No. 01-1662

In the Supreme Court of the United States

GRID RADIO AND JERRY SZOKA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' First Amendment rights were violated by the imposition of a fine and the issuance of a cease and desist order for broadcasting without a license in violation of the Communications Act of 1934, 47 U.S.C. 301.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 278 F.3d 1314. The order of the Federal Communications Commission (Pet. App. A17-A35) is reported at 14 F.C.C.R.2d 9857.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2002. The petition for a writ of certiorari was filed on May 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1995, without having applied for a broadcasting license, Szoka (petitioner) began operat-

ing an FM station known as "Grid Radio" from "The Grid" nightclub in downtown Cleveland. Pet. App. A3, A19. On February 20, 1997, after receiving a complaint about this unlicensed station, the Federal Communications Commission (FCC or the Commission) sent a letter to petitioner warning that operation of a radio station without a license violates 47 U.S.C. 301 and could subject him to penalties. A second warning letter was sent on June 11, 1997. Pet. App, A3-A4, A20. Despite receiving these warning letters, petitioner continued to broadcast without a license. *Id.* at A20.

On April 6, 1998, after confirming that Grid Radio was still on the air, the Commission issued an order directing petitioner to show cause why he should not be ordered to cease and desist from violating the Communications Act of 1934 (Act), 47 U.S.C. 301. Pet. App. A18. On September 4, 1998, over petitioner's objection, the administrative law judge (ALJ) to whom the matter had been assigned issued a summary decision ordering petitioner to cease and desist his unlicensed broadcasting. *Id.* at A19.

In the course of this proceeding, petitioner challenged on First Amendment grounds the FCC's "microbroadcasting ban," which proscribed the issuing of new Class D licenses during the time period in which petitioner was broadcasting.[1] The ALJ "rejected [peti-

[1] Until 1978, the Commission had provided for the licensing of low power "Class D" noncommercial educational stations (defined as operating with no more than 10 watts). In 1978, in order to promote more efficient operations, "the Commission adopted a 'microbroadcasting ban,'" under which no new Class D applications would be accepted (except for stations in Alaska). Pet. App. A3; see *In re Changes in the Rules Relating to Noncommercial Educational FM Broad. Stations*, 70 F.C.C.2d 972, 983 (1979) (codified at 47 C.F.R. 73.512(d)).

tioner's] constitutional challenges to the microbroadcasting ban" on two grounds. First, the ALJ noted that petitioner's challenge was without substantive merit because the "right of free speech does not include the right to use radio facilities without a license." Pet. App. A5. Second, the ALJ held that petitioner lacked standing to challenge the microbroadcasting ban because petitioner had "failed to apply for either a license or a waiver of the microbroadcasting ban." *Ibid.* The ALJ also imposed a forfeiture of $11,000 for petitioner's violation of Section 301.[2] That amount was warranted, the ALJ concluded, because petitioner's unauthorized broadcast operation was willful and had continued even after the FCC had explicitly warned petitioner (on two occasions) that he was acting in violation of federal law. *Ibid.*

On June 15, 1999, the Commission affirmed the ALJ's Summary Decision. The Commission held that petitioner's First Amendment objections to the FCC's licensing rules, even if valid, did not excuse his unlicensed radio operation, because this Court has held repeatedly that there is no First Amendment right to broadcast without a license and that the FCC has authority to regulate the radio spectrum. Pet. App. A5. The Commission also found that petitioner lacked standing to challenge the licensing regulations because he had never applied for a license or a waiver. *Id.* at A27-A28. If petitioner had made such a request and

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[2] The relevant forfeiture statute authorizes a penalty of $11,000 per day of each continuing violation, up to a maximum of $82,500 for each act. Pet. App. A18-A19 (citing 47 U.S.C. 503(b)(2)(C); 47 C.F.R. 1.80(b)(3), (4) and (5)). Petitioner, who operated without a license for more than five years, was penalized well below the maximum amount authorized.

that request had been denied, he could have sought judicial review and challenged the constitutionality of the FCC's rules as applied to him. As the Commission explained, it must give "serious consideration" to a license applicant's waiver request, and "must 'articulate with clarity and precision its findings and the reasons for its decisions.'" *Id.* at A28-A29 (quoting *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969)). The Commission also noted that, in any event, petitioner's claims—that its licensing rules were overbroad, content-based, and not reasonably related to the objectives of the Act—were without merit. It explained that, because its technical rules "are not content-based," they are not subject to strict scrutiny and pass constitutional muster. *Id.* at A29.[3] The Commission subsequently denied petitioner's petition for reconsideration and request for a stay. *Id.* at A36.

2. Notwithstanding the Commission's cease and desist order, petitioner continued to broadcast without a license. Pet. App. A76, A80. To enforce its order, the Commission filed suit in the United States District Court for the Northern District of Ohio. Pursuant to 47 U.S.C. 401(b), the Commission sought a declaration that the cease and desist order was "regularly made and duly served," and requested a preliminary and permanent injunction to stop petitioner from violating the order by continuing to broadcast without a license. On February 23, 2000, after a combined preliminary injunction hearing and trial on the merits, the district

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[3] The Commission also affirmed the forfeiture ordered by the ALJ. Pet. App. A31-A33 (holding that forfeiture was not an excessive fine under the Eighth Amendment, and that the statutory scheme set out in 47 U.S.C. 503(b) authorizing assessment of monetary forfeitures satisfies due process requirements).

court granted the government's request and ordered petitioner to cease unauthorized radio transmissions by March 1, 2000. Pet. App. A73.

The district court held that, because Congress had provided for an injunction by statute, an injunction could be obtained simply by showing that all of the statutory requirements had been met. The district court rejected petitioner's suggestion that the court should take into account equitable factors and should refuse to issue an injunction because of petitioner's claim that the harm to him and his listeners outweighed the harm caused by his unlicensed broadcasting. The district court observed that "[petitioner] understates the importance of the FCC's regulatory function when he asks this Court to second-guess or interfere with it, * * * and ignores the harm to that authority which would flow from his unchecked unilateral decision to flout it." Pet. App. A85. As the court explained, "[i]f radio stations could broadcast without a license so long as they claim to serve some segment of the public not currently being served by other radio stations, the structure set up by Congress in the Communications Act of 1934 to stop a 'cacophony of competing voices, none of which could be clearly and predictably heard,' without some control, would be impotent." *Ibid.* (quoting *Red Lion Broad.* v. *FCC*, 395 U.S. 367, 376 (1969)). The United States Court of Appeals for the Sixth Circuit affirmed. *Id.* at A44-A72.

3. While that litigation was pending in the Sixth Circuit, petitioners pursued an appeal of the Commission's cease and desist order in the D.C. Circuit. Petitioners contended that the enforcement order—and the micro-broadcasting ban giving rise to it—was unconstitutional and was not in the public interest. On February 8, 2002, the D.C. Circuit upheld the Commission's cease

and desist order, as well as the $11,000 forfeiture. The court of appeals first rejected the Commission's argument that petitioner lacked standing to challenge the Commission's microbroadcasting regulations because he had failed to apply for a license or to seek a waiver of the microbroadcasting ban. It explained that the enforcement order presents injuries "fairly, if circuitously, traceable to the Commission's microbroadcasting ban." Pet. App. A8.

Reaching the merits, the court of appeals concluded that the Commission, having considered the policy arguments in a rulemaking, was not required to consider the individual circumstances relating to Grid Radio before taking enforcement action, thereby rejecting petitioners' contention that shutting down Grid Radio was inconsistent with the public interest. Pet. App. A10-A13. The court noted that allowing petitioner to broadcast without a license "as a means of challenging the microbroadcasting ban * * * could produce the very 'chaos' that * * * the broadcasting licensing regime was designed to prevent," and it noted that petitioner could have challenged the constitutionality of the ban without resorting to unlicensed broadcasts. *Id.* at A11 (quoting *Red Lion Broad.*, 395 U.S. 367, 375 (1969). The court accordingly concluded that it would be appropriate in this enforcement action to entertain a challenge to the constitutionality of the microbroadcasting ban only if there were an undisputable indication of the ban's unconstitutionality. *Id.* at A10-A14. The court ruled that this standard was not met here. *Id.* at A12, A14.[4]

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[4] The D.C. Circuit also upheld the $11,000 forfeiture against petitioners' Eighth Amendment challenge. Pet. App. A14-A16. Petitioners do not renew that claim here.

4. In January 2000, the FCC adopted new rules authorizing the licensing of two new classes of noncommercial educational FM radio stations, one operating at a maximum of 10 watts and one at a maximum of 100 watts. *In re Creation of Low Power Radio Serv.* (*Low Power Rule Making Order*), 15 F.C.C.R. 2205. "The order encouraged local ownership of low-power stations, limited the number of such stations any single entity could own, required the stations to operate on a noncommercial, educational basis, and prohibited existing media entities from holding interests in them." *Ruggiero* v. *FCC*, 278 F.3d 1323, 1326 (2002), vacated, No. 00-1100, 2002 WL 1359486 (D.C. Cir. May 2, 2002).

While petitions for review of the *Low Power Rulemaking Order* were pending, Congress enacted legislation—known as the Radio Broadcasting Preservation Act of 2000 (Act of Dec. 21, 2000, Pub. L. No. 106-553, § 632, 114 Stat. 2762A-111 to 2762A-112)—that, among other things, directed the "Commission to amend the low-power rules to limit the frequencies available for low-power stations, thus reducing the risk of interference to existing stations." *Ruggiero*, 278 F.2d at 1326. Although Congress thus cut back on the opportunities for low-power FM stations that the Commission's rulemaking had created, the ban on microbroadcast licensing about which petitioners complain no longer exists. *Ibid.* Petitioner has not, however, applied for a license under the new regulatory regime, nor does he challenge that new regime here. Pet. App. A7.

ARGUMENT

Because the challenged regulation is no longer in effect, this case does not merit review by this Court.

Moreover, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Review is therefore not warranted.

1. Petitioners acknowledge that the regulation they challenge is no longer in effect. Pet. 5. Thus, resolution of the ultimate question in the case—whether that regulation was constitutional at the time it was in effect –-will affect few, if any, cases other than this one. The adoption of more liberal broadcasting regulations and the elimination of the microbroadcasting ban obviate the need for this Court to consider petitioners' constitutional challenge to the superseded ban.[5] Moreover, a case involving an extant regulation would provide a more appropriate vehicle for resolution of any subsidiary issues related to the constitutional claim, such as the proper standard of review.

2. Furthermore, the outcome in the court of appeals —affirmance of the Commission's enforcement order against petitioner—was correct. Federal law has long provided that it is unlawful to operate a radio station without an FCC license. 47 U.S.C. 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."). This Court has, for nearly 60

[5] Nor did the standard of review adopted by the court of appeals leave would-be broadcasters without a method for raising challenges to such regulations. Petitioners could have applied for a license or requested a waiver and challenged the policy leading to that decision in the likely event that the application was denied. Petitioners' constitutional claim would be more cleanly presented in that procedural context, where this Court would not have to address whether petitioners had standing.

years, consistently rejected challenges to the requirement that all broadcasters be licensed, holding that "[t]he right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC* v. *United States*, 319 U.S. 190, 227 (1943); see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 (1994) ("'[I]t is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.'") (quoting *Red Lion Broad.*, 395 U.S. 367, 390 (1969)); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 597 (1990) ("'[N]o one has a First Amendment right to a license.'") (quoting *Red Lion Broad.*, 395 U.S. at 389).

Having never applied for a license, petitioners therefore had no constitutional right to broadcast. It follows that the court of appeals was correct in denying petitioners the remedy they sought—non-enforcement against them of the statutory prohibition against unlicensed broadcasting. Even if the court below had agreed with petitioners' challenge to the microbroadcasting regulations and had ultimately concluded that the Commission's refusal to grant licenses for microbroadcasting was unconstitutional, petitioners would have been entitled only to the right to apply for a license with assurance that their status as a microbroadcaster would not prejudice their application; they would not have been entitled to broadcast without a license. See 47 U.S.C. 308(a) ("The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it."); 47 U.S.C. 308(b) (application for license must "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station").

Thus, even if the court of appeals had agreed with petitioners' contention that the microbroadcasting ban was unconstitutional, petitioners could not have prevailed in the enforcement action against them for unlicensed broadcasting. The court of appeals' decision to uphold the cease and desist order and fine against petitioners therefore was a correct application of settled law.

3. Contrary to petitioners' assertion (Pet. 14-18), the court of appeals' decision in this case does not conflict with any decision of this Court or of any other court of appeals. Petitioners argue that the decision below is inconsistent with the "clear" rule that "the unconstitutionality of a licensing scheme [ha]s always been a defense to its enforcement." Pet. 16. In each of the cases cited by the petitioners, however, the challenge was to the constitutionality of the licensing scheme itself. This case, by contrast, challenges only a particular facet of what has long been held to be a *constitutional* licensing scheme. See *NBC*, *supra*.

Furthermore, the cases cited by petitioners all involve claims of a First Amendment right to speak *without a license*. To the extent that petitioners seek to engage in broadcast speech without a license, that claim is foreclosed by this Court's decisions. The Court has long adhered to its holding in *NBC* that "[t]he right of free speech does not include * * * the right to use the facilities of radio without a license," 319 U.S. at 227. See, *e.g.*, *Red Lion Broad. Co.*, *supra*. Petitioners offer no reason for this Court to reconsider that longstanding precedent.

4. In any event, petitioner's constitutional challenge to the microbroadcasting ban is without merit. Petitioners specifically assert (Pet. 19-20) that the microbroadcasting ban was not narrowly tailored because it

allowed space in the spectrum to go unused. With respect to the claim that the microbroadcasting ban violated the Commission's duty to maximize use of the spectrum, "the Commission resolved just this issue in its 1978 rulemaking when it concluded that licensing low-power stations would interfere with the propagation of higher-power stations." Pet. App. A12.

At the time petitioner broadcast without a license, the Commission had reasonably concluded that its spectrum management policies—which restricted low-power broadcasting—promoted both efficient and equitable use of the spectrum. As the Commission explained below, in fulfilling Congress's mandate to distribute radio services in a "fair, efficient, and equitable" manner, see 47 U.S.C. 307(b), "the Commission has allotted stations to communities throughout the United States and has assigned their frequency and power levels to accommodate the goals of utilizing the spectrum efficiently, achieving a wide distribution of stations, allowing each station to serve as many people as possible, and allowing numerous stations to be licensed." Pet. App. A29-A30. In particular, the Commission limited "the size of stations and [did] not permit the highest power possible because that would reduce the number of stations and undermine the Commission's goal of promoting diversity of voices." *Id.* at A30. See *In re Application for Review of Stephen Paul Dunifer*, 11 F.C.C.R. 718, 721-725 (1995). The court of appeals held that there was no need for the Commission to revisit this policy determination in an enforcement proceeding. Pet. App. A14 ("[Petitioner] offers no evidence to suggest that his circumstances were so unique as to impose on the Commission a constitutional

obligation to apply the ban differently to him than to any other unlicensed microbroadcaster.").[6]

Petitioners' assertion (Pet. 19) that the microbroadcasting ban was not a narrowly tailored means of achieving a substantial government interest fails to acknowledge that, as this Court has recognized since *NBC*, *supra*, there is a substantial government interest in protecting the listening public as well as licensed broadcasters from interference with the broadcast airwaves. See *Prayze FM* v. *FCC*, 214 F.3d 245, 252-253 (2d Cir. 2000) ("The prohibition of microbroadcasting was designed to further the substantial government interest in allowing other broadcasters to operate free of interference"). Because it is established that such an interest is substantial, it follows that the microbroadcasting ban—coupled with the availability of lawful means of challenging the ban, such as filing an application and seeking a waiver—was a narrowly tailored means of protecting that interest. See *Prayze FM*, 214 F.3d at 251 (observing that a facial challenge to the Commission's microbroadcasting ban was unlikely to prevail on the merits).[7]

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[6] In both the companion case to this one in the Sixth Circuit, and in similar cases in other circuits, other courts of appeals have similarly declined to consider individualized arguments in upholding enforcement orders preventing microbroadcasters from broadcasting without a license. See, *e.g.*, *United States* v. *Szoka*, 260 F.3d 516 (6th Cir. 2001) (Pet. App. A44-A72); *United States* v. *Neset*, 235 F.3d 415 (8th Cir. 2000), cert. denied, 122 S. Ct. 61 (2001); *United States* v. *Dunifer*, 219 F.3d 1004 (9th Cir. 2000).

[7] Insofar as the current manner of the FCC's licensing of microbroadcasters may raise any constitutional questions, such questions are not presented by this case but are under consideration at this time in unrelated cases involving challenges to the constitutionality of provisions of the Radio Broadcasting Preservation Act of 2000. See *Ruggiero* v. *FCC*, No. 00-1100 (D.C. Cir. filed Mar. 16,

For all of these reasons, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2000); *Prayze FM* v. *FCC*, 83 Civil No. 3:98CV375 (D. Conn. filed Feb. 25, 1998).