

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-50848

UNITED STATES OF AMERICA,

PLAINTIFF - APPELLEE,

v.

RAYMOND FRANK,

DEFENDANT - APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with Appellant that the issues presented in this case do not require oral argument.

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BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

The United States is authorized by statute to recover monetary forfeitures imposed by the Federal Communications Commission (“FCC” or “Commission”) in a civil action in district court. 47 U.S.C. § 504(a). The district court had jurisdiction over the government’s suit under 28 U.S.C. §§ 1331, 1345, and 1355(a). On June 23, 2011, the district court entered a final

order of judgment against Appellant (RE Tab 3, R.281; R.288).¹ On September 8, 2011, Appellant filed a notice of appeal (RE Tab 2, R.364) within the 60 days permitted by Fed R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly held that it lacked jurisdiction to consider Appellant's challenges to the validity of FCC regulations.
2. Whether the district court properly held that Appellant violated 47 U.S.C. § 301 by operating an FM radio station and broadcasting without a license or other authorization from the Federal Communications Commission.

STATEMENT OF THE CASE

This case involves the government's suit to enforce an order of the Federal Communications Commission imposing a \$10,000 monetary forfeiture against Appellant Raymond Frank for operating an unlicensed FM radio broadcast station from his home in Austin, Texas, in violation of section 301 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 301. *See Raymond Frank*, 24 FCC Rcd 13660 (Enf. Bur. 2009)

¹ "RE xxx" refers to Appellant's Record Excerpts. Because each Tab of the Record Excerpts contains a number of related documents, for each reference we have also cited the specific page of the Record, designated "R.xxx" as well.

(“*Forfeiture Order*”) (RE Tab 4; Pl. Exh. 1).² Because Mr. Frank failed to pay the FCC’s forfeiture order, the government filed a complaint (SRE Tab 1, R.7)³ in the United States District Court for the Western District of Texas for judicial enforcement pursuant to 47 U.S.C. § 504(a).

Mr. Frank twice moved to dismiss the action prior to trial (SRE Tab 2, R.56; SRE Tab 3, R.78), raising a variety of procedural, legal, and constitutional challenges to the validity of the FCC and its regulations generally, as well as the specific Forfeiture Order at issue. In an order filed April 15, 2011 (“*April 15 Order*”), the district court denied both motions, finding that it lacked jurisdiction to address such challenges in an enforcement action under 47 U.S.C. § 504(a). *April 15 Order* at 17 (RE Tab 3, R.187). The district court set an evidentiary hearing and bench trial limited to determining: (1) whether the FCC’s allegations in the Forfeiture Order were true; (2) whether the allegations found to be true met the elements required for liability; and (3) whether the amount of the forfeiture penalty was appropriate in light of the facts. *April 15 Order* at 17 (RE Tab 3, R.187).

² A related appeal, *United States v. Stevens*, No. 11-50862, which involves the enforcement by the same district court judge of a separate monetary forfeiture imposed against two other Austin residents by the FCC for unlicensed broadcasting, raises nearly identical issues on appeal. See *June 23 Order* at 2 n.1 (RE Tab 3, R.282).

³ “SRE” refers to the government’s Supplemental Record Excerpts, followed by a Record citation.

After a bench trial, the district court found, in an order filed on June 23, 2011 (“*June 23 Order*”), that (1) the allegations in the FCC’s Forfeiture Order had been proved; (2) they established that Mr. Frank violated federal law and FCC regulations against unlicensed broadcasting; and (3) the amount of the forfeiture was not unreasonably high. *June 23 Order* at 7 (RE Tab 3, R.287). The district court accordingly entered judgment (“*June 23 Judgment*”) in favor of the government in the amount of \$10,000 plus interest. *June 23 Order* at 7 (RE Tab 3, R.287); *June 23 Judgment* (RE Tab 3, R.288).

Mr. Frank has appealed. *Notice of Appeal* (RE Tab 2, R.364).

COUNTERSTATEMENT OF FACTS

I. REGULATORY BACKGROUND

The Communications Act seeks “to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority.” 47 U.S.C. § 301. To that end, the statute provides that “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State,

Territory, possession, or District . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.” *Ibid.*; *see also KVUE, Inc. v. Austin Broad. Corp.*, 709 F.2d 922, 932 (5th Cir. 1983) (noting the comprehensive federal regulation of broadcasting under the Communications Act’s licensing provision), *aff’d mem.*, 465 U.S. 1092 (1984).

Under the Communications Act, the FCC has the power to issue licenses for radio broadcasting “if the public convenience, interest, or necessity will be served thereby.” 47 U.S.C. § 307(a). The Act also generally authorizes the Commission to issue rules and regulations implementing the statute’s provisions. 47 U.S.C. § 154(i).

The Commission by rule has exempted certain low-power radio transmission devices, such as garage door openers, from licensing under Part 15 of its regulations. 47 C.F.R. pt. 15. For Part 15 radio transmissions in the FM broadcast band (88-108 MHz), the Commission’s rules require that the field strength of any unlicensed radio emissions not exceed 250 microvolts per meter at 3 meters. 47 C.F.R. § 15.239(b). The Part 15 rules make clear that unless otherwise exempted, “[t]he operation of an intentional or unintentional radiator that is not in accordance with the regulations in this

part must be licensed pursuant to the provisions of section 301 of the . . . Act.” 47 C.F.R. § 15.1(b).⁴

Under the Communications Act, “[a]ny person who is determined by the Commission . . . to have . . . willfully or repeatedly⁵ failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.” 47 U.S.C. § 503(b)(1). In determining a forfeiture penalty, the Commission considers “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4) and note thereto.

⁴ The Act also empowers the Commission to authorize the operation of radio stations by rule, rather than by individual license, in the “citizens band radio service,” the “radio control service,” the “aviation radio service,” and the “maritime radio service.” 47 U.S.C. § 307(e). Those services are not at issue in this case.

⁵ Section 312 of the Act defines “willful” and “repeated” as applicable to violations for which forfeitures are assessed under section 503(b). 47 U.S.C. § 312. Section 312(f)(1) provides that “[t]he term ‘willful,’ when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act.” 47 U.S.C. § 312(f)(1). Section 312(f)(2) provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once, or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2).

The Communications Act authorizes the Commission to institute monetary forfeiture proceedings by issuing a Notice of Apparent Liability (“NAL”), and providing the person to whom the NAL is issued an opportunity to show, in writing, why no forfeiture penalty should be imposed. 47 U.S.C. § 503(b)(4).⁶ Any forfeiture penalty that the Commission decides to impose is recoverable in a “civil suit in the name of the United States” pursuant to section 504(a) of the Act, which shall be a “trial de novo.” 47 U.S.C. §§ 503(b)(4); 504(a).

Finally, proceedings to “enjoin, set aside, annul or suspend any order of the Commission” under the Communications Act must be brought as provided in the Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2341 *et seq.*, in the federal courts of appeal, which have “exclusive jurisdiction” to review “all final orders of the Federal Communications Commission.” 28 U.S.C. § 2342(1).

II. PRIOR PROCEEDINGS

This case began on January 23, 2007, when agents from the Houston Office of the FCC’s Enforcement Bureau (“Houston Office”) investigated a complaint about an unlicensed radio station in the Austin, Texas area. *See*

⁶ Alternatively, at the Commission’s discretion, it can impose a monetary forfeiture against a person after notice and an opportunity for a formal hearing before the Commission or an administrative law judge. 47 U.S.C. § 503(b)(3). This procedure was not used in this case.

Forfeiture Order, ¶ 2 (RE Tab 4; Pl. Exh. 1). On that date, the FCC agents confirmed that signals on frequency 100.1 MHz were being transmitted from Mr. Frank's residence in Austin, Texas. *Id.*

On February 22, 2007, the Enforcement Bureau sent a Notice of Unlicensed Operation ("Notice") to Mr. Frank warning him that his operation of a radio station without a license violated federal law and subjected him to serious penalties, including monetary fines. *See Raymond Frank*, No. W20073250004 (Enf. Bur. 2007) ("*Notice*") at 1 (SRE Tab 4; R.67). The Notice emphasized the importance of complying strictly with the licensing requirements of the Communications Act and stated that operation of radio transmitting equipment without proper authority granted by the Commission should cease immediately. *Id.* On March 5, 2007, Mr. Frank filed a written response to the FCC's Notice, stating that the transmissions had ceased. *See Forfeiture Order*, ¶ 3 (RE Tab 4; Pl. Exh. 1).

In response to an additional complaint about an unlicensed radio station operating in the Austin, Texas area, on July 22, 2009 and August 3, 2009, FCC agents from the Houston Office confirmed that the unauthorized

FM radio broadcasts were being transmitted from Mr. Frank's home on frequency 90.1 MHz.⁷ *See Forfeiture Order*, ¶¶ 4-5 (RE Tab 4; Pl. Exh. 1).

On August 13, 2009, the Houston Office issued an NAL to Mr. Frank pursuant to 47 U.S.C. § 503(b)(4)(A). *See Raymond Frank*, NAL No. 200932540003 (Enf. Bur. 2009) (“NAL”) (RE Tab 4; Pl. Exh. 4). The NAL listed the dates and times of the alleged illegal broadcasts and preliminarily assessed a forfeiture of \$10,000 against Mr. Frank for “willfully” and “repeatedly” operating an unlicensed station in violation of 47 U.S.C. § 301. *Id.* ¶¶ 2, 4-5, 7-9 (RE Tab 4; Pl. Exh. 4).

In his response to the NAL, Mr. Frank again did not deny that he had operated the radio station without a license. Instead, he disputed the FCC's jurisdiction over intrastate communications and asserted that he was not liable for the proposed forfeiture amount. *See Forfeiture Order*, ¶¶ 6, 9-10 (RE Tab 4; Pl. Exh. 1).

⁷ The field strength measurements of the signals emanating from Mr. Frank's residence conducted on both July 22, 2009 and August 3, 2009, established that the emission of the unlicensed station far exceeded the 250 microvolts/meter limit set forth in the FCC's Part 15 rules, 47 C.F.R. § 15.239(b). *See June 23 Order* at 4 & n.2 (RE Tab 3, R.284) (finding that the FCC's measurements indicated an average field strength of over thirteen thousand times the Part 15 limit); *see also July 22 Field Measurements* (SRE Tab 5; Pl. Exh. 9); (showing power level 13,048 times the Part 15 limit); *Aug. 3 Field Measurements* (SRE Tab 6; Pl. Exh. 11) (showing power level 15,434 times the Part 15 limit).

On November 9, 2009, the FCC’s Enforcement Bureau issued a Forfeiture Order. *Forfeiture Order* (RE Tab 4; Pl. Exh. 1). In the Forfeiture Order, the Bureau considered and rejected Mr. Frank’s claim that the FCC had no jurisdiction over his unlicensed radio station, *id.*, ¶¶ 8-11 (RE Tab 4, Pl. Exh. 1), and ordered Mr. Frank to pay a forfeiture of \$10,000 for his “willful” and “repeated” violations of the broadcast licensing requirement of 47 U.S.C. § 301, *id.* ¶ 12 (RE Tab 4; Pl. Exh. 1).

Mr. Frank failed to pay the \$10,000 forfeiture penalty and continued his unlicensed broadcasts.⁸ Consequently, on December 16, 2010, the United States filed an action (SRE Tab 1, R.7) in the United States District Court for the Western District of Texas for judicial enforcement. Mr. Frank filed two motions to dismiss the government’s suit (SRE Tab 2, R.56; SRE Tab 3, R.78). In his motions, he challenged the FCC’s authority to regulate his activity, the validity of the FCC regulations he violated, and the procedures the Commission used in issuing the Forfeiture Order.

Relying on 47 U.S.C. § 402(a)’s grant of exclusive jurisdiction over final orders of the FCC to the federal courts of appeal, the district court concluded that it lacked “the authority to entertain challenges to the validity

⁸ See *June 23 Order* at 4-5 & n.5 (RE Tab 3, R.285) (noting that the evidence established that “transmissions were once again emanating from Frank’s home” by May 27, 2011).

of FCC orders, even in the context of enforcement actions.” *Apr. 15 Order* at 14 (RE Tab 3, R.184). Instead, it had jurisdiction in a suit by the government to enforce a monetary forfeiture to determine “three things: (1) whether the facts alleged by the FCC are true; (2) whether the set of facts found by the court to be true are sufficient to establish liability; and (3) whether the size of the fine is appropriate in light of the facts.” *Id.*

On May 31, 2011, the district court conducted an evidentiary hearing and bench trial (RE Tab 3, R.266). On June 23, 2011, the court issued an order entering judgment in favor of the United States. *June 23 Order* at 7 (RE Tab 3, R.287). The court noted that Mr. Frank had raised “several legal and constitutional challenges to the validity of the FCC’s regulations and the Forfeiture Order during the proceedings,” but that these had been rejected in its April 15, 2011 Order, and were in any event “meritless, frivolous, incomprehensible, or simply beyond the jurisdiction of the Court to consider.” *Id.* at 3 (RE Tab 3, R.283). The court further observed that Mr. Frank “did not deny—and to this Court’s knowledge, has never denied—the factual allegations against him,” including that “he was ‘broadcasting a signal’” and lived at the address the FCC identified “as the source of the offending radio signal.” *Id.* at 4-5 (RE Tab 3, R.284-85). The court stated that while “[Mr.] Frank may disagree with the law, . . . he is not above it.” *Id.*

at 6 (RE Tab 3, R.286) (characterizing Mr. Frank’s arguments to the contrary as “composed of equal parts wishful thinking, cherry-picked quotations, and archaic legal terminology”). On the basis of the testimony of the government’s witnesses regarding the violation, as well as Mr. Frank’s corroborating statements, the court found that: (1) the allegations in the FCC’s Forfeiture Order were true; (2) they were sufficient to establish Mr. Frank’s liability under federal law and FCC regulations; and (3) the amount of the forfeiture penalty was “not unreasonably high.” *Id.* at 7 (RE Tab 3, R.287). Accordingly, the district court entered judgment in favor of the United States in the amount of \$10,000, plus interest. *Id.*; *June 23 Judgment* (RE Tab 3, R.288).

SUMMARY OF ARGUMENT

Section 301 of the Communications Act provides that “no person shall use or operate any apparatus for the transmission of energy or communication or signals by radio . . . except under and in accordance with this Act and with a license.” 47 U.S.C. § 301. In this case, the undisputed facts establish that Mr. Frank was broadcasting from his residence in Austin, Texas in violation of the Act’s longstanding requirement that persons engaged in radio broadcasting obtain an FCC license. *Br.* at 7; *Oct. Response* at 1 (RE Tab 4; Pl. Exh. 16); *June 23 Order* at 4-5 (RE Tab 3, R.284-85). The FCC is

authorized to impose monetary forfeitures for violations of the Communications Act, including section 301, *see* 47 U.S.C. § 503, and Mr. Frank does not challenge the reasonableness of the forfeiture amount. *June 23 Order* at 5 (RE Tab 3, R.285).

Instead, Mr. Frank challenges the validity and constitutionality of the Communications Act's radio licensing requirement and the FCC's implementing licensing rules and regulations. *See, e.g.,* Br. at 5-6. He maintains that the intrastate operation of an FM radio station is outside the jurisdiction of the FCC and requests that the district court's judgment upholding the FCC's monetary forfeiture be set aside. Br. at 51.

The Court should affirm the district court's judgment. The district court properly concluded that under the framework for judicial review established by the Communications Act, Mr. Frank's challenges to the validity and constitutionality of FCC rules and regulations are within the exclusive jurisdiction of the courts of appeal. *See Apr. 15 Order* (RE Tab 3, R.171); 47 U.S.C. § 402(a). In a forfeiture enforcement proceeding brought in district court pursuant to 47 U.S.C. § 504(a), the district court was limited to a de novo review of only factual determinations.

Even if the district court had jurisdiction over any of Mr. Frank's legal challenges to the FCC's authority, there is no basis for overturning the

judgment against him. Section 301's broadcast licensing requirement is a valid exercise of Congress' powers under the Commerce Clause, which does not depend on what Mr. Frank terms an "animating action" (Br. at 7) or on his consent to regulation (Br. at 8). Nor is section 301(a) limited to "point-to-point" communications rather than FM broadcasting. Br. at 9-35. By its terms, the section prohibits persons from using equipment to transmit radio signals, of any kind, "from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District." 47 U.S.C. § 301(a). A broadcast signal travels from one place to another just as much as any other radio transmission. Mr. Frank's argument to the contrary is frivolous.

Finally, the validity of section 15.239(b) of the Commission's rules, 47 C.F.R. § 15.239(b), which excludes from the licensing requirement those broadcasting at a power level below 250 microvolts per meter at 3 meters, is irrelevant because Mr. Frank was operating far in excess of those limits. *See June 23 Order* at 4 & n.2 (RE Tab 3, R.284); *July 22 Field Measurements* (SRE Tab 5; Pl. Exh. 9); *Aug. 3 Field Measurements* (SRE Tab 6; Pl. Exh. 11).

In sum, the undisputed facts show that Mr. Frank was broadcasting without a license in violation of section 301 of the Communications Act, and

were thus liable for the monetary forfeiture that the Commission imposed. The judgment of the district court should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo the district court's decision, as a matter of law, that it lacked the power to consider certain defenses. *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572, 1574 (5th Cir. 1988); *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010) ("We review questions of subject matter jurisdiction *de novo*."), *cert. denied*, 131 S.Ct. 3063. A district court's interpretation of a statute or regulation is a question of law that is reviewed de novo. *Dresser v. MEBA Med. & Benefits Plan*, 628 F.3d 705, 707 (5th Cir. 2010); *Teemac v. Henderson*, 298 F.3d 452, 456 (5th Cir. 2002). Review of the district court's findings of fact made in the bench trial, however, "are not to be set aside on appeal unless clearly erroneous." *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970).

II. THE DISTRICT COURT PROPERLY DETERMINED THAT IT WAS WITHOUT JURISDICTION TO CONSIDER CHALLENGES TO THE VALIDITY OF FCC STATUTES AND REGULATIONS.

The district court correctly concluded that it lacked jurisdiction over Mr. Frank's "constitutional, legal, and procedural challenges to the FCC, its regulations, and the forfeiture order issued against him." *Apr. 15 Order* at 1-

2 (RE Tab 3, R.171-72). The court held that such challenges are in the exclusive jurisdiction of the court of appeals. *Id.* at 8 (RE Tab 3, R.178). This Court should affirm that ruling.

The Communications Act vests district courts with jurisdiction in recovery actions brought by the government to enforce unpaid monetary forfeitures assessed by the FCC. *See* 47 U.S.C. §§ 503(b)(3)(B); 504(a). This jurisdiction of the district courts over FCC matters, however, is only “a sliver of the [FCC] jurisdictional pie.” *Action for Childrens Television v. FCC (ACT I)*, 827 F. Supp. 4, 10 (D.D.C. 1993), *aff’d*, 59 F.3d 1249 (D.C. Cir. 1995) (*ACT II*).

The general rule is that the courts of appeal have exclusive jurisdiction to hear challenges to FCC orders. 47 U.S.C. § 402(a); 28 U.S.C. § 2342; *see ACT I*, 827 F. Supp. at 10; *see also FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463, 468 (1984). Specifically, section 402(a) of Title 47 of the United States Code specifies that any challenge to the validity of an FCC order or regulation must be brought under the Hobbs Administrative Orders Review Act, §§ 2341 *et seq.*, which in turn provides that the court of appeals generally 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; *see also Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 425 (1942) (holding that the FCC’s promulgation of regulations is an order reviewable under section 402(a)).⁹

Thus, this Court has recognized that in suits involving the FCC, “special [judicial review] rules apply.” *Bywater Neighborhood Ass’n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). Indeed, “[i]t is hard to think of clearer language [than 47 U.S.C. 402(a) and 28 U.S.C. 2342] confining the review of regulations to the Courts of Appeal.” *United States v. Any and All Radio Station Transmission Equip. (Laurel Avenue)*, 207 F.3d 458, 463 (8th Cir. 2000), *cert. denied*, 531 U.S. 1071(2001).

Because Congress has vested exclusive jurisdiction over FCC regulatory actions in the courts of appeal, such actions ordinarily may not be reviewed in a district court. That is because “[s]pecific grants of jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts.” *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010), *cert. denied*, 131 S.Ct. 3063; *accord Telecomm. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 77 (D.C. Cir. 1984) (“[A] statute which vests jurisdiction in a

⁹ In addition, section 402(b) of Title 47 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).

particular court cuts off original jurisdiction in other courts in all cases covered by that statute.”); *see Bywater*, 879 F.2d at 168 (discussing “Congress’s specific and obvious intent to restrict to the circuit courts any appeals from rulings of the FCC”); *see also United States v. Neely*, 595 F. Supp. 2d 662, 669 (D.S.C. 2009); *United States v. TravelCenters of America*, 597 F. Supp. 2d 1222, 1225-26 (D. Or. 2007).

The direction in section 504 that actions for the recovery of monetary forfeitures shall be brought by the United States in district court pursuant to a “trial de novo,” 47 U.S.C. § 504(a), is thus a limited exception to the general rule that federal law gives the courts of appeal exclusive jurisdiction over challenges to FCC orders and regulations.

We agree with Mr. Frank that under this de novo standard, district courts “are not limited to a review of the administrative record before the FCC, and the FCC’s findings carry no weight whatsoever.” Br. at 38 (citing *FCC v. Summa Corp.*, 447 F. Supp. 923, 925 (D. Nev. 1978)). Rather, “[t]he words ‘de novo’ mean that ‘the court should make an independent determination of the issues.’” *Summa*, 447 F. Supp. at 925 (quoting *United States v. First City Nat’l Bank of Houston*, 386 U.S. 361, 368 (1967)); *United States v. Daniels*, 418 F. Supp. 1074, 1080-81 (D.S.D. 1976).

But those “issues” which the court must “independent[ly] determine” are those concerning questions of fact, and not challenges to the validity of the underlying statutes or regulations. A contrary conclusion would undermine the Supreme Court’s determination that the exclusive jurisdiction of the court of appeals may not be evaded by seeking relief or raising defenses in the district court. *ITT*, 466 U.S. at 468; *see also Laurel Avenue*, 207 F.3d at 463 (“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. . . . ‘Where exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action.’”) (quoting *Sw. Bell Tel. v. Ark. Pub. Serv.*, 738 F.2d 901, 906 (8th Cir. 1984), *vacated and remanded on other grounds*, 476 U.S. 1167 (1986)).

In sum, given the general rule whereby FCC orders are reviewable only in the courts of appeal, the district court correctly determined that the scope of its authority to review FCC forfeitures “de novo” was limited to determining whether the facts alleged were true, whether they supported the agency’s determination that there was a violation of federal communications law or FCC regulation, and whether the amount of the forfeiture was not

unreasonable. *See Apr. 15 Order* at 2-3, 8, 14, 17 (RE Tab 3, R.172-73, 178, 184, 187).

Importantly, these statutory jurisdictional rules did not deprive Mr. Frank of the ability to challenge the validity of the FCC's Forfeiture Order or the agency's regulations against unlicensed broadcasting. After exhausting his administrative remedies,¹⁰ Mr. Frank could have paid the Forfeiture Order and raised his challenges in the court of appeals. *See, e.g., SBC Commc 'ns, Inc. v. FCC*, 373 F.3d 140 (D.C. Cir. 2004); *AT&T Corp. v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

Alternatively, Mr. Frank could have petitioned for a declaratory ruling to have the Commission clarify its interpretation of the reach of the licensing requirement or for a rulemaking to change the licensing rules in his favor. In addition, he could have applied for a waiver of the license requirement (or any other regulation) "for good cause shown."¹¹ If the Commission denied his requests, or Mr. Frank was otherwise still aggrieved, he could have

¹⁰ In this case, because the Forfeiture Order was issued by the Enforcement Bureau pursuant to delegated authority, Mr. Frank would have been required to file an Application for Review as a "condition precedent to judicial review." 47 C.F.R. § 1.115(k).

¹¹ Section 1.2 provides that the Commission on motion may issue a declaratory ruling to "terminat[e] a controversy" or to "remov[e] uncertainty." 47 C.F.R. § 1.2. Section 1.401 of the FCC's rules grants "any interested person" the right to "petition [the Commission] for the issuance, amendment or repeal of a rule or regulation." 47 C.F.R. § 1.401. Section 1.3 of the FCC's rules provides that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3.

challenged the denials or decisions in the appropriate circuit court under section 402(a). Instead, he chose to operate without a license. *See Grid Radio v. FCC*, 278 F.3d 1314, 1321 (D.C. Cir. 2002) (noting that operating without a license was an “inappropriate” method by which to challenge the FCC’s licensing rules); *United States v. Dunifer*, 219 F.3d 1004, 1008-09 (9th Cir. 2000) (noting that it was not the case that Dunifer “had no means to obtain judicial review of the regulations,” and identifying various alternative methods by which a party in such circumstances might have obtained relief).

The Communications Act does not, however, empower persons who object to the FCC’s broadcast rules to commence broadcasting while they litigate their arguments in court. Instead, the Act makes clear that no person may broadcast unless and until he or she obtains a license from the Commission. *See* 47 U.S.C. § 301. The constitutionality of the Act’s broadcast licensing requirement has long been settled. *See, e.g., Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 386-95 (1969); *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 225-27 (1943); *see also June 23 Order* at 6 (RE Tab 3, R.286). Permitting Mr. Frank or anyone else to operate without a license as a means of challenging the Communications Act’s licensing requirement or implementing regulations “could produce the very ‘chaos’ that, according to the Supreme Court, the broadcast licensing regime was

designed to prevent.” *Grid Radio*, 278 F.3d at 1321 (quoting *Red Lion*, 395 U.S. at 375-76).

On the same reasoning, a number of courts have prohibited challenges to FCC regulations as defenses to suits to enforce the Communications Act’s radio licensing requirement. *See, e.g., United States v. Neset*, 235 F.3d 415 (8th Cir. 2000) (holding that, in adjudicating the government’s request for injunctive relief under 47 U.S.C. § 401(a), a district court lacks jurisdiction to consider the validity of the FCC’s low power rules); *Laurel Avenue*, 207 F.3d 458 (holding that the district court had jurisdiction to adjudicate *in rem* forfeiture action, but not to hear claimant’s constitutional challenges to microbroadcasting regulations); *Dunifer*, 219 F.3d 1004 (affirming the district court’s grant of an injunction against a low power radio station from operating without a license, and holding that the district court lacked jurisdiction to adjudicate operator’s affirmative defenses challenging validity of the applicable regulation).¹²

Mr. Frank’s interpretation of the de novo provision of section 504(a), to require “independent determination” of all issues (Br. at 38), including the

¹² Although the Sixth Circuit in *United States v. Any and All Radio Station Transmission Equip. (Bent Oak)*, 204 F.3d 658, 667 (6th Cir. 2000), Br. 37-38, 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, it has since limited its ruling to *in rem* forfeitures, where, unlike here, no FCC order is at issue. *See La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313, 320 (6th Cir. 2000).

validity and construction of the FCC's statutes and rules, would upset the traditional framework of judicial review of agency action. If Mr. Frank's reading were correct, not only would the district court be authorized to determine the validity of FCC regulations and interpretations of the Communications Act, but also the court would do so without the ordinary deference that courts of appeals apply in Hobbs Act review proceedings. There is no reason to think that Congress would have intended to strip the FCC of all deference to which it is normally entitled in a forfeiture enforcement proceeding. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984); *see also City of Arlington v. FCC*, No. 10-60039, slip. op. at 26-27 (5th Cir. Jan. 23, 2012). This highly unlikely outcome is sensibly avoided by concluding that the de novo review provision of section 504(a) authorizes the district court to examine the factual determinations that underlie the imposition of an FCC forfeiture order. The section thereby provides an additional layer of process by assuring that the evidence underlying the Commission's forfeiture order is evaluated by a neutral arbiter and is not determined solely by the FCC.¹³ This interpretation

¹³ *Accord U.S. Nuclear Regulatory Comm'n v. Radiation Tech., Inc.*, 519 F. Supp. 1266, 1286 (D.N.J. 1981) (finding that "a trial *de novo* is quite appropriate in [NRC collection proceedings] inasmuch as the NRC was acting as 'both prosecutor and judge' in the penalty proceedings") (quoting *Summa*, 447 F. Supp. at 925).

also avoids the problem of giving forfeiture subjects the proverbial “two bites at the apple,” where they would “be able to challenge the forfeiture order in a court of appeals on the basis of the administrative record and, if unsuccessful, . . . litigate all issues *de novo* in the district court with a right of appeal to the court of appeals.” *Pleasant Broad. Co. v. FCC*, 564 F.2d 496, 501 (D.C. Cir. 1977). As the district court found, this review structure “creates a logical and consistent division of labor” between district and appellate courts. *Apr. 15 Order* at 15 (RE Tab 3, R.185).

III. THE DISTRICT COURT CORRECTLY HELD MR. FRANK LIABLE FOR BROADCASTING WITHOUT A LICENSE.

A. The undisputed evidence shows that Mr. Frank was broadcasting without a license or other authorization from the FCC.

Mr. Frank admits making FM radio broadcasts at all relevant times, and adamantly states that he “*never* applied for any ‘license’ of any type, kind, or nature.” Br. at 3 (emphasis in the original); *see also June 23 Order* at 4-5 (RE Tab 3, R.284-85); *Oct. Response* (RE Tab 4; Pl. Exh. 16). Nor does Mr. Frank dispute the government’s showing that his radio transmissions were far more powerful than those permitted by the Commission’s Part 15 regulations. *See June 23 Order* at 4 & n.2 (RE Tab 3; R.174); *see also July 22 Field Measurements* (SRE Tab 5; Pl. Exh. 9); *Aug. 3*

Field Measurements (SRE Tab 6; Pl. Exh. 11). Mr. Frank has also never challenged the reasonableness of the forfeiture amount assessed against him. The district court thus had an ample basis on which to hold that Mr. Frank violated section 301 of the Communications Act and was therefore liable for a monetary forfeiture for broadcasting without a license. *See June 23 Order* at 4-7 (RE Tab 3, R.174-77).

B. Mr. Frank's legal objections are without merit.

On appeal, Mr. Frank continues to raise procedural, legal, and constitutional challenges to the validity of the FCC's regulations and the Forfeiture Order. *See, e.g., Br. 5-6; June 23 Order* at 2-3 (RE Tab 3, R.172-73). As we have shown in Part II *supra*, the district court correctly determined that it lacked jurisdiction to consider such arguments. *See Apr. 15 Order* (RE Tab 3, R.171). Even if Mr. Frank's objections to the FCC's regulation of his broadcasts are considered, however, they are entirely without merit and afford him no relief from liability.

1. Mr. Frank did not have to consent to regulation or otherwise apply for a license for the FCC's rules to apply.

Mr. Frank contends that because he "never applied for a 'license,' never initiated any administrative proceeding . . . and to this day has not paid one penny of the alleged 'damages,'" he never "consented to being regulated

by the FCC” (Br. at 8), and never “animated the FEDERAL CAPACITY” (Br. at 7). But there is no requirement in federal law or FCC regulations that a person engaging in broadcasting consent to regulation. Instead, Section 301 provides that “[n]o person” shall operate equipment to transmit radio signals from, among other things, “one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.” 47 U.S.C. § 301. Under the Communications Act, the licensing requirement is triggered by the act of broadcasting, not consent.

Mr. Frank contends that he was never a “party to any commercial nexus involving the FCC.” Br. at 7-8. To the extent he means to argue that his actions do not fall within Congress’s power under the Commerce Clause, his argument is foreclosed by Supreme Court precedent, which has “unequivocally” held that the Communications Act’s broadcast licensing requirement is “a proper exercise of [Congress’s] power over commerce.” *June 23 Order* at 6 (RE Tab 3, R.286) (quoting *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 227 (1943)). To the extent he means to suggest he is immune from regulation because he does not operate on a commercial basis, his argument finds no basis in the statute, which does not limit its reach

to commercial broadcasting. *See, e.g., Coal. for Noncommercial Media v. FCC*, 249 F.3d 1005, 1006-07 (D.C. Cir. 2001) (discussing FCC rules governing noncommercial broadcast stations).¹⁴

2. Mr. Frank's broadcasts fall within Section 301's licensing requirement.

Mr. Frank's primary argument (Br. 9-35) is that Section 301(a)'s licensing requirement does not apply to his broadcasts because he was engaged in a form of "one-way messaging technology" that is "different and distinct" from the "point to point" technology – "e.g., cell phones, garage door openers, radio-controlled airplanes," – with which 301(a) is concerned. Br. at 10. Mr. Frank contends that "[w]here there's no *specific and intended* destination or recipient, § 301(a) is facially inapplicable." Br. at 12. The argument is frivolous.

Section 301(a) provides, in no uncertain terms, that "[n]o person" shall operate any equipment for the transmission of radio signals "(a) from one place in any State, Territory, or possession of the United States or in the

¹⁴ Nor is it relevant to Mr. Frank's Commerce Clause objection that a broadcaster might intend to transmit only "intrastate" communications. "By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause." *Fisher's Blend Station, Inc. v. Tax Comm'n*, 297 U.S. 650, 655 (1936); *see also United States v. Brown*, 661 F.2d 855, 855-56 (10th Cir. 1981) (per curiam) (prosecution does not have to prove that defendant's signals crossed stated borders); *United States v. Butterfield*, 91 F. Supp. 2d 704, 705 (D. Vt. 2000) ("[R]adio broadcasts have impact upon interstate commerce, regardless of whether those broadcasts are interstate or intrastate in scope.").

District of Columbia to another place in the same State, Territory, possession, or District.” 47 U.S.C. § 301(a).¹⁵ The statute does not speak of intended recipients or destinations; it is enough that the radio signals are transmitted from a place in one state to another place in the same state. In this case, Mr. Frank well knew that his signals would be received by many recipients and in many destinations within the state of Texas – *i.e.*, to be received by all within range of reception. Br. at 30. As the district court properly found, “[t]he undisputed facts at trial demonstrated Frank transmitted radio signals from his residence in Texas to other places in Texas, specifically to FCC Resident Agent Steven Lee’s signal detection vehicle in Austin.” *Aug. 8 Order* at 2 (RE Tab 3, R.363). Such actions place Mr. Frank squarely within the plain meaning of section 301(a), transmitting “from one place in any State . . . to another place in the same State,” and as such were prohibited from operating without a license. Thus, Mr. Frank’s assertions that the Government “never

¹⁵ This subsection was amended in 1982 to clarify the authority of the FCC to enforce the licensing requirement on intrastate transmissions, without the need to affirmatively show that the transmissions were causing interference or crossed state or international boundaries. Communications Amendments Act of 1982, § 107, Pub. L. No. 97-259, 96 Stat. 1087, 1091. Because “persons who intend to broadcast by radio must have an FCC license, whether or not such broadcasts are intended to be interstate or intrastate,” it is irrelevant to a finding of liability that Mr. Frank’s broadcasts may not have extended beyond the borders of Texas. *Butterfield*, 91 F. Supp. 2d at 705; *see also United States v. Ganley*, 300 F. Supp. 2d 200, 202-03 (D. Me. 2004).

alleged, much less proved,” the applicability and violation of section 301 (Br. at 33) are meritless.

Finally, Mr. Frank’s construction of section 301(a) would produce an absurd result, according to which the FCC would have authority to require the comprehensive licensing of “garage door openers” and “radio-controlled planes” but not AM or FM broadcasters (Br. at 9), who would only be subject to regulation if their signals could be shown to cross state lines, 47 U.S.C. § 301(b), or to interfere with transmissions in other states, 47 U.S.C. § 301(d). There is no basis for thinking that Congress intended such a result, for it would directly undermine the Act’s purpose of establishing “a unified and comprehensive regulatory system” for regulating broadcasting. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940); *see also KVUE, Inc.*, 709 F.2d at 932.

3. Section 15.239(b) of the FCC’s Rules does not provide a defense to Mr. Frank’s unlicensed broadcasting.

Mr. Frank also contends that section 15.239(b) of the FCC’s rules is unconstitutional. 47 C.F.R. § 15.239(b); Br. at 46-50. As we have explained, the district court correctly concluded that it lacked jurisdiction to entertain Mr. Frank’s challenges to the validity of FCC regulations because such review was confined to the court of appeals under section 402(a). *Apr. 15 Order* (R.171); *see supra* Part II. Even if the district court would have had

jurisdiction to consider such a challenge, Mr. Frank nowhere explains why section 15.239(b) violates his constitutional rights.

Mr. Frank appears to argue that the rule is invalid because it exceeds the FCC's statutory authority under his view of section 301(a), which he contends only requires a license for "point-to-point" communications. Br. at 48-49. As we have explained, that view of the statute is unsustainable. *See supra* pp. 27-29.

In any event, even if section 15.239(b)'s exception to the individual licensing requirement were invalid, it would provide Mr. Frank with no relief from his violation of the broadcast licensing provisions of the Communications Act.

As applicable to this case, Part 15 of the Commission's rules "sets out regulations under which an intentional . . . radiator may be operated without an individual license." 47 C.F.R. § 15.1. The Part 15 regulations make clear that the operation of a radio transmitter that is not in accordance with the

regulations “must be licensed” pursuant to 47 U.S.C. § 301, unless otherwise specifically exempted. 47 C.F.R. § 15.1(b).¹⁶

As we have explained, see *supra* pp. 5-6, section 15.239(b) provides that operations within the FM band (88-108 MHz) are permitted without an individual license, otherwise required by section 301, provided that “[t]he field strength of any emissions . . . shall not exceed 250 microvolts/meter at 3 meters.” 47 C.F.R. § 15.239(b). This section is only applicable to this case to the extent it provides permission to transmit radio signals on the FM band within the prescribed power limits. Because Mr. Frank’s radio transmissions “averaged over thirteen thousand times stronger than [the Part 15] limit” (*June 23 Order* at 4 & n.2 (RE Tab 3, R.284)), he cannot rely on section 15.239(b) as a defense to his unlicensed broadcasting.

Accordingly, even if Mr. Frank was correct that section 15.239(b) is invalid, the statutory licensing requirement would remain in effect. At most, instead of allowing low-power emitters to transmit without an individual license, it would require persons employing such equipment to apply for a

¹⁶ The rules in Part 15 “are designed to provide a balance of [the FCC’s] competing goals of eliminating unnecessary regulatory barriers and burdens on the development of new low power [radio frequency] equipment and maintaining adequate interference protections for authorized radio services and recognized passive users of low level [radio frequency] signals.” *Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License*, 4 FCC Rcd 3493, ¶¶ 2, 13 (1989), *recon. denied*, 5 FCC Rcd 1110 (1990).

broadcast license in accordance with section 301, regardless of operational power.

* * * * *

In sum, because Raymond Frank engaged in unlicensed broadcasting in plain violation of federal law, the district court's decision enforcing the FCC's imposition of a \$10,000 monetary forfeiture was entirely correct and should be upheld.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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February 1, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF - APPELLEE,

v.

RAYMOND FRANK,

DEFENDANT - APPELLANT.

No. 11-50848

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT copies of the foregoing Brief for the United States were served in paper form this 1st day of February, 2012, by certified mail, upon following defendants-appellants:

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a), I hereby certify that the accompanying “Brief for Appellee” in the captioned case complies with the type-volume and typeface limitations because:

1. Pursuant to Fed. R. App. P. 32(a)(7), this brief contains 8,859 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. Pursuant to Fed. R. App. P. 32(a)(5), (6), this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman typeface with 14-point font.

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No. 11-50848, USA v. Raymond Frank
USDC No. 1:10-CV-957

The following pertains to your brief electronically filed on 2/1/12.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: 
Steve A. Totor, Deputy Clerk
504-310-7667

cc: Mr. Raymond Frank

P.S. To All: If the record on appeal is still in your possession, please return it to the 5th Circuit within ten (10) days from the date of this notice.