *See Pleasant Broad. Co. v. FCC*, 564 F.2d 496, 502 (D.C. Cir. 1977); *see also Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994) (approving *Pleasant Broadcasting*).

**B. The Panel Erroneously Held That The Forfeiture Proceeding Was Outside The Public Rights Exception To The Seventh Amendment**

Because Section 504(a) entitled AT&T to a de novo jury trial before any legal obligation to pay the forfeiture would arise, AT&T’s Seventh Amendment challenge lacks merit. But even if the statute did not confer a jury trial right, the scheme would be constitutional based on the public rights exception to the Seventh Amendment.

Under that exception, “Congress may assign [a] matter for decision to an agency without a jury, consistent with the Seventh Amendment.” *Jarkesy*, 603 U.S. at 127. Oversight of telecommunications providers like

AT&T is doubly imbued with a public character because such companies are both common carriers and licensees of federally managed spectrum. *See AT&T v. FCC*, No. 24-60223, No. Dkt. 45, at 30–35 (Sept. 27, 2024). Indeed, the panel’s acknowledgment that the public rights exception may apply to certain Commission matters “such as when setting rates or granting licenses,” Op. 16, supports the government’s position. AT&T is a spectrum licensee subject to the standard license term that it must follow Commission rules, including those relating to protecting customer data. Not only did the panel fail to address AT&T’s role as a spectrum licensee, but under the panel’s own reasoning, the exception should apply to enforcement actions, like this one, against licensees that violate the terms of their licenses to use spectrum, a public resource. *See Jarkesy*, 603 U.S. at 130 (recognizing “historical categories of adjudications [that] fall within the exception,” including “the granting of public benefits”).

The other aspects of the panel’s public rights analysis were equally flawed. For example, it is irrelevant that private suits against common carriers are commonly adjudicated in court. Op. 15 & n.10. The public rights exception applies to matters specifically assigned to agency oversight. *See Jarkesy*, 603 U.S. at 130. Here, the statutory proprietary data protections are “technical prescriptions for engaging in . . .

regulated activity” that were “unknown to the common law.” *Cf. Axalta Coating Sys. LLC v. FAA*, No. 23-2376, 2025 WL 1934352, at \*5 (3d Cir. July 15, 2025) (rejecting under the public rights exception a Seventh Amendment challenge to an FAA civil penalty for improperly shipping a can of paint). They are not, as the panel concluded, “closely analogous to a negligence action.” Op. 12; *see Axalta Coating Sys.*, 2025 WL 1934352, at \*5 (rejecting analogy to common law negligence). The fact that a similar claim *can* be litigated between private parties in court does not imply that all such claims *must* be litigated in court. By definition, the public rights exception covers matters “‘determined exclusively by [the executive and legislative] branches,’ even when they were ‘presented in such form that the judicial power is capable of acting on them.’” *Jarkesy*, 603 U.S. at 128.

## **II. THE PANEL OPINION SHOULD BE VACATED IN LIGHT OF *McLAUGHLIN***

In dismissing the significance of a Section 504(a) de novo jury trial, the panel relied on the Fifth Circuit’s prior decision in *Stevens*, 691 F.3d 620, *see* Op. 19–20. Because that decision is irreconcilable with *McLaughlin*, 606 U.S. \_\_\_, 2025 WL 1716136, rehearing *en banc* should be granted and the panel opinion should be vacated. *See, e.g., Guevara v.*

*Mar. Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995) (rehearing case *en banc* where intervening Supreme Court precedent “effectively overruled” circuit precedent that bound panel).

*Stevens* read the Hobbs Act, 28 U.S.C. § 2342(1), to preclude a defendant in an FCC enforcement trial from challenging the legal validity of the underlying forfeiture order, thus limiting the trial court “to considering the factual basis for the agency action’ but not [a defendant’s] ‘legal arguments,’” such as proper interpretation of the Communications Act. Op. 19 (quoting *Stevens*, 691 F.3d at 622). *Stevens* reached that conclusion even though the plain text of Section 504(a) guarantees a “trial de novo” without limiting the arguments a defendant may raise. Under the established interpretative rule that a specific statute controls over a general one, Section 504(a) would allow AT&T to challenge the underlying forfeiture order in the district court proceedings, even if the Hobbs Act generally applied to Commission enforcement actions. According to the panel here, *Stevens*’s rule unconstitutionally forced AT&T to choose between a jury trial without the “ability to challenge the order’s legality” on the one hand, and appellate review (without a jury trial) on the other. Op. 20; *see also* Op. 19 (calling this a “glaring problem”).

*Stevens* is no longer good law. *McLaughlin* holds that “[i]n an enforcement proceeding, a district court must independently determine . . . whether the agency’s interpretation of a statute is correct,” as well as “whether the rule or order was arbitrary and capricious under the APA or otherwise was unlawful.” 2025 WL 1716136, at \*6 & n.2.<sup>1</sup> That decision effectively abrogates *Stevens*. Compare *McLaughlin*, 2025 WL 1716136, at \*4 (“The Hobbs Act does not preclude district courts in enforcement proceedings from independently assessing whether an agency’s interpretation . . . is correct”), with *Stevens*, 691 F.3d at 622 (allowing consideration of “factual defenses” but not “legal validity”). *McLaughlin* confirms that a Section 504(a) “trial de novo” does not require a penalized party to choose between raising factual and legal issues; there is no longer any force to the panel’s suggestion, Op. 19, that AT&T would not be able to challenge the legal validity of a forfeiture order in a Section 504(a) action.

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<sup>1</sup> *McLaughlin* was a lawsuit between two private parties, but the Court made clear that its holding applied to both private litigation to enforce agency rules and “enforcement actions brought by the Government.” *McLaughlin*, 2025 WL 1716136, at \*5 n.1.

AT&T may argue that a Seventh Amendment problem remains because *Stevens* was the law of this circuit at the time of the forfeiture order in 2020 and that AT&T had to petition for Hobbs Act review lest the government bring its Section 504(a) in the Fifth Circuit. That argument fails. When the Supreme Court “construes a statute” like the Hobbs Act, it explains what the statute “ha[s] *always* meant.” *See, e.g., Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994); *accord, e.g., United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002). Thus, even before *McLaughlin*, the Hobbs Act was no bar to AT&T’s raising legal issues in a jury trial under Section 504(a)—including in this circuit.

Even if any ambiguity remained, this Court should not “manufacture” a constitutional conflict with Section 504(a) by continuing to follow the rule announced in *Stevens*. *United States v. Hansen*, 599 U.S. 762, 781 (2023). At minimum, the Court should grant panel rehearing and conduct further proceedings in light of *McLaughlin*. *See, e.g., Carroll v. United States*, 721 F.2d 155, 156 (5th Cir. 1983) (treating en banc rehearing petition as panel rehearing petition and granting rehearing in light of intervening Supreme court precedent).

### III. THE CONSTITUTIONALITY OF THE COMMISSION'S AUTHORITY TO ASSESS MONETARY PENALTIES PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

Rehearing *en banc* is also warranted because the panel decision involves “questions of exceptional importance.” FRAP R. 40(b)(2)(D).

Civil penalties are among the Commission’s most important regulatory remedies. Monetary forfeiture orders have constituted a substantial portion of the Commission’s enforcement efforts in recent years, imposed not only on violators of the Commission’s privacy rules, but also, for example, on companies that have flouted robocalling and unlicensed broadcasting rules. Such forfeitures remain “a top priority at the FCC,”<sup>2</sup> an area of bipartisan agreement, and have been celebrated as among the “key wins” in recent months.<sup>3</sup>

Although AT&T’s challenge arose in a specific factual context, the panel’s logic seems to widely question Section 503(b)(4)’s

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<sup>2</sup> FCC, *First Commission-Level Vote Under Chairman Carr Proposes A Nearly \$4.5 Million Fine Stemming From Apparently Illegal Robocall Scheme* (Feb. 4, 2025) (available at <https://docs.fcc.gov/public/attachments/DOC-409354A1.pdf>).

<sup>3</sup> FCC, *Chairman Carr Highlights Wins Delivered During First 100 Days* 3 (Apr. 29, 2025) (available at <https://docs.fcc.gov/public/attachments/DOC-411127A1.pdf>).

constitutionality in all (or nearly all) of its applications. If the panel’s decision stands, the validity of every Commission enforcement action that seeks to impose a monetary penalty under that provision is likely to be challenged. Indeed, since the panel’s decision, trade groups have argued that “*Jarkesy* renders the Commission’s current enforcement process unconstitutional.”<sup>4</sup> And one party has asked the Commission to “curtail its forfeiture proceedings” enforcing robocalling rules.<sup>5</sup>

Other nonmonetary remedies remain at the Commission’s disposal—including seizure of radio equipment, cease and desist orders, and injunctive relief, *see, e.g.*, 47 U.S.C. §§ 312(b), 401, 501, 510. But those remedies are significantly less flexible (and less frequently used) than monetary penalties. And unlike some other agencies, *e.g., Jarkesy*, 603 U.S. at 116, the FCC cannot independently initiate enforcement actions seeking monetary remedies in district court.

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<sup>4</sup> CTIA, NCTA, Competitive Carriers Association, USTelecom, WIA Petition for Rulemaking at 2 (May 1, 2025) (available at <https://www.fcc.gov/ecfs/document/10501450301035/1>).

<sup>5</sup> INCOMPAS, Letter, *Re: Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (May 6, 2025) (available at <https://www.fcc.gov/ecfs/document/105060027810913/1>).

Congress granted the Commission forfeiture authority after the agency expressed its view that “the power to impose monetary forfeitures” would provide the agency “with an effective tool in dealing with violations in situations where” more draconian remedies, such as “revocation or suspension [of licenses,] do[es] not appear to be appropriate.” Communications Act Amendments, 1960, H.R. Rep. No. 86-1800, at 17 (1960). Depriving the Commission of the flexibility to assess monetary forfeitures for regulatory violations would necessarily relegate the agency to an increased reliance on license revocation or nonrenewal for regulatory violations—severe, all-or-nothing penalties that would affect regulated parties far more substantially than targeted fines.

The exceptional importance of the Commission’s monetary forfeiture authority thus warrants rehearing *en banc*.

## CONCLUSION

The petition for rehearing *en banc* should be granted.

Dated: July 16, 2025

Respectfully submitted,

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United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

April 17, 2025

Lyle W. Cayce  
Clerk

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No. 24-60223

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AT&T, INCORPORATED,

*Petitioner,*

*versus*

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF  
AMERICA,

*Respondents.*

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Petition for Review of the Federal Communications Commission  
Agency No. 24-40

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Before HAYNES, DUNCAN, and WILSON, *Circuit Judges*.\*

STUART KYLE DUNCAN, *Circuit Judge*:

AT&T seeks review of a Federal Communications Commission forfeiture order. In an internal proceeding, the Commission found that AT&T violated section 222 of the Telecommunications Act by mishandling customer data and fined the company \$57 million. AT&T's petition argues, among other things, that the in-house adjudication violated the Constitution

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\* JUDGE HAYNES concurs in the judgment only.

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by denying it an Article III decisionmaker and a jury trial. Guided by *SEC v. Jarkesy*, 603 U.S. 109 (2024), we agree with AT&T.

Accordingly, we grant the petition and vacate the forfeiture order.

I

A

We first outline section 222 of the Telecommunications Act and then explain the Commission’s procedures for enforcing it.

1

Under section 222, telecommunications carriers must protect the confidentiality of “customer proprietary network information” (“CPNI”). 47 U.S.C. § 222(a). CPNI is defined as “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship.” *Id.* § 222(h)(1)(A).

Section 222 further provides that carriers “[e]xcept as required by law or with the approval of the customer . . . shall only use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service . . .” *Id.* § 222(c)(1). Commission regulations flesh out these responsibilities. Carriers “must take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI,” 47 C.F.R. § 64.2010(a), and they may use or disclose CPNI only with customers’ “opt-in approval.” *Id.* § 64.2007(b).

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2

The Commission assesses forfeiture penalties for violations of the Act, including violations of section 222. 47 U.S.C. § 503(b)(3)(A). The Commission adjudicates alleged violations in two ways: either by assigning a case to an administrative law judge (“ALJ”) or by investigating and adjudicating the case itself. *Ibid.* The choice is entirely up to the Commission. *Ibid.*<sup>1</sup> Unsurprisingly perhaps, the Commission typically opts to investigate and adjudicate violations itself, as it did here. That process works as follows.

First, upon receiving information about a potential violation, the Commission’s Enforcement Bureau opens an investigation into a carrier. The Bureau can gather information through letters of inquiry sent to the carrier, which may include interrogatories and requests for production. *Enforcement Primer*, FEDERAL COMMUNICATIONS COMMISSION, <https://perma.cc/FMQ2-ZH7C>. It may also compel documents and testimony through administrative subpoenas. *Ibid.* If the Bureau suspects a violation has occurred, it issues a charging document to the carrier called a Notice of Apparent Liability for Forfeiture (“NAL”). 47 U.S.C. § 503(b)(4)(A). An NAL advises the carrier how it violated the law and proposes a penalty.

To assess the amount of a penalty, the Commission “shall take into account the nature, circumstances, extent, and gravity of the violation and,

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<sup>1</sup> Section 503(b)(3)(A) provides in full:

At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative judge therefore in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

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with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” *Id.* § 503(b)(2)(E). Any penalty “shall not exceed \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act . . . .” *Id.* § 503(b)(2)(B).

Once the Commission issues an NAL, the carrier may respond in writing to explain why it should incur no penalty. *Id.* § 503(b)(4)(C). After considering this response, the Commission decides whether to affirm the NAL. If it affirms, the Commission issues a forfeiture order. The written response is the only way a carrier can oppose a NAL. That is, a carrier receives neither a hearing nor a trial before it incurs a Commission forfeiture order and accompanying penalty. *See AT&T Corp. v. FCC*, 323 F.3d 1081, 1083 (D.C. Cir. 2003) (alleged violators can challenge NAL in writing only).

Two paths exist for a carrier to seek review of forfeiture orders.

On the first path, a carrier fails to timely pay the penalty, which becomes a debt to the United States. 47 U.S.C. § 504(a). The Commission refers the debt to the United States Attorney General (DOJ) for a collection action in federal district court. *Ibid.* If DOJ pursues the action, the carrier is entitled to a trial *de novo* (we refer to this as a “section 504 trial”). At trial, however, the carrier may challenge only the order’s factual basis, not its legal validity. *See United States v. Stevens*, 691 F.3d 620, 622 (5th Cir. 2012) (in section 504(a) action, district court was “limited to considering the factual basis for the agency action” but not petitioner’s “legal arguments”).

On the second path, a carrier timely pays the penalty and seeks review in the appropriate court of appeals. *See AT&T Corp.*, 323 F.3d at 1084; *see also Stevens*, 691 F.3d at 623 (noting “the courts of appeals[’] . . . exclusive jurisdiction . . . to determine the validity of final FCC forfeiture orders”)

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(quoting 28 U.S.C. § 2342(1)) (cleaned up); *see also* 47 U.S.C. § 402(a). The carrier may challenge the order’s legal validity but, by choosing this path, forgoes a jury trial. *See AT&T Corp.*, 323 F.3d at 1084.

## B

Next, we sketch this case’s factual and procedural background.

### 1

AT&T provides its customers with voice, text, and data services. To make and receive calls and to transmit data, customers’ phones periodically “register,” or “check in,” with nearby signal towers. Because AT&T knows where these towers are, it can calculate the approximate location of its customers’ phones. AT&T uses this location information to maintain network function and to provide services to customers.

At issue here is AT&T’s former location-based services program, which it discontinued March 2019. Location-based services give users up-to-date information about their surroundings, such as maps and traffic information. They also include services from providers like Life Alert and AAA, which depend upon customers’ locations.

While nothing is wrong in principle with providing location-based services, the Commission took issue with how AT&T protected its customers’ location data. To implement location-based services, AT&T contracted with “location aggregators,” who collected customers’ location data. The aggregators, in turn, sold this data to service providers like Life Alert or AAA.

Before allowing those sales, however, AT&T would review a service provider’s “use case,” where the provider described why it needed the location data and how it obtained customers’ opt-in consent to use the data. (That the providers—as opposed to AT&T—obtained users’ consent would

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be important in the Commission's section 222 analysis.) AT&T's program also required providers to obtain and document customer consent for every location request.

While AT&T reviewed the providers' consent records daily, it did not verify customer consent before providing access to location data. AT&T also required aggregators to monitor providers and to comply with various security requirements, such as vulnerability scanning and encryption. At the same time, AT&T could cut off access to customer location information at any time.

Beginning in May 2018, several news articles reported problems with AT&T's (and other carriers') location-based services programs. Put simply, it became clear that some service providers were misusing or failing to protect customer location data.<sup>2</sup> After learning about this, AT&T promptly terminated those providers' access to the data. And by March 2019, AT&T stopped providing location data to all aggregators for use by any location-based service provider.

## 2

In May 2018, prompted by such news reports, the Commission's Enforcement Bureau began investigating AT&T and eventually sent the company a letter of inquiry seeking information about its location-based services program. AT&T complied with the investigation.

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<sup>2</sup> One example was Securus Technologies, which provided location services to law enforcement and correctional facilities. Securus allegedly allowed officers to access customer location data without a customer's consent, so long as officers uploaded a document (like a warrant) authorizing the location request. The problem was that Securus did not verify whether uploaded documents actually authorized the request.

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In February 2020, the Commission issued AT&T an NAL for willful and repeated violations of section 222 of the Act and section 64.2010 of the Commission's rules. The NAL proposed a \$57,265,625 penalty. Responding in writing, AT&T argued that: (1) location information is not subject to the Act because it is not CPNI, and, in any event, AT&T lacked fair notice that location information is CPNI; (2) AT&T acted reasonably; (3) the forfeiture amount was arbitrary and capricious; and (4) the Commission's enforcement regime is unconstitutional under Article III, the Seventh Amendment, and the nondelegation doctrine.

In April 2024, the Commission rejected all of AT&T's arguments and affirmed the proposed \$57 million penalty. In short, the Commission decided that: (1) CPNI relates to the "location" of a telecommunications service under § 222(h)(1)(A) because a carrier must be aware of and use the device's location for customers to send and receive calls; (2) that section speaks for itself and thus gave AT&T notice; (3) AT&T acted unreasonably by relying on providers to enforce safeguards against unauthorized access to location information<sup>3</sup>; and (4) AT&T's constitutional arguments failed because (a) the possibility of a section 504 trial satisfied the Seventh Amendment and Article III, and (b) the Commission's ability to choose between enforcement procedures did not implicate the nondelegation doctrine.<sup>4</sup>

The Commission therefore issued a forfeiture order demanding AT&T pay the \$57 million penalty within 30 days.

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<sup>3</sup> Specifically, the Commission found that AT&T committed 84 continuing violations of the Act and that its failures were willful or repeated.

<sup>4</sup> Two Commissioners dissented from the NAL. One thought CPNI does not include customer location data; but if it did, AT&T lacked notice of that. The other thought the forfeiture amount was unreasonable.

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AT&T elected to timely pay the penalty and seek review in our court. Before us, the company raises the same arguments it raised before the Commission.

We resolve AT&T's appeal based on its Seventh Amendment and Article III challenges to the Commission's enforcement regime, which we review *de novo*. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024). So, we need not reach the other issues AT&T raises.<sup>5</sup>

## II

AT&T argues that the Commission's enforcement procedures violate its Seventh Amendment right to a jury trial and its right to adjudication by an Article III court.

Our analysis is governed by *SEC v. Jarkesy*, 603 U.S. 109 (2024). In that case, the Supreme Court ruled that the Seventh Amendment prohibited the SEC from requiring respondents to defend themselves before an agency, rather than a jury, against civil penalties for alleged securities fraud. *Id.* at 140. The Court also ruled that the case did not fall within the “public rights” exception, which would let Congress assign certain matters to an agency instead of an Article III court. *Id.* at 134.

We must determine whether, following *Jarkesy*, the Commission's enforcement regime also violates the Seventh Amendment and Article III.

### A

The Seventh Amendment provides in relevant part:

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<sup>5</sup> Specifically, those issues are: whether the Commission's discretion to choose between an NAL or ALJ violates the nondelegation doctrine; whether the Commission lacked statutory authority to issue the forfeiture order; and whether the forfeiture order is arbitrary and capricious.

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In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]

U.S. CONST. amend. VII. The threshold question is whether the Commission’s enforcement proceeding qualifies as a “suit at common law.” A common law suit is one that is “legal in nature,” as opposed to one sounding in the realm of equity or admiralty. *See Jarkey*, 603 U.S. at 122 (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53 (1989)); *see ibid.* (“[T]he Framers used the term ‘common law’ in the Amendment in contradistinction to equity, and admiralty, and maritime jurisprudence.” (quoting *Parsons v. Bedford*, 3 Pet. 433, 446 (1830))).

How do we tell whether a suit is legal in nature? By considering two things: the cause of action and the remedy provided. *Id.* at 123.

1

We start with the remedy because it is the “more important” consideration. *Ibid.* (quoting *Granfinanciera*, 492 U.S. at 421).

The Commission’s civil penalties “are the prototypical common law remedy.” *Ibid.* They are money damages designed to “punish or deter” violators of section 222. *Ibid.* This is evident from the statutory factors, which instruct the Commission to set penalties by reference to “the nature, circumstances, extent, and gravity of the violation” as well as the violator’s “degree of culpability.” 47 U.S.C. § 503(b)(2)(E). It is also evident from the considerations the Commission used to set AT&T’s penalty, such as whether AT&T acted “willfully” and “repeatedly” and whether the violations were “serious.” *Cf. Jarkey*, 603 U.S. at 123 (noting the statutory penalty factors included whether a defendant was a repeat offender and whether its conduct was deliberate).

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Moreover, the penalties are not remedial. They are not designed “solely to ‘restore the status quo.’” *Ibid.* (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)); *see also United States v. Hoffman*, 901, F.3d 523, 560–61 (5th Cir. 2018) (“As opposed to restitution which is remedial, forfeiture is punitive.”). Nor are they meant to compensate victims whose location data was compromised. *See* 47 U.S.C. § 504(a) (“The forfeitures provided for in this chapter shall be payable into the Treasury of the United States”); *cf. Jarkesy*, 603 U.S. at 124 (noting SEC was “not obligated to return any money to victims”).

So, like the penalties in *Jarkesy*, the civil penalties here are “a type of remedy at common law that could only be enforced in courts of law.” *Id.* at 125 (quoting *Tull*, 481 U.S. at 422). That “is all but dispositive” of the Seventh Amendment issue. *Id.* at 123.

2

Saying nothing about the remedy, the Commission instead focuses on the second consideration, the nature of the cause of action. It argues that an action to enforce section 222 does not bear a “close relationship” to any common law cause of action and that, as a result, the Seventh Amendment does not apply. We disagree.

As AT&T argues, the section 222 action is analogous to common law negligence.<sup>6</sup> The action punishes carriers for failing to take reasonable measures to protect customers’ personal data. *See* 47 C.F.R. § 64.2010(a) (“[Carriers] must take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI.”). The Commission decided

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<sup>6</sup> AT&T also argues the action is analogous to common law actions for intrusion upon seclusion and eavesdropping. We need not address that argument.

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whether AT&T violated section 222 by repeatedly asking whether the company had acted reasonably.

For example, the Commission found AT&T unreasonably failed to protect customer data by relying on aggregators to enforce procedural safeguards, instead of enforcing the safeguards itself. The Commission also found AT&T's safeguards to be unreasonable because the company continued to provide customer location data to aggregators, despite reports of unauthorized disclosures. And the Commission found AT&T acted unreasonably by failing to “rectify the systemic vulnerabilities at the heart of its [] program.” In sum, the Commission assessed AT&T's protection of customer location data entirely in terms of the reasonableness of the company's actions.

Such analysis is a staple of the common law. “An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.” RESTATEMENT (SECOND) OF TORTS § 302B (2024). This familiar tort mirrors the Commission's analysis of AT&T's actions: “[AT&T's] failure to adequately protect CPNI for a protracted amount of time caused substantial harm by making it possible for malicious actors to identify the exact locations of AT&T subscribers who belong to law enforcement, military, government, or other highly sensitive positions—thereby threatening national security and public safety . . . .” The Commission's action, then, is analogous to common law negligence.

The Commission responds that section 222 is not analogous to negligence but instead is a “highly reticulated and technical scheme” for safeguarding customer data. That is a false choice. The Seventh Amendment applies to common law suits “whatever may be the peculiar form which they

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may assume.” *Jarkesy*, 603 U.S. at 122 (quoting *Parsons*, 3 Pet. at 447); *see also Tull*, 481 U.S. at 418–19 (“Actions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury.”). However “technical” section 222 may be, its substance is closely analogous to a negligence action.

The Commission also points out that, unlike the securities laws in *Jarkesy*, section 222 does not borrow common law terms like “negligence” or “reasonable care.” *Cf. Jarkesy*, 603 U.S. at 125 (noting “Congress deliberately used ‘fraud’ and other common law terms of art” in the securities laws). That is partially true—the scheme does not use the term “negligence” but does speak of “reasonable measures”—but in any event it is not determinative. Yes, a statute’s borrowing common law terms may show its kinship to a common law action. *Cf. ibid.* (“Congress’s decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law ‘ancestor.’”) (cleaned up). The key inquiry, though, is not what terminology the statute uses but whether the statute “target[s] the same basic conduct” as the common law claim. *Ibid.* The answer here is yes: section 222 action targets a carrier’s negligence in handling customer data.

Moreover, as *Jarkesy* explained, the statutory action need not be “identical” to a common law analogue. *See id.* at 126 (“That is not to say that federal securities fraud and common law fraud are identical.”); *id.* at 135 (“[I]f the action resembles a traditional legal claim, its statutory origins are not dispositive.” (citing *Granfinanciera*, 492 U.S. at 52)). All that is needed is a “close relationship,” *Jarkesy*, 603 U.S. at 126, and section 222 satisfies that requirement.

To be sure, the relationship between the section 222 action and a common law analogue is not as obvious as it was in *Jarkesy*. But ambiguity on

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this second consideration points us back to the “more important” first consideration—remedy. *Jarkesy*, 603 U.S. at 123. As noted, section 222 imposes the archetypal common law remedy of money damages, which is “all but dispositive” of the Seventh Amendment issue. *Ibid.*

## B

The Commission next defends its enforcement proceeding under the “public rights” exception, which, it contends, lets Congress assign the proceeding to an agency rather than a court. We disagree.

### 1

Suits at common law presumptively concern “private rights” and must be adjudicated by Article III courts. *Jarkesy*, 603 U.S. at 127 (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). “The Constitution prohibits Congress from ‘withdraw[ing] [such matters] from judicial cognizance.’” *Ibid.* (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (second brackets added)). “Public rights” cases, however, may be channeled to agencies instead of courts. *Ibid.*

This narrow exception to Article III applies only to matters that “historically could have been determined exclusively by [the executive and legislative] branches.” *Id.* at 128 (quoting *Stern*, 564 U.S. at 493). While the Supreme Court has not “definitively explained” what divides public from private rights, it has pointed to “historic categories of adjudications” occurring outside Article III. *Id.* at 131, 130. Examples include revenue collection, foreign commerce, immigration, tariffs, tribal relations, public lands, public benefits, and patents. *Id.* at 128–30.<sup>7</sup> That said, the exception

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<sup>7</sup> See *Murray’s Lessee*, 18 How. at 281, 285 (action to compel federal customs collector to pay public funds into Treasury); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 335 (1909) (action to enforce fine on steamship company for disobeying federal

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must be handled “with care.” *Id.* at 131. “[E]ven with respect to matters that arguably fall within the scope of the ‘public rights’ doctrine, the presumption is in favor of Article III courts.” *Id.* at 132 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982)).

2

The Commission argues its enforcement action falls within the public rights exception because it involves common carriers. *See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) (“The [Communications] Act regulates telecommunications carriers . . . as common carriers.”). Given that common carriers like AT&T are “affected with a public interest,” *Munn v. Illinois*, 94 U.S. 113, 130 (1876), the Commission contends Congress could assign adjudication of civil penalties against them to agencies instead of courts. For several reasons, we disagree.

First, the Commission’s proposal would blow a hole in what is meant to be a narrow exception to Article III. Myriad enterprises might be said to implicate the “public interest.”<sup>8</sup> And Congress’s power to regulate common carriers is broad. *See Glob. Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 48 (2007) (“When Congress enacted the Communications Act of 1934, it granted the FCC broad authority to

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prohibition on allowing immigration by aliens with contagious diseases); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929) (assessment of President’s tariffs on goods imported by “unfair methods of competition”); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (relations with Indian tribes); *Crowell v. Benson*, 285 U.S. 22, 51 & n.13 (1932) (administration of public lands); *ibid.* (public benefits such as veterans benefits and pensions); *United States v. Duell*, 172 U.S. 576, 582–83 (1899) (patent rights).

<sup>8</sup> *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) (social media activity), *overruled on other grounds by Moody v. NetChoice, L.L.C.*, 603 U.S. 707 (2024); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 611 (1944) (natural gas operations); *Nat’l Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, 74 (1922) (hail insurance); *New York v. FERC*, 535 U.S. 1, 19 (2002) (electric energy).

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regulate interstate telephone communications.”). If injected into the public rights exception, this combination would empower Congress to bypass Article III adjudication in countless matters. But the Supreme Court has cautioned that the doctrine is a narrow and extra-textual “*exception*” to presumptively mandatory Article III jurisdiction. *Jarkesy*, 603 U.S. at 131.

Second, the common carrier doctrine is deeply rooted in the common law. *See, e.g., NetChoice*, 49 F.4th at 469 (“The common carrier doctrine is a body of common law dating back long before our Founding.”).<sup>9</sup> Negligence claims against common carriers have been routinely adjudicated in state and federal courts. *See, e.g., Cole v. Goodwin & Storey*, 19 Wend. 251, 281 (N.Y. Sup. Ct. 1839) (a “coach proprietor’s” common carrier status made it strictly liable in tort).<sup>10</sup> In light of that, it would be bizarre to situate a negligence action against carriers within the “historic categories of adjudications” falling *outside* Article III. *Jarkesy*, 603 U.S. at 130.<sup>11</sup>

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<sup>9</sup> *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *Federal Practice and Procedure* § 4514 (3d ed. 2024) (citing cases placing common carriers’ liability within the federal common law because such liability involves significant federal interests); *see also* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO STATE L.J. 1127, 1132 (1990) (explaining that “the common law imposed on persons engaged in a common calling a duty of reasonable care and a standard of professional competence”).

<sup>10</sup> *See also New Jersey Steam Nav. Co. v. Merch. ’s Bank of Bos.*, 47 U.S. 344 (1848) (steamboat operator liable for losses at sea); *S. Exp. Co. v. Purcell*, 37 Ga. 103 (1867) (railroad for loss of cotton bales); *Duggan v. New Jersey & W. Ferry Co.*, 76 A. 636 (Del. Super. Ct. 1909) (ferry operator for personal injuries); *Goldstein v. Northern Pac. Ry. Co.*, 164 N.D. 602 (1917) (railroad for conversion); *Korner v. Cosgrove*, 108 Ohio St. 484 (1923) (taxicab operator for employee’s assault of a passenger); *Callaway v. Hart*, 146 F.2d 103 (5th Cir. 1944) (railroad for negligently leaving doors open) *Andrews v. United Airlines, Inc.*, 24 F.3d 39 (9th Cir. 1994) (airline for luggage falling on passenger).

<sup>11</sup> Nor does it matter that this action is brought by the Government. The Supreme Court “ha[s] never held that ‘the presence of the United States as a proper party to the

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Third, the cases cited by the Commission fail to show that the public rights exception generally applies to common carriers. Some of the cases involved actions far afield from this one, such as public benefits or actions falling within federal admiralty jurisdiction.<sup>12</sup> Those actions arguably fall within the historical categories of non-Article III adjudications listed in *Jarkesy*. See 603 U.S. at 130. Whether they do or not, though, they do not involve anything like a negligence action against a common carrier for money damages.

It is true that federal agencies like the Commission have long had regulatory authority over common carriers, such as when setting rates or granting licenses. See, e.g., *Virginian Ry. Co. v. United States*, 272 U.S. 658 (1926) (discussing the Interstate Commerce Commission’s oversight of railroad carriers).<sup>13</sup> But that does not imply, as the Commission seems to think, that any regulatory action concerning common carriers implicates the public rights exception and can therefore be “siphon[ed] . . . away from an Article III court.” *Jarkesy*, 603 U.S. at 135.

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proceeding is . . . sufficient’ by itself to trigger the [public rights] exception.” *Jarkesy*, 603 U.S. at 135.

<sup>12</sup> See *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942) (addressing FCC order granting application for a construction permit and station license); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (addressing “fairness doctrine” governing content carriers could broadcast over radio frequency); *Crowell*, 285 U.S. 22 (addressing challenge to the Longshoremen’s and Harbor Workers’ Compensation Act of 1927).

<sup>13</sup> See also *Burlington N., Inc. v. United States*, 459 U.S. 131, 141 (1982) (discussing Commission’s authority to set rates); *Regents of Univ. Sys. of Ga. v. Carroll*, 338 U.S. 586, 598 (1950) (discussing Commission’s authority to grant licenses); *Belluso v. Turner Commc’ns Corp.*, 633 F.2d 393, 397 (5th Cir. 1980) (discussing the Commission’s authority to sanction licensees).

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Not even the first modern administrative agency thought that was so.<sup>14</sup> The Interstate Commerce Commission, while empowered to regulate common carriers and recommend monetary penalties, believed its enforcement actions were subject to the Seventh Amendment and so, necessarily, to Article III adjudication. The agency’s 1887 report, issued the year it was created, stated that its power “must be so construed as to harmonize with the seventh amendment to the Federal Constitution, which preserves the right of trial by jury in common-law suits.” 1887 INTERSTATE COM. COMM’N ANN. REP. 27; *see also* Richard L. Jolly, *The Administrative State’s Jury Problem*, 98 WASH. L. REV. 1187, 1242 (2023) (quoting Report’s conclusion that it was “unquestionable that parties can not [*sic*] be deprived of [the jury] right through conferring authority to award reparation upon a tribunal that sits without a jury as assistant”). The Commission takes no account of this history, which is flatly inconsistent with exempting its enforcement action from Article III adjudication.<sup>15</sup>

\* \* \*

Ultimately, “what matters” for Article III purposes “is the substance of the suit, not where it is brought, who brings it, or how it is labeled.” *Jarkesy*, 603 U.S. at 135. As explained, this matter involves an action closely

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<sup>14</sup> *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985). The ICC was the FCC’s predecessor.

<sup>15</sup> Consistent with this history is *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430 (1915), which involved an ICC action targeting a railroad’s unreasonable rates. The Supreme Court addressed whether a provision treating the ICC’s initial factfinding as a “rebuttable presumption” that could be reconsidered in a later jury trial comported with the Seventh Amendment. *Ibid.* Unlike the Commission’s action against AT&T here, the ICC action there (rate setting) had no common law analogue. Even so, the Court assumed the railroad had a jury right in the action and held the provision does not violate the Seventh Amendment because “[i]t cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.” *Ibid.*

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analogous to a common law negligence action—and, importantly, one where the Commission seeks “civil penalties, a punitive remedy that [the Supreme Court] ha[s] recognized ‘could only be enforced in courts of law.’” *Id.* at 134 (quoting *Tull*, 481 U.S. at 422). Accordingly, the public rights exception does not apply and Article III adjudication is mandatory. *Id.* at 128.

### C

Finally, the Commission argues that, even if the Seventh Amendment and Article III apply, the proceeding here meets their demands.

The Commission points to the possibility of a back-end section 504 trial. Recall that a carrier who fails to timely pay a forfeiture penalty may be sued by DOJ in federal district court. *See* 47 U.S.C. § 504(a). The Commission suggests this would give a carrier everything promised by the Seventh Amendment and Article III. We disagree.

To begin with, by the time DOJ sues (if it does), the Commission would have already adjudged a carrier guilty of violating section 222 and levied fines. This case shows how the process works. The Commission investigated AT&T, issued a charging document (the NAL), and received AT&T’s written objections. The Commission then affirmed the NAL by making fact findings, interpreting section 222, and applying that understanding to the facts it had found. This resulted in a forfeiture order concluding AT&T had violated the law and imposing \$57 million in penalties. So, in this process, which was completely in-house, the Commission acted as prosecutor, jury, and judge.

Such forfeiture orders, furthermore, are not mere suggestions—to the contrary, they have real-world impacts on carriers. For example, the Commission must consider any history of prior adjudicated offenses in imposing future penalties. *See* 47 U.S.C. § 503(b)(2)(E) (“In determining the amount of such a forfeiture penalty, the Commission or its designee shall take

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into account . . . any history of prior offenses . . . .”). Unsurprisingly, they also cause reputational harm to carriers because they can be widely publicized and reported. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 256 (2012) (explaining forfeiture orders’ impact on carriers’ reputations). And consider the risks to a carrier of even getting to the section 504 trial: the carrier must refuse to pay a penalty and wait for DOJ to drag it into court.

In light of this, we reject the Commission’s argument that a section 504 enforcement proceeding satisfies Article III and the Seventh Amendment. The Commission cites no authority supporting the proposition that the constitutional guarantee of a jury trial is honored by a trial occurring after an agency has already found the facts, interpreted the law, adjudged guilt, and levied punishment.

But put all that aside for a moment and consider another glaring problem. In a section 504 trial, a defendant cannot challenge a forfeiture order’s legal conclusions. As our court has explained, in a section 504(a) action, the district court is “limited to considering the factual basis for the agency action” but not petitioner’s “legal arguments.” *Stevens*, 691 F.3d at 622.<sup>16</sup> So, even assuming an after-the-fact jury trial could potentially satisfy the demands of the Constitution, the one provided here amputates the carrier’s ability to challenge the legality of the forfeiture order.

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<sup>16</sup> The Commission tries to distinguish *Stevens* on the ground that it involved legal challenges to a rule outside of a statutorily imposed deadline, but *Stevens*’ reasoning was not limited to such challenges. *See id.* at 623 (“Persons aggrieved by a final FCC forfeiture order must raise legal challenges to the validity of the order in a timely petition for review in the appropriate court of appeals.”). And, contrary to the Commission’s argument, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019), does not support a narrow reading of *Stevens*. There, the Supreme Court expressly refused to decide whether the Hobbs Act’s exclusive-review provision affords a prior and adequate opportunity for judicial review of Commission orders interpreting statutory provisions. *Id.* at 8.

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True, AT&T could challenge the Commission's legal conclusions by doing what it did in this case—paying the forfeiture and seeking direct appellate review. *See* 47 U.S.C. § 402(a); *see also AT&T Corp.*, 323 F.3d at 1084. But that only underscores the dilemma in which AT&T finds itself. If AT&T wants an Article III court to review the forfeiture order's legality, it has to give up a jury trial. If it wants a jury trial, it has to defy a multi-million dollar penalty, wait for DOJ to sue, and, even then, relinquish its ability to challenge the order's legality.

Either way, AT&T's Seventh Amendment rights have been denied.

#### IV

No one denies the Commission's authority to enforce laws requiring telecommunications companies like AT&T to protect sensitive customer data. But the Commission must do so consistent with our Constitution's guarantees of an Article III decisionmaker and a jury trial.

Accordingly, we GRANT AT&T's petition and VACATE the Commission's forfeiture order.

***United States Court of Appeals***

FIFTH CIRCUIT  
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July 17, 2025

Mr. Adam Sorensen  
Federal Communications Commission  
Office of General Counsel  
45 L Street, N.E.  
Washington, DC 20554

No. 24-60223 AT&T v. FCC  
Agency No. 24-40

Dear Mr. Sorensen,

We have filed your Petition for Rehearing. However, it has the following deficiency. Unless the deficiency is corrected within 10 days from this date, we will forward the document to the court to be stricken.

Attachments to the rehearing are not allowed, see Fed. R. App. P. 40 and 5th Cir. R. 40.

Once you have prepared your sufficient rehearing, you must email it to: **ca05ml\_SETX@ca5.uscourts.gov** for review. If the rehearing is in compliance, you will receive a notice of docket activity advising you that the sufficient rehearing has been filed.

Sincerely,

LYLE W. CAYCE, Clerk

*Christy Combel*

By: \_\_\_\_\_  
Christy M. Combel, Deputy Clerk  
504-310-7651

cc:

Ms. Mariel A. Brookins  
Mr. James Michael Carr  
Mr. Z.W. Julius Chen  
Ms. P. Michele Ellison  
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