No. _____

In The

Supreme Court of the United States

ANY AND ALL RADIO STATION TRANSMISSION EQUIPMENT; RADIO FREQUENCY POWER AMPLIFIERS, RADIO FREQUENCY TEST EQUIPMENT, AND ANY OTHER EQUIPMENT ASSOCIATED WITH OR USED IN CONNECTION WITH THE TRANSMISSION AT 97.7 MHZ, LOCATED AT 1400 LAUREL AVENUE, APARTMENT 1109, MINNEAPOLIS, MN 55403, and

ALAN FRIED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MANSFIELD, TANICK & COHEN, P.A.
MARSHALL H. TANICK
Suite 1560
900 Second Street South
Minneapolis, MN 55402-3383
(612) 339-4295

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK
*SCOTT G. BULLOCK
DANA BERLINER
Suite 200
1717 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-1300
Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a micro-radio broadcaster entitled to raise a constitutional defense to the U.S. government's forfeiture action in the District Court, where the Government initiated the proceeding and where 47 U.S.C. § 504(a), the statute governing the enforcement of forfeitures, vests jurisdiction in the District Court?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 207 F.3d 458 (8th Cir. 2000), and is reprinted in the Appendix. A-1 – A-13. The original opinion of the Eighth Circuit panel, which was vacated by the Eighth Circuit on Grant of Rehearing of August 2, 1999, was reported at 169 F.3d 548 (8th Cir. 1999), and is reprinted in the Appendix at A-14 – A35. The opinion of the United States District Court for the District of Minnesota is reported at 976 F. Supp. 1255 (D. Minn. 1997), and is reprinted in the Appendix. A-36 – A-45.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered on March 27, 2000. A-1. The Order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (with four judges voting to rehear the case) was entered on July 5, 2000. A-46.

This Court has jurisdiction to review the judgment of the Eighth Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

47 U.S.C. § 504(a). Forfeitures.

(a) Recovery. The forfeitures provided for in this Act shall be payable into the Treasury of the United

States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this Act in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: Provided, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo: Provided further, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties herein provided. It shall be the duty of the various district attorneys under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

47 U.S.C. § 402(a)-(b). Judicial review of Commission's orders and decisions.

(a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

(b) Right to appeal. Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide inter-LATA services under section 271 of this Act whose application is denied by the Commission.

28 U.S.C. § 2342. Jurisdiction of court of appeals.

The 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;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of –

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (*46* U.S.C. App. 802, 803, 808, 835, 839 and 841a) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to –

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (*46 U.S.C. App. 817d*(d) or 817e(d));

(iv), (v) [Redesignated]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

STATEMENT OF THE CASE

A. Introduction

Petitioner Alan Fried ("Fried") was a "micro-broadcaster," a person who owns and operates a low-power radio station. A-3. Micro-radio stations typically operate at less than 100 watts. *Id.* Fried used a vacant space in the broadcast spectrum at 97.7 MHZ on the FM dial in downtown Minneapolis. *Id.* The station, known as The BEAT, provided alternative dance music of a type not broadcast by any other radio station in the Twin Cities metro area, along with programming by alternative music disc jockeys and producers from the community. *Id.* It broadcast at approximately 20 watts to an area spanning about six miles in radius. *Id.* The BEAT's signal created no interference with any other stations. *Id.*

Fried did not a have a broadcast license for his micro-radio station. A-3. Under federal law, it is unlawful to

broadcast a radio signal without a license. However, current regulations of the Federal Communications Commission ("FCC"), as well as those enforced when this case began, *see* 47 C.F.R. § 73.512(c), prohibit Fried and others like him from gaining a license to micro-broadcast. A-3 – A-4.[1] This regulatory anomaly placed micro-broadcasters between the proverbial rock and a hard place: federal law makes it illegal to broadcast without a license but the FCC would not grant licenses to stations under 100 watts. It also led to a major controversy in the last several years between the FCC and micro-broadcasters who seek to broadcast diverse community-based programming using relatively inexpensive and therefore widely accessible, broadcasting equipment. Before turning to the specifics of Fried's case, it is important to set forth briefly the background of micro-broadcasters' conflict with the FCC.

B. A Brief Background History Of Micro-Radio

Before 1980, Low Power Class D licenses to serve communities were granted by the FCC. *See* Walker,

---

[1] As set forth in more detail below, the FCC's refusal to license micro-broadcasters has been in effect since 1978, except in Alaska. The FCC has recently promulgated rules allowing micro-broadcasters to apply for licensure, but flatly disallowing any micro-broadcaster who previously engaged in unlicensed broadcasting (which would include Fried) from doing so. *See FCC Report and Order in Creation of Low Power Radio Service*, 15 F.C.C.R. 2205, FCC 00-19, MM Docket No. 99-25, § 54 (Jan. 27, 2000). Legislation that would repeal even the limited licensure for new micro-broadcasters proposed by the FCC passed the House of Representatives on April 13, 2000 and is currently pending in the Senate. *See* H.R. 3439, S. 3020, *Radio Broadcasting Preservation Act of 2000.*

"Rebel Radio: The FCC's Absurd New Crusade," *The New Republic*, March 9, 1998, pp. 10-11. The Class D license allowed community and educational stations to broadcast in the noncommercial portion of the spectrum (the lower end of the FM dial). *Id.* These stations began to multiply, creating an outlet for community and educational radio. *Id.* In 1978, however, the FCC changed its rules by announcing that it would no longer license stations of 10 watts or less (except in Alaska, which has its own system of regulating the spectrum). *See* 47 C.F.R. §§ 73.211(a); 73.511(a) ("[n]o new noncommercial educational station will be authorized with less power than minimum power requirements for commercial class A facilities"); *Changes in Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C.2d 240 (1978) ("*Second Report and Order*"), *modified*, 70 F.C.C.2d 972 (1979); *see also* A-3 – A-4.

Therefore, after 1980 (when the rule went into effect), all FM stations had to maintain a minimum effective radiated power of 100 watts. *Id.* This change was justified under the FCC's "public interest convenience and necessity" mandate, ostensibly to ensure more "efficient" and "effective" use of educational noncommercial FM radio service. *Second Report and Order*, 69 F.C.C.2d at 248. As a result, no new Class D applications could be filed with the FCC. 47 CFR § 73.512(c) ("[e]xcept in Alaska, no new Class D [micro-radio station] applications nor major change applications by existing Class D stations are acceptable for filing except by existing class D stations seeking to change frequencies").

This regulatory scheme resulted in pockets or "holes" of unused parts of the broadcast spectrum too small to

accommodate a full-power commercial station, but perfect for small broadcasters. Walker, *id.* During this same time, the cost of starting a low-power station dropped dramatically. *Id.* Due to technological advancements and the declining cost of equipment, micro-broadcasters, who otherwise would not have an opportunity to communicate, could now more easily and with little expense create and operate micro-radio stations of less than 100 watts. *Id.* The FCC regulations governing the issuance of licenses began to clash with technological advancements and the desire of individuals to create alternatives to commercial radio in their communities. *Id.* Many saw themselves as part of a community radio movement, providing an alternative to corporate and public radio. *Id.* Micro-radio formats range from non-mainstream political commentary to religious and ethnic programming to music styles not typically available on commercial radio, such as swing and alternative dance music and even classical and big band. *Id.*; *see also* A-4.

Until the mid-1990s, the FCC largely overlooked micro-radio operators, unless there were complaints of interference with existing stations. *See* Walker, *id.* However, in recent years, the FCC dramatically stepped up enforcement against micro-radio broadcasters. *Id.* As the instant case aptly demonstrates, the FCC now goes after even those broadcasters that do not interfere with existing stations or cause any harm to licensed broadcasters or anyone else. Fried and many others like him have attempted to challenge the FCC's policies as a violation of the First Amendment's guarantee of free speech.

C. Proceedings Below

While he was broadcasting The BEAT, Fried received a warning letter, dated August 12, 1996, from the FCC, directing him to cease broadcasting. A-37. The letter gave Fried ten days to respond, and he timely did so on August 19, 1996. *Id.* In his response, Fried challenged the constitutionality of the FCC's micro-radio prohibition. *Id.* He also requested a waiver of the FCC's ban on licensing micro-broadcasters to permit him to lawfully broadcast. *Id.* The FCC never responded to his request for a waiver and, over four years later, has still not responded to Fried's request nor issued him any type of administrative order. *Id.*[2] Instead, the United States government ("the Government") pursued Fried by initiating an *in rem* forfeiture action in Federal District Court against his equipment pursuant to 47 U.S.C. § 510. A-38. It seized Fried's equipment, which it has never returned, in early November 1996, pursuant to Court Order. *Id.* Fried asserted a claim of ownership to the equipment and filed an Answer in the forfeiture proceeding. *Id.* His Answer raised numerous affirmative defenses, including challenging the constitutionality of the FCC's micro-radio licensing ban on First Amendment grounds. *Id.*

The District Court, where the Government brought the case, granted the Government's Motion for Judgment on the Pleadings, holding that Fried could not raise his defenses in the Government's forfeiture proceeding because the Court of Appeals, not the District Court, has exclusive jurisdiction to adjudicate any challenge to the

---

[2] The district court below assumed for purposes of its analysis that Fried had duly requested a waiver. A-37.

validity of FCC regulations. *U.S. v. Any and All Radio Station Transmission Equip., et al.*, 976 F. Supp.2d 1255 (D. Minn. 1997), reprinted in the Appendix at A-36 – A-45. The District Court's ruling noted that there were conflicting jurisdictional provisions at issue in the case: (1) 47 U.S.C. §§ 402(a)-(b), the statute governing review of FCC administrative action, which vests jurisdiction to review final FCC orders in the U.S. Courts of Appeals; and (2) 47 U.S.C. § 504(a), the specific statute governing forfeiture actions, which gives District Courts jurisdiction over forfeiture proceedings such as Fried's case. *Id.* at 1258, A-42. Section 504(a) further requires the Government to seek forfeiture in a "trial de novo" in the District Court. *Id.* The District Court in the instant matter observed that the statutes "seem to mandate exclusive jurisdiction in two different jurisdictions." *Id.* Nevertheless, the District Court held that it had jurisdiction over the Government's claims but not over Fried's defenses and ruled against Fried. *Id.* at 1259, A-44.

Fried appealed the District Court decision to the U.S. Court of Appeals for the Eighth Circuit, claiming that he was entitled to raise his constitutional defenses in the District Court as part of the forfeiture proceeding, rather than initiating a separate challenge before the FCC and then, eventually, in the Court of Appeals. A-23. He maintained that the forfeiture statute, 47 U.S.C. § 504(a), gives the District Court exclusive jurisdiction to hear forfeiture suits, including adjudication of his constitutional defenses. A-23. The Eighth Circuit initially upheld Fried's position, ruling in a 2-1 decision that the District Court erred in disallowing the constitutional defenses to be raised, and remanded the case to the District Court. *U.S. v. Any and All Radio Transmission Equip., et al. (Laurel*

Avenue), 169 F.3d 548 (8th Cir. 1999), reprinted in the Appendix at A-14 – A-35.

At the Government's request, the Eighth Circuit vacated the earlier opinion and ordered a rehearing by the same Panel, which issued a new ruling on March 27, 2000, in favor of the Government. *U.S. v. Any and All Radio Station Transmission Equip., et al. ("Laurel Avenue")*, 207 F.3d 458 (8th Cir. 2000), reprinted in the Appendix at A-1 – A-13. In this opinion, the Eighth Circuit ruled that Fried could not raise constitutional defenses in the District Court. *Id.*, A-10 – A-13. Instead, to raise a constitutional argument, he would have to file an application for a waiver of the licensing prohibition with the FCC, (which he did and to which the FCC never responded), with the appropriate Court of Appeals reviewing the outcome of the proceeding. *Id.*, A-13. Fried timely filed a Petition for Rehearing and for Rehearing En Banc. A-46. On July 5, 2000, the Eighth Circuit denied the petition. Chief Judge Wollman, Judge Richard S. Arnold, Judge Loken and Judge Hansen of the Eighth Circuit would have granted the Petition. A-46. Fried now files the instant petition with this Court.

REASONS FOR GRANTING WRIT

I. THE CIRCUITS HAVE CREATED A DIRECT, IRRECONCILABLE SPLIT OVER WHICH COURT SHOULD HEAR CONSTITUTIONAL DEFENSES IN A CIVIL FORFEITURE PROCEEDING INITIATED BY THE UNITED STATES GOVERNMENT.

The issue in this case is whether Federal District Courts have jurisdiction to consider the constitutionality

of FCC regulations in forfeiture proceedings brought by the Government. The Eighth Circuit below described the issue as "an important one for the statutory scheme created by Congress for the regulation of broadcasting" and for which the Panel recognized there is no "precise precedent." *Laurel Avenue,* 207 F.3d at 462, A-11.

Not only is the issue raised in this case an "important one," as the Eighth Circuit recognized, but it arises in the context of a highly unsettled legal landscape in which there is a clear split among circuits. The Second Circuit recently framed the conflict:

> Two courts of appeals have considered the similar question of whether § 504 of the Communications Act, which confers on the district courts jurisdiction to hear in rem forfeiture suits brought by the government against unlicensed broadcasters, *see id.* § 504(a), allows the district courts to consider constitutional challenges to the microbroadcasting regulations when these are asserted as defenses to forfeiture. The Eighth Circuit found such challenges barred on the ground that "[a] defensive attack on the FCC regulations is . . . an evasion of the exclusive jurisdiction of the Court of Appeals." *United States v. Any & All Radio Station Transmission Equip. ("Laurel Avenue"),* 207 F.3d 458, 463 (8th Cir. 2000). The Sixth Circuit came to the opposite conclusion, reasoning that it was unlikely that Congress intended to deprive defendants in forfeiture actions of the ability to raise constitutional defenses to those actions. *See United States v. Any & All Radio Station Transmission Equip. ("Maquina Musical"),* 204 F.3d 658, 667 (6th Cir. 2000).

Prayze FM v. F.C.C., 214 F.3d 245, 250-51 (2d Cir. 2000).[3]

The clear split of authority between the Eighth and Sixth Circuits concerns interpretation of two different statutory provisions regulating telecommunications. Title 47 of the United States Code regulates communications via "telegraphs, telephones, and radiotelegraphs." Chapter 5 of Title 47, the Communications Act, governs "wire or radio communications." Within Chapter 5 are the two competing provisions at issue here. Subchapter IV, entitled "Procedural and Administrative Provisions," governs the administrative review of FCC decisions. 47 U.S.C. §§ 401-416. Subchapter V, entitled "Penal Provisions: Forfeitures," addresses the imposition and recovery of forfeitures for violations of the Communications Act. 47 U.S.C. §§ 501-559. The chart on page A-68 of the Appendix illustrates this statutory framework.

Even though the Government pursued Fried under Subchapter V of the Act governing forfeitures, the Eighth Circuit in *Laurel Avenue* based its decision on Subchapter

---

[3] While noting the split between the Eighth and Sixth Circuits, the Second Circuit in *Prayze FM* declared that it "need not, however, resolve [this] jurisdictional issue today." *Id.*, 214 F.3d at 251. The court assumed that it had jurisdiction and went on to the merits, ruling against the micro-broadcaster's First Amendment arguments and granting the FCC a preliminary injunction. The case, however, is not relevant to the issue presented in this petition. The issue here is jurisdiction, which in no way depends on the ultimate merits of either the Petitioner's or the FCC's claims. Of course, Petitioner disagrees with the Second Circuit on his First Amendment claim, but seeks, through this Petition, simply to establish his ability to raise a constitutional argument at all, something the Eighth Circuit explicitly disallowed.

IV of the Communications Act, governing FCC procedural and administrative provisions. In particular, the court based its ruling upon 47 U.S.C. § 402. That statutory provision, in conjunction with 28 U.S.C. § 2342, prescribes that actions to "enjoin, set aside, annul, or suspend any order of the Commission" must be brought in the Court of Appeals, which has exclusive jurisdiction over all final orders of the FCC.[4] The Eighth Circuit held that any challenge to FCC regulations must be heard in the Court of Appeals, whether they are presented as affirmative claims or defenses. *Laurel Avenue*, 207 F.3d at 462-63, A-12 – A-13. It then determined that Fried's constitutional claims constituted a "defensive attack" on the FCC's licensing regulations, which it characterized "as much an evasion of the exclusive jurisdiction of the Court of Appeals" as if Fried had made a "preemptive strike by seeking an injunction." *Laurel Avenue*, 207 F.3d at 463, A-12. The Eighth Circuit held that Fried's remedy was to apply for a license and request a waiver (which he had already done but the FCC has ignored for years), and then appeal that decision to the Appellate Court pursuant to the procedural and administrative provisions of Subchapter IV. *Id.*, A-13.

In contrast, the Sixth Circuit in *Maquina Musical*, *supra*, (reprinted in the Appendix at A-47 – A-67), based

---

[4] The Appellate Court to which a petitioner must apply depends upon the type of FCC action at issue. 47 U.S.C. § 402(b) specifies certain actions that are reviewed by the D.C. Circuit Court of Appeals and others that are reviewed by the circuit court "in which the petitioner resides. . . . " *See* 28 U.S.C. § 2343.

its ruling on Subchapter V of the Act governing both monetary forfeitures and forfeitures of communications devices. For the Government to enforce any type of forfeiture under the Act, it must bring an action for recovery of the forfeiture in District Court pursuant to 47 U.S.C. § 504(a), which vests exclusive jurisdiction in the District Court to adjudicate forfeiture enforcement suits brought by the Government.

> **The forfeitures provided for in this chapter** . . . shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the **district** where the person or carrier has its principal operating office. . . . **[A]ny suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo.** (emphasis added).[5]

Focusing its analysis on 47 U.S.C. § 504, the Sixth Circuit in *Maquina Musical* determined that the District Court, not the Appellate Court, is the proper forum for adjudication of a micro-broadcaster's constitutional challenges when the Government institutes a forfeiture action. In *Maquina Musical*, the Court considered two consolidated cases in which District Courts held that the doctrine of primary jurisdiction barred consideration of micro-broadcasters' constitutional defenses. *Id.*, 204 F.3d at 663-64, A-47 – A-56. Reversing, the Sixth Circuit

---

[5] This provision is fortified by 47 U.S.C. § 505, which provides that venue of all trials brought "for any offense under this chapter" shall be in U.S. District Court.

rejected the District Courts' application of primary jurisdiction and remanded both cases back to the District Courts for full adjudication, including consideration of constitutional defenses. *Id.* at 667-668, A-64 – A-66. Like the Eighth Circuit, the Sixth Circuit also considered the effect of § 402(a) but held that it was inapplicable because no "final order" of the FCC was at issue:

> Congress presumably could have created a streamlined forfeiture remedy that excluded certain defenses by giving claimants the opportunity to raise those defenses in some other forum. But it did not do so. Forfeiture actions, although normally civil, are quasi-criminal in nature. . . . **We believe that this makes it even less likely that Congress enacted a statute that allows the government to forfeit a person's property while denying the right to defend himself by challenging the legal basis of the government's forfeiture case.**

Id. at 667 (emphasis added), A-63 – A-64.

The Sixth Circuit based its holding in part on the earlier vacated decision in *Laurel Avenue*. In that decision, Judge McMillian held that 47 U.S.C. § 402, the jurisdictional statute that assigns review of final FCC orders to the Appellate Court, is a general statute. A-23 – A-29. In contrast, 47 U.S.C. § 504, the jurisdictional statute that assigns forfeiture actions to a de novo trial in the District Court, is a specific statute. *Id.* Therefore, Judge McMillian held that the specific statute superseded the general one and that "exclusive jurisdiction" rested with the district court. *Id.*

In the same case, Judge Morris Arnold wrote separately from Judge McMillian, but also ruled in favor of Fried for two separate reasons: first, defendants in federal court, such as Fried, may always raise their defenses when they are sued by the Government, unless Congress has explicitly provided a different forum for them to do so; and second, the Courts of Appeals only have exclusive jurisdiction over final orders of the FCC, and FCC regulations are not final orders. A-31 – A-32. Judge Arnold distinguished the language in 28 U.S.C. § 2342 governing other agencies, including the Secretary of Transportation, the Federal Maritime Commission and the Interstate Commerce Commission. Congress gave exclusive jurisdiction to the Courts of Appeals over all "rules, *regulations*, or final orders" of those agencies, whereas it only gave exclusive jurisdiction over appeals from final *"orders"* of the FCC. A-31 – A-32; 28 U.S.C. § 2342 (emphasis added).

Although the Eighth Circuit Panel in *Laurel Avenue* subsequently vacated its earlier opinion, the Sixth Circuit's opinion in *Maquina Musical*, which relied in part on the now-vacated Eighth Circuit opinion, has not been changed or subsequently amended. The opinion is final and remains good law in the Sixth Circuit.

Decisions from other courts addressing monetary forfeitures under Subchapter V support the Sixth Circuit's opinion in *Maquina Musical* and conflict with the Eighth Circuit's opinion in *Laurel Avenue*. In *Pleasant Broadcasting Co. v. F.C.C.*, 564 F.2d 496 (D.C. Cir. 1977), unlicensed broadcasters challenging monetary forfeitures imposed by the FCC filed petitions with the D.C. Circuit claiming that the Appellate Court had jurisdiction based on 47 U.S.C. § 402, the same general jurisdiction statute the

Eighth Circuit claims applies in this case. The Appellate Court refused to consider the broadcasters' challenges, holding that 47 U.S.C. § 504(a) "establish[ed] the District Court as the exclusive forum for review of forfeiture orders in the first instance." *Id.* at 500. The court also ruled that the grant of jurisdiction to the District Courts "cuts off" the jurisdiction of other courts, including jurisdiction in the Appellate Courts under 47 U.S.C. § 402. *Id.*

Similarly, in *U.S. v. Evergreen Media Corp. of Chicago*, 832 F. Supp. 1183 (N.D. Ill. 1993), the Government sought enforcement of a § 503 monetary forfeiture order issued by the FCC against a radio station for violating a criminal statute prohibiting obscene radio communications. The radio station defended itself by challenging the constitutionality of the measure and the FCC's interpretation of it. Rejecting the FCC's claim of lack of jurisdiction, the court in *Evergreen* held that Section 504(a), the same section at issue in the instant matter, authorized jurisdiction in the District Court over forfeiture actions. The court stated:

> 47 U.S.C. § 504(a), which gives district courts jurisdiction to hear suits for recovery of forfeitures determined under 47 U.S.C. § 503(b), provides an exception to [28 U.S.C.] § 2342(1) for forfeiture orders. *Pleasant Broadcasting*, 564 F.2d at 501. **The court has jurisdiction to hear all defendants' counterclaim.**

Id. 1185-86 (emphasis added). *See also U.S. v. WIYN Radio, Inc.*, 464 F. Supp. 101, 105 n. 3 (N.D. Ga. 1978), *rev'd on other grounds*, 614 F.2d 495 (5th Cir. 1980) (if Congress had intended 402(a) review of forfeiture orders "it could have included them within the scope of Section 402 rather than adding the trial de novo requirement to Section 504(a)").

These cases also stand in conflict with the Eighth Circuit's decision in the instant matter.[6]

As demonstrated above, a clear and irreconcilable conflict exists between the circuits on "an important [issue] for the statutory scheme created by Congress for the regulation of broadcasting" and one in which "[n]o binding authority is a precise precedent." *Laurel Avenue*, 207 F.3d at 462, A-11. The Sixth Circuit has held that the District Court, not the Appellate Court, is the proper forum for the adjudication of constitutional defenses to a

---

[6] Recently, the Ninth Circuit ruled against a micro-broadcaster in a suit brought by the Government under 47 U.S.C. § 301, which allows the government to pursue declaratory and injunctive relief as an alternative to forfeiture against those who violate the Communications Act. *See U.S v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000). In holding that the micro-broadcaster could not raise constitutional defenses to the Government's declaratory and injunctive action, the court relied, in part, on the Eighth Circuit's recent decision in *Laurel Avenue* (while also recognizing the split of authority among the circuits). *See Dunifer*, 219 F.3d at 1006-08. Importantly, however, the Ninth Circuit declared that it would not decide the separate issue of whether individuals facing forfeitures under 47 U.S.C. § 504(a), the statutory section at issue in this case, can raise constitutional defenses. *Id.* at 1007 n.6. Indeed, as the court further recognized, it earlier held in *Dougan v. F.C.C.*, 21 F.3d 1488 (9th Cir. 1994), that at least with respect to monetary forfeitures, a defendant could raise constitutional defenses in District Court. *See Dougan*, 21 F.3d at 1491 ("§ 504(a) vests exclusive jurisdiction in the district courts to hear enforcement suits brought by the government"). The unsettled legal landscape within the Ninth Circuit itself over the ability of micro-broadcasters to raise constitutional arguments when the Government files suit against them contributes to the need for this Court to resolve this important issue.

Government forfeiture action under the Communications Act. The Eighth Circuit has held precisely the opposite. Moreover, decisions from other courts addressing the intersection between Subchapters IV and V of the Communications Act contribute to the highly unsettled state of the law in this area. The need for resolution by this Court is critical.

Finally, the issue of where a micro-broadcaster can raise defenses to a Government enforcement action is an urgent one. Throughout the nation, the Government brings enforcement actions against micro-broadcasters like Fried. Their broadcasts vary from religious programming to alternative music formats, but one thing is the same: all of the broadcasters, when faced with court action, cannot be certain where to defend themselves or what defenses can be raised due to conflicting law, and, as a result, often find themselves defenseless. In Fried's case, this confusion was heightened by the FCC's choice not to pursue him administratively, or even bother to respond to his administrative request for a waiver. Rather, the Government chose to pursue him in District Court, the same place where Fried should be allowed to defend himself, as set forth below, pursuant to the specific statutory mandate of 47 U.S.C. § 504(a).

II. THE RULING BELOW CONFLICTS WITH THE STATUTORY LANGUAGE AND HISTORY OF THE COMMUNICATIONS ACT.

Fried is entitled to raise constitutional defenses to the Government's forfeiture of his equipment in District Court based on the specific mandate of 47 U.S.C. § 504(a).

Forfeitures under § 510 are enforced by § 504(a), which encompasses both monetary fines and seizures of property, such as this case. Under § 504(a), any lawsuit to recover a forfeiture is subject to "trial de novo" in District Court. Nothing in the statute's language or history restricts the defenses that can be raised in a forfeiture proceeding.

Indeed, Section 504's legislative history reinforces the clear statutory language entitling a claimant in a forfeiture action to an opportunity to present all defenses in the District Court. The legislative history indicates that:

> [I]n passing the amendments Congress was operating under the assumption that **any review** would occur through trial de novo in the district court. . . . **[T]he possibility of providing for a review on the basis of the administrative record, following a full administrative hearing by the Commission, was raised in the hearings before the Senate Committee, but was rejected in favor of the approach ultimately enacted into § 504. . . .**

Pleasant Broadcasting Co., 564 F.2d at 501 (emphasis added). As a special jurisdiction statute, § 504(a) trumps 47 U.S.C. § 402, the statute upon which the Eighth Circuit below relied. *Pleasant Broadcasting, id.* ("a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction"); see also *Edmond v. U.S.*, 520 U.S. 651 (1957) (specific statute trumps general one). Accordingly, the "statutory scheme" supports jurisdiction of this case in the District Court, not the Appellate Court. Section 504(a) is a special review statute that vests the District Court with full jurisdiction over forfeiture

actions and entitles Fried to assert all available defenses in that District Court proceeding. Barring him from defending himself there effectively guts the explicit statutory mandate that a forfeiture claimant is entitled to a full trial de novo in the Government's enforcement action.

Contrary to the Panel's characterization, Fried is not seeking to make an "end run" around § 402(a), which provides for Appellate Court review of "any order" of the FCC. That provision is inapplicable here because the FCC never issued an "order" from which Fried could appeal. The FCC sent Fried a warning letter, which triggered his prompt response and waiver request. It has now been over four years since Fried's request and the FCC has never responded to it or even acknowledged its existence. The FCC also never issued Fried a Notice of Apparent Liability, a Cease and Desist Order, or any other administrative order that it could have issued and from which he could appeal. See 47 U.S.C. §§ 312(b), 503. Without any response to his request for a waiver or some other administrative action, Fried has no "order" to appeal.

Moreover, the FCC regulatory scheme disallowing micro-broadcasting does not constitute an appealable "order" under § 402(a). Fried cannot, sua sponte, challenge the FCC's regulatory scheme under that statute, absent the FCC's initiation of some administrative action, which it has not done. Further, § 402(a) prescribes that any proceeding to challenge a FCC order not specifically identified in § 402(b) is governed by 28 U.S.C. § 2342. Under 28 U.S.C. § 2342(1), Appellate Courts have exclusive jurisdiction to set aside "final orders" of the FCC. That measure does not give the Appellate Court jurisdiction to determine the validity of "all rules, regulations, or

final orders" of the FCC, as it does with those of the Secretary of Transportation, the Federal Maritime Commission, and the Surface Transportation Board. 28 U.S.C. § 2342(3), (5). If the statute encompassed appellate review of FCC rules and regulations, it would so state and its omission from the FCC list in particular indicates congressional intent to exclude regulations from the appellate court review procedure. *See Amtrak v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (setting forth the statutory construction doctrine of *expressio unius*: when "legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.") The narrow language of "final orders," when contrasted with the broader view the same statute specifies for other agency actions, indicates that Congress did not intend it to govern review of FCC rules and regulations, which is also consistent with § 504's language and history.[7]

Because there is no "final order," or any "order" for that matter, Fried has nothing to appeal to the Court of Appeals. The sole forum available for any remedy on his part is the District Court. That forum, under § 504(a), has jurisdiction to conduct a "trial de novo" in forfeiture

---

[7] The main case on which the Eighth Circuit relied, *F.C.C. v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), is entirely inapposite to the issue here. That case involved a District Court challenge initiated by a telecommunications carrier. The Plaintiff challenged a rulemaking proceeding, which are specifically assigned to the Courts of Appeal, *after* the carrier had already brought the rulemaking petition before the FCC and lost. *Id.* at 463.

proceedings, entitling him to assert all available claims and defenses there.

III. THE RULING BELOW DEPARTS FROM ESTABLISHED FEDERAL JURISDICTION AND STANDING PRINCIPLES WHEN A PARTY FACES AN ENFORCEMENT ACTION BROUGHT BY THE GOVERNMENT.

As set forth above, a careful reading of the statutes in this case indicate that District Courts have the authority to hear all available claims and defenses in forfeiture proceedings under the Communications Act. In addition, general principles of federal jurisdiction and standing indicate that jurisdiction in the District Court contemplates submission of pleadings by the complaining party and defenses by the party being sued. Jurisdiction in the District Court encompasses jurisdiction over both the causes of action *and* any defenses to them, unless, as mentioned above, Congress specifically provides another forum for the entire case.

It is vitally important to remember that Fried came before the District Court as the *defendant* in a forfeiture action brought by the Government. The leading text on federal jurisdiction puts the issue of his ability to raise defenses in proper context: "Defendants in enforcement proceedings, threatened with the imposition of state force, clearly face injury. . . . Defendants may, *of course*, assert *any* claimed violation of their own rights. . . . " Hart and Wechsler, *The Federal Courts and the Federal System* 187 (4th ed. 1996) (emphasis added). This principle, that defendants may *of course* assert *any* claimed

violation of their rights, stands so clear that the only real body of case law on the issue of defendants' ability to raise defenses concerns their standing to assert the rights of others, *see, e.g., Craig v. Boren*, 429 U.S. 190 (1976), an issue not presented in the instant matter.

The Eighth Circuit's decision below seemed to suggest that micro-broadcasters like Fried are trying to avoid the jurisdictional requirement of bringing constitutional challenges in the correct forum by waiting for enforcement and then using these constitutional issues as defenses. This understanding is incorrect. To challenge a law or regulation, individuals generally have to wait until they have been the subject of a prosecution or threatened with prosecution. Otherwise, they will not have standing. Raising constitutional defenses to civil and criminal actions by the Government is so common that citations are unnecessary.

The Government initiated this action against Fried. The Government, not Fried, chose a District Court proceeding as the place to determine his rights when it could have pursued him administratively. Fried raised his arguments as constitutional defenses, not as part of an original action against the FCC. Perversely, the court ruled that it had jurisdiction over the Government's claims but not over Fried's defenses. No doubt many parties would love to prosecute actions while simultaneously denying the other party any defenses. That is not, however, the law. General principles of federal jurisdiction and standing law clearly indicate that Fried may properly raise defenses in the context of an enforcement action.

IV. BY DEPRIVING PETITIONER OF A TIMELY FORUM TO PRESENT HIS CONSTITUTIONAL CLAIM, THE RULING BELOW INSULATES THE FCC'S ACTIONS AND REGULATIONS FROM COURT REVIEW.

If the Eighth Circuit's interpretation of the law stands, the FCC will be able to enforce unconstitutional rules and regulations with impunity. Defendants under these actions would not be able to raise unconstitutionality as a defense. Instead, according to the Eighth Circuit, their only recourse would be to request a waiver of the applicable regulation, hope the FCC responds in sooner than four years, and then go through the FCC's administrative process.

Moreover, the actions (or, more specifically, lack thereof) of the FCC in regard to Fried's waiver application highlight the constitutional insufficiency of the supposed waiver alternative proposed by the Eighth Circuit. The FCC's generic waiver procedure, 47 C.F.R. § 1.3, applies to all FCC regulations, not just to the micro-radio regulations. And as Fried's case clearly demonstrates, there is no limitation on the amount of time the FCC may consider a waiver application. Pursuant to *Freedman v. United States*, 380 U.S. 51 (1965), procedural standards must be met by application procedures of any licensing scheme that impacts First Amendment rights. One of the primary standards under *Freedman* is that a ruling on the application must take place within a "specified, brief period." *Id.* at 59. As Fried's now over-four year wait for even a reply from the FCC aptly demonstrates, the agency's supposed waiver procedure wholly fails to meet

the requirement of a "specified, brief period" for consideration of license applications.

The FCC cannot be allowed to require Fried to go through an indefinite waiver procedure before seeking to vindicate his constitutional rights in court. Any other legal rule would allow the FCC to use its general waiver procedure to insulate unconstitutional substantive rules and regulations from judicial scrutiny. For example, a blatantly unconstitutional regulation, such as forbidding the granting of licenses to members of a particular ethnic group, could be defended from scrutiny through the simple expedient of delays in the consideration of waivers filed by members of that group. Under such a provision, the FCC would have its actions insulated from judicial review through its catch-all waiver provision. Likewise, the FCC employs its waiver provision to insulate its micro-radio regulations from judicial scrutiny while simultaneously pursuing micro-broadcasters. The effect of the Eighth Circuit's ruling in this case is to let the FCC have its cake and eat it too. The decision insulates the FCC's regulations from constitutional scrutiny and protects the agency's ability to enforce even blatantly unconstitutional regulations. It cannot stand.

V. BOTH THE EIGHTH CIRCUIT'S POLICY REASONS AND THE FIRST AMENDMENT RIGHTS AT STAKE IN THIS MATTER WARRANT REVIEW BY THE DISTRICT, NOT APPELLATE, COURT.

The policy reasons the Eighth Circuit cited as supporting appellate review are unavailing. *See Laurel Avenue*, 207 F.3d at 463, A-13. The desire to ensure a review

based upon an administrative record conflicts with § 504's legislative history, which indicates that Congress rejected a "review on the basis of the administrative record." *Pleasant Broadcasting*, 564 F.2d at 501.[8] The Sixth Circuit also explicitly rejected the administrative record rationale, holding that because the agency itself instituted the action "it makes little sense to refer the very question at issue to the agency." *Maquina Musical*, 204 F.3d at 664 (*quoting C.A.B. v. Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1973)). Moreover, the desire for uniformity of decisionmaking will not be undermined by allowing Fried to proceed with trial in the District Court, as § 504 mandates. Holding that District Court proceedings are appropriate would be consistent with the majority of cases decided by the federal courts, as set forth in the first section of this petition. Finally, the goal of having agency "expertise" is not applicable here. District Courts have the appropriate expertise to examine constitutional issues.

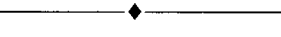
While raising a number of unfounded policy considerations in ruling against the micro-broadcaster, the Eighth Circuit unfortunately did not recognize that vital First Amendment rights are at stake in this case and similar micro-radio cases throughout the country. Certainly, there is no absolute First Amendment right to broadcast without a license, *see NBC v. United States*, 319 U.S. 193 (1943), but First Amendment rights are at the heart of the instant case and must inform this Court's decision on the relevant legal doctrines. Because of the

---

[8] In this case there is no administrative record, as the FCC has never issued an administrative order.

forfeiture authorized by the courts in this case, the broadcast service offered by Fried and desired by listeners has been silenced. He has been deprived of his First Amendment rights and listeners have been deprived of information and artistic expression.

In *F.C.C. v. League of Women Voters*, 468 U.S. 364, 378 (1984), this Court held that "broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which [the Government] exercises its regulatory power in this area." *See also Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to reserve an uninhibited marketplace of ideas. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . . [and] [t]hat right may not constitutionally be abridged either by Congress or the FCC"). This Court has established a "middle-tier" scrutiny test for the regulation of broadcasting. Such regulations must be "narrowly tailored to further a substantial governmental interest." *F.C.C. v. League of Women Voters*, 468 U.S. at 380. If Fried is allowed to raise his constitutional defenses, he will argue to the District Court that the FCC's regulation of micro-radio and the forfeiture action fail to meet this standard. To prevent such a defense would inflict manifest injustice upon Fried and other micro-broadcasters, allowing the FCC to suppress speech without an opportunity to test the constitutional limits of the Government's power.



CONCLUSION

The circuits have created a clear and irreconcilable split on the issue presented in this petition. The issue is of vital importance not only to micro-radio broadcasters who find their First Amendment rights abridged, but also, as the Eighth Circuit below recognized, to "the statutory scheme created by Congress for the regulation of broadcasting." *Laurel Avenue*, 207 F.3d at 462, A-11. For these reasons, Petitioner respectfully urges this Court to grant the Petition.

Respectfully submitted,

MANSFIELD, TANICK & COHEN, P.A.
MARSHAL H. TANICK
Suite 1560
900 Second Street South
Minneapolis, MN 55402-3383
(612) 339-4295

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK
*SCOTT G. BULLOCK
DANA BERLINER
Suite 200
1717 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-1300
Counsel for Petitioner

**Counsel of Record*