ORAL ARGUMENT NOT YET SCHEDULED
Nos. 24-1224 (lead), 24-1225

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPRINT CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

T-MOBILE USA, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Final Orders
of the Federal Communications Commission

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Mariel A. Brookins
Counsel of Record
Maria C. Monaghan
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 659-6000
mbrookins@USChamber.com

Counsel for Amicus Curiae

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* states as follows:

A. Parties and *Amici*:

Except for the following, all parties, intervenors, and *amici* appearing in this Court in these consolidated cases are listed in the Brief of Petitioners T-Mobile USA, Inc. and Sprint Corporation. As of the finalization of this brief, *amici* appearing in this Court in these consolidated cases are The Chamber of Commerce of the United States of America ("Chamber"), CTIA – The Wireless Association, Electronic Privacy Information Center, Center for Democracy & Technology, Electronic Frontier Foundation, Privacy Rights Clearinghouse, and Public Knowledge.

B. Ruling(s) Under Review:

Petitioners seek direct review of the Federal Communications Commission's ("FCC" or "Commission") forfeiture orders in *T-Mobile USA, Inc.*, Forfeiture Order, File No. EB-TCD-18-00027702 (rel. April 29, 2024) and *Sprint Corporation,* Forfeiture Order, File No. EB-TCD-18-00027700 (rel. April 29, 2024). There are no prior rulings under review.

C. Related Cases:

These cases were not previously before this Court or any other court. The following cases deal with similar Commission forfeiture orders, but do not involve

substantially the same parties as this case: *AT&T, Inc. v. FCC*, No. 24-1225 (5th Cir.) and *Verizon Communications Inc. v. FCC*, No. 24-1733 (2d Cir.).

/s/ Mariel A. Brookins
Counsel for *Amicus Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that *Amicus Curiae* The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

/s/ Mariel A. Brookins
Counsel for *Amicus Curiae*

CIRCUIT RULE 29(d) CERTIFICATE

Amicus curiae The Chamber of Commerce of the United States of America certifies that a separate *amicus* brief is necessary. This brief provides the unique perspective of the world's largest business organization which has represented the interests of its members for over a century. The Chamber's decades of experience participating in legislative, regulatory, and litigation matters involving agency overreach as well as the collection and use of data by American businesses are directly relevant to the issues presented in this appeal.

/s/ Mariel A. Brookins
Counsel for *Amicus Curiae*

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GLOSSARY

DOJ	Department of Justice
FCC or Commission	Federal Communications Commission
SEC	Securities and Exchange Commission
Sprint Forfeiture Order	The forfeiture order imposed on Sprint in *Sprint Corporation*, Forfeiture Order, FCC 24-42 (rel. Apr. 29, 2024)
T-Mobile Forfeiture Order	The forfeiture order imposed on T-Mobile in *T-Mobile USA, Inc.*, Forfeiture Order, FCC 24-43 (rel. Apr. 29, 2024)

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The U.S. Chamber of Commerce is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations.

The FCC's role in data privacy and security is limited to specific regulatory activities directed by Congress. But in the absence of statutory authority to adopt rules to assert a more muscular role on privacy, the agency has at times turned to its Enforcement Bureau to establish new policies outside the strictures of notice-and-comment rulemaking. This approach has resulted in threatening regulated entities with crushing liability for novel violations and obtaining consent decrees where a company acquiesces.

In this case, the FCC initiated an investigation in response to press reports about location data services. Five years later, a divided Commission approved controversial new legal standards—announced through administrative adjudication—and imposed massive civil penalties on T-Mobile, Sprint, and other carriers on the same day. Neither T-Mobile nor Sprint was given an opportunity to test the agency's new legal theories, its methodology for assessing violations, or the

[1] No counsel for any party authored any part of this brief. No entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund this brief. *See* Fed. R. App. P. 29(a)(4)(E). No party opposes this filing.

calculation of the forfeitures before an Article III court. Nor have they had an opportunity, even to this day, to receive a jury trial on their liability or the amount of penalties.

The FCC's orders flagrantly violated the Constitution by depriving Petitioners of their rights to a neutral, Article III adjudicator and a jury. As the Supreme Court recently explained in *SEC v. Jarkesy*, the text, history, and precedent of Article III and the Seventh Amendment emphatically dictate that before the federal government can impose a punitive fine like the ones here, the defendant has a right to an Article III judge and jury. But the FCC imposed its gargantuan fines through its own adjudication.

The panel upheld this clear constitutional violation by invoking Section 504(a) of the Communications Act, which allows DOJ to sue in federal district court to collect unpaid penalties. Because Section 504(a) provides that a DOJ collection action shall include a trial *de novo*, the panel held, Petitioners could have received the Seventh Amendment's protections by refusing to pay the penalties.

That argument fails many times over. *First*, Petitioners could not be expected, nor should they have been forced, to refuse to pay what on its face is a binding government directive, nor do Petitioners have any control over whether DOJ will bring a collection action with its attendant procedural protections. *Second*, regardless whether Petitioners paid the penalties, the forfeiture orders themselves

imposed legal, reputational, and economic harms on Petitioners from the moment they were adopted. *Third*, under both *Jarkesy* and the Constitution's text, Congress may not convert federal agencies into *de facto* district courts by assigning initial adjudication to agencies with appellate review (even *de novo*) by the federal courts. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024) ("involvement by an Article III court *in the initial adjudication* is necessary" for common-law claims (emphasis added)). *Jarkesy* resolves this dispute.

The forfeiture orders also exceeded the FCC's statutory authority, as Petitioners explain. For example, the Communications Act caps damages at a particular amount for each "single act or failure to act," but the FCC determined that T-Mobile had 73 and Sprint had 11 "single act[s] or failure to act[s]" because Petitioners had relationships with 73 and 11 location-based service providers or aggregators. The FCC further asserted that, because there was a purported violation with respect to each of T-Mobile's 79.7 million subscribers and Sprint's 54.4 million subscribers, there were actually 79.7 million "single act[s] or failure to act[s]" by T-Mobile and 54.4 million "single act[s] or failure[s] to act" by Sprint, and therefore it could have imposed a fine of *$159.4 trillion* on T-Mobile and a fine of *$108.8 trillion* on Sprint. The panel avoided this issue entirely by holding *sua sponte* that Petitioners forfeited it, but they did not (*see* Pet. 19-21) and the statute requires vacatur.

The FCC's violation of Petitioners' constitutional and statutory rights conflicts with decisions of the Supreme Court and another federal court of appeals, as Petitioners explain, warranting rehearing. *See* Pet. 7-19. The exceptional nature of the issues presented also merits plenary consideration by this Court, and the Chamber respectfully submits this brief to further elucidate those issues. *See* Fed. R. App. P. 40(b)(1)-(2).

I. REHEARING IS WARRANTED TO REMEDY THE FCC'S UNCONSTITUTIONAL PROCESS FOR IMPOSING PENALTIES

The FCC imposed a $80 million penalty on T-Mobile and $12.2 million penalty on Sprint without any judicial process. Rather than making its case before an Article III judge and jury as the Constitution requires, the FCC made its case to itself. As *Jarkesy* explains, that violates the Seventh Amendment because, when it comes to civil penalties like those at issue here, respondents have "the right to be tried by a jury of [their] peers before a neutral adjudicator." *Jarkesy*, 144 S. Ct. at 2139. The panel held (at 15-16) that Section 504(a) resolves the Seventh Amendment problem, but that is wrong: The Constitution required the right to trial by jury at the outset.

A. Article III And The Seventh Amendment Entitled Petitioners to A Jury Trial

Here the FCC seeks civil money penalties, a "type of remedy available only in law courts." *Jarkesy*, 144 S. Ct. at 2136; *see also* United States Br. 12, *United*

States v. Rhodes, No. 9:21-cv-0110 (D. Mont. Mar. 1, 2024), ECF No. 108 (an FCC forfeiture penalty "is a civil penalty" that is "plainly punitive in nature"). That means the Constitution required an Article III judge and jury.

B. Section 504(a) Does Not Save The FCC's Approach to Imposing Forfeitures

The panel reached the opposite conclusion because of Section 504(a), which allows DOJ to sue in federal district court to collect unpaid FCC forfeiture penalties. But Section 504(a) does not solve the problem.

1. The Forfeiture Orders Compelled Payment

Section 504(a) does not satisfy T-Mobile's and Sprint's right to de novo jury review. The FCC argues that Section 504(a) gave Petitioners a "statutory right" to Section 504(a) review. T-Mobile Forfeiture Order ¶ 97 n.315; *see also id.* ¶ 97 (T-Mobile was "entitled" to Section 504(a) review). That is mistaken.

Section 504(a) does not grant any rights to regulated entities; rather, it empowers DOJ to institute a collection action in certain circumstances. Section 504(a) is titled "Recovery." It provides that FCC forfeitures "shall be recoverable … in a civil suit in the name of the United States brought in [federal district court]." 47 U.S.C. § 504(a). Nothing in Section 504(a) entitles an FCC defendant to refuse to pay penalties or demand an Article III court and jury in the event it fails to do so. Section 504(a) simply enables DOJ to sue for the funds when a defendant does not

pay its debt. Should DOJ decide not to collect, Petitioners would have no mechanism to assert their constitutional rights.

Furthermore, nothing about the FCC's forfeiture orders suggests that Petitioners might be "entitled" to disregard them. The orders were titled "Forfeiture Order," not "Forfeiture Suggestion." T-Mobile Forfeiture Order at 1. The orders were "[b]y the Commission." *Id.* In the first paragraph of the T-Mobile order, for example, the Commission wrote that "we … impose a penalty of $80,080,000 against T-Mobile." *Id.* ¶ 1. The order states: "**IT IS ORDERED**" that T-Mobile "**IS LIABLE FOR A MONETARY FORFEITURE** in the amount of … $80,080,000." *Id.* ¶ 109. The order states that "[p]ayment of the forfeiture shall be made … within thirty (30) calendar days." *Id.* ¶ 110. And T-Mobile "shall send electronic notification," the order continues, upon payment. *Id.* ¶ 110.

Needless to say, that is language of coercion. The orders tell Petitioners what they "shall" do. And they require Petitioners to do it promptly. Despite all the orders' emphatic commands, astoundingly, the FCC says that any payment by T-Mobile or Sprint was made "voluntarily." *Id.* ¶ 97 n.315. That is Orwellian nonsense.

2. The Forfeiture Orders Immediately Harmed Petitioners

The difference between a trial initiated in an Article III court and a DOJ collection action following an in-house adjudication is not merely semantic. It is

embedded in the constitutional design for good reason, because it protects targets of enforcement actions from being unilaterally deemed a lawbreaker in an invalid and unfair procedure, and from facing the legal, reputational, and economic harms that come from a finding of liability in that proceeding. The panel suggested (at 19) that the FCC order combined with nonenforcement is a "positive outcome" for Petitioners, but ignored all these harms.

As the Supreme Court has noted, FCC orders impose "reputational injury" in addition to "legal consequence." *FCC v. Fox Television Stations*, 567 U.S. 239, 255 (2012). The agency's "findings of wrongdoing can result in harm to a broadcaster's reputation with viewers and advertisers," for example, given the "strongly disapproving terms" that "are contained in the permanent Commission record," and the fact that such findings are "widely publicized." *Id.* at 256 (cleaned); *see also* CTIA Amicus Brief at 27 (Nov. 27, 2024). Meanwhile, enforcement targets must determine whether the forfeiture order must be further disclosed to investors or in potential applications for new government contracts or in applications for new lines of credit, for instance. These reputational and economic harms exist regardless of whether DOJ tests the allegations in federal court.

Additionally, the procedures in an in-house adjudication contribute to the costs imposed on enforcement targets. The safeguards of federal court do not exist. An FCC investigation and enforcement action can linger for years without

resolution; indeed, in the orders under review, it took five years from the initiation of an investigation until the FCC issued its forfeiture orders against T-Mobile and Sprint. And should a target eventually get to federal court, it must start the process all over again. Even then, the target is branded with being a defendant in a "collection" action for a forfeiture already imposed.

3. The Panel Opinion Renders *Jarkesy* Inapplicable To FCC Adjudications

Rehearing is warranted to correct the panel's Article III holding because it conflicts with *Jarkesy* and a decision of the Fifth Circuit and involves issues of exceptional importance. *See* Fed. R. App. P. 40(b)(1)-(2). Under the panel's opinion, *Jarkesy* would not apply to FCC adjudications because of the Section 504 process. But as explained above, this process puts regulated parties in the untenable position of needing to defy a federal order to receive their constitutionally required jury trial, and then only if the Department of Justice elects in its discretion to drop the Sword of Damocles on the defendant. In part for these reasons, the Fifth Circuit recently reached the opposite conclusion—civil penalties for violations of FCC rules can only be imposed in an Article III court equipped with a jury-trial right. *See* Pet. 9-10. This Court should resolve the split in authority through rehearing.

II. REHEARING IS WARRANTED TO CORRECT THE FCC'S FLAWED STATUTORY INTERPRETATION, WHICH PRODUCES ABSURD RESULTS.

The FCC has claimed for itself substantial discretion to determine virtually every element of a civil penalty: the number and type of violations that occurred in a given case, how to apply forfeitures to those claimed violations, whether to apply upward adjustments, and more. This unpredictable and standardless exercise of authority has enabled the FCC's Enforcement Bureau to threaten regulated entities with exorbitant penalties to secure consent decrees and behavioral commitments it could not otherwise obtain. *See, e.g.*, *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325, ¶ 52 (2014) (claiming, over two dissents, the ability to impose a $9 billion forfeiture) ("TerraCom NAL").

Petitioners' cases illustrate the problem. Section 503(b) provides that a person may be liable for forfeiture for "willfully or repeatedly fail[ing] to comply with any of the provisions of" the Communications Act or rules promulgated by the FCC. 47 U.S.C. § 503(b)(1)(B). The Act then caps the total per-violation amount at approximately $200,000 for "each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed" approximately $2 million, numbers adjusted for inflation, "for any single act or failure to act" that violates the statute or FCC rules. *Id.* § 503(b)(2)(B).

The continuing violation provision "subjects to separate liability the recurring daily episodes of a delictual pattern that might otherwise be treated in the aggregate"—such as operating a broadcast station each day for 14 consecutive days without a license. *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497 (5th Cir. 1980). It does not penalize, by mere passage of time, the "fail[ure] to fulfill … a single, pointed duty, admitting of only a single dereliction," even if "the effect of [the] failure to act within the prescribed period persists." *Id.* Nor, by extension, does it permit the agency to identify tens, hundreds, or even millions of separate continuing violations based on a single failure to perform a legal duty.

Here, the Commission's findings in the forfeiture orders could support at most a single "failure to act" warranting a forfeiture—that Petitioners purportedly "failed to take reasonable measures to discover and protect against attempts to gain unauthorized access to its customers' location information." T-Mobile Forfeiture Order ¶ 45. But the FCC found *73* separate violations by T-Mobile and *11* separate violations by Sprint—not grounded in additional "acts" or "failure[s] to act" committed by Petitioners, but instead based on each location-based service provider that Petitioners did business with.

As the FCC saw it, that was conservative. According to the Commission, it "could well have chosen to look to the total number of [Petitioner's] subscribers when determining the number of violations." *Id.* ¶ 80. As of December 31, 2018,

T-Mobile had 79.7 million wireless subscribers. T-Mobile, Form 10-K (Feb. 6, 2019), https://tinyurl.com/bdhndyby. As of March 2019, Sprint had 54.4 million subscribers. Sprint, Form 10-K (May 29, 2019), https://tinyurl.com/b2jmt6te. Taking the agency at its word, using those numbers and multiplying them by the approximately $2 million per-violation cap equals $159.4 trillion and $108.8 trillion, respectively. That is not a typo, and it is the amount the FCC says it could have fined Petitioners under Section 503. It is more than double the entire world's GDP. An interpretation that allows this "ludicrous … result[]" and that would permit the FCC to regulate in such "draconian fashion" cannot possibly be what Congress had in mind when enacting a *cap* on damages. *WIYN Radio*, 614 F.2d at 497-98.

In the forfeiture orders, the FCC invoked *Chevron* deference (without calling it that, of course). The FCC began by asserting that Section 503(b)(2)(B) does not "speak to" "the application of the phrase 'single act or failure to act.'" T-Mobile Forfeiture Order ¶ 78. That is *Chevron*'s first step. The FCC then asserted that its 73-violations determination and 11-violations determination were "reasonabl[e]." *Id.* ¶ 79 (determination was "rational and properly within the Commission's discretion"). That is *Chevron*'s second step. But "*Chevron* is overruled." *Loper Bright v. Raimondo*, 144 S. Ct. 2224, 2273 (2024).

Congress enacted the Administrative Procedure Act "as a check upon administrators whose zeal" has "carried them to excesses not contemplated in

legislation creating their offices." *Id.* at 2261. The FCC's approach in this case is exactly what Congress had in mind, but the panel ignored all of these errors by deeming the argument forfeited.

CONCLUSION

This Court should grant the petition.

September 29, 2025

Respectfully submitted,

/s/ Mariel A. Brookins
Counsel of Record
Maria C. Monaghan
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 659-6000
mbrookins@USChamber.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because this brief contains 2600 words. This brief also complies with the typeface requirements of Fifth Circuit Rules 29.2 and 32.1 and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Fifth Circuit Rules 29.2 and 32.2 and Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font.

Additionally, this brief complies with D.C. Circuit Rule 32(b)(1) because when electronically filed in PDF format, the document was generated from the original word-processing file and is fully text searchable.

September 29, 2025 */s/* Mariel A. Brookins

CERTIFICATE OF SERVICE

I certify that on September 29, 2025, a true and correct copy of this Brief of *Amici Curiae* was filed and served electronically upon counsel of record registered with the Court's CM/ECF system.

September 29, 2025 */s/* Mariel A. Brookins