Nos. 25-406 and 25-567

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
AT&T, INC.,
Respondent.

VERIZON COMMUNICATIONS INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF AT&T, INC. AND VERIZON COMMUNICATIONS INC.

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QUESTION PRESENTED

Whether the Communications Act violates the Seventh Amendment and Article III by authorizing the FCC to order the payment of monetary penalties for failing to reasonably safeguard customer data, without guaranteeing the defendant carrier a right to a jury trial.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute works to protect property rights, preserve the structure and provisions of the Constitution, and ensure that the judiciary fulfills its responsibility to follow the Constitution. This case draws attention to structural separation-of-powers questions of first importance. Here, the FCC's administrative structure for adjudications deprives individuals of their right to a jury trial and is therefore inconsistent with the Constitution.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case concerns whether the Constitution permits a federal agency to impose substantial civil penalties through in-house adjudication without affording the accused a jury trial in the first instance. Amicus respectfully submits that it does not.

From the Founding, the right to trial by jury in civil cases was understood as a structural safeguard against governmental overreach. The colonists' objections to vice-admiralty courts that deprived them of juries, the ratification-era debates, and the adoption of the Seventh Amendment all reflect a settled principle: When the government seeks to deprive a person of property through actions analogous to common-law suits for penalties or forfeitures, the people themselves—through a jury—must stand between the sovereign and the accused. The jury is not a procedural luxury; it is a constitutional check.

Modern administrative enforcement actions seeking civil penalties replicate the very dangers the Framers feared. In such proceedings, executive-branch officials investigate, prosecute, adjudicate, and impose binding monetary sanctions. Administrative law judges exercise significant authority, yet as officers within the Executive Branch, they cannot impanel juries. When agencies adjudicate liability and assess penalties internally, they combine prosecutorial and adjudicative functions in a single branch of government—precisely the consolidation of power the Constitution's separation-of-powers design was meant to prevent.

The constitutional problem is not confined to just the Seventh Amendment. The right to a jury in cases seeking monetary penalties rests on multiple textual foundations, including Article III and the Fifth Amendment's guarantee of due process of law. Before the government may deprive a person of property, it must provide genuine judicial process. That process historically and constitutionally includes adjudication in an Article III court, with a jury serving as the factfinder in suits at common law. To relegate the jury to a contingent or delayed role—available only after the agency has already declared liability—does not preserve the right; it postpones and dilutes it.

Delay compounds the constitutional injury. When an agency publicly determines liability and imposes a substantial penalty, the accused may endure years of reputational harm, financial uncertainty, and market consequences before any judicial proceeding occurs. A jury convened only at the enforcement stage is asked to reconsider a matter already decided by an "expert" agency. Such sequencing undermines the presumption of innocence in practical effect and erodes public confidence in neutral adjudication.

Constitutional rights cannot be held in abeyance for administrative convenience. A system that permits the Executive to impose punitive civil sanctions without a jury in the first instance departs from the Constitution's promise of justice. This Court should reaffirm that when the government seeks civil penalties of the sort traditionally tried at common law, the Seventh Amendment—and the broader guarantees of due process—require a jury trial in an Article III court.

ARGUMENT

Representative government and trial by jury "are the heart and lungs, the mainspring and the centre wheel, and without them the body must die, the watch must run down, the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution." John Adams, *The Earl of Clarendon to William Pym No. III*, *reprinted in* The Revolutionary Writings of John Adams 53 (Bradley Thompson ed., 2000). Without them, we have no other fortification "against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds . . . ." *Id.*

I. Excluding the right to a jury in civil administrative actions realizes the fears of the Founders and the Framers.

In the American legal system, "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . . ." The Federalist No. 78, at 443 (Alexander Hamilton) (Fall River Press ed. 2021). Juries are the keystone of judicial protection. William Blackstone praised the right to trial by jury as "the glory of the English law." *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 142 (1851) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 227–29 (Oxford, Clarendon Pr. 1992)). He also identified the *jury trial* as "'the grand bulwark' of English liberties." The Honorable Jennifer Walker Elrod, *w(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 7 (2011).

In 1775 the Second Continental Congress issued the Declaration of the Causes and Necessity of Taking Up Arms, which "specifically challenged Parliament's passage of statutes 'extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits [and] . . . depriving . . . [the colonies] of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property.'" Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 596 (1993) (citation omitted) (alterations in original). The sometimes denial of a jury trial was one of the abuses perpetuated by King George III against American Colonists, impelling the colonies to separate from the Crown. After "depriving colonists 'of the benefits of Trial by Jury,'" Americans looked to ensure such deprivations would not take place in their new regime. Elrod, *supra*, at 7.

During the debates on the Constitution, Old Whig III implored the Framers to ensure that all civil proceedings be guaranteed jury protection—especially those when the government enforced the law civilly.

> Are there not a thousand civil cases in which the government is a party?—In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution yet these are all of them civil causes.—These penalties, forfeitures and demands of public debts

> may be multiplied at the will and pleasure of government.

An Old Whig III (Oct. 20, 1787), *reprinted in* 3 The Complete Anti-Federalist (H. Storing ed. 1981).

In a statement so prescient that *An Old Whig III* seemingly prophesied of the rise of administrative adjudication, he explained,

> [t]hese modes of harrassing the subject have perhaps been more effectual than direct criminal prosecutions.—In the reign of Henry the Seventh of England, Empson and Dudley acquired an infamous immortality by these prosecutions for penalties and forfeitures:—Yet all these prosecutions were in the form of civil actions; they are undoubtedly objects highly alluring to a government.—They fill the public coffers . . . . Perhaps they have at all times been more eagerly pursued than mere criminal prosecutions.—Shall trial by jury be taken away in all these cases and shall we still be told that "we are effectually secured against the oppressions of government?"

Id.

An Old Whig was not the only one to speak on the necessity of trial by jury. Thomas Jefferson "'consider[ed] trial by jury as the only anchor ever yet invented by man, by which a government can be held to the principles of its constitution'"; John Adams saw "'representative government and trial by jury [as] the

heart and lungs of liberty'"; and Thomas Paine understood "the civil jury [to be] an extension of a natural right." Elrod, *supra*, at 8 (citations omitted).

Elbridge Gerry concurred in this sentiment, explaining that "the people's rights were 'rendered insecure . . . by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star-Chamber as to Civil cases.'" Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 B.Y.U. L. Rev. 331, 350 (2017) (quoting 13 *The Documentary History of the Ratification of the Constitution* 197 (John P. Kaminski et al. eds., 1981)).

This thinking was diffuse throughout the states, not limited to elite opinion. In Pennsylvania, "the Anti-Federalists nearly prevented the ratification convention from even occurring 'largely because they believed the Federalists were trying to abolish civil juries." Elrod, *supra*, at 9 (citation omitted). And a similar sentiment existed in a "variety of other states, most notably Massachusetts, New Hampshire, Virginia, New York, and Rhode Island." Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to A Civil Jury Trial*, 53 Ohio St. L.J. 1005, 1010 (1992).

And the purpose of trial by jury is "to secure impartial justice between the government and the accused in each case as it arose." *Sparf* v. *United States*, 156 U.S. 51, 174–75 (1895) (Gray, J., dissenting). While *Sparf* was a criminal case, Justice Gray's recognition of the jury's purpose applies to all actions by the government against private entities. Cf. *Musick* v. *People*, 40 Ill. 268, 272 (1866) ("The very

object of all government is to protect individuals in their rights.").

The new Republic ultimately recognized the critical importance of civil juries. But surprisingly, in the United Kingdom,

> that lamp [of freedom] has been dimmed and that bulwark weakened. The grand jury was abolished in the United Kingdom in 1933. The right to civil jury trial has been greatly diminishing over the past hundred years. Since 1981, it exists only with respect to libel, slander, malicious prosecution, false imprisonment, and fraud.

The Honorable Garrett Brown, *The 2011 Chief Justice Joseph Weintraub Lecture*, 65 Rutgers L. Rev. 217, 221 (2012). Moreover, "the judge can deny a jury trial" in complex civil cases. *Id*. "Of all the common-law nations, the United States is the only one that routinely uses juries in civil cases." *Id*.

And now, in the United States, administrative agencies have been trading the invaluable birthright to civil jury trials for the thin porridge of expediency. Compare *Riley* v. *Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988) (holding the First Amendment does not permit the State to sacrifice speech for efficiency). As Old Whig III anticipated—and feared—the FCC, in this case and others, pursues "actions for penalties" that are "perhaps more effectual than direct criminal prosecutions" without having to face a jury. *An Old Whig III*, *supra*. See generally 47 C.F.R. § 0.341.

Without requiring the government to make its case to a jury, even meritorious decisions can appear suspect. After all, "[t]he key problem with all agency hearings . . . is that they create inherent partiality concerns." Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1648 (2016). The Court has said that administrative law judges are officers of the United States. *Lucia* v. *SEC*, 585 U.S. 237, 244–45, 247–52 (2018). They exercise "significant authority," *id.* at 245, and they wield "significant discretion when carrying out important functions," *id.* at 247. This Court has warned that even if "duties" of executive-agency hearing officers "partake of a Judiciary quality," these officers "exercis[e] executive power" because they operate within the Executive Branch. *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 17 (2021).

Yet in adversarial administrative proceedings, ALJs hear evidence, make rulings, and enter binding decisions—all of which are judicial-like functions. *Lucia*, 585 U.S. at 241, 247–48. And to the extent their binding decisions interfere with private rights, ALJs are de facto, if not de jure, exercising judicial power. See generally William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511 (2020). And that then implicates the long-venerated value of a right to a jury trial in civil cases—especially when the "whole weight of the government is brought to bear." *An Old Whig III*, *supra*.

II. The FCC's adjudication procedures violate multiple constitutional guarantees in bypassing the right to a jury trial.

While no one is entitled to their desired outcome in judicial proceedings, Americans are at least ensured "that anyone caught up in our judicial system receives due process." *SEC* v. *Jarkesy*, 603 U.S. 109, 142 (2024) (Gorsuch, J., concurring).

A. The right to a jury trial has more than one textual basis.

The Seventh Amendment "does not work alone" in requiring jury trials in cases where a federal agency seeks monetary relief. *Id.* at 141 (Gorsuch, J., concurring). Before depriving any person of property exceeding "twenty dollars," U.S. Const. amend. VII, the government owes that person "due process of law," U.S. Const. amend. V. That "judicial process" includes both an independent judge presiding, *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring), and a jury trial, Randy Barnett & Evan Bernick, *The Original Meaning of the 14th Amendment* 31 (2021).

Article III and the Sixth Amendment provide for juries in criminal cases. The Fifth Amendment guarantees a grand jury and the due process of law, which itself requires a jury. Gary Lawson, *Take the Fifth... Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 658 (2017). If the Fifth and Fourteenth Amendments' Due Process Clauses guarantee anything, they require "some judicial process before any person can be deprived of life, liberty, or property." Barnett & Bernick, *supra*, at 31. "This judicial process

includes a jury trial," which "date[s] back to the Founding." *Id*. And the Seventh Amendment provides for civil juries: "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.

Because a jury is the fact-finding arm of the judicial branch, not the executive branch where ALJs are housed, an individual must be given a judicial process—meaning a trial by jury in an Article III court. Akhil Reed Amar, *Bill of Rights: Creation and Reconstruction* 94–95 (1998). Thus, civil juries serve as a check of the people over the judicial branch. Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. Colo. L. Rev. 767, 779–80 (2005). Trial by jury ensures "that common people should have a part and share of influence, in the judicial . . . department." *Letter from the Federal Farmer IV* (Oct. 12, 1787), *reprinted in* 2 The Complete Anti-Federalist 249 (H. Storing ed. 1981). Yet ALJs cannot impanel and preside over jury trials. See, *e.g.*, 47 C.F.R. § 0.341. As ever, adjudicators, "unincumbered by juries, have been ever found much better friends to government than juries." *An Old Whig VIII* (Feb. 6, 1788), *reprinted in* 3 The Complete Anti-Federalist 49 (H. Storing ed. 1981).

Juries are integral to America's concept of popular sovereignty. "We the People," U.S. Const. pmbl., hold all power. By allowing the people to supervise adjudicators and prosecutors, civil juries ensure that parties are not subject to judicial biases that might develop.

B. Jury-less executive adjudication fails to provide Americans due process of law.

Jury-less agency adjudication flouts the Constitution's guarantee of due process of law. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

This fairness rule applies to administrative adjudications as well as to courts. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). The Fifth Amendment requires that "no man is allowed to be a judge in his own cause." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009). That is so "because his interest would certainly bias his judgment, and not improbably, corrupt his integrity." The Federalist No. 10, at 50 (James Madison) (Fall River Press ed. 2021). Yet an FCC employee sits as judge, jury, and executioner, while his employer is a party.

The Fifth Circuit below correctly concluded that suits seeking civil penalties require a trial by jury. Pet. App. at 44a–45a. That approach should be affirmed and instructed to erroneous courts, such as the Second Circuit.

III. Justice delayed is justice denied.

The FCC maintains that its 504 procedures satisfy the Seventh Amendment's jury guarantee. See Pet App. at 42a. Yet there was another who advocated for a similar process:

> "Let the jury consider their verdict," the King said, for about the twentieth time that day.
>
> "No, no!" said the Queen. "Sentence first–verdict afterward."
>
> "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

Lewis Carroll, *Adventures in Wonderland and Through the Looking Glass* 113 (1998).

The FCC's methodology is not too far from the Queen's demand. The FCC first determines guilt and the penalty, then—when the FCC decides to execute the judgment—the accused gets a jury to determine the verdict. While the FCC's "sentence" is not as harsh as the Queen's cry of "off with their head," individuals on the wrong side of an FCC enforcement action will have the FCC's sentence hanging over their head for years.

But in contrast to Wonderland, we live under a government of laws and not of men. *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). And the rule of law demands that courts

> "exercise their power within a constraining framework, of well-established public norms rather than in an arbitrary, ad hoc, or purely

> discretionary manner on the basis of their own preference or ideology. . . ." Yet implementation and acceptance of the Rule of Law can experience bumps and obstructions. Predominant among them is delay, which "can unquestionably frustrate the achievement of justice." Centuries of complaints regarding delays in justice—reflected in Chapter 40 of the Magna Carta in 1215, Sir Edward Coke's Institutes in 1642, and centuries thereafter—all encapsulate the sentiment of the well-known statement attributed to Gladstone that "justice delayed is justice denied." Such delay could result in delivering justice "too late to benefit the claimant." "[A]ny significant lapse of time" between the start of a cause of action and a legal remedy "increases the loss suffered by the innocent party."

Elizabeth Lee Thompson, *Procedural Innovation, the Rule of Law, and Civil Rights Justice*, 14 U.C. Irvine L. Rev. 1164, 1172 (2024) (citations omitted).

Few would dispute Ohio Supreme Court Justice Maureen O'Conner's assertion that "[d]elay in the courts is unqualifiedly bad." Maureen O'Connor, *The Ohio Modern Courts Amendment: 45 Years of Progress*, 76 Alb. L. Rev. 1963, 1967 (2013) (citing Ohio Legislative Serv. Comm'n, *The Ohio Court System: Its Organization and Capacity* 37 (1961)). And it is bad

> because it deprives citizens of a basic public service; it is bad because the lapse

> of time frequently causes deterioration of evidence and makes it less likely that justice be done when the case is finally tried; it is bad because delay may cause severe hardship to some parties and may in general affect litigants differentially; and it is bad because it brings to the entire court system a loss of public, confidence, respect, and pride.

Id.

The FCC does not dispute the necessity of a jury—it just claims that it is free to delay that jury for years after it has rendered its own sentence against the investigated party. *FCC Fines Largest Wireless Carriers for Sharing Location Data*, Federal Communications Commission (Apr. 29, 2024), https://www.fcc.gov/document/fcc-fines-largest-wireless-carriers-sharing-location-data. Years of management fighting off termination by the board. Years of share price deflation. Years of contingent liabilities on the corporate balance sheet. Years of embedding AT&T's and Verizon's "guilt" in the minds of potential jurors. And then, if the parties hold out until trial, the spirit of any independent jury is undermined by a prior finding of liability by an "expert" agency. Indeed, it would be an obvious error for a court to issue a jury instruction stating "Ladies and Gentlemen of the Jury: the FCC has fined AT&T $57,000,000, but it is up to you to decide if AT&T is liable for the fine." Yet under the current administrative adjudicatory structure, this message is communicated to subsequent juries all the same.

This concern is not new.

> New Hampshire's Ten Pound Act of November 1785 allowed a justice of the peace, sitting without a jury, to try any case where the value in question did not exceed £10. This act "was ostensibly designed to ensure 'the recovery of small debts in an expeditious way,' but it might also be said to impose summary process on the collection of small debts.

Philip Hamburger, *Law and Judicial Duty*, 14 Tex. Rev. L. & Pol. 367, 380 (2010). A newspaper essay at the time argued that "the law may answ[e]r the purposes of the legislative" in providing justice in an expeditious manner, but "[t]he question before us is that of *right* not *utility*." Philip Hamburger, *Is Administrative Law Unlawful* 153 (2015) (emphasis added).

"The Ten Pound Cases" are particularly revealing about the right to a jury even 'in the first stage of the action.' The statute allowed appeals to the Inferior Courts, where either party could demand a new trial with a jury." *Id.* When a justice of the peace denied a jury under the Ten Pound Act, the Inferior Court reversed, holding the statute "manifestly contrary to the constitution of this state." *Id.* at 154 (citation omitted). Thus, the denial of a jury in the first instance was unconstitutional. *Id.*

The promise of a trial by jury is a vital protection against an overreaching government agency. C.f. *United States* v. *Haymond*, 588 U.S. 634, 637 (2019) (plurality opinion) (noting that the promise of a jury in a criminal trial "stands as one of the Constitution's most vital protections against arbitrary government").

But delaying a jury adjudication until after an agency adjudication does not fulfill that promise.

At least in Wonderland, the trial was convened with a jury in the first instance. Only after evidence was presented to the jury did the Queen demand a sentence before the verdict. Carroll, *supra*, at 109–113. The FCC would bypass the jury, issue its verdict, *then* allow the regulated party to try to relitigate its guilt before a jury. AT&T and Verizon might fare better in Wonderland than they do under the current statutory scheme under which they live.

Constitutional rights held in abeyance are not constitutional rights. They are governmental favors. If the government takes away a right, determines liability and a fine, with the possibility of getting that right back after waiting a few years, it looks more like a favor than a right.

CONCLUSION

The Court should protect Americans' right to a jury trial in administrative proceedings by affirming the Fifth Circuit's decision and reversing the Second Circuit's.

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