The FCC's enforcement process needs legislative reform following *SEC v. Jarkesy*

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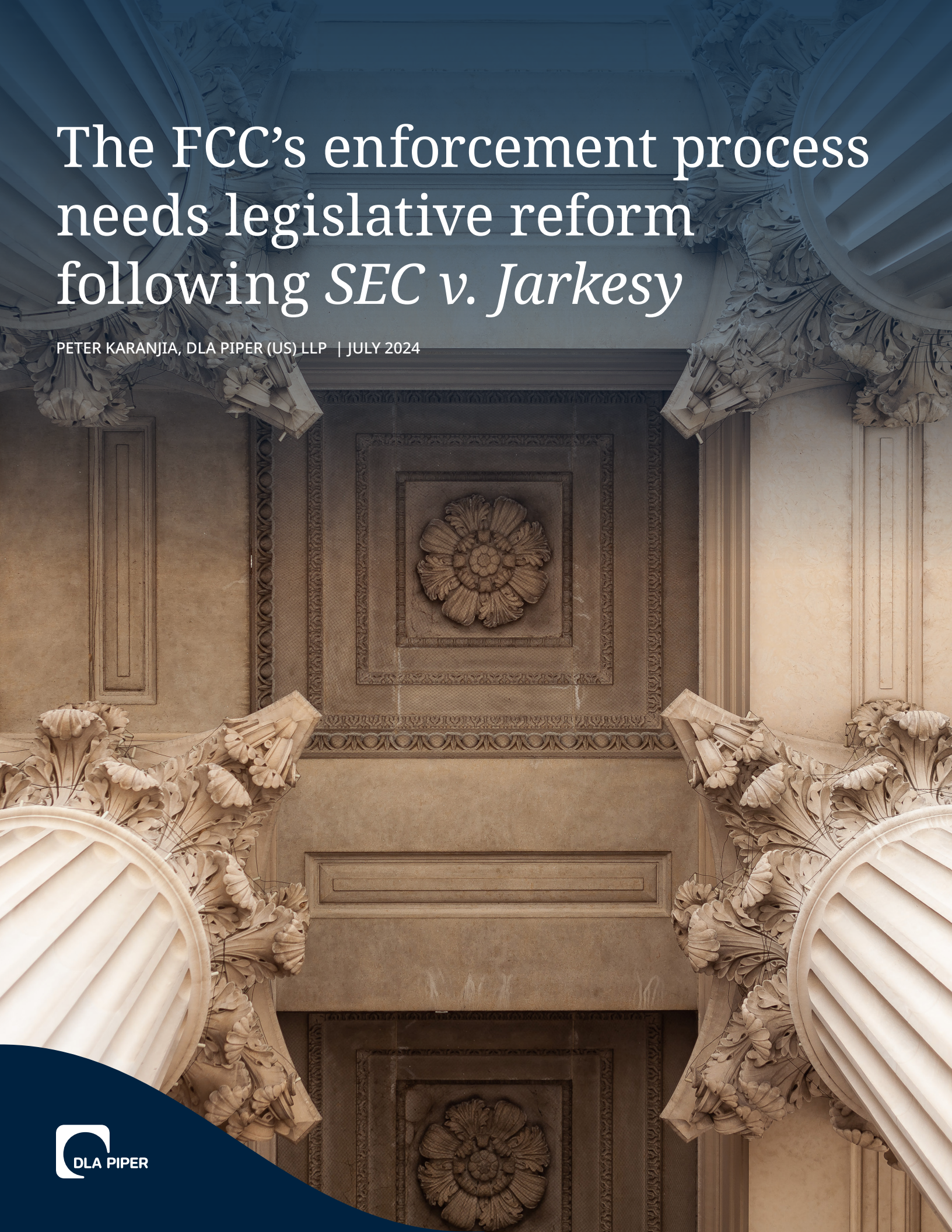

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Introduction

On June 27, 2024, the US Supreme Court decided *Securities and Exchange Commission v. Jarkesy*, a landmark case that will have far-reaching implications for federal agencies – such as the Federal Communications Commission (FCC) – that have been authorized by statute to seek civil penalties in administrative enforcement proceedings without juries.[1] Indeed, three dissenting justices argued that the decision will have "momentous consequences" and effect a "seismic shift" in the Court's approach to common agency enforcement practices.[2] The dissent acknowledged that the FCC's enforcement regime – as well as that of numerous other federal agencies – would be profoundly affected.[3]

The Seventh Amendment to the US Constitution provides that, in "[s]uits at common law, . . . the right of trial by jury shall be preserved." And the Supreme Court has long held that the civil jury-trial right is triggered by claims that are "legal in nature" – in other words, the types of claims that were traditionally adjudicated by courts of law rather than courts of equity. As discussed below, the Court in *Jarkesy* held that the Seventh Amendment prohibited the Securities and Exchange Commission (SEC) from subjecting an individual and corporate entity to an *administrative* enforcement proceeding, rather than a *federal court action with a jury* where the SEC sought civil penalties for alleged securities fraud. Accordingly, the defendants were "entitled to a jury trial in an Article III court" before civil penalties could be assessed.[4]

This paper focuses on the practical implications of *Jarkesy* for the FCC – in particular, how courts are likely to interpret and apply the decision when addressing the constitutionality of FCC enforcement actions. Like the SEC, the FCC conducts administrative adjudication of enforcement actions – almost always by issuing a "Notice of Apparent Liability" (akin to an administrative complaint), adjudicating the matter itself, and issuing a resulting "forfeiture order" that requires the target to pay civil penalties to the US Treasury.[5] With parallels to the SEC enforcement mechanism that the Court declared unlawful in *Jarkesy*, the FCC Commissioners themselves often issue the NAL and those same Commissioners vote on the resulting forfeiture order.[6] Unlike the SEC, however, the FCC does not currently have statutory authority to bring such actions in federal court – it can only bring such actions administratively (*i.e.*, "in house") or not bring them at all.[7]

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1. __ U.S. __, 144 S. Ct. 2117 (2024).
2. 144 S. Ct. at 2173-2174 (dissenting opinion of Sotomayor, J., joined by Kagan, J., and Jackson, J.); *see also id.* at 2174 (describing "the earthshattering nature of" the Court's holding); *id.* at 2173 ("The majority's decision . . . effects a seismic shift in this Court's jurisprudence.").
3. *See id.* at 2173-2174 (noting that "there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings") (dissenting opinion of Sotomayor, J., joined by Kagan, J., and Jackson, J.) (citing, *inter alia*, 47 U.S.C. § 503(b)(3), the statute authorizing FCC enforcement actions).
4. *Id*. at 2139.
5. *See, e.g.,* Enforcement Overview (FCC Enf. Bur. April 2020), at 15-16, *available at* https://www.fcc.gov/sites/default/files/public_enforcement_overview.pdf; *see also* 47 U.S.C. § 503(b)(1), (2) (statutory authorization for FCC to "determine[] . . . forfeiture penalties," which make the target "liable to the United States for [the] forfeiture penalty"); *id.* § 503(b)(4) (statutory authorization for NAL process); *id*. § 504(a) (specifying that forfeitures "shall be payable into the Treasury of the United States"). As an alternative to the NAL-to-forfeiture order process, the FCC has the "discretion" to instead issue a Notice of Opportunity for Hearing (NOH) and proceed via a formal trial-like hearing before the Commission or an in-house Administrative Law Judge. *See* 47 U.S.C. § 503(b)(3)(A); Enforcement Overview at 16. The FCC very rarely uses the NOH process, however, and the overwhelming majority of enforcement actions it brings follow the NAL-to-forfeiture order process. Because neither process involves a jury trial before an Article III court, the conclusions of this paper would apply to the FCC *regardless* of whether it pursues its typical enforcement path (NAL followed by forfeiture order) or its infrequently used NOH process.
6. *Cf. Jarkesy*, 144 S. Ct. at 2139 (majority opinion of Roberts, C.J.) (allowing the SEC to subject the defendants to penalties without the right to a jury would "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch."); *id.* at 2140 (Gorsuch, J., concurring) (noting that "the SEC's Commissioners – the same officials who authorized the suit against Mr. Jarkesy – [had] the power to preside over his case themselves and issue judgment.").
7. *See* 47 U.S.C. § 503(b); *cf. id.* § 504(a) (authorizing "the various United State Attorneys, under the direction of the Attorney General of the United States" – but *not* the FCC itself – to "prosecute for the recovery of forfeitures" by bringing a collection action "in the name of the United States"); *see also infra* at pp. 10-11 (discussing potential DOJ collection actions).

As discussed below, this paper reaches the following conclusions:

- The FCC's current regime of administratively adjudicating forfeiture orders that impose civil penalties without a jury is incompatible with *Jarkesy* and the Seventh Amendment right to a civil jury trial.[8] Legislative reform therefore would be needed to enable the FCC to continue its current enforcement efforts. Specifically, Congress will have to adopt new legislation authorizing the FCC to file enforcement proceedings in federal court (as various agencies, including the SEC, can do) or allow parties to enforcement proceedings to remove those proceedings to federal court for initial adjudication.
- Courts applying *Jarkesy* will likely conclude that, at a minimum, many FCC enforcement actions seeking civil penalties – including actions the FCC has emphasized as high enforcement priorities – would trigger the Seventh Amendment's right to a jury trial and the FCC could not proceed administratively based on the historical "public rights exception" (discussed below). Examples of such actions triggering the jury-trial right include claims that a party has engaged in fraud or misrepresentation (for example, by misrepresenting the nature of the services it offers), claims that a telecommunications carrier has engaged in "unjust and unreasonable practices," various privacy and data breach claims, and claims that a service provider acted unreasonably in failing to prevent a network outage.
- Absent reform, the FCC also faces litigation risk that courts will interpret *Jarkesy* to bar virtually any FCC enforcement action that seeks civil penalties because the action does not fall within certain historically recognized areas of adjudication under the public rights exception (for example, tax and revenue collection, immigration, and relations with Native American tribes).
- Courts are unlikely to find that the FCC can avoid the Seventh Amendment problem by pointing to the fact that, in theory, targets of forfeiture orders may obtain a jury trial by declining to pay the penalties assessed and instead waiting for a potential DOJ collection action any time within five years – an action over which the enforcement target has no control.

In reaching these conclusions, this paper proceeds as follows. First, it provides an overview of *Jarkesy*, including the relevant facts of the case, the Fifth Circuit's decision, and the Supreme Court's recent decision. Second, it explores the implications for FCC enforcement proceedings, explaining that legislative reform is needed to enable the FCC to continue its enforcement efforts.

8. As discussed below, the dissenting opinion acknowledged that the current practices of agencies, including the FCC, are incompatible with the Court's holding. *See infra* at p. 12; *see also Jarkesy*, 144 S. Ct. at 2174 (Sotomayor, J., dissenting) (pointing to agencies that currently do not have congressional authorization to seek civil penalties in both administrative proceedings and in federal court, and noting that under the Court's holding, these agencies would need to "get a new statute from Congress").

The Court's decision

Background

In *Jarkesy*, the SEC alleged that defendant George Jarkesy and a company he controlled engaged in securities fraud. The SEC had the option of bringing an enforcement action against the defendants in federal court, which would have triggered their right to a jury trial, but instead chose to proceed administratively – before an in-house Administrative Law Judge (ALJ).[9] The ALJ found the defendants liable for securities fraud, and the Commission affirmed. Accordingly, the SEC ordered defendants to pay a civil penalty of $300,000, as well as ordering other relief.

The Fifth Circuit's decision

The US Court of Appeals for the Fifth Circuit found the penalty constitutionally infirm and accordingly vacated the SEC's order on three independent grounds: (1) the defendants were unlawfully denied their right to a jury trial in federal court under the Seventh Amendment because the securities law provisions on which the SEC relied were analogous to common law fraud claims subject to the jury-trial right; (2) the SEC's discretion to bring the case within the agency instead of federal court violated the "nondelegation doctrine"; and (3) a for-cause restriction on the removal of Commission ALJs violated Article II of the Constitution and the separation of powers.[10]

The Supreme Court's decision

The US Supreme Court affirmed the Fifth Circuit on the first ground, without reaching the other two constitutional grounds for vacating the SEC's order.[11]

In a 6-3 opinion authored by Chief Justice Roberts – joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barret – the Court agreed with the Fifth Circuit that the SEC's enforcement order was unconstitutional because the SEC had assessed civil penalties in the context of an administrative proceeding (specifically, using an in-house ALJ) even though the defendants were "entitled to a jury trial in an Article III court."[12] The Court explained that allowing Congress to "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch" – as the SEC enforcement action did, and as the FCC's current enforcement process similarly does – "is the very opposite of the separation of powers that the Constitution demands."[13]

The Court began by underscoring the importance of the jury-trial right under the Seventh Amendment: That right "is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'"[14]

The Court's analysis then proceeded in two steps: (1) asking whether the Seventh Amendment's right to trial by jury was implicated by the claim(s) asserted, and (2) asking whether Congress was permitted to assign the claims to agency adjudication without a jury trial under the "'public rights' exception."

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9. Before 2010, the SEC was authorized to seek civil penalties for securities fraud only in Article III courts, where defendants have the right to a jury trial. In 2010, however, Congress passed the Dodd-Frank Act, which expanded the SEC's authority, and allowed it to seek civil penalties for securities fraud in the agency's administrative courts. If the SEC chose to sue a defendant for securities fraud in-house and seek penalties in an administrative proceeding, the defendant was no longer entitled to a jury trial.
10. *Jarkesy v. Securities & Exch. Comm'n*, 34 F.4th 446, 451-465 (5th Cir. 2022).
11. The three dissenting Justices would have rejected the alternative holdings of the Fifth Circuit, however. *See Jarkesy*, 144 S. Ct. at 2156, n.1 (dissenting opinion of Sotomayor, J., joined by Kagan, J., and Jackson, J.).
12. *Id.* at 2139 (majority opinion of Roberts, C.J.).
13. *Id.*
14. *Id.* at 2128 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The majority also pointed to the deep historical roots of the Seventh Amendment right: "Commentators recognized the right as 'the glory of the English law,' . . . and it was prized by the American colonists." *Id.* (quoting 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778)).

When the Seventh Amendment's jury-trial right is implicated

In evaluating the first question, the Court explained that the Seventh Amendment extends to any statutory claim that is "legal in nature" (rather than sounding in equity), even where the statutory claim is brought by the government.[15] The Court emphasized that, to determine whether a suit is legal in nature, courts will consider the cause of action and the remedy it provides – with the latter being the "more important" consideration.[16]

Here, and importantly for the FCC, the Court explained that the remedy the SEC sought administratively (civil penalties) was "***all but dispositive***"[17] because "money damages are the prototypical common law remedy" and "only courts of law issued monetary penalties to 'punish culpable individuals.'"[18]

The Court also emphasized that the civil penalties are "designed to punish and deter, not to compensate" – an observation that would equally apply to the FCC's forfeiture orders imposing similar penalties – and concluded that the case therefore involved "'a type of remedy at common law that could only be enforced in courts of law.'"[19] "That conclusion," the Court explained, "effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims."[20]

The Court further observed that this conclusion was "confirm[ed]" by "[t]he close relationship between the causes of action in this case and common law fraud."[21] While the securities law claims at issue in *Jarkesy* admittedly were not "identical" to common law fraud claims – a classic type of claim of a "legal" nature that triggers the Seventh Amendment – they bore significant similarities, and there was an "enduring link between federal securities fraud and its common law 'ancestor.'"[22] This confirmed that the SEC's administrative action seeking civil penalties was "legal in nature" and therefore implicated the Seventh Amendment's jury-trial right.[23]

The "'public rights' exception"

Next, the Court addressed whether the SEC's securities fraud claims seeking civil penalties could be decided administratively (by an in-house ALJ) under the narrow "'public rights' exception," by which Congress may assign certain matters to an agency, rather than to a jury. The Court stressed that, generally, matters concerning private rights may *not* be removed from Article III courts, whereas matters concerning public rights may be.[24] The public rights exception did not save the SEC's enforcement action from constitutional infirmity, however, because the SEC's claims for civil penalties implicated the defendants' "private rights" – for substantially the same reasons that they implicated the Seventh Amendment as claims that are "legal in nature."[25] The Court reaffirmed that "Congress cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal,'"[26] and observed that Congress could not "siphon this action away from an Article III court."[27]

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15. *Id.* (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53 (1989)).
16. *Id.* at 2129 (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)).
17. *See id.* ("In this case, *the remedy is all but dispositive*") (emphasis added).
18. *Id.* (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) and *Tull*, 481 U.S. at 422).
19. *Id*. (quoting *Tull*, 481 U.S. at 422).
20. *Id.* at 2130.
21. *Id.*
22. *Id.* at 2130-2131 (citation omitted).
23. *Id.* at 2131 (quoting *Granfinanciera*, 492 U.S. at 53).
24. *Id.* at 2132 ("[M]atters concerning private rights [as opposed to public rights] may not be removed from Article III courts."); *see also id.* at 2131 ("The Constitution prohibits Congress from 'withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.' . . . Once such a suit 'is brought within the bounds of federal jurisdiction,' an Article III court must decide it, with a jury if the Seventh Amendment applies.'") (citations and internal quotation marks omitted); *id.* at 2132 ("[I]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.").
25. The Court explained that "the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. *This is a common law suit in all but name*. And such suits typically must be adjudicated in Article III courts." *Id.* at 2136 (emphasis added).
26. *Id.* at 2136 (quoting *Granfinanciera*, 492 U.S. at 52); *see also Granfinanciera*, 492 U.S. at 51-52 (Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a jury. . . . [T]o hold otherwise would be to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common law forbears.").
27. *Jarkesy*, 144 S. Ct. at 2136.

The Court distinguished prior precedent applying the public rights exception, because those cases applied the exception only where the claim related to matters that were historically determined by the Executive and Legislative Branches,[28] including the powers to:

1. Collect taxes and revenue,[29]
2. Regulate immigration and foreign commerce (for example, by imposing tariffs on imports),[30]
3. Organize and manage relations with Native American tribes,[31]
4. Administer public lands,[32] and
5. Grant "public benefits" in well-established historical areas, such as those involving payments to veterans, pensions, and patent rights.[33]

Whatever remains of the public rights exception after *Jarkesy*, the Court made clear that it is narrow and courts may invoke it only "with care."[34] "The public rights exception is, after all, an *exception*,"[35] and "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts."[36]

No Seventh Amendment exemption for claims by the government or statutory claims

The Court rejected the SEC's arguments – largely based on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), a decision the FCC has similarly relied on to justify its enforcement mechanisms[37] – urging a much more expansive conception of the public rights exception.[38]

First, the Court rejected the SEC's argument that, because this was a government enforcement action purporting to assert the agency's "sovereign" powers to vindicate the public interest, the matter involved "public rights" and therefore did not require a jury trial in an Article III court. To the contrary, the Court explained that "we have never held that 'the presence of the United States as a proper party to the proceeding is . . . sufficient' by itself to trigger the [public rights] exception . . . . [W]hat matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled."[39]

Second, the majority rejected the SEC's argument that because the enforcement action involved *statutory* claims (for example, under the Securities Exchange Act), it necessarily raised a matter of public rights and avoided application of the Seventh Amendment: "[T]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.' . . . *[W]hether that claim is statutory is immaterial to this analysis*."[40] As discussed below, both points are directly relevant to FCC enforcement actions under the federal Communications Act.

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28. *See id.* at 2133 (referring to "historic categories of adjudications [that] fall within the exception").
29. *Id.* at 2132 (discussing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856), the seminal case that recognized what later became known as the public rights exception).
30. *Id.* at 2132-2133 (discussing *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339-340 (1909) and *Ex parte Bakelite Corp*., 279 U.S. 438, 446 (1929)). The majority stressed that this historical category of public rights cases involved "the exercise of Congress's power over *foreign* commerce." *Id.* at 2133 n.1 (discussing *Oceanic Steam Navigation Company* as limited to that area – not domestic, interstate commerce).
31. *Id.* at 2133 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011)); *see also Jicarilla Apache Nation*, 564 U.S. at 175 (discussing Congress's longstanding "plenary authority" to "organiz[e] and manage[]" "the Indian trust relationship").
32. *Id*. (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).
33. *Id.* (citing *Crowell*, 285 U.S. at 51 and *United States v. Duell*, 172 U.S. 576, 582–583 (1899)).
34. *Id.* at 2133-2134.
35. *Id.* at 2134 (emphasis in original).
36. *Id.* (citation and internal quotation marks omitted).
37. *See, e.g*., *AT&T Corp. v. Bell Atlantic-Pennsylvania, et al.*, 14 FCC Rcd. 556, 561, ¶ 8 & n.24 (1998) (relying on *Atlas Roofing* to reject Seventh Amendment argument in response to enforcement action).
38. The majority noted that "the author of *Atlas Roofing*" (Justice White) believed that the case may have already been "overruled" by *Granfinanciera*. *See Jarkesy*, 144 S. Ct. at 2137 n.3 (citing *Granfinanciera*, 492 U.S. at 79 (White, J., dissenting)). Regardless of whether it remains good law, the majority concluded that *Atlas Roofing* was not controlling because the Occupational Health & Safety Act claims at issue in that case "were 'unknown to the common law.'" *Id.* at 2137-2138 (quoting *Atlas Roofing*, 430 U.S. at 461).
39. *Jarkesy*, 144 S. Ct. at 2136 (citation omitted); *see also id.* at 2132 (noting that "[a] hallmark that we have looked to in determining if a suit concerns private rights is whether it is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'") (citations and internal quotation marks omitted).
40. *Id.* at 2128 (emphasis added) (citing *Tull*, 481 U.S. at 414-415 (government claim under the Clean Water Act did not fall within the public rights exception)); *see also id.* at 2135 ("'[T]raditional legal claims' must be decided by courts, 'whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears.'") (quoting *Granfinanciera*, 492 U.S. at 52).

The concurring and dissenting opinions

In a concurring opinion joined by Justice Thomas, Justice Gorsuch concluded that two other constitutional provisions – Article III, which vests judicial power in the federal courts, and the Fifth Amendment's Due Process Clause – confirm that the SEC could not assess civil penalties without affording the defendants a jury trial in federal court.[41] In a passage relevant to the FCC's routine enforcement practices, Justice Gorsuch expressed concern that "the SEC's Commissioners – the same officials who authorized the suit against Mr. Jarkesy – [have] the power to preside over his case themselves and issue judgment."[42] This echoed the majority's criticism that allowing the SEC to subject the defendants to penalties without the right to a jury would "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch."[43]

In a dissenting opinion joined by Justices Kagan and Jackson, Justice Sotomayor argued that "the majority oversteps its role and encroaches on Congress's constitutional authority."[44] Justice Sotomayor acknowledged the sweeping implications of the Court's opinion for agency enforcement proceedings and suggested that many agencies, including the FCC, may need to "get a new statute from Congress."[45]

Implications for the FCC

FCC enforcement actions seeking penalties will likely implicate the Seventh Amendment

As relevant to the FCC, the first takeaway from *Jarkesy* is that enforcement actions in which the FCC seeks civil penalties will likely implicate the Seventh Amendment and thus presumptively trigger the target's right to a jury in federal court.[46] This conclusion – which would apply equally to enforcement proceedings that follow the routine NAL-to-forfeiture order path and those that involve rare trial-like proceedings before an ALJ under the NOH process – follows from the Court's holding that the SEC's administrative action seeking civil penalties implicated the Seventh Amendment.

As discussed above, the majority explained that the SEC's pursuit of civil penalties was "all but dispositive"[47] because "money damages are the prototypical common law remedy" and "only courts of law issued monetary penalties to 'punish culpable individuals.'"[48] The Court underscored that the penalties remedy was "designed to punish and deter, not to compensate" and concluded that the case therefore involved "'a type of remedy at common law that could only be enforced in courts of law.'"[49] "That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims."[50]

The same logic applies to FCC enforcement proceedings seeking civil penalties because the FCC has made clear that it seeks to impose penalties for punitive and deterrence purposes, rather than for compensatory purposes.[51]

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41. *See id.* at 2140-2154 (Gorsuch, J., concurring); *see also id.* at 2145-2146 ("Because the penalty the SEC seeks would 'depriv[e]' Mr. Jarkesy of 'property,' Amdt. 5, due process demands nothing less than 'the process and proceedings of the common law,'" "mean[ing] the regular course of trial proceedings with their usual protections" rather than "the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review.") (citing 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833) and *Murray's Lessee*, 18 How. at 280).
42. *Id.* at 2140; *see also id.* at 2142 ("Mr. Jarkesy had the right to appeal to the Commission, but appeals to that politically accountable body (again, the same body that approved the charges) tend to go about as one might expect.").
43. *Id.* at 2139.
44. *Id.* at 2175 (Sotomayor, J., dissenting).
45. *Id.* at 2173-2174.
46. Though less common, the agency's enforcement actions seeking non-penalties remedies such as an "admonishment" (*see* FCC Enforcement Overview, *supra*, at 13) may also implicate the Seventh Amendment where the claims asserted are akin to traditional claims at law—for instance, fraud claims.
47. *Jarkesy*, 144 S. Ct. at 2129.
48. *Id.* (citations omitted).
49. *Id*. at 2130 (quoting *Tull*, 481 U.S. at 422).
50. *Id.*
51. *See, e.g.*, 47 U.S.C. § 503(b)(1)(D) (FCC's power to impose a "forfeiture *penalty*") (emphasis added); *id.* § 503(b)(2)(E) (directing FCC to take into account,

Furthermore, the Court noted that "[t]he SEC is also not obligated to return any money to victims" of the alleged misconduct.[52] So, too, for the FCC, as civil penalties assessed under forfeiture orders accrue to the US Treasury – not to individuals who were allegedly injured by the challenged conduct.[53] Nor does the Commission have any mechanism to order restitution to injured parties in Section 503 enforcement proceedings. Accordingly, civil penalties sought in FCC forfeiture orders, like the SEC civil penalties in *Jarkesy*, "are . . . 'a type of remedy at common law that could only be enforced in courts of law,'" and therefore "implicate[] the Seventh Amendment right and a defendant would be entitled to a jury on these claims.[54]

This holding is highly consequential, as it will generally require the FCC to decline to pursue any administrative enforcement action seeking penalties unless it can show that the narrow public rights exception applies.[55] As discussed below, doing so will likely be an uphill battle for the agency in the wake of *Jarkesy*.

The public rights exception is narrow and is unlikely to save many FCC enforcement claims

The Court took pains to emphasize that "[t]he public rights exception is, after all, an *exception*,"[56] and "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts."[57] Lower courts (and FCC personnel) are therefore on clear notice that the exception is narrow and should be invoked only sparingly.[58]

To the extent that the FCC attempts to justify its enforcement actions based on the public rights exception, this will present a significant challenge and considerable litigation risk for the agency. As noted above, the FCC has previously relied on *Atlas Roofing*[59] – a case of dubious vitality in the wake of *Jarkesy*.[60]

Furthermore, some courts may interpret the public rights exception as cabined to the discrete areas involving historic exercises of Executive and Legislative Branch action without jury trials (tax and revenue collection, regulation of immigration and foreign commerce, relations with Native American tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights).[61] Targets of FCC enforcement actions can be expected to point to language in Justice

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among other things, the defendant's "degree of culpability" when setting penalty amount); *Matter of Gregory Robbins Interstate Brokers of Am. LLC Nat'l Health Agents LLC*, 37 FCC Rcd. 2591, 2602, ¶ 34 (2022) (describing "the purposes of monetary penalties" as "penalizing the company for its apparently unlawful actions and serving as a deterrent to both [defendants] and others from future violations"); *Liability of Sonderling Broad. Corp.*, 69 FCC 2d 289, 292, ¶ 10 (FCC Broad. Bureau 1977) ("Congress intended that forfeitures be a method of civil punishment.").

52. *Jarkesy*, 144 S. Ct. at 2130.

53. *See* 47 U.S.C. § 504(a); Letter from FCC Chairman Tom Wheeler to Sen. Steve Daines (Dec. 18, 2015), at 10, available at 2015 WL 9703482 ("Pursuant to Section 504 of the Act, all forfeiture penalties paid to the FCC are payable into the Treasury of the United States.").

54. *Jarkesy*, 144 S. Ct. at 2130 (quoting *Tull*, 481 U.S. at 422).

55. Courts applying *Jarkesy* may also consider whether the FCC's legal theory resembles a claim that is legal in nature – as discussed above, the *Jarkesy* majority noted that the legal nature of the SEC's securities fraud claims "confirm[ed]" that the action implicated the Seventh Amendment – but presumably this would be the case for any action that involves "private" rather than "public" rights and therefore falls outside the public rights exception (*see* discussion below). In this respect, the "step 1" (is the Seventh Amendment implicated?) and "step 2" (does the public rights exception apply?) analyses under *Jarkesy* overlap.

56. *Jarkesy*, 144 S. Ct. at 2134 (emphasis in original).

57. *Id.* (citation and internal quotation marks omitted).

58. *See id.* at 2133-2134 ("[S]ince *Murray's Lessee*, this Court has typically evaluated the legal basis for the assertion of the doctrine with care."); *see also id.* at 2128 (any "seeming curtailment" of the jury-trial right "should be scrutinized with the utmost care.") (citation and internal quotation marks omitted).

59. *See* note 37, *supra* (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd. at 561, ¶ 8 & n.24).

60. *See* note 38, *supra*. As the *Jarkesy* majority pointed out, *Atlas Roofing* involved statutory claims with no common law antecedents – claims that were "'unknown to the common law.'" 144 S. Ct. at 2138 (quoting *Atlas Roofing*, 430 U.S. at 461). As discussed below, that is not the case for FCC enforcement actions modeled on traditional legal claims. *See infra* at pp. 9-10.

61. *See Jarkesy*, 144 S. Ct. at 2132-2134; *see also id.* at 2127 ("The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury.").

Gorsuch's concurring opinion[62] and Justice Sotomayor's dissenting opinion[63] to support this interpretation. Under this understanding of the public rights exception, the vast majority of (if not all) FCC enforcement actions would require a jury trial in an Article III court. The FCC does not engage in tax and revenue collection, regulate immigration or purely foreign commerce,[64] or organize and manage relations with Native American tribes, nor does it administer public lands or grant benefits of the type recognized in the cases cited by the Court.

Regardless of whether courts applying *Jarkesy* adopt this interpretation of the public rights exception going forward, they will likely conclude that a broad range of FCC enforcement claims – including those that the FCC has indicated are high priorities – trigger the Seventh Amendment's jury-trial right and would not fall within whatever remains of the narrow public rights exception. That is because, under the Supreme Court's reasoning, administrative actions for civil penalties that assert claims that are "legal in nature" involve matters of private rights that must be adjudicated in Article III courts with juries.[65] "If the suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory."[66]

The *Jarkesy* Court made clear that an agency's enforcement claim does not need to be "identical" to a traditional claim at common law in order to involve a matter of "private rights" that requires a jury trial in federal court; indeed, the majority acknowledged that the SEC's securities fraud claims were *not* "identical" to common law fraud.[67] Nor is the jury-trial right "limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified."[68] Rather, a relatively loose connection between the agency enforcement claim and a traditional action at common law is all that is required to both trigger the Seventh Amendment *and* fall outside the public rights exception. The Court used various articulations to describe this association, including whether the agency's enforcement claim "*resembles* a traditional legal claim,"[69] is "*akin to* 'suits at common law,'"[70] was "*modeled on* [a] common law" cause of action,[71] or has an "enduring link" to a "common law 'ancestor.'"[72]

Under this approach, courts would likely conclude that many FCC enforcement actions are sufficiently "akin to" traditional legal claims that they trigger the Seventh Amendment and are not immunized from the jury-trial right by the public rights exception. Among others, illustrative examples include the following:

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62. *See id.* at 2146, 2149 (Gorsuch, J., concurring) ("[P]ublic rights are a narrow class defined and limited by history. As the Court explains, that class has traditionally included the collection of revenue, customs enforcement, immigration, and the grant of public benefits. . . . Yes, a limited category of public rights were originally and even long before understood to be susceptible to resolution without a court, jury, or the other usual protections an Article III court affords. But outside of those limited areas, we have no license to deprive the American people of their constitutional right to an independent judge, to a jury of their peers, or to the procedural protections.").

63. *Id*. at 2164 & n.6 (Sotomayor, J., dissenting) ("The majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law. . . . The majority also cites cases involving 'relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights.'").

64. The FCC instead has only limited jurisdiction over communications that, at least in part, originate or terminate within the United States. While "[t]he Communications Act authorizes the Commission to regulate 'foreign telecommunications,'" "[t]he [FCC] claims no authority to directly regulate foreign carriers." *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1229 (D.C. Cir. 1999); *see also Unigestion Holding, S.A. v. UPM Tech., Inc.*, 305 F. Supp. 3d 1134, 1154–55 (D. Or. 2018) ("The [Communications] Act does not apply to telecommunications providers that operate only as foreign carriers."); *Matter of Int'l Settlement Rates*, 12 FCC Rcd. 19806, 19933, ¶ 277 (1997) ("[W]e have previously acknowledged that the Act generally limits our jurisdiction over international telecommunications services to the U.S. end of the service only.").

65. *See Jarkesy*, 144 S. Ct. at 2128-2129, 2131-2132, 2136.

66. *Id.* at 2132.

67. *Id*. at 2131 (acknowledging that the statutory claims were in some respects narrower than common law fraud and in other respects broader; despite these differences, the claims were "legal in nature" and thus involved private rights rather than public rights).

68. *Id*. at 2128 (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)); *see also Curtis*, 415 U.S. at 195 ("a jury trial must be available if the action involves rights and remedies *of the sort* typically enforced in an action at law.") (emphasis added); *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 564 (1990) ("The right to a jury trial includes more than the common-law forms of action recognized in 1791.").

69. *Jarkesy*, 144 S. Ct. at 2136 (emphasis added).

70. *Id*. at 2135 (emphasis added); *see also id.* at 2139 ("[T]he Seventh Amendment does apply to novel statutory regimes, so long as the claims are *akin to* common law claims.") (emphasis added) (citing *Tull*, 481 U.S. at 421-23).

71. *Id.* at 2136 (emphasis added).

72. *Id.* at 2130 (citation omitted); *see also id.* at 2131 (referring to the "common law analogue" of the agency's statutory claim).

- ***Fraud and misrepresentation claims.*** In a variety of contexts, the FCC has brought enforcement actions against regulated entities alleging that they misrepresented facts (for example, the performance characteristics of the services they offer).[73] The FCC will also often mandate certain disclosures under "transparency" rules and then penalize the subjects of those rules for allegedly failing to live up to those mandated disclosures. Whenever the FCC seeks to impose civil penalties for such violations, these types of claims would seem to be on all fours with *Jarkesy*. All are modeled on – or at the very least "akin to" – traditional common law fraud claims, and that is all that is required to constitute a claim that is "legal in nature" and thus subject to the jury-trial right.
- ***"Unjust and unreasonable practices" claims.*** The FCC also regularly relies on the flexible concept of "unjust and unreasonable practices" to address a wide variety of common carrier conduct it seeks to challenge, such as allegedly deceptive advertising and "cramming" (placing unauthorized service charges on bills), failure to abide by rules for FCC subsidy programs, and failure to inform consumers that their personal information has been subject to unauthorized access.[74] These "unjust and unreasonable practices" claims have deep roots in centuries-old common law precedents, as an *amicus* brief in support of the SEC in *Jarkesy* comprehensively detailed.[75]
- ***Privacy and data breach claims.*** The FCC has recently shown increasing interest in regulating privacy and data breach matters through enforcement actions, often relying on negligence-type theories of liability that allege that parties failed to take "reasonable care" to protect their customers' data.[76] These causes of action resemble traditional common law claims for negligence, which are clearly claims of a legal nature or "claims at law."[77] Other privacy-related theories of liability may be modeled on common law claims for invasion of privacy.[78]

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73. *See, e.g.*, *Matter of Tele Cir. Network Corp.*, 36 FCC Rcd. 7664, 7664–65, ¶ 1 (2021) (forfeiture order finding that defendant "made misrepresentations to consumers"); *Matter of Cent. Telecom Long Distance, Inc.*, 31 FCC Rcd. 10392, 10403, ¶ 23 (2016) (forfeiture order finding that defendant "misrepresented the services [offered] and the purpose of" its calls to prospective customers); *Matter of STI Telecom Inc.*, 30 FCC Rcd. 11742, 11747, ¶ 11 (2015) (forfeiture order finding that defendant engaged in "fraudulent and deceptive telemarketing and advertising practices"); *Matter of Kyle Traxler & Cleo Commc'ns*, 37 FCC Rcd. 8151, 8153, ¶ 4 (2022) (NAL alleging that defendant committed "wire fraud by misrepresenting to consumers that [it] would deliver discounted services and devices to them" under a subsidy program).

74. *See, e.g.*, *Matter of Tele Cir. Network Corp.*, 36 FCC Rcd. 7664, 7665, ¶ 2 (2021) (forfeiture order finding that defendant engaged in "unjust and unreasonable" practices prohibited by 47 U.S.C. § 201(b) when it assessed unauthorized charges on a telephone bill); *Matter of City Commc'ns, Inc.*, 2024 WL 688538, *22, ¶ 71 (FCC Jan. 26, 2024) (NAL alleging that defendant engaged in "unjust and unreasonable practices" by violating rules for the Affordable Connectivity Program); *Matter of Terracom, Inc. & Yourtel Am., Inc.*, 29 FCC Rcd. 13325, 13325, ¶ 2 (2014) ("*Terracom/Yourtel NAL*") (NAL alleging that defendants "engaged in unjust and unreasonable practices by not fully informing consumers that their [personal information] had been compromised by third-party access"); *Bus. Disc. Plan, Inc.*, 15 FCC Rcd. 14461, 14462, ¶ 4 (2000) (forfeiture order finding that defendant had engaged in "unjust and unreasonable practices" by conducting fraudulent marketing).

75. *See* Br. For *Amici Curiae* Admin. Law Scholars in Support of Petitioner, No. 22-859 (Sept. 2023), at 29-30 (noting that "[a] high proportion of the claims that agencies resolve today are arguably 'akin to' claims that could have been resolved at common law in 1791" and offering as an example "claims that agencies are authorized to resolve through application of the ubiquitous 'just and reasonable' standard. *That standard does have common law roots*. Many states adopted it in their constitutions and statutes during the 1800s. *See Atchison, Topeka & Santa Fe R.R. Co. v. Denver & New Orleans R.R. Co.*, 110 U. S. 667, 678–79 (1884). In doing so, *they borrowed it from the common law that colonial, and British courts had applied to innkeepers for centuries*. *See Scofield v. Lake Shore & M. S. Ry. Co.*, 3 N.E. 907, 929 (Ohio 1885). Congress first instructed a federal agency to apply the 'just and reasonable' standard in the Interstate Commerce Act of 1887, 24 Stat. 379, and it has since included it as a decisional standard in many other statutes.") (emphasis added). This "just and reasonable" standard, deeply rooted in the common law, was adopted verbatim in the Communications Act, *see* 47 U.S.C. § 201(b), and, as noted above, it is a source of a wide range of FCC enforcement actions covering disparate subject matter.

76. *See, e.g., Matter of Liberty Latin Am. Ltd.*, 2024 WL 3010629, *1, ¶ 1 (FCC Enf. Bur. June 13, 2024) (consent decree resolving enforcement investigation into whether defendant "reasonably protect[ed] the confidentiality of customer information"); FCC Enforcement Advisory, 2024 WL 576533, *2 (FCC Enf. Bur. Feb. 9, 2024) (stating that "the Commission has taken enforcement action against telecommunications carriers and interconnected VoIP providers that failed to comply with the requirements" of the FCC's rules concerning customer proprietary network information ("CPNI") and that these rules "require carriers to," among other things, "take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI."); *FCC Enforcement Advisory: Telecommunications Carriers Must Protect Consumers' Priv. & Sensitive Data by Taking Reasonable Steps to Prevent SIM Fraud Schemes*, 2023 WL 8646280, *2 (FCC Enf. Bur. Dec. 11, 2023) (stating that "[a] telecommunications carrier's failure to reasonably protect customer information, including through allowing fraudulent SIM swap schemes, can independently violate the Act and Commission rules. These failures may result in," among other remedies, "monetary forfeiture.") (footnote and citations omitted); *Terracom/Yourtel NAL*, 29 FCC Rcd. at 13329, ¶ 12 (NAL alleging that defendants violated the Communications Act by "failing to employ reasonable data security practices to protect consumers' PI" (*i.e.*, personal information) and thereby "created an unreasonable risk of unauthorized access.").

77. *See, e.g.*, *Air & Liquid Sys. Corp. v. DeVries*, 586 U.S. 446, 452 (2019) ("Tort law imposes 'a duty to exercise reasonable care' on those whose conduct presents a risk of harm to others.") (citing 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2005) (negligence)); 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances."); *see also Ceriale v. Sup. Ct.*, 48 Cal. App. 4th 1629, 1634 (1996) ("[T]here is a jury trial right in a negligence action which solely seeks damages because such a claim is normally an action at law.") (citations omitted); *Interstate Bankers Cas. Co. v. Hernandez*, 3 N.E.3d 353, 362, ¶ 23 (Ill. App. Ct. 2013) ("[T]he underlying claim is one at law for negligence, which has always carried the right to a jury trial."); *Jones v. Chase*, 270 A.2d 102, 103 (N.H. Sup. Ct. 1970) ("Being actions at law to recover damages for negligence, plaintiffs were entitled to have the issues tried by a jury.") (citation omitted).

78. *See, e.g.*, Restatement (Second) of Torts § 652A (1977) (invasion of privacy general principles); *see also Mehau v. Reed*, 76 Haw. 101, 111 (1994) (concluding that "invasion of privacy, as a general tort action, should be construed as a 'suit at common law,'" and therefore was subject to jury-trial right under state constitution).

- ***Network outage claims.*** Similarly, the FCC has brought enforcement actions relying on allegations that defendants did not take "reasonable care" by failing to prevent network outages that obstructed the transmission of customer calls or other communications.[79] These claims, too, are akin to common law claims for negligence.[80]

In addition to these illustrative examples, courts will likely be called upon to address other instances of FCC enforcement claims that have common law analogues.

The FCC cannot avoid the Seventh Amendment by invoking the possibility of post-adjudication DOJ collection actions in court

The FCC may argue that if a party subject to a forfeiture order assessing civil penalties fails to pay the forfeiture, the DOJ may commence a collection action and that action would entitle the defendant to a "*de novo*" jury trial in an Article III court.[81] For several reasons, courts are unlikely to conclude that this possibility obviates the Seventh Amendment concern in cases where the target of an FCC enforcement action has the right to a jury trial

First, *Jarkesy* confirms that "[o]nce . . . a suit [at common law] is brought within the bounds of federal jurisdiction, *an Article III court must decide it*" in the first instance.[82] Because "matters concerning private rights [as opposed to public rights] may not be removed from Article III courts,"[83] the FCC may not adjudicate such matters, even if a trial in response to a DOJ collection action – something that lies outside the defendant's control – may later occur.[84] Pre-*Jarkesy* case law likewise confirms that such belated judicial review cannot avoid or cure a constitutional violation where Congress lacks the authority to remove adjudication of common law claims from Article III courts in the first place.[85]

Second, the target of an FCC forfeiture order has no control over whether DOJ will commence a Section 504(a) collection action, so the *possibility* of such an action – perhaps years later[86] – cannot meaningfully preserve the jury-trial right in cases where it attaches.[87] In this scenario, invocation of the right effectively rests with the government (DOJ), not with the defendant – making the jury-trial right seemingly illusory. The meaningful vindication of constitutional rights should "not leave [regulated parties] . . . at the mercy of *noblesse oblige*."[88]

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79. *See, e.g.*, *Matter of Lumen Techs., Inc.*, 2023 WL 8540521, *11, ¶ 41 (FCC Oct. 17, 2023) (NAL alleging that, in allowing outage that prevented the connection of 911 calls, defendant "failed to employ reasonable steps in designing and operating key aspects of its network").

80. *See* note 77, *supra*.

81. *See, e.g.*, 47 U.S.C. § 503(b)(3)(B) (setting forth mechanism by which FCC refers matter to DOJ for collection "[i]f any person fails to pay an assessment of a forfeiture penalty"); *id*. § 504(a) (authorizing DOJ to commence collection action to seek penalties assessed in forfeiture order); *see also AT&T Corp. v. FCC*, 323 F.3d 1081, 1083 (D.C. Cir. 2003) ("If the order becomes final and the forfeiture subject refuses to pay, then Communications Act section 504(a) permits the Commission to refer the matter to the Department of Justice for commencement of a civil action to recover the forfeiture in a district court, where the forfeiture subject is entitled to a trial *de novo*.") (citing 47 U.S.C. § 504(a)).

82. *Jarkesy*, 144 S. Ct. at 2131 (emphasis added; citation and internal quotation marks omitted).

83. *Id.* at 2132.

84. *See also id.* ("[I]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and *adjudication by an Article III court is mandatory*.") (emphasis added; citation omitted); *id.* (in cases involving "public rights," "*[i]n contrast to common law claims*, no *involvement by an Article III court in the initial adjudication* is necessary.") (emphasis added); *see also id.* at 2155 (Sotomayor, J., dissenting) (criticizing the Court's "conclusion that Congress cannot assign a certain public-rights matter for *initial adjudication* to the Executive because it must come only to the Judiciary.") (emphasis added).

85. *See, e.g.*, *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion) (where Congress vested bankruptcy courts with broad adjudicatory powers, albeit subject to further review by Article III courts, Congress "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes" in the non-Article III bankruptcy court); *id.* at 91 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment) (agreeing with the plurality that "the extent of review by Art. III courts provided on appeal from a decision of the bankruptcy court . . . does not save the grant of authority to the latter" because "[a]ll matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated"; thus, the bankruptcy court was not a mere "'adjunct' of either the district court or the court of appeals").

86. *See* 28 U.S.C. § 2462 (establishing five-year statute of limitations from accrual of claim).

87. DOJ, of course, has many competing priorities, and it does not (and cannot) pursue every Section 504(a) collection action to seek civil penalties assessed in an FCC forfeiture order. The FCC also views its authority to refer collection actions to DOJ as discretionary. *See* FCC Enforcement Overview, *supra*, at 17 (stating that "the FCC *may* refer the case to the U.S. Department of Justice (DOJ) for enforcement") (emphasis added).

88. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 255 (2012) (citation and internal quotation marks omitted; brackets and bracketed text in original).

Third, potential judicial review in the context of a Section 504(a) DOJ collection action is severely circumscribed in certain jurisdictions. While a Section 504(a) collection action ostensibly involves a "trial *de novo*," several courts have held that judicial review in this context is "extremely limited."[89] Others have held that defendants are barred from raising constitutional and statutory arguments as defenses (including challenges to the validity of the underlying FCC regulations that allegedly establish liability).[90]

Fourth, a defining feature of the FCC's process (either under the NAL-to-forfeiture order approach or the NOH process before the FCC's ALJ) is that it adjudicates both liability and the civil penalty in a final agency action (the forfeiture order) *before* a jury or Article III judge has any involvement in the process.[91] The upshot is to expose the defendant to the collateral consequences of the order for however long it takes for (i) the FCC to refer the matter to DOJ, (ii) DOJ to bring a Section 504(a) collection action in federal court, and (iii) the collection action to proceed to trial. Given the applicable five-year statute of limitations,[92] this process could deprive the target of any ability to exercise its right to a jury trial until many years after the forfeiture order was issued. That is the opposite of how jury review typically works – where there are only *allegations* and *claims* at the time a lawsuit is filed, not final adjudications of liability and the remedy.

Moreover, the collateral consequences of an FCC forfeiture order are severe. They include reputational harm associated with a finding that the target has violated the law,[93] as well as an immediate debt to the Treasury where the FCC has imposed forfeiture penalties. A forfeiture order can also negatively affect how the FCC treats the target in unrelated pending matters before the agency. If an enforcement target has the right to a jury trial, as held in *Jarkesy*, it should follow that subjecting it to these serious consequences *before* a jury can adjudicate liability is irreconcilable with the Seventh Amendment. Given the *in terrorem* effect of a forfeiture order – including the cloud that would otherwise hang over an enforcement target for many months or even years while it waits for a potential DOJ collection action and even longer for an eventual trial[94] – it is not surprising that the vast majority of targets opt to settle, pay the forfeiture and move on, or pay and seek appellate judicial review.[95]

For all these reasons, courts are unlikely to find that the possibility of post-forfeiture jury review – at the discretion of DOJ, in tandem with "extremely limited" judicial review, potentially many years after the enforcement target has borne the severe consequences of a forfeiture order – is an adequate substitute for jury and Article III adjudication *in the first instance*.

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89. *See, e.g.*, *United States v. Olenick*, 2019 WL 2565280, at *3 (W.D. Tex. Apr. 2, 2019) ("[A] district court's subject matter jurisdiction in a case to enforce an FCC forfeiture order under section 504(a) is *extremely limited.*") (emphasis added) (M.J. Report & Recommendation), *adopted*, 2019 WL 3818041, *1 (W.D. Tex. May 14, 2019); *United States v. Sutton*, 2024 WL 2926594, *12 (W.D. Ark. Mar. 27, 2024) (notwithstanding "trial *de novo*" standard under Section 504(a), "[r]eview of a forfeiture amount is limited to whether it reflects a reasonable application of [47 U.S.C. § 503] and the 'adjustment criteria' set out in" FCC rules); *see also id.* (noting that "[o]ther courts have held that an FCC forfeiture penalty should be upheld where the amount is reasonable and consistent with the relevant FCC guidelines.").

90. *See, e.g.*, *United States v. Any & all Radio Station Transmission Equip.*, 207 F.3d 458, 459, 463 (8th Cir. 2000) (district court lacked jurisdiction to hear constitutional challenges to underlying FCC regulations); *United States v. Stevens*, 691 F.3d 620, 622 (5th Cir. 2012) (enforcement target has "an opportunity to present a factual defense to enforcement of the forfeiture," but is barred from raising legal challenges to the validity of the forfeiture order); *Radar Sols., Ltd. v. FCC*, 628 F. Supp. 2d 714, 728 (W.D. Tex. 2009) ("[T]his Court lacks jurisdiction over Plaintiff's claims that the FCC's practice violates Plaintiff's rights to due process."), *aff'd*, 368 F. App'x 480 (5th Cir. 2010); *United States v. Neely*, 595 F. Supp. 2d 662, 669 (D.S.C. 2009) ("Such 'defensive attack[s]' are not permitted even during a 'trial de novo,' . . . which allows for judicial review of the Commission's factual determinations (without deference) but not its regulations. Therefore, insofar as Neely claims that the Commission's forfeiture policy and rules are unlawful . . . , the only 'appropriate procedure for obtaining judicial review of the agency's [regulatory actions] was appeal to the Court of Appeals as provided by statute.'") (citations omitted). More recent Supreme Court precedent may call into question these cases. *See, e.g.*, *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023).

91. The forfeiture order is a final action of the Commission and has immediate effects. Forfeiture orders typically demand payment within 30 days and thereby establish a debt to the U.S. Treasury, as well as the other severe consequences discussed below. *See, e.g.*, *Matter of Cumulus Licensing LLC*, 2024 WL 194111, *8–9, ¶¶ 26-27 (FCC Jan. 16, 2024) (ordering that subject of forfeiture order "is liable for a monetary forfeiture" in a specified dollar amount of civil penalties and directing "[p]ayment of the forfeiture . . . within thirty (30) calendar days.") (original text in bold and all caps).

92. *See* note 86, *supra*.

93. *See, e.g.*, *FCC v. Fox Television Stations*, 567 U.S. at 255 ("reputational injury" resulting from FCC's finding that broadcaster aired "indecent" material caused material harm that was sufficient to establish an actionable constitutional violation, even though FCC did not impose monetary penalties).

94. *See, e.g.*, *Action for Children's Television v. FCC*, 59 F.3d 1249, 1255 (D.C. Cir. 1995) ("Once an action is timely filed, . . . there is no law limiting the amount of time that may pass before the case is actually tried. In an extreme case, therefore, a [defendant] could wait as long as six or seven years from the [challenged conduct] . . . until its first opportunity for judicial review of the Commission's decision. . . . By all indications, a long wait promises to be the rule rather than the exception.").

95. Generally, a forfeiture target can seek judicial review in a U.S. Court of Appeals only if it first pays the penalties assessed. *Compare AT&T Corp. v. FCC*, 323 F.3d at 1085 (appellate review allowed where penalty was paid), *with Pleasant Broad. Co. v. FCC*, 564 F.2d 496, 500 (D.C. Cir. 1977) (appellate review foreclosed where penalty was not paid). This path to judicial review, however, cannot vindicate Seventh Amendment rights because no jury is involved; review is before a panel of appellate judges.

As the dissenting justices recognized, legislation will be necessary

As noted above, unlike the SEC, the FCC currently lacks statutory authority to commence enforcement actions with jury trials in federal court; under the current (and antiquated) statutory scheme, the FCC can only proceed with a forfeiture action seeking civil penalties or other remedies administratively, via the typical NAL-to-forfeiture order process or the rarely used NOH process.[96]

To be able to continue to enforce the Communications Act and Commission rules (as it is required to do) – but to do so in a manner that comports with the Seventh Amendment and related constitutional provisions, as interpreted by the *Jarkesy* Court – the FCC will need to obtain new statutory authority to file enforcement actions in federal court with attendant jury-trial rights or, alternatively, allow parties to enforcement proceedings to remove those proceedings to federal court. At least the former reform option was directly contemplated by the dissenting opinion. Justice Sotomayor pointed out that the SEC and certain other agencies (for example, the CFPB and EPA) can choose to file future enforcement actions in federal court, which they are statutorily authorized to do.[97] But she also noted that "[o]thers do not have that choice."[98] "For those and countless other agencies," including the FCC – which was specifically identified among the agencies that pursue enforcement actions administratively[99] – the dissent explained that the Court's holding will effectively require them to "get a new statute from Congress."[100]

Conclusion

Jarkesy is a game-changer for the FCC (as well as other administrative agencies), and the FCC's Enforcement Bureau will not be able to continue with "business as usual."

Even under the narrowest and most optimistic reading of the decision from the FCC's perspective, a great many enforcement actions would require a jury trial in an Article III court – leaving both the FCC's preferred NAL-to-forfeiture order process and its rarely used NOH process incompatible with the Court's holding and the Seventh Amendment. And because the FCC currently lacks the statutory authority to sue in court, it will need to heed the dissent's advice and "get a new statute from Congress." Unless and until it does so, the FCC will be constitutionally foreclosed from continuing with its current enforcement efforts.

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96. *See* note 7, *supra* (citing 47 U.S.C. §§ 503 (FCC authority), 504 (DOJ authority)). The FCC lacks authority to prosecute criminal violations of the Communications Act; those prosecutions must be referred to and, where appropriate, filed by DOJ in federal court with attendant jury-trial rights. *See* FCC Enforcement Overview, *supra*, at 21-22 (discussing 47 U.S.C. § 501).

97. *See Jarkesy*, 144 S. Ct. at 2173-2174.

98. *Id.* at 2174.

99. *See id.* (pointing to FCC and 47 U.S.C. § 503(b)(3)).

100. *Id.*

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