No. 00-537

In the Supreme Court of the United States

ALAN FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the owner of equipment used for unlicensed, low power radio broadcasts can raise, as a defense to a forfeiture action brought by the government in district court, the validity of the Federal Communications Commission's regulations concerning low power radio stations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 207 F.3d 458. That opinion vacated an earlier opinion of the court (Pet. App. A14-A35), which was reported at 169 F.3d 548. The opinion of the district court (Pet. App. A36-A45) is reported at 976 F. Supp. 1255.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2000. A petition for rehearing was denied on July 5, 2000 (Pet. App. A46). The petition for a writ of

certiorari was filed on October 3, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act) seeks "to maintain the control of the United States over all the channels of radio transmission." 47 U.S.C. 301. The Act therefore provides that "[n]o person shall use or operate any apparatus for the transmission of * * * signals by radio" without "a license in that behalf granted under the provisions of this [Act]." *Ibid.* The Act authorizes the Federal Communications Commission (FCC or Commission) to grant radio licenses when it finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). The Act also authorizes the Commission to issue rules and regulations regarding license applications and orders regarding specific license applications. 47 U.S.C. 154(i).

Section 402(a) of Title 47 of the United States Code specifies that any challenge to the validity of an FCC rule or regulation must be brought under the Administrative Orders Review Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), which in turn provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342 (1994 & Supp. IV 1998). See also *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942) (FCC's promulgation of regulations is an order reviewable under Section 402(a)). Section 402(b) of Title 47 further provides that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review

FCC orders regarding individual license applications, modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. IV 1998).

The Communications Act provides a number of mechanisms to enforce its licensing requirement, including cease-and-desist orders (47 U.S.C. 312 (1994 & Supp. IV. 1998)), injunctions (47 U.S.C. 401(a)), and criminal penalties (47 U.S.C. 501). The Act also provides for a monetary forfeiture penalty against those who willfully and repeatedly fail to comply with the Act. 47 U.S.C. 503(b). The government recovers that penalty in a civil suit in district court, where there "shall be a trial de novo." 47 U.S.C. 504(a).

Congress determined, however, that the FCC needed additional authority to ensure that owners would not retain radio equipment used to violate the Act. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 59 (1982) (Conf. Rep.). Therefore, in 1982, Congress amended the Act to provide that any device used with willful and knowing intent to violate the prohibition on broadcasting without a license "may be seized and forfeited to the United States," Communications Amendments of 1982, Pub. L. 97-259, Tit. I, § 125, 96 Stat. 1098 (47 U.S.C. 510(a)), "thus preventing its continued operation" (Conf. Rep. 58). The amendment further provides that "[a]ny property subject to forfeiture to the United States under this section may be seized by the Attorney General of the United States upon process issued * * * by any district court of the United States having jurisdiction over the property." 47 U.S.C. 510(b).

2. In 1996, the FCC received a complaint from a radio station in Rochester, Minnesota, that an unlicensed radio station was broadcasting at a frequency of 97.7 MHz. The FCC identified the unlicensed station as "the BEAT," owned and operated by petitioner. The

FCC sent petitioner a warning letter, which informed him that 47 U.S.C. 301 prohibits broadcasting without a license. Pet. App. A4, A16. Petitioner refused to stop broadcasting. *Id.* at A5.

The United States filed suit in district court to obtain authorization to seize petitioner's transmission equipment in accordance with 47 U.S.C. 510. Petitioner admitted that his equipment was used to broadcast without the required license. Pet. App. A40. Nevertheless, he opposed forfeiture on the ground that the FCC's regulations at that time, which prohibited the licensing of low power radio stations such as petitioner's, violated his rights under the First Amendment and other constitutional and statutory provisions. *Id.* at A38.[1]

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[1] Petitioner was broadcasting at approximately 20 watts. Pet. App. A16. In 1996, when this dispute arose, the Commission generally would not license low power radio stations, *i.e.*, stations operating at less than 100 watts. Until 1978, the Commission had licensed low power (typically 10 watt) educational stations. In 1978, however, the Commission explained that it would no longer license such stations because they "function in a manner which defeats the opportunity for other more efficient operations which could serve larger areas, and bring effective noncommercial educational radio service to many who now lack it." *In re Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240, 248 (1978), aff'd on recons., 70 F.C.C.2d 972, 973 (1979). After the events at issue in this case, the Commission determined that low power stations that meet certain conditions will not interfere with existing full power FM stations. It therefore issued new rules establishing two classes of low power noncommercial radio stations, one at a maximum of 100 watts and one at a maximum of 10 watts. *In re Creation of Low Power Radio Service*, 15 F.C.C.R. 2205 (rel. Jan. 27, 2000), aff'd on recons., FCC 00-349 (rel. Sept. 28, 2000). A petition to review the newly adopted low power rules is pending before the D.C. Circuit. *National Ass'n of Broad.* v. *FCC*, No. 00-1054 (argued Nov. 28, 2000).

The district court granted judgment on the pleadings in the government's favor. Pet. App. A36-A45. "Because [petitioner] admit[ted] that he used the radio equipment to broadcast without an FCC license," the court held, "there [was] no material issue remaining in regards to a violation of 47 U.S.C. § 301." Pet. App. A40. In so holding, the court declined to consider the validity of the FCC's low power regulations because "jurisdiction" over that question "is properly conferred on the Court of Appeals pursuant to 47 U.S.C. § 402(a)-(b)." Pet. App. A44.

3. The United States Court of Appeals for the Eighth Circuit initially reversed and remanded in a decision in which each judge on the panel issued a separate opinion. Pet. App. A14-A35. Judge McMillian wrote the lead opinion (*id.* at A15-A31), Judge Morris Sheppard Arnold issued a concurring opinion (*id.* at A31-A32), and Judge John T. Noonan, sitting by designation, dissented (*id.* at A32-A35). On panel rehearing, however, the court of appeals unanimously adopted the reasoning of Judge Noonan's initial dissenting opinion and affirmed the judgment of the district court. *Id.* at A1-A13.

The court of appeals observed that petitioner's "defense is exclusively focused on the validity of the [low power broadcast] regulations." Pet. App. A12. Under the Communications Act, the court noted, the courts of appeals have "exclusive jurisdiction" over "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." *Ibid.* (quoting 47 U.S.C. 402(a) and 28 U.S.C. 2342 (1994 & Supp. IV 1998)). The court of appeals stated that "[i]t is hard to think of clearer language confining the review of regulations to the Courts of Appeal[s]." *Ibid.*

Moreover, the court explained, the "Supreme Court has authoritatively determined that the exclusive jurisdiction of the Court of Appeals over rulemaking by the FCC may not be evaded by seeking to enjoin a final order of the FCC in the district court." Pet. App. A12 (citing *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984)). The court reasoned that "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *Ibid.* Regardless of the "way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements." *Ibid.* Because the district court "has no jurisdiction to decide the validity of the regulations," the court held, the district court "has no jurisdiction to consider the defense." *Ibid.*

The court of appeals explained that the statutory requirement of an initial agency decision followed by review in the court of appeals makes sense for three reasons. Pet. App. A13. First, it "ensure[s] review based on an administrative record made before the agency charged with implementation of the statute." *Ibid.* Second, it "ensure[s] uniformity of decision-making because of uniform factfinding made by the agency." *Ibid.* Finally, it "bring[s] to bear the agency's expertise in engineering and other technical questions." *Ibid.*

The court of appeals suggested that petitioner's case "might be different" if he "had no way of obtaining judicial review of the regulations." Pet. App. A13. As the court explained, however, petitioner "could have obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would have permitted appeal to the circuit." *Ibid.* The court

therefore rejected petitioner's refusal to "follow the procedures established by law" and refused to allow an "end run" around "the statutory channels provided for constitutional claims." *Ibid.*

The Eighth Circuit, with four judges dissenting, denied petitioner's request for en banc review. Pet. App. A46.

ARGUMENT

The decision of the court of appeals is correct. Although the decision conflicts with the current position of the Sixth Circuit, this case is not an appropriate one in which to resolve the conflict because its resolution will not affect the ultimate outcome of the case. Moreover, there is reason to believe that the Sixth Circuit may modify its view to conform to the decision of the court of appeals here. Finally, because the FCC has made changes to the regulations challenged by petitioner, it is not clear that the conflict is of continuing importance. Review by this Court is therefore not warranted at this time.

1. a. The court of appeals correctly affirmed the district court's conclusion that it lacked jurisdiction to entertain petitioner's First Amendment challenge to the FCC's licensing regulations.[2] As the court of appeals held, the Communications Act confines review

[2] As we have noted above, in the district court, petitioner challenged the regulations on a variety of constitutional and statutory grounds. See p. 4, *supra*. His petition for a writ of certiorari, however, concerns only his First Amendment challenge. See Pet. i (referring to "a constitutional defense"), 11-12 (describing "[t]he issue in this case" as "whether Federal District Courts have jurisdiction to consider the constitutionality of FCC regulations"), 27-30 (relying on the importance of the First Amendment issues at stake to support the request for review).

of FCC regulations to the courts of appeals. See Pet. App. A12-A13.

The Communications Act expressly provides that "*[a]ny* proceeding to enjoin, set aside, annul, or suspend *any order* of the Commission under this chapter (except those appealable under subsection (b) of this section[3]) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." 47 U.S.C. 402(a) (emphasis added). That chapter in turn provides, in relevant part, that "[t]he court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of*—(1) *all final orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1) (emphasis added). This Court long ago held that "the Commission's promulgation of [its] regulations is an order reviewable under [47 U.S.C.] 402(a)." *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 425 (1942). As the court of appeals concluded, "[i]t is hard to think of clearer language confining the review of regulations to the Courts of Appeal[s]." Pet. App. A12.

Moreover, as the court of appeals explained (Pet. App. A12), this Court has held that the exclusive jurisdiction of the courts of appeals over FCC rulemaking may not be evaded by seeking to enjoin a final order of the FCC in the district court. See *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). "A

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[3] Subsection (b) of 47 U.S.C. 402 gives the United States Court of Appeals for the District of Columbia Circuit jurisdiction over FCC orders regarding individual license applications, modifications, revocations, or suspensions. 47 U.S.C. 402(b) (1994 & Supp. IV 1998).

defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Pet. App. A12. Therefore, in this case, just as in *ITT*, 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." 466 U.S. at 468.

As the court of appeals recognized, the statutory scheme's requirement of an initial regulatory decision by the Commission followed by review in the court of appeals makes eminent sense. Pet. App. A13. It "ensure[s] review based on an administrative record made before the agency charged with implementation of the statute." *Ibid.* In addition, it "ensure[s] uniformity of decisionmaking because of uniform factfinding made by the agency." *Ibid.* Finally, it "bring[s] to bear the agency's expertise in engineering and other technical questions." *Ibid.*

b. Petitioner mistakenly claims (Pet. 22-24) that Section 402(a) is not applicable to his challenge because the FCC has not issued an "order" from which he could appeal. Contrary to petitioner's contention that "the FCC regulatory scheme disallowing micro-broadcasting does not constitute an appealable 'order' under §402(a)" (Pet. 22), the promulgation of regulations is (as we have explained above) an "order" within the meaning of Section 402(a). See *Columbia Broad. Sys.*, 316 U.S. at 425. Petitioner's lack of standing to challenge those regulations directly (see Pet. 22) does not negate the existence of an "order" triggering the applicability of Section 402(a).

To the extent that petitioner's argument is based on the absence of any order that he personally can appeal at this time, petitioner himself is responsible for that

situation. He could have petitioned the FCC for a rulemaking to repeal or modify its low power broadcasting regulations. See 47 C.F.R. 1.401(a) (providing that "[a]ny interested person may petition for the issuance, amendment or repeal" of a "rule or regulation" of the Commission). If the Commission denied the request, or granted it in a manner that aggrieved petitioner, he could have appealed that order to the court of appeals in accordance with Section 402(a).

In the alternative, petitioner could have raised his challenge to the FCC's low power broadcasting policies by filing an application for a broadcast license, accompanied by a request for a waiver of the FCC's low power regulations. If the Commission denied his application and request for waiver, petitioner could then have appealed the denial to the United States Court of Appeals for the District of Columbia Circuit, where he could have asserted that the regulations were constitutionally invalid. See 47 U.S.C. 402(b)(1); note 3, *supra*. See generally *Turro* v. *FCC*, 859 F.2d 1498, 1499 (D.C. Cir. 1988). The fact that petitioner sought to bypass the Communications Act's judicial review procedures cannot vest the district courts with jurisdiction to review FCC rules in contravention of the Act's command that review of those rules is the exclusive province of the courts of appeals. See *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000).

Petitioner's contention (Pet. 22, 26-27) that he submitted a request that the FCC waive its minimum power requirements but the Commission did not act on the request does not alter that analysis. Waiver of the minimum power requirements would not permit petitioner to operate his radio station unless he also applied for and received a license. See 47 U.S.C. 301, 308 (1994 & Supp. IV 1998). FCC regulations therefore contem-

plate that a request for a waiver of a specific requirement for operation of a radio station will be made in conjunction with an application for a license to operate a station. See 47 C.F.R. 73.3566(a). And it is undisputed that petitioner never submitted a license application.[4] Moreover, the FCC's failure to act on a license application or waiver in a timely manner is subject to review by mandamus in the court of appeals. See *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984). Thus, the contention that the FCC failed to act on petitioner's waiver request provides no basis for district court review of FCC regulations.[5]

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[4] Although the district court and the court of appeals assumed without deciding that petitioner had submitted a valid waiver request, Pet. App. A7, petitioner's request was facially deficient quite apart from the fact that it was not made in conjunction with a license application. A request to waive the FCC's low power rules must demonstrate "good cause" (47 C.F.R. 1.3) and "set forth the reasons" for the request (47 C.F.R. 73.3566(a)). In a letter responding to the FCC's warning letter, petitioner's counsel wrote that he "requests a waiver of the prohibition on micro broadcasts of less than 100 watts." C.A. App. 30. That summary request with no supporting material plainly failed to meet the minimum regulatory requirements and thus fell short of what was necessary to constitute a valid waiver request. See *Rio Grande Family Radio Fellowship, Inc.* v. *FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968) (holding that "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action").

[5] In view of the availability of mandamus to prevent unreasonable delay in agency action, there is no merit to petitioner's claims (Pet. 26-27) that the FCC has an unlimited amount of time to rule on a valid waiver request and that the Commission could use the waiver process to insulate "a blatantly unconstitutional regulation" from review. Furthermore, as we have explained, someone who wants to make a constitutional challenge to an existing regulation

c. Petitioner also errs in contending (Pet. 20-22) that the decision in this case is inconsistent with 47 U.S.C. 504(a), which provides for a "trial de novo" in district court when the FCC assesses a monetary forfeiture. Petitioner's argument that this provision permits him "to assert all available defenses," including the invalidity of the low power regulations (Pet. 22), is flawed in two respects.

First of all, district court jurisdiction over the property forfeiture in this case arises under 47 U.S.C. 510 rather than 47 U.S.C. 504(a), and it is far from clear that Congress intended for the monetary forfeiture procedures described in Section 504(a) to apply to property forfeiture actions brought under the later-enacted Section 510.[6] Furthermore, the requirement of a "trial de novo" does not necessarily encompass a requirement that the trial entail consideration of the validity of the FCC's low power rules. The asserted invalidity of the FCC's low power broadcasting regulations does not speak to the gravamen of the government's complaint, which is that petitioner chose to broadcast without obtaining a license as required by the Act. See *United States* v. *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d

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can do so by filing a petition requesting the FCC to repeal or modify the objectionable regulation, see 47 C.F.R. 1.401(a), and may obtain judicial review of the Commission's action on that petition in the court of appeals, 47 U.S.C. 402(a).

[6] Although Section 504(a) states that it applies to "any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter," it also states that "forfeitures provided for in this chapter shall be payable into the Treasury," a provision that appears not to apply to property and that therefore suggests that the Section applies only to monetary forfeitures. See 47 U.S.C. 504(a).

543, 549-550 (6th Cir. 2000) (holding that First Amendment does not provide a defense to the forfeiture of radio equipment used in unlicensed low power broadcasting).[7]

2. Petitioner points (Pet. 11-20) to a conflict between the decision in this case and the Sixth Circuit's decision in *United States* v. *Any and All Radio Transmission Equipment (Strawcutter)*, 204 F.3d 658 (6th Cir. 2000). There, the Sixth Circuit held that a district court may, in ruling on a forfeiture action against radio equipment used for unlicensed broadcasting, consider whether the low power regulations are unconstitutional. *Id.* at 667. Although the two cases are in disagreement on the jurisdictional question, this Court's review is not warranted at this time for several reasons.[8]

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[7] Petitioner's assertion (Pet. 24-25) that the decision of the court of appeals "departs from established federal jurisdiction and standing principles when a party faces an enforcement action brought by the government" is unfounded. Petitioner's sole support for that proposition is a single sentence from a treatise on federal courts that does not address the question at issue here—whether a defendant in an enforcement action can raise an issue in that action when resolution of that issue is committed by statute to another forum and the defendant has bypassed available opportunities to raise the issue in the forum to which it is statutorily committed.

[8] Petitioner mistakenly suggests (Pet. 17-18) that the decision of the court of appeals in this case also conflicts with *Pleasant Broadcasting Co.* v. *FCC*, 564 F.2d 496 (D.C. Cir. 1977). In that case, two licensees requested appellate review of FCC monetary forfeiture orders, issued under 47 U.S.C. 503(b), claiming that they were operating under a "misunderstanding" of the Commission's rules and that the Commission had applied its rules "arbitrarily." 564 F.2d at 499-500. The District of Columbia Circuit held that Section 504(a) grants district courts exclusive jurisdiction to review the FCC monetary forfeiture orders, regardless of whether the FCC or the licensee initiates the lawsuit. 564 F.2d at 502. But

a. First, this case is not an appropriate one in which to resolve the conflict, because its resolution will not affect the ultimate outcome of the case. The invalidity under the First Amendment of the FCC's minimum power requirements for radio stations would not provide a defense to forfeiture based on broadcasting without a license.

It has long been settled that the Act's prohibition on broadcasting without a license does not violate the First Amendment. *National Broad. Corp.* v. *United States* (*NBC*), 319 U.S. 190, 227 (1943) ("The right of free speech does not include * * * the right to use the facilities of radio without a license."); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 (1994); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-389 (1969). Indeed, petitioner concedes (Pet. 28) that the Communications Act's licensing requirement is valid. Thus, even if petitioner is correct that he would qualify for a license but for an unconstitutional impediment to his receiving one, he still has no entitlement to broadcast without one. If the rule were otherwise, the "confusion and chaos" that was characteristic of the airwaves before effective government regulation—in which, with "everybody on the air, nobody could be heard," *NBC*, 319 U.S. at 212—would necessarily reappear because of the inevitable interference.

Pleasant Broadcasting did not hold that a district court would have authority to consider a challenge to a monetary forfeiture order based on an attack on the validity of the underlying regulations. Thus, even if we assume that case law regarding monetary forfeitures is applicable to this property forfeiture case, but see p. 12 & note 6, *supra*, *Pleasant Broadcasting* does not conflict with the holding in this case that district courts lack jurisdiction to assess the validity of FCC regulations.

Strawcutter itself and a subsequent Sixth Circuit decision support that conclusion. The court noted in *Strawcutter* that "[t]he district court may have been right when it concluded that even if the challenged regulation is unconstitutional, the statute is valid, and that [the broadcaster's] violation of the statute is the beginning and end of the government's forfeiture case." 204 F.3d at 668. And, in *Any and All Radio Station Transmission Equipment (Perez)*, 218 F.3d at 549-550, the Sixth Circuit affirmed a district court's ruling that the First Amendment did not provide a defense to forfeiture of radio equipment used in unlicensed low power broadcasting. The court stated: "Because [the claimant] does not have a First Amendment right to broadcast his views on an unlicensed radio station, this argument does not present a defense to forfeiture." *Id.* at 549-550. As a practical matter, therefore, it ultimately makes no difference whether the district court has jurisdiction over petitioner's challenge to the FCC's regulations, because that challenge cannot immunize petitioner from the consequences of his violation of the Act.

Indeed, it is precisely because the outcome on the merits of this sort of case is so clear that the Second Circuit recently avoided resolving this very jurisdictional question. *Prayze FM* v. *FCC*, 214 F.3d 245, 251 (2d Cir. 2000). See Pet. 13 n.3. In *Prayze*, the Second Circuit affirmed the grant of a preliminary injunction against an unlicensed low power broadcaster. The court declined to "resolve the jurisdictional question" because "even assuming" that the district court would have jurisdiction to evaluate the constitutionality of the low power regulations the FCC had demonstrated that it would likely prevail. See *Prayze*, 214 F.3d at 251. Because the unlicensed broadcaster's attack on the low

power rules lacked merit, the Second Circuit saw no need to resolve the conflict identified by petitioner. *Ibid.*

b. This Court's resolution of the conflict is also not necessary at this time because there is reason to believe that the Sixth Circuit may reconsider its current position. As petitioner has noted, "the Sixth Circuit's opinion * * * relied in part on the now-vacated Eighth Circuit opinion." Pet. 17. Specifically, the Sixth Circuit's decision in *Strawcutter* adopted Judge Morris Arnold's concurrence in the original panel opinion in this case. 204 F.3d at 667. One month after the *Strawcutter* decision was issued, however, Judge Arnold and Judge McMillian voted to vacate the prior opinions (including Judge Arnold's concurrence) and to affirm the district court in accordance with the views of Judge Noonan. It is entirely possible, given the Eighth Circuit's (and Judge Arnold's) ultimate decision in this case, that the Sixth Circuit will likewise reconsider its view when an occasion to do so arises.[9]

For that reason, two courts of appeals have questioned the continuing vitality of the *Strawcutter* opinion. The Second Circuit, for example, noted the decision in *Strawcutter* but observed that "in reaching that result the Sixth Circuit relied in relevant part on an Eighth circuit opinion that was superseded." *Prayze*, 214 F.3d at 251. Similarly, the Ninth Circuit, after explaining that it found the reasoning of the court

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[9] The position of the Eighth Circuit, in contrast, now appears settled. The court of appeals recently reaffirmed and extended the holding of the present case in *United States* v. *Neset*, No. 98-3539, 2000 WL 1742042, at *5 (8th Cir. Nov. 28, 2000), in which it held that, in adjudicating the government's request for injunctive relief under 47 U.S.C. 401(a), a district court also lacks jurisdiction to consider the validity of the FCC's low power rules.

of appeals in this case "persuasive," cited *Prayze*, "pointing out the Sixth Circuit's reliance on now out-of-date Eighth Circuit case law." *United States* v. *Dunifer*, 219 F.3d 1004, 1007 & n.7 (2000).[10]

Further doubt as to the vitality of the Sixth Circuit's position has been created by another Sixth Circuit decision issued just two months after the decision in this case. In *La Voz Radio de La Communidad* v. *FCC*, 223 F.3d 313, 318 (2000), the Sixth Circuit held that a district court lacked jurisdiction to consider the validity of the FCC low power rules in the context of a law suit for injunctive relief initiated by the broadcaster. The *La Voz* court distinguished *Strawcutter* on the ground that in *Strawcutter* there was no final order, the rationale offered by Judge Arnold's concurring opinion. 223 F.3d at 320. Judge Arnold's subsequent decision to abandon that rationale in this case calls into question the distinction relied upon by the Sixth Circuit in *La Voz*. Moreover, the fact that *Strawcutter* has not

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[10] The court in *Dunifer* noted that, in *Dougan* v. *FCC*, 21 F.3d 1488 (9th Cir. 1994), the court had denied a petition to review an FCC monetary forfeiture order because the district court is the proper court to consider the validity of forfeiture orders. *Id.* at 1491. The petitioner in *Dunifer* also raised the validity of the underlying regulations. *Ibid.* The *Dunifer* court stated that *Dougan* "relied too broadly on *Pleasant Broadcasting*, in which the parties did not challenge the underlying regulations, but merely asserted standard defenses to the validity of the FCC orders." 219 F.3d at 1008 n.8. Nevertheless, the court in *Dunifer* reiterated that *Dougan* remains good law "at least with respect to monetary forfeitures." *Id.* at 1007 n.6. See p. 12 & note 6, *supra*. Thus, contrary to petitioner's contention (Pet. 19 n.6), the Ninth Circuit's case law is not "unsettled." Moreover, any disagreement within the Ninth Circuit does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

been applied by the Sixth Circuit to actually invalidate a forfeiture on the merits further diminishes that decision's precedential force.

c. A final consideration that counsels against review by this Court at this time is the FCC's recent adoption of new rules authorizing low power broadcasting. See note 1, *supra*. That action may significantly reduce the number of FCC forfeiture actions. As petitioner emphasizes (Pet. 6), in the past many individuals may have felt frustration with the agency's prohibition on low power broadcasting. Now, however, more than one thousand persons have so far applied for low power licenses under the new rules. FCC News Release (Sept. 15, 2000) (available at http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0039.html). The FCC's new low power rules may therefore substantially reduce the importance of the question presented in this case, which arose under the prior regulatory regime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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