Nos. 25-406, 25-567

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,
v.
AT&T, INC., *Respondent.*

VERIZON COMMUNICATIONS INC., *Petitioner*,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Second Circuits

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the scope of the Seventh Amendment and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Amendment protects the right to a trial by jury. *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."). This means that when Congress designs executive-branch civil-enforcement schemes, it must respect the Seventh Amendment's requirements. But Congress has considerable freedom in how it does so: the Amendment does not prescribe any specific procedures to vindicate that right.

Under the Communications Act of 1934, the Federal Communications Commission (FCC) imposes forfeiture orders on carriers like AT&T and Verizon and provides a pathway for regulated entities to challenge such orders (before paying them) via jury trial in federal district court. The government argues

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

that this scheme poses no Seventh Amendment problem because such orders become legally binding only after a *de novo* jury trial. *See* Gov't Br. 19-24; *contra* AT&T & Verizon Br. 32-34. Regardless of when exactly those orders become binding, however, this particular model of securing the Seventh Amendment's jury right is consistent with historical practice since the Founding. Congress has regularly authorized officials to make initial legal determinations—even ones with far more immediate consequences than the FCC's forfeiture orders—while providing for a subsequent jury trial. This type of scheme satisfies the Seventh Amendment.

The Constitution requires "merely that enjoyment of the right of trial by jury be not obstructed, and that the *ultimate* determination of issues of fact by the jury be not interfered with." *In re Peterson*, 253 U.S. 300, 310 (1920) (emphasis added). Beyond that, the Seventh Amendment permits Congress to use a broad range of procedural designs "to adapt the ancient institution [of the jury right] to present needs and to make of it an efficient instrument in the administration of justice." *Id.* Here, the FCC's longstanding statutory scheme ensures that carriers can avoid making payment under a forfeiture order until and unless it is confirmed by a jury verdict in federal court.

I. Dating back to the Founding, Congress has at various points created civil-enforcement models that feature an initial legal determination and a later post-determination jury trial. These historical examples demonstrate that the Seventh Amendment's primary concern is not with any particular procedure, but simply with ensuring that the jury retains its role in making "the ultimate determination." *Id.*

"From the earliest days of the Republic, the availability of a jury *at some point* following an executive decision was believed necessary to comply with the jury trial guarantee" when the Seventh Amendment applied. Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 Wash. L. Rev. 1187, 1237 (2023) (emphasis added). For example, in the Founding era, Congress's early legislation permitted government officers first to seize property or collect bonds from regulated parties, to be followed by a jury trial concerning the merits of that seizure or bond. And in the nineteenth century, Congress authorized a statutory scheme under which justices of the peace in the District of Columbia were permitted to issue legally binding decisions without a jury; so long as those decisions could be appealed to a court that provided a jury trial, this Court held that the jury right was not impaired. And when Congress created the Interstate Commerce Commission as the first modern regulatory agency in the 1880s, it let the agency investigate and impose financial penalties on carriers, which were then subject to collateral challenge before a federal district-court jury, under a framework this Court approved.

These regimes are varied but they share a common feature: an initial legal determination made without a jury followed by later access to a full jury trial, either through collateral action or direct appeal. None was thought to offend the Constitution. Indeed, one was created by the same Congress that proposed the Seventh Amendment, and this Court upheld the other two against Seventh Amendment challenges.

II. The FCC's enforcement scheme under the Communications Act falls within this established model. It too features an initial legal determination

made by the Commission and the availability of a later *de novo* jury trial under 47 U.S.C. § 504(a).

Here, the FCC imposed monetary penalties on AT&T and Verizon. After the penalties were determined, each carrier had the option under § 504(a) of the Act to challenge them *de novo* by proceeding in federal district court. That they declined to exercise the opportunity available to them does not transform the Seventh Amendment analysis: the FCC's statutory scheme satisfies the civil jury-trial right. Indeed, AT&T and Verizon concede that § 504(a) "entitled" them to the option of a trial by jury, AT&T & Verizon Br. 10, but object to the procedural design of that process, *id.* at 31-36. As detailed below, that objection is misplaced. Offering a carrier a *de novo* jury trial before they must pay any imposed penalty, as the FCC regime ensures, comports with this Court's Seventh Amendment case law and fully preserves the right to trial by jury.

This Court has previously recognized that the Constitution does not impose a one-size-fits-all approach to guaranteeing access to a jury, and it should not change course now. The judgment of the Second Circuit should be affirmed and the judgment of the Fifth Circuit should be reversed.

ARGUMENT

I. Historical Practice Confirms that Post-Determination Jury Trials Are Not Novel and Satisfy the Seventh Amendment.

Congress has designed and codified a broad range of statutory civil-enforcement schemes. From the eighteenth century onward, these schemes have secured civil litigants' jury rights in different ways. Some, as detailed below, were structured such that an

initial legal determination without a jury was followed by an action or appeal where a jury trial attached.

In considering these schemes, courts and treatise writers considered adjudicatory processes as a cohesive whole rather than focusing narrowly on any single step. Critically, these historical examples underscore the traditional understanding that the Seventh Amendment requires only that a jury be available at some stage of the legal process before an ultimate determination is reached.

A. The Founding era featured enforcement systems in which appointed executive-branch officials made an initial determination of a penalty or forfeiture and an aggrieved merchant's recourse was to proceed to federal court and litigate that determination with a jury. Under the Excise Act of 1791—otherwise known as the Whiskey Tax—an "officer of inspection" was authorized to directly "seize" "any cask, case, or vessel containing distilled spirits" that lacked the "marks and certificate" required by the Act. Act of Mar. 3, 1791, ch. 15, § 28, 1 Stat. 199, 206. That forfeiture could then be contested at a later "trial in consequence of such seizure," which would ultimately determine whether the seizure would stand (and the spirits "be adjudged to be forfeited"). *Id.*[2]

The Act provided that in any action "brought against any supervisor or other officer of inspection, for any seizure by him made . . . the trial shall be by jury," which was charged with "assess[ing] reasonable damages for any prejudice or waste." *Id.* § 38, at 208. It also provided that "forfeiture[s] shall be recoverable

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[2] Congress approved the Seventh Amendment in 1789—and the Act remained in effect, and was enforced, after the Amendment's ratification by the states in December 1791.

with costs of suit, by action of debt . . . or by information, *id.* § 44, at 209, both legal actions tried before juries, *see Hylton v. United States*, 3 U.S. (3 Dall.) 171, 171 (1796) (discussing an "action of debt" and the parties' waiver of the default "trial by jury"); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2470-71 (2016) (noting in the context of the Act that "information[s]" included actions *in rem*). In other words, the First Congress authorized officers to seize goods knowing that the affected owners would encounter a jury (in a suit against the officer or through an action of debt or forfeiture information) only *after* the goods had already left their possession.

Congress followed a similar model in customs law. Early customs statutes allowed importers to post bonds for contested customs duties and gave importers one route for judicial review of the duties after the bond was paid: not paying the bond when it matured and forcing the government to sue to collect on it. *See* Patrick C. Reed, *Access to Judicial Review of Customs Duties: The Overlooked Constitutional Rights*, 29 Fed. Cir. B.J. 1, 45-47 (2019) (noting that customs bond litigation "served as the main vehicle to secure judicial resolution of disputes . . . over the proper amount of duties owed" (alteration in original) (quoting Patrick C. Reed, *The Role of Federal Courts in U.S. Customs and International Trade Law* 26 (1997))); *see generally* Act of Mar. 2, 1799, ch. 22, §§ 62, 65, 1 Stat. 627, 673-77; Act of Aug. 4, 1790, ch. 35, §§ 41, 45, 1 Stat. 145, 168-69.

That this scheme was crafted in the shadow of the Seventh Amendment is especially striking. After all, merchants and traders were among those most affected by "juryless admiralty, vice admiralty, and

chancery courts" that inspired American colonists to protect the jury-trial right. *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024). Nonetheless, early American merchants "submitted" to the authority of customs collectors. Aaron T. Knapp, *From Empire to Law: Customs Collection in the American Founding*, 43 L. & Soc. Inquiry 554, 579 (2018) (noting that the "availability of juries to soften the Collection Act's rigors in the final judgment" may explain why early American merchants "generally submit[ted] to the federal courts but not the imperial courts"). And although this Court later observed that the Seventh Amendment does not apply in the context of tariff collection and "foreign commerce," *Jarkesy*, 603 U.S. at 129-30, nineteenth-century justices nonetheless interpreted early customs acts with explicit reference to the "right of trial by jury," *Ex parte Davenport*, 31 U.S. 661, 664-65 (1832) (construing the Act of Mar. 2, 1799 to allow importers to raise defenses in bond litigation because "[t]o deprive a citizen of a right of trial by jury, in any case, is . . . not to be raised by implication from any general language in a statute"); *see Ex parte United States*, 33 U.S. 700, 701-03 (1834) (construing that Act and noting in the summary of proceedings that Justice McLean indicated from the bench that, under one reading, "he would be disposed to think congress . . . would be depriving the party of his right to a trial by jury"). In doing so, they did not object to the fact that any consideration by a jury occurred *after* an initial finding of liability and payment of a bond.

Nor did Congress. When it abandoned the bond scheme in the 1830s because the procedure began to "endanger[] the revenue by compelling the government to accept inadequate security," Reed, *Access to*

Judicial Review, *supra*, at 47 (quoting John Dean Goss, *The History of Customs Administration from Colonial Times to the McKinley Administrative Bill* 47 (2d ed. 1897)), it soon expressly codified an importer's "right to a trial by jury" to contest customs duties—but only after the duties had already been paid to the collector, Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (providing for an "action at law" to challenge "duties paid under protest").

Considered together, these acts authorized federal officials to seize the property at issue as part of a physical forfeiture (in the case of excises) or to create a legal obligation to pay (in the case of customs). Although the regulated parties could later contest the legal merits of these actions in a jury trial, the official's initial determination was made unilaterally and without the involvement of a jury. Affected merchants' only recourse was to cooperate with the seizure or pay the bond and later attempt to vindicate their property interests in a subsequent jury trial.

B. In the late-nineteenth century, this Court, as well as other courts and scholars, recognized that the right to a civil jury trial inheres at the level of an overall legal dispute rather than at each discrete stage of a case's progression. On this approach, putative violations of the jury right are assessed by viewing the entirety of a case across multiple tribunals.

In 1895, Congress passed a law giving District of Columbia justices of the peace exclusive "jurisdiction to hear, try, and determine all civil pleas and actions" below a value threshold, subject to certain carveouts. Act of Feb. 19, 1895, ch. 100, § 1, 28 Stat. 668, 668. Under that statute, justices of the peace made determinations concerning debts and money damages

against parties, which could then be appealed to a federal court with full jury rights.

In *Capital Traction Co. v. Hof,* this Court upheld that federal statutory scheme against a Seventh Amendment challenge, holding that "the right of trial by jury secured by the seventh amendment to the constitution is preserved by allowing a common-law trial by jury in a court of record, upon appeal from a judgment of a justice of the peace." *Cap. Traction Co. v. Hof*, 174 U.S. 1, 18 (1899). Because there was a common-law trial by jury available at *some* point during the life cycle of a justice-of-the-peace case, the "right of trial by jury" was sufficiently "preserved" under the Seventh Amendment. U.S. Const. amend. VII. The absence of a jury when the justice of the peace made a legal determination at a case's initial stage did not determine the protocol's overall constitutionality.[3]

This Court explained why that was by referencing the history of the jury right in England and the early United States. As the Court explained, that history confirms that the option of appeal to a court of record with a jury can render a broader scheme compliant with the Seventh Amendment. "In this country, before the Declaration of Independence, the jurisdiction over

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[3] In certain situations, a justice of the peace did convene a "jury," but *Hof* is clear that it was not a jury within the meaning of the Seventh Amendment. *Hof*, 174 U.S. at 18, 38-39 ("[S]uch persons, even if required to be 12 in number, and called a 'jury,' were rather in the nature of special commissioners or referees."). This would have surprised D.C. lawyers because, when the *Hof* litigation first began, "the members of the bar . . . generally held that a Justice of the Peace jury trial was of the kind intended by the common law as guaranteed by the Constitution." *Justice Jury Trial Not Final: Judge Cox Renders an Opinion Which Upsets a Former Practice*, Wash. Post, at 10 (Oct. 7, 1896).

small debts, which county courts and similar courts had in England, was generally vested in single justices of the peace. Whenever a trial by jury of any kind was allowed at any stage of an action begun before a justice of the peace, it was done in one of two ways," one of which was "by providing for an appeal from the judgment of the justice of the peace to a court of record . . . and for a trial in that court by common jury, as in Massachusetts." *Hof*, 174 U.S. at 17 (state-law and case citations omitted).

Nor was *Hof* an anomaly in recognizing that a later court's jury review preserves the jury right guaranteed by the Seventh Amendment. A treatise by Michigan Supreme Court Justice Thomas Cooley, for example, made clear that "if a [civil] trial is given in one court without a jury, with a right to appeal and to have a trial by jury in the appellate court, that is sufficient." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 410 n.2 (1868) (collecting cases); *see also* Seymour D. Thompson & Edgar W. Merriam, *A Treatise on the Organization, Custody and Conduct of Juries* § 10 (1882) ("Juries did not form a part of the machinery of such tribunals [justices' courts] at common law; and so long as an appeal is provided for to the common law courts from their determinations, no constitutional objection can arise, whether the facts are found [in the justices' courts] by the justice or by the aid of a jury of any number of men.").

Nineteenth-century state courts interpreting the scope of the civil jury right took the same view. *Cf. Hof*, 174 U.S. at 23 (noting that "the judicial decisions and the settled practice in the several states are entitled to great weight" when construing the Seventh

Amendment). Those courts acknowledged that a post-determination appeal before a jury preserved the jury right, often in cases dealing with decisions by justices of the peace. *See, e.g.*, *Steuart v. Mayor of Baltimore*, 7 Md. 500, 507 (1855) ("[S]o long as the *right of appeal* is allowed, by means of which a trial *by jury* can be had, the right of trial by jury is not taken away."); *Morford v. Barnes*, 16 Tenn. 444, 446 (1835) ("[I]nasmuch as the party was in all cases allowed his appeal, when he could have a trial by jury, the right of trial by a jury was not taken away."); *Beers v. Beers*, 4 Conn. 535, 540 (1823) ("The liberty of appeal in the case under discussion, preserves the right of trial by jury inviolate."); *Keddie v. Moore*, 6 N.C. 41, 45 (1811) ("So long as the trial by Jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the Legislature."); Gov't Br. 30 n.3. Notably, other state and federal schemes provided *de novo* review of decisions via collateral legal actions rather than by direct appeal. *See* Jolly, *supra*, at 1237-39 (cataloguing examples in federal and state courts spanning federal land sales, "indebtedness by a public officer," and the slaughter of contagious animals). The underlying rationale was the same: "providing [subsequent] de novo review of agency decisions that affect legal rights either on appeal or on collateral attack" renders an adjudicatory scheme "complian[t] with the Seventh Amendment." *Id.* at 1246.

Importantly, *Hof* distinguished jury rights in civil and criminal proceedings. For civil cases, preservation of the jury right is compatible with a range of procedural arrangements. The same is not true, this Court explained, with respect to criminal cases, which present an "essentially . . . different" constitutional

issue, such that a defendant has "the right to a trial by jury in the first instance" and it is "not enough to allow him a trial by jury after having been convicted . . . without a jury." *Hof*, 174 U.S. at 18-19; *see id.* at 19 ("All the other cases cited at the bar in which the constitutional right of trial by jury was held not to be secured by allowing such a trial on appeal from a justice of the peace or from an inferior court were criminal cases.").

C. Even when the initial legal determination and the eventual jury trial were not connected by direct appeal, parties bringing Seventh Amendment claims lodged no constitutional objection to post-determination jury trials. Indeed, "until comparatively recently, providing de novo review either on direct appeal or upon collateral attack was the dominant approach for reviewing administrative decisions." Jolly, *supra*, at 1237; *see id.* at 1238 ("As originally understood . . . all that is required is that a jury be made available at some point.").

In the 1880s, the Interstate Commerce Commission (ICC) issued reparations orders against railroad carriers after investigating complaints and making findings on charges of discrimination or unreasonable rates. When it first began operating, the Commission itself raised a Seventh Amendment concern. *See* Interstate Com. Comm'n Ann. Rep. 27 (1887) ("It is believed to be unquestionable that parties can not be deprived of [the jury] right through conferring authority to award reparation upon a tribunal that sits without a jury as assistant."). The Commission's first annual report noted that its organic statute did not "confer upon it the general power to award damages in the cases of which it may take cognizance" and must be construed to that effect in order "to harmonize with the seventh amendment to

the Federal Constitution, which preserves the right of trial by jury in common-law suits." *Id.* That report also suggested that any Seventh Amendment concern could be assuaged by the option of a post-determination jury trial. *Id.* ("[T]herefore any determination that reparation should be made, in a case in which a suit at law might have been maintained, can not be made absolutely binding and enforcible against the defendant in the form of a judgment; but that under the statute it will put the defendant to election, either to satisfy the complainant [by paying the penalty], in which case he will be relieved from further liability or penalty, or, on the other hand, to take the risks of proceedings in a Federal court to recover damages or penalty, or both . . . .").

In 1889, Congress amended the ICC's organic statute to channel disputes over reparations orders to courts of law rather than courts of equity. *See* Act of Mar. 2, 1889, ch. 382, § 5, 25 Stat. 855. When a petition "alleging [a] violation" of an ICC order was filed in a court of law by a "person interested in such order," the jury right was now available. *See id.* at 861 ("[I]f either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause."). The amendment was understood to cure any "possible constitutional question" by ensuring that "the class of cases requiring trial by jury" could be heard before a "circuit court sitting as a court of law . . . not more than forty days after [a] petition is filed." 19 Cong. Rec. 5149-50 (June 12, 1888); *see United States v. ICC*, 337 U.S. 426, 454-55 (1949) (Frankfurter, J., dissenting) (noting that the amendment responded to Seventh Amendment concerns). Under the new framework, the ICC issued

a reparations order against a carrier and, if the carrier did not pay the assessed penalty, the complainant could choose to file a related action in federal court to recover the reparations amount before a jury. *See* 25 Stat. at 861.

This Court upheld the amended statutory scheme against a railroad's Seventh Amendment challenge 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." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 430 (1915). Notably, even the railroad did not take the position that the Seventh Amendment barred any procedure that made a jury trial available only by filing a related action after an initial agency determination. Although the Lehigh Valley Railroad advanced an argument that the ICC's reparations-order procedures violated the Seventh Amendment, *see* Lehigh Valley Br. at 52-74, *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915) (No. 434) (arguing at length that the statute "deprives the defendant in a damage suit of a fair trial by jury"), it confined its Seventh Amendment challenge to a theory that the statute gave ICC reparations orders too much presumptive evidentiary weight at a post-determination jury trial, *see id.*

Verizon and AT&T argue that *Meeker* "had nothing to do with . . . whether providing a jury in a back-end enforcement suit was sufficient protection for defendants." AT&T & Verizon Br. 38. But it is not that "[t]hose questions never came up" in that case. *Id.* Quite the opposite. Lehigh Valley expressly indicated that the sequence of events in ICC proceedings—agency reparations order followed by jury trial—raised no Seventh Amendment issue: "If in practice a petition based upon a reparation order could be treated by the

trial Court as a special proceeding, the merits of which involved the trial of certain questions of fact by a jury, perhaps these questions of fact might be so framed and sent to the jury as to reasonably protect the carrier's rights." Lehigh Valley Br. 56, *Meeker*, 236 U.S. 412; *cf. id.* ("If, on the other hand, the practice is to be that followed in the present case [with the evidentiary presumption applied], the jury trial becomes a farce.").

To the extent this Court's decision in *Meeker* focused on the evidentiary-presumption question, *see* AT&T & Verizon Br. 38-39, it was again because *no* party—not even the railroad marshaling its Seventh Amendment challenge—viewed a post-determination jury trial as inherently constitutionally suspect.

II. Section 504(a)'s Provision for a Post-Determination Jury Trial Satisfies the Seventh Amendment.

The availability of a *de novo* trial under § 504(a) satisfies the Seventh Amendment's guarantee that "the right of trial by jury shall be preserved." U.S. Const. amend. VII.

Under the Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064, as amended, after the FCC imposes a financial penalty against a carrier, the regulated party can refuse to pay the assessment and instead wait for the debt to be referred to the Department of Justice for recovery. Such unpaid amounts are "recoverable . . . 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," with the express proviso "[t]hat any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo." 47 U.S.C. § 504(a). The full process is prescribed in a

cohesive statutory scheme, and jury rights attach in the usual course to the *de novo* federal trial.

In its case arising against the FCC, Verizon did not elect to pursue a jury trial under § 504(a). Instead, it chose the other statutorily available option to challenge the FCC's determination: it paid the assessed penalty and appealed the adverse determination directly to the Second Circuit. As that court held, Verizon "had, but chose to forgo, an opportunity for a § 504(a) trial" and so relinquished any Seventh Amendment objection it may have had to the Communications Act's scheme. Verizon Pet. App. 40a. In its own case, AT&T similarly bypassed the jury trial that was available under § 504(a) and instead "elected to timely pay the penalty" while pursuing direct appellate review in the Fifth Circuit. AT&T Pet. App. 8a. Notably, Verizon and AT&T could have opted not to pay any imposed penalty at all until and unless it were confirmed by a jury verdict in federal district court.

Because the Communications Act made a jury trial available to Verizon and to AT&T before the FCC's penalty became final—which neither carrier chose to pursue—that procedural scheme does not conflict with the right to a jury trial that the Seventh Amendment guarantees. Indeed, as the historical examples outlined in the previous Part confirm, the FCC's statutory scheme is consistent with historical practice dating to the Founding. The enforcement regimes at issue in *Hof* and *Meeker* make that clear.

Just as with the FCC's scheme, under the law governing the District of Columbia's justice-of-the-peace system, there was no guarantee that every legal dispute would end up before a jury in a court of record. Instead, the scheme simply made that option available

if the relevant party chose to appeal from the justice of the peace's otherwise binding decision. It was sufficient under the Seventh Amendment that Congress had "authorized either party to appeal from the judgment of the justice of the peace . . . to the supreme court of the District of Columbia, and to have a trial by jury in that court . . . within the meaning of the common law and of the seventh amendment to the constitution." *Hof*, 174 U.S. at 45. What the Seventh Amendment requires is, as § 504(a) provides, the *option* to access a jury trial. *See id.* at 23 ("[I]t is not 'trial by jury,' but 'the right of trial by jury,' which the amendment declares 'shall be preserved.'"); *cf. Bank of Columbia v. Okely*, 17 U.S. 235, 243-44 (1819) ("[I]f the [civil] defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable, that he cannot dispute the justice of the claim . . . . Had the terms been, that 'the trial by jury shall be preserved,' it might have been contended, that they were imperative, and could not be dispensed with. But the words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducto*, and the benefit of it may, therefore, be relinquished.").

The FCC's statutory scheme also bears similarities to the ICC scheme upheld in *Meeker*. As this Court recognized, the ICC imposed monetary "award[s]" against railroad carriers. *Meeker*, 236 U.S. at 418. After conducting an investigation, the Commission "made and entered of record an order for reparation" against Lehigh Valley Railroad. *Id.* at 420. That order was phrased in no uncertain terms, "order[ing] that defendant Lehigh Valley Railroad Company be . . . required to pay unto complainant" Meeker tens of thousands of dollars plus interest based

on determinations "found by th[e] Commission." *Id.* at 421; *see Mitchell Coal Co. v. Penn. R.R. Co.*, 230 U.S. 247, 258 (1913) (describing ICC reparations orders as "conclusive"). "Although duly served with a copy of this order," Lehigh Valley "refused to comply with it." *Meeker*, 236 U.S. at 422. Instead, the railroad waited until "the time allotted for compliance had expired" and Meeker filed a related action in federal district court to recover the awarded amount; that action proceeded to a jury trial. *Id.*

That is, the railroad—like Verizon and AT&T here—had the choice either to pay the assessed award or not to pay and then challenge the award in front of a jury when another party brought an action to enforce it. Of course, Meeker could have declined to file a recovery action in federal court. If he chose not to try to recover on the reparations order assessed against Lehigh Valley, there would have been no jury trial at all and Lehigh Valley would not have paid the assessed reparations. In that scenario, it would be difficult to suggest that the railroad's jury right was nevertheless obstructed.

Finally, the enforcement framework under the Communications Act differs from the statutory scheme at issue in this Court's decision in *SEC v. Jarkesy*. *See* 603 U.S. 109. In *Jarkesy*, this Court considered a protocol in which "the SEC adjudicates [a] matter in-house" and "there are no juries" at any stage of the process. *Id.* at 117. Instead, that scheme authorized the "Commission or its delegee[s]," including individual commissioners or administrative law judges, to conduct proceedings and impose "civil penalties." *Id.* Judicial review of the SEC's determination was available before a federal appellate court, also without a jury. *See id.* at 119 (noting that

Jarkesy "petitioned for judicial review" before the Fifth Circuit).

Jarkesy thus concerned a statute that imposed civil penalties but lacked any provision analogous to § 504(a), which expressly provides for a *de novo* reexamination of an FCC penalty's legal merits in front of a jury. *See* 47 U.S.C. § 504(a) ("[A]ny suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo."). Although the SEC regime allowed recovery of existing penalties in district court, *see* 15 U.S.C. § 78u(d)(3)(C)(ii) ("If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court."), it did not authorize a *de novo* trial on the merits. Congress designed different schemes for different agencies, and the scheme at issue here expressly authorizes a *de novo* jury trial.

* * *

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." *Hof*, 174 U.S. at 23. Congress therefore has considerable discretion in designing civil-enforcement systems. It has historically exercised that leeway to provide different mechanisms in different contexts to protect the Seventh Amendment right to a trial by jury. The FCC's scheme—initial imposition of a penalty followed by the option of a *de novo* jury trial under § 504(a)—falls well within that ambit.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit and reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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