

Who's Allowed to Kill the Radio Star? Forfeiture Jurisdiction under the Communications Act

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INTRODUCTION

The Federal Communications Commission (FCC) issues regulations, the violation of which can result in the FCC seeking forfeiture—“the divestiture of property without compensation.”¹ Courts are currently split regarding the jurisdiction of district courts to entertain constitutional challenges to these regulations when raised as affirmative defenses in forfeiture actions under the Communications Act of 1934.² The Act sets up a jurisdictional structure for review of FCC actions. Three provisions are of interest here: 47 USC §§ 402, 504, and 510. The courts of appeals have exclusive jurisdiction over “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC]” under § 402.³ The federal district courts have exclusive jurisdiction over forfeiture proceedings under §§ 504 and 510.⁴ Unfortunately, the Act’s jurisdictional grants are notably complicated, and it is unclear whether district court forfeiture jurisdiction extends to constitutional defenses that implicate the validity of an FCC order.⁵

In 2000, the Sixth and Eighth Circuits disagreed over whether district court forfeiture jurisdiction extended to constitutional challenges to regulations raised as defenses (“constitutional defenses”) during a forfeiture proceeding. It is important to emphasize that the split is about constitutional challenges to the FCC *directives* underlying the forfeiture action and *not* constitutional challenges to either

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¹ *Black’s Law Dictionary* 722 (West 9th ed 2009).

² Pub L No 73-416, 48 Stat 1064, codified as amended at 47 USC § 151 et seq.

³ 47 USC § 402(a). As explained in Part I.D.3, “orders” has been interpreted to encompass FCC rules and regulations.

⁴ 47 USC §§ 504(a), 510(b). See also *Prayze FM v FCC*, 214 F3d 245, 250 (2d Cir 2000) (stating that § 504 “confers on the district courts jurisdiction to hear in rem forfeiture suits”); *United States v Evergreen Media Corporation of Chicago, AM*, 832 F Supp 1183, 1184, 1186 (ND Ill 1993) (same).

⁵ See *Action for Childrens Television v FCC*, 827 F Supp 4, 10 (DDC 1993) (lamenting the “maze of jurisdictional rules governing the review of FCC matters” as “difficult to navigate”).

the forfeiture action itself (for example, that the search violated the Fourth Amendment) or the statute. In *United States v Any and All Radio Station Transmission Equipment*⁶ (“Laurel Avenue”), the Eighth Circuit found that district courts lack jurisdiction over such defenses.⁷ In *United States v Any and All Radio Station Transmission Equipment*⁸ (“Maquina Musical”), the Sixth Circuit found that district courts have jurisdiction.⁹ While other circuits have discussed the issue, none has fully committed to either approach.¹⁰ Ultimately, the solutions presented are either too blunt or too confused to resolve this issue—the courts have brought a sledgehammer to surgery.

The Act’s jurisdictional provisions demand no particular solution. These provisions do not discuss defenses and provide no guidance on how courts should deal with them. Although § 402 grants exclusive jurisdiction to the appellate courts to review the validity of FCC regulations, a hyper-literal reading that drew from this fact the conclusion that district courts may not hear constitutional defenses is in conflict with the robustly supported intuition that Congress is unlikely to grant forfeiture jurisdiction to the district courts while depriving them of jurisdiction over constitutional defenses raised during those actions.¹¹ To simply begin and end with § 402 is to ignore both the specific grant of forfeiture jurisdiction to district courts (§§ 504 and 510) and the intuitions that accompany the defenses at issue. Ultimately, the language and structure of the Act provide little guidance to resolve the split and, instead, indicate that the jurisdictional provisions are in tension.

This Comment resolves the tension. It argues that district courts have jurisdiction to hear constitutional defenses to FCC directives, but only as-applied defenses and *not* facial defenses. That is, defendants cannot, as a defense, challenge the wholesale constitutionality of FCC directives. They can, however, raise constitutional defenses as to the application of those directives in the forfeiture proceeding. This approach is supported by the language and structure of the Act. Analogous case law also suggests that splitting the defenses satisfies the demand of the appellate court jurisdictional grant without overly

⁶ 207 F3d 458 (8th Cir 2000).

⁷ *Id.* at 463.

⁸ 204 F3d 658 (6th Cir 2000).

⁹ *Id.* at 665.

¹⁰ See Part II.C.

¹¹ See generally Courtney J. Linn, *International Asset Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction over Foreign Assets under 28 U.S.C. § 1355(b)(2)*, 31 Am J Crim L 251 (2004) (discussing constitutional issues in the context of forfeiture and district court jurisdiction).

circumscribing the district court jurisdictional grant. This interpretation gives weight to the complexity and nuance of the jurisdictional provisions, ensuring that neither jurisdictional grant unduly limits the extent of the other. Further, the resolution balances the concerns of the Sixth and Eighth Circuits by ensuring the ability to defend constitutional rights while preventing forfeiture defendants from improperly using the district courts to strike down regulations. Finally, this solution brings much needed clarification to the jurisdictional provisions.

This Comment is divided into three parts. Part I discusses forfeiture in general and its application within the Act in particular. Part II discusses the two main sources of the current split and related decisions reached by other circuits. Part III presents an analysis of the statutory provisions and the solution.

I. FORFEITURE, JURISDICTION, AND THE COMMUNICATIONS ACT

This Part describes the history and mechanics of forfeiture, the general grant of jurisdiction over forfeitures, and the Act's forfeiture and jurisdictional provisions. The goal is to provide a basic background on these subjects in order to give context to the circuit split and the solution presented in Part III.

A. The Form of Forfeiture

The circuit split at issue implicates civil forfeiture—civil actions to obtain control of property. The two primary cases involve civil in rem forfeiture, but other forms of forfeiture arise in similar cases.

Civil in rem forfeiture is an action against the property itself.¹² Important aspects of in rem forfeiture are illustrated by *Laurel Avenue*. The first aspect of the case to notice is the caption. The defendant is the equipment itself: “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.”¹³ When Alan Fried, the equipment owner, refused to cease his unauthorized broadcasting, the Government initiated an in rem forfeiture action in the federal district court for Minnesota under § 510.¹⁴ The magistrate judge issued a warrant of arrest and notice, and the US Marshal “arrest[ed]

¹² See Note, *Fifth Amendment: Double Jeopardy Clause—In Rem Civil Forfeiture*, 110 Harv L Rev 206, 208 (1996).

¹³ *Laurel Avenue*, 207 F3d at 458.

¹⁴ *Id* at 459–60.

the radio equipment” after notice was given.¹⁵ In response, Fried sought restoration of the equipment and filed an answer to the Government’s initial complaint.¹⁶ This scenario illustrates several key aspects of a civil in rem forfeiture proceeding: statutory authorization of the forfeiture, filing an action against the property itself, and seizure of the property during the forfeiture proceeding.

In some cases, however, the Government pursues civil in personam forfeiture, which involves an action against a specific person.¹⁷ The Government sues an individual under a particular statute to recover property associated with the statutory violation. For example, the FCC’s pursuit of monetary forfeiture is a form of in personam forfeiture.¹⁸ The FCC generally issues notice to inform a statutory violator of what the violator might owe. After issuing notice, the FCC proceeds to impose the forfeiture. If the violator does not comply with the demand, the FCC sues the violator in district court.¹⁹ This example illustrates two key facets of in personam forfeiture: filing against the person and no seizure of the property during the proceeding.

Additionally, an agency will sometimes pursue administrative forfeiture. This action is simply a forfeiture proceeding that is conducted through mechanisms internal to the agency rather than through the courts.²⁰

B. A Brief History of Forfeiture

As suggested by the opening examples, forfeiture is a way of attaining title to property that has been used “in a manner contrary to the laws of the sovereign.”²¹ It is “the divestiture of property without compensation” in which “[t]itle is instantaneously transferred to [the government].”²² The government cannot use this power arbitrarily, however—it has traditionally been constrained to instances where the

¹⁵ Id at 460.

¹⁶ Id.

¹⁷ See Note, 110 Harv L Rev at 208 (cited in note 12).

¹⁸ See 47 USC § 503(b)(1).

¹⁹ See *Action For Children’s Television v FCC*, 59 F3d 1249, 1253–54 (DC Cir 1995); *United States v Ganley*, 300 F Supp 2d 200, 202 (D Me 2004) (explaining that the FCC has authority to issue forfeitures and that uncollected amounts from forfeiture orders can be recovered in civil actions).

²⁰ See Dee R. Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* 3–4 (ABA 2d ed 2008). See also 47 USC § 503(b)(3)(A)–(B) (setting up a procedure for FCC administrative forfeiture actions).

²¹ Edgeworth, *Asset Forfeiture* at 1 (cited in note 20).

²² *Black’s Law Dictionary* at 722 (cited in note 1).

“laws of the sovereign” have been violated. In the modern era, forfeiture requires statutory authorization.²³

As noted, the forfeiture actions discussed in this Comment are civil forfeitures, of which there are two types.²⁴ The first is civil in rem forfeiture, which is an action against the property based “upon the fiction that inanimate objects themselves can be guilty of wrongdoing.”²⁵ The legal proceedings arising from this fiction often bear odd captions, such as *United States v 144,774 Pounds of Blue King Crab*.²⁶ The second is civil in personam forfeiture, which is “brought against a person for the assets acquired or maintained through the conduct giving rise to the forfeiture.”²⁷

The basic fiction underlying civil forfeiture has a long history. It is mentioned in Plato’s *Laws*, where he discusses an object in the polity that would “on conviction . . . be cast beyond the frontier” if that object killed a man.²⁸ The laws of medieval England required that certain items of property be surrendered to the authorities “for retribution” if they caused harm to a person.²⁹ Eventually, this quasi-superstitious concept morphed into the law of deodand, “a thing forfeited . . . for the good of the community.”³⁰ For example, if a person was run over by a barrel, the “community” (meaning the king) confiscated the object as a deodand. This practice was transferred to the American colonies but fell into disuse after occasional application in the eighteenth century.³¹

While the core concept underlying civil forfeiture is found in the law of deodand, the legal structure owes more to English commercial

²³ See *United States v Lane Motor Co*, 199 F2d 495, 496–97 (10th Cir 1952).

²⁴ More broadly, judicial forfeiture—forfeiture involving formal court action—is split into civil forfeiture and criminal forfeiture. Criminal forfeiture is an action filed against a specific alleged wrongdoer in connection with a criminal investigation.

²⁵ *United States v United States Coin & Currency*, 401 US 715, 719–20 (1971).

²⁶ 410 F3d 1131, 1132 (9th Cir 2005) (involving forfeiture action by the United States against “the defendant 144,774 pounds of cooked, frozen blue king crab”).

²⁷ Edgeworth, *Asset Forfeiture* at 11 (cited in note 20).

²⁸ Plato, *Laws* 624a, 873e–874a, in Edith Hamilton and Huntington Cairns, eds, *The Collected Dialogues of Plato, Including the Letters* 1225, 1433 (Princeton 2002) (A.E. Taylor, trans). See also Leonard W. Levy, *A License to Steal: The Forfeiture of Property* 1–20 (North Carolina 1996).

²⁹ Levy, *License to Steal* at 10–11 (cited in note 28) (noting that the property would be surrendered if an accidental homicide occurred, even if the owner exercised reasonable care in controlling the property).

³⁰ *Id* at 7, 11–13 (explaining that the value of the deodand was forfeited to the crown and that deodand was an important source of revenue).

³¹ *Id* at 13–19.

law.³² Specifically, civil forfeiture is an outgrowth of forfeiture proceedings against “guilty” vessels based on authorization from trade and navigation statutes.³³ The pre-revolutionary admiralty courts used such forfeiture proceedings to enforce the laws that England imposed on the American colonies and to prevent “revenue evasion schemes.”³⁴ In these proceedings a “vessel whose guilt was suspected would be arrested and prosecuted by name,” and the “law treated the ship as if it were alive, a guilty person.”³⁵ By proceeding against the ship, the courts were often able to sidestep thorny questions regarding jurisdiction over the ship owners.³⁶ Despite the use of forfeiture to enforce some hated laws of the era, the idea of using statutorily granted “in rem confiscation proceedings in which . . . the offending object is the defendant” to proceed with a forfeiture has remained vital in American law.³⁷

Today, civil forfeiture is a “creature of statute”³⁸ and cannot be employed unless “authorized by an applicable statute.”³⁹ Importantly, many agencies have been granted the power to pursue forfeiture.⁴⁰ For example, in addition to the FCC’s civil forfeiture power, the National Park Service,⁴¹ the Environmental Protection Agency,⁴² and the Food and Drug Administration⁴³ all have statutory grants allowing them to seek forfeiture.

³² See Charles Doyle, *Crime and Forfeiture* 3 (Congressional Research Service May 9, 2007), online at <http://www.fas.org/sgp/crs/misc/97-139.pdf> (visited Nov 25, 2012). See also Levy, *License to Steal* at 39 (cited in note 28).

³³ See Levy, *License to Steal* at 39–47 (cited in note 28).

³⁴ Doyle, *Crime and Forfeiture* at 3 (cited in note 32).

³⁵ Levy, *License to Steal* at 43 (cited in note 28).

³⁶ *Id.* (observing that proceeding against the vessel was easier because the owners of the vessels were often unknown, unavailable, or out of the court’s jurisdiction).

³⁷ Doyle, *Crime and Forfeiture* at 3 (cited in note 32) (emphasis omitted).

³⁸ *Id.* at 4.

³⁹ *Lane Motor*, 199 F2d at 497.

⁴⁰ See Doyle, *Crime and Forfeiture* at 66–73 (cited in note 32) (listing the federal forfeiture statutes).

⁴¹ See 16 USC § 128 (“All guns, traps, teams, horses, or means of transportation . . . used by any person . . . when engaged in killing, trapping, ensnaring, or capturing [certain animals] shall be forfeited to the United States.”).

⁴² See 33 USC § 1415(b)(2) (granting forfeiture authority over property associated with criminal penalties and over vessels associated with statutory violations).

⁴³ See 21 USC § 467b (granting authority for the seizure of poultry products that are misbranded, adulterated, or that otherwise violate of specified statutory provisions).

C. General Forfeiture Jurisdiction

Jurisdiction over forfeitures has been explicitly prescribed since the early days of the Republic,⁴⁴ rather than simply being packed into general federal question jurisdiction.⁴⁵ In 1948, Congress granted the district courts general jurisdiction over actions involving the “recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade.”⁴⁶ Section 1355 of Title 28 controls when a government entity is granted forfeiture power,⁴⁷ but the entity’s authorizing statute fails to specify the jurisdictional details. Additionally, particular grants of forfeiture power to agencies can also have specific jurisdictional components that exist alongside the general grant.⁴⁸

D. FCC Forfeiture Jurisdiction

The Communications Act grants forfeiture jurisdiction to the federal district courts.⁴⁹ The statutory framework for forfeiture proceedings is provided for in 47 USC §§ 503, 504, and 510.⁵⁰

Section 503 outlines the circumstances under which monetary forfeiture can be pursued. These include situations in which a violator “willfully or repeatedly fail[s] to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the [FCC]” or “willfully or repeatedly fail[s] to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the [FCC].”⁵¹ Section 510 outlines the circumstances in which the FCC can pursue the forfeiture of “[a]ny

⁴⁴ See Judiciary Act of 1789 § 9, ch 20, 1 Stat 73, 76–77 (granting the federal courts jurisdiction over forfeitures under the “laws of impost, navigation or trade”); Levy, *License to Steal* at 46–57 (cited in note 28).

⁴⁵ Compare 28 USC § 1355, with 28 USC § 1331. Forfeiture jurisdiction was originally granted separately from general federal question jurisdiction and continues to be granted separately today. In fact, forfeiture jurisdiction originated long before federal question jurisdiction. See John B. Oakley, *Prospectus for the American Law Institute’s Federal Judicial Code Revision Project*, 31 UC Davis L Rev 855, 921–22 (1998).

⁴⁶ Pub L No 80-773, 62 Stat 869, 934 (1948), codified as amended at 28 USC § 1355(a).

⁴⁷ See *United States v \$13,963.00, More or Less, in United States Currency*, 793 F Supp 2d 809, 813 (SD W Va 2011).

⁴⁸ See, for example, 21 USC § 881 (providing additional requirements for certain forfeitures made pursuant to the Food and Drug Act); 26 USC § 7323 (providing additional requirements for the judicial enforcement of seizures imposed under the Internal Revenue Code).

⁴⁹ See *Laurel Avenue*, 207 F3d at 463.

⁵⁰ Section 507 also discusses forfeiture, but it is a specialized provision that addresses violations of the Great Lakes Agreement.

⁵¹ 47 USC § 503(b)(1).

electronic, electromagnetic, radio frequency, or similar device, or component thereof.”⁵² Sections 504(a) and 510 set out how a forfeiture action can be brought in court and establish jurisdiction over those proceedings.

1. Section 504(a)—granting the district courts jurisdiction over FCC forfeitures.

Section 504(a) provides,

The forfeitures provided for in this chapter 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 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 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 chapter shall be a trial de novo.⁵³

Essentially, under § 504(a) the federal district courts have exclusive jurisdiction over FCC forfeitures and such suits are tried de novo.

The one minor qualification is the clause referring to § 503(b)(3). The referenced section grants the FCC discretion to provide a person with a hearing “before the [FCC] or an administrative law judge” prior to proceeding with forfeiture, and it channels such optional proceedings down a separate jurisdictional path.⁵⁴ Section 503(b)(3) carves out a separate procedure for when the FCC chooses to grant a hearing prior to forfeiture. The provision is purely optional, however. As such, this provision provides the FCC with *alternate means* of pursuing forfeiture but does not restrict the jurisdictional grant found in § 504.⁵⁵

⁵² 47 USC § 510(a).

⁵³ 47 USC § 504(a).

⁵⁴ 47 USC § 503(b)(3)(A) (allowing administrative hearings, followed by an option for appellate review of any forfeiture penalty determinations pursuant to § 402(a)).

⁵⁵ See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum L Rev 1435, 1452–53 (1979) (noting that § 504(b)(3) gives the FCC discretion to utilize an “alternative procedure” involving an administrative hearing). See also *Prayze FM v FCC*, 214 F3d 245, 250 (2d Cir 2000) (stating that § 504 “confers on the district courts jurisdiction to hear in rem forfeiture suits”); *United States v Northeast Communications of Wisconsin, Inc.*, 608 F Supp 2d 1049, 1053 (ED Wis 2008) (noting that § 504 grants exclusive jurisdiction to district courts to hear actions regarding unpaid forfeitures); *United States v Evergreen Media Corporation of Chicago, AM*, 832 F Supp 1183, 1184–86 (ED Ill 1993) (stating § 504(a) gives district courts jurisdiction to hear suits for the recovery of forfeitures).

2. Section 510(b)—a method for bringing in rem forfeitures.

Section 510(b) provides,

Any property subject to forfeiture to the United States under this section may be seized by the Attorney General of the United States upon process issued pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made if the seizure is incident to a lawful arrest or search.⁵⁶

This provision clarifies that district courts have particular authority over in rem forfeiture. Importantly, it also sets up the process whereby a court can begin to exercise that jurisdiction.

Sections 504 and 510 complement each other.⁵⁷ Section 504's jurisdictional language is extremely broad and encompasses all the "forfeitures provided for in [the] chapter."⁵⁸ Section 510 reinforces the district court's jurisdiction over civil in rem forfeiture actions and provides a particular method for those actions.⁵⁹

3. Section 402—giving appellate courts exclusive jurisdiction to invalidate final orders of the FCC.

The Act also provides a broad grant of jurisdiction to the *appellate* courts to review "final orders" of the FCC. Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of title 28."⁶⁰ The relevant provision in chapter 158 is found at 28 USC § 2342.⁶¹ "The court

⁵⁶ 47 USC § 510(b).

⁵⁷ See, for example, *Prayze*, 214 F3d at 250 (stating that § 504 "confers on the district courts jurisdiction to hear in rem forfeiture suits"); *Laurel Avenue*, 207 F3d at 460–63 (explaining that the "federal district courts have exclusive jurisdiction to hear forfeiture suits" under § 504 in an action brought under § 510). But see *Northeast Communications of Wisconsin*, 608 F Supp 2d at 1053–54 (distinguishing between the jurisdictional grants found in § 504 and § 510).

⁵⁸ 47 USC § 504(a). See also *Action for Childrens Television v FCC*, 827 F Supp 4, 10 (DDC 1993) (stating that the "the District Court has jurisdiction over [FCC] forfeiture enforcement actions" and citing § 504(a)).

⁵⁹ See *United States v Any and All Radio Station Equipment*, 93 F Supp 2d 414, 417 (SDNY 2000) (noting that § 510 forfeiture actions have specific requirements and can be brought alone or in conjunction with § 503 forfeiture actions).

⁶⁰ 47 USC § 402(a).

⁶¹ This provision was originally enacted as § 4(e) of the Hobbs Act, Pub L No 89-554, 80 Stat 378, 622 (1966). See *CE Design, Ltd v Prism Business Media, Inc*, 606 F3d 443, 448 (7th Cir 2010).

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 . . . all final orders of the [FCC] made reviewable by section 402(a) of title 47.”⁶² Additionally, § 402(b) provides that “[a]ppeals may be taken from decisions and orders of the [FCC] to the United States Court of Appeals for the District of Columbia” in prescribed circumstances.⁶³

The words “order” and “final orders” are not paragons of lucidity. *Columbia Broadcasting System, Inc v United States*⁶⁴ strongly suggests that the phrase “final orders” should be broadly construed to cover a range of FCC actions, including the promulgation of rules and regulations.⁶⁵ The Court held that “it is the substance of what the [FCC] has purported to do and has done which is decisive” for the purposes of § 402(a), rather than the particular label given to the action.⁶⁶ To that end, the Court found that those orders that “promulgat[e] regulations” that “affect or determine rights generally even though not directed to any particular person or corporation” are reviewable.⁶⁷

Courts have read *Columbia Broadcasting System* for the proposition that “a substantive rule . . . is a final order” under § 402(a).⁶⁸ Secondary sources also take this broad interpretation of § 402(a) as a given.⁶⁹ The heavy weight of precedent thus indicates that the provision gives appellate courts jurisdiction over challenges to rules and regulations.

In general, to invoke the appellate review discussed above, a party must “first petition[] the FCC to reconsider the rule” or “seek[] some kind of remedy from the agency.”⁷⁰ That is, the appellate courts have jurisdiction over challenges to regulations, but a party that wishes to invoke that jurisdiction generally must first go through the FCC. There are, however, certain situations in which a

⁶² 28 USC § 2342.

⁶³ 47 USC § 402(b).

⁶⁴ 316 US 407 (1942).

⁶⁵ *Id.* at 415–25.

⁶⁶ *Id.* at 416.

⁶⁷ *Id.* at 417.

⁶⁸ *City of Peoria v General Electric Cablevision Corp (GECCO)*, 690 F2d 116, 119 (7th Cir 1982) (citing *Columbia Broadcasting System* for the proposition that a substantive FCC rule is a final order under § 402(a) and stating that review of such orders may only be brought in a court of appeals). See also *Gottlieb v Carnival Corp*, 635 F Supp 2d 213, 220 (EDNY 2009) (noting that “an order promulgating rules and regulations is an ‘order’ under § 402(a)” and listing cases).

⁶⁹ See, for example, Michael Botein, *Judicial Review of FCC Action*, 13 *Cardozo Arts & Enter L J* 317, 334 (1995) (describing § 402(a) as the main path for review of “rulemaking actions, policy statements, declaratory rulings, and a wide variety of other decisions”).

⁷⁰ *GECCO*, 690 F2d at 119. See also 47 USC § 405; *Laurel Avenue*, 207 F3d at 463.

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party can directly file a petition for review with the circuit court without going through the FCC.⁷¹ Regardless of the method for invoking appellate jurisdiction—whether direct or indirect—parties dissatisfied with an FCC directive cannot simply go to the district court with a direct challenge. They must seek judicial review in the appellate courts.

* * *

Taken as a whole, a tension in the language of the Communication Act emerges. On the one hand, district courts have jurisdiction over *all* forfeiture cases. But, on the other hand, circuit courts have jurisdiction to decide that a rule or regulation is invalid. Left unclear is the status of constitutional defenses in forfeiture cases—are district courts unable to hear such defenses?

While jurisdictional confusion is a larger issue for the Act, it is especially troubling in the context of forfeiture. Uncertainty concerning the boundaries of district court forfeiture jurisdiction can significantly impair a defendant's fight against the FCC. Defendants who raise arguments over which the court has no jurisdiction stand to lose their assets without the opportunity to present a full defense. The FCC forfeiture provisions might not be unique within the realm of federal forfeiture, but they raise a host of uniquely confusing jurisdictional issues. That forfeiture involves an imposition on fundamental property rights only heightens the importance of bringing clarity to these issues.

II. THE CIRCUIT SPLIT

The appellate courts have divided over whether district courts have jurisdiction over constitutional challenges to regulations brought as affirmative defenses to FCC forfeiture actions. As noted, 47 USC § 402 provides that the appellate courts have exclusive jurisdiction over challenges to final orders of the FCC, but 47 USC §§ 503, 504, and 510 indicate that the district courts have exclusive jurisdiction over FCC forfeiture actions. The Eighth Circuit has found that the district courts lack jurisdiction to hear such defenses in forfeiture cases. The Sixth Circuit has found that district courts have jurisdiction to hear such defenses. Other circuits have not taken firm stands.

⁷¹ See *GECCO*, 690 F2d at 119 (implying that a party seeking review of a rule can obtain appellate review directly if it was also a party to the FCC's rulemaking proceeding). See also 47 USC § 405(a).

A. The Eighth Circuit

In *Laurel Avenue*, the court found that the district court lacked the power to hear constitutional defenses to FCC forfeiture actions.⁷² Instead, it found that that power is vested exclusively with the appellate courts.⁷³

As with all in rem forfeiture cases, the defendant was the equipment itself. Alan Fried, the owner, submitted the answer to the complaint and advanced a variety of affirmative defenses.⁷⁴ Fried was a microbroadcaster—an operator of a “low-wattage radio station[] without licensing approval from the FCC.”⁷⁵ After warning Fried of his violation, the FCC initiated forfeiture proceedings.⁷⁶ Following the seizure of his equipment, Fried “raised several affirmative defenses challenging the constitutionality of the microbroadcasting regulations.”⁷⁷ In particular, “Fried argued . . . that the FCC regulations barring new licenses to microbroadcasters violated the First Amendment, equal protection and due process.”⁷⁸ Ultimately, the district court granted judgment on the pleadings to the government.⁷⁹ Fried had argued that the district court had “exclusive jurisdiction over the forfeiture action, including the merits of his constitutional challenges” under § 504(a).⁸⁰ The district court, however, decided that it lacked jurisdiction to hear his constitutional defenses.⁸¹

On appeal, Fried argued that § 504’s reference to a trial de novo “contemplates adjudication of all issues raised in the forfeiture action, including any and all defenses.”⁸² Additionally, Fried contended that this provision “overrides 47 U.S.C. § 402, which is a general jurisdictional provision.”⁸³ The government argued that Fried should not be allowed to shoehorn constitutional challenges properly within appellate court jurisdiction into forfeiture actions.⁸⁴

⁷² *Laurel Avenue*, 207 F3d at 463.

⁷³ *Id.*

⁷⁴ *Id.* at 460.

⁷⁵ *Id.* at 459.

⁷⁶ *Laurel Avenue*, 207 F3d at 460.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 461.

⁸⁰ *Laurel Avenue*, 207 F3d at 461.

⁸¹ *Id.*

⁸² *Id.* at 462.

⁸³ *Id.*

⁸⁴ *Laurel Avenue*, 207 F3d at 461. The Government argued that the proper path for Fried was to seek a waiver from the FCC and bring his challenges there. See *id.* at 462. It is important to clarify that the statute itself does not compel a particular path for waivers from a particular directive. Instead, the waiver power is created and articulated by the FCC’s regulations. See 47 CFR § 1.3 (stating that waivers can be granted, in whole or in part, “for good cause shown”).

Initially, the Eighth Circuit overturned the district court's holding on appeal.⁸⁵ On rehearing, however, the Eighth Circuit changed course and affirmed the district court's holding on jurisdiction. While it explained its new reasoning, the court did not explain why it reversed itself. Indeed, the court found that no binding authority was directly applicable, giving it "a certain leeway in its interpretation of the jurisdictional provisions of the Federal Communications Act."⁸⁶

The court took advantage of this leeway, relying on a mixture of persuasive authority, statutory construction, and policy. Before reaching its analysis, the court began by implicitly questioning Fried's motives, stating "[w]here exclusive jurisdiction is mandated by statute, a party cannot bypass the procedure by characterizing its position as a defense to an enforcement action."⁸⁷ With this intuition in the background, the court looked at the Communications Act. It concluded that the statute provides circuit courts with exclusive jurisdiction to review challenges to FCC regulations: "It is hard to think of clearer language confining the review of regulations to the Courts of Appeal."⁸⁸

The court also relied on precedent. First, it looked to the Supreme Court's decision in *FCC v ITT World Communications, Inc.*,⁸⁹ which held that a defendant may not evade the exclusive jurisdiction of the appellate courts by seeking to enjoin a final order of the FCC in a district court.⁹⁰ Second, bolstered by its own precedent,⁹¹ the court declared that a "defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction."⁹² Finally, the court mentioned three policy arguments justifying its construction of the statute, namely that it will ensure: (1) review based on a proper administrative record; (2) uniformity in decision making and fact finding; and (3) proper utilization of "the agency's expertise."⁹³

⁸⁵ See *United States v Any and All Radio Station Transmission Equipment*, 169 F3d 548, 551–54 (8th Cir 1999) ("Fried").

⁸⁶ *Laurel Avenue*, 207 F3d at 462–63.

⁸⁷ *Id.* at 463, quoting *Southwestern Bell Telephone Co v Arkansas Public Service Commission*, 738 F2d 901, 906 (8th Cir 1984), vacd 106 S Ct 2885 (1986).

⁸⁸ *Laurel Avenue*, 207 F3d at 463.

⁸⁹ 466 US 463 (1984).

⁹⁰ *Id.* at 468. See also *Laurel Avenue*, 207 F3d at 463.

⁹¹ See *Laurel Avenue*, 207 F3d at 463 ("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 *Southwestern Bell Telephone*, 738 F2d at 906.

⁹² *Laurel Avenue*, 207 F3d at 463.

⁹³ *Id.*

Despite the Eighth Circuit's reversal of its initial position, the possibility of jurisdiction over the challenges at issue was not entirely foreclosed; the district court might have jurisdiction "[i]f Fried had no way of obtaining judicial review of the regulations."⁹⁴ Despite this caveat, however, the court still came out strongly against district court jurisdiction over constitutional defenses to FCC forfeiture actions.⁹⁵

B. The Sixth Circuit

In *Maquina Musical*, the Sixth Circuit held that district courts have jurisdiction to hear constitutional defenses to FCC forfeiture actions.⁹⁶ *Maquina Musical* is actually a consolidation of two in rem forfeiture actions, the first against Rick Strawcutter and the second against Maquina Musical. The relevant case, against Maquina Musical, involved a signal emitted by an unlicensed radio station. The FCC informed the president of Maquina of the violations.⁹⁷ When Maquina did not stop, the Government filed a complaint seeking forfeiture and proceeded to arrest the equipment.⁹⁸ In response, Maquina sought a temporary restraining order, a preliminary injunction, "a dismissal of the government's forfeiture complaint for lack of subject matter jurisdiction, and an order quashing the in rem arrest warrant."⁹⁹ The temporary restraining order was denied in a separate hearing.¹⁰⁰ In the opinion forming the basis of the appeal, the district court addressed Maquina's defense that the FCC regulations were unconstitutional.¹⁰¹

Maquina claimed that "the moratorium on Class D licenses, [which applied to microbroadcasters], was an unconstitutional prior restraint on speech."¹⁰² The district court, however, found that "it lacked jurisdiction to entertain Maquina Musical's constitutional defenses because 28 U.S.C. § 2342 provides that the courts of appeals

⁹⁴ *Id.*

⁹⁵ See *id.* See also *United States v Neset*, 235 F3d 415, 418–21 (8th Cir 2000) (extending *Laurel Avenue* to actions for injunctive relief).

⁹⁶ See *Maquina Musical*, 204 F3d at 666–67.

⁹⁷ *Id.* at 663.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *United States v Any and All Radio Station Transmission Equipment*, 29 F Supp 2d 393, 395 (ED Mich 1998) ("West Vernor Highway").

¹⁰¹ *Id.* at 397–98.

¹⁰² *Maquina Musical*, 204 F3d at 666. The language used by the court to describe Maquina's challenge indicates that it was a general challenge to the regulations. The court states that the regulations were challenged as a general "restraint on speech," rather than a specific restraint on Maquina's speech. *Id.* See also *West Vernor Highway*, 29 F Supp 2d at 397.

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have exclusive jurisdiction ‘to enjoin, set aside, suspend . . . or to determine the validity of . . . all final orders of the [FCC].’¹⁰³

The Sixth Circuit reversed the district court, relying on statutory construction and legislative intent. It found that the district court had jurisdiction over constitutional defenses “for the simple reason that no FCC order [was] being challenged.”¹⁰⁴ In asserting this, the court approvingly cited the reasoning in the Eighth Circuit’s first *Laurel Avenue* decision.¹⁰⁵ The court was apparently unaware of the Supreme Court’s decision in *Columbia Broadcasting System*, which held that regulations are orders under § 402, as the case is not discussed in the opinion. According to the court, it simply did not make sense for the statute to grant forfeiture jurisdiction to the district court but surreptitiously remove jurisdiction over certain defenses. Beyond this appeal to common sense, the court argued that the quasi-criminal nature of forfeiture made it unlikely that Congress would have denied defendants the ability to raise constitutional defenses.¹⁰⁶ Congress could have explicitly “excluded certain defenses” but did not.¹⁰⁷ As such, the court found it unlikely “that Congress [would have] enacted a statute that allow[ed] the government to forfeit a person’s property while denying the owner the right to defend himself by challenging the legal basis of the government’s forfeiture case.”¹⁰⁸

Subsequent forfeiture cases have pointed out that *Maquina Musical* relied on an overturned version of *Laurel Avenue*.¹⁰⁹ Nevertheless, Sixth Circuit cases since *Maquina Musical* have confirmed its continuing viability in forfeiture situations.¹¹⁰ Further, these cases also indicate that the applicability of *Maquina Musical*’s holding depends upon whether the FCC is pursuing forfeiture and not on the particular type of constitutional challenge the defendant is raising.¹¹¹

¹⁰³ See *Maquina Musical*, 204 F3d at 667 (alterations in original).

¹⁰⁴ *Id.* (quotation marks omitted).

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ *Maquina Musical*, 204 F3d at 667.

¹⁰⁸ *Id.*

¹⁰⁹ See, for example, *Prayze FM v FCC*, 214 F3d 245, 250–51 (2d Cir 2000).

¹¹⁰ See, for example, *United States v Szoka*, 260 F3d 516, 526–28 (6th Cir 2001) (treating *Maquina Musical* as good law but declining to extend it to actions in which the government seeks an injunction to enforce an administrative cease and desist order); *La Voz Radio de la Comunidad v FCC*, 223 F3d 313, 319–20 (6th Cir 2000) (distinguishing between the use of constitutional arguments as a shield, as in *Maquina Musical*, and the use of such arguments as a “sword against the possibility of adverse administrative action in the future,” as in the case before the court).

¹¹¹ See *La Voz*, 223 F3d at 319–20 (distinguishing *Maquina Musical* based on the action the FCC was bringing).

C. The Other Circuits

Other circuits have yet to take a firm position on jurisdiction over constitutional defenses in FCC forfeiture actions. The Ninth and DC Circuits have come the closest, indicating sympathy with the Eighth and Sixth Circuits, respectively. The Second Circuit has indicated awareness of the issue.

1. Recent cases in the Ninth Circuit lean toward the Eighth Circuit's holding, but earlier cases pull it toward the Sixth Circuit's.

In *United States v Dunifer*,¹¹² the Ninth Circuit agreed with the Eighth Circuit's general jurisdictional holding.¹¹³ *Dunifer*, however, was *not* a forfeiture proceeding. It dealt with injunctive relief and the injunction jurisdiction provision found in § 401(a), and it involved forfeiture only in the background facts.¹¹⁴ The FCC was seeking to enjoin *Dunifer* from broadcasting under 47 USC § 301, "which prohibits the operation of a radio station without [an FCC license]."¹¹⁵ Prior to the § 301 action, the FCC sent "a Notice of Apparent Liability for a monetary forfeiture of \$20,000."¹¹⁶ After the FCC rejected *Dunifer*'s constitutional arguments, the district court heard arguments to enjoin *Dunifer* from broadcasting and found that it had subject matter jurisdiction "under the applicable statutory scheme to hear [the] arguments concerning the unconstitutionality of the regulations."¹¹⁷ Neither the district court nor the appellate court claimed to be construing the forfeiture provisions. Indeed, the appellate court specifically distinguished *Dunifer* from forfeiture cases.¹¹⁸ Despite utilizing the language of *Laurel Avenue*, *Dunifer* does not deal with forfeiture. This case, however, is still useful for divining how the Ninth Circuit might view forfeiture cases.

The Ninth Circuit found that the lower court did not have jurisdiction to hear constitutional defenses. The court admitted that normally "the district courts would have subject matter jurisdiction to entertain constitutional and statutory defenses to an injunctive action."¹¹⁹ In this situation, however, § 402(a) granted the appellate

¹¹² 219 F3d 1004 (9th Cir 2000).

¹¹³ *Id.* at 1006–09.

¹¹⁴ See *id.* at 1005, 1008.

¹¹⁵ *Id.* at 1005.

¹¹⁶ *Dunifer*, 219 F3d at 1005.

¹¹⁷ *Id.* at 1006.

¹¹⁸ See *id.* at 1007–08.

¹¹⁹ *Id.* at 1006.

courts jurisdiction to hear such challenges.¹²⁰ The court declared that “[b]y its terms, the Communications Act’s jurisdictional limitations apply as much as to affirmative defenses as to offensive claims.”¹²¹ In reaching this decision, the court relied heavily on *Laurel Avenue* and distinguished *Maquina Musical* based on precedent.¹²²

Although the Ninth Circuit leaned toward the Eighth Circuit’s view in its *Dunifer* opinion, the status of constitutional defenses to forfeiture actions in the Ninth Circuit remains unclear. The court specifically distinguished *Dunifer* from the 1994 forfeiture case, *Dougan v FCC*.¹²³ In *Dougan*, the Ninth Circuit found that “the ‘specific’ jurisdictional grant of § 504(a) to the district courts over forfeiture actions trumped the general jurisdictional grant of § 402(a) to the courts of appeals to review FCC orders,” including for constitutional challenges.¹²⁴ If *Dougan* and *Dunifer* were considered alone, the Ninth Circuit’s position would seem similar to the Sixth Circuit’s position. However, a 2007 District of Oregon case creates some confusion regarding the actual state of the law in the Ninth Circuit. In *United States v TravelCenters of America*,¹²⁵ the District of Oregon extended the reasoning in *Dunifer* to forfeiture and found that it did not have jurisdiction to consider constitutional defenses in a monetary forfeiture action, stating that “actions which attack the legality of the Act or its regulations . . . must be addressed by the appellate courts.”¹²⁶

2. The DC Circuit has not committed to a position but appears inclined toward the Sixth Circuit’s view.

The DC Circuit has not taken an explicit position on this split, but dicta in *Action for Children’s Television v FCC*¹²⁷ indicates sympathy with the Sixth Circuit’s view. *Children’s Television* involved interest group “challenges to the [FCC’s] scheme for imposing forfeitures for the broadcast of indecent material.”¹²⁸ Specifically, the case

¹²⁰ *Dunifer*, 219 F3d at 1007, citing *Sable Communications of California, Inc v FCC*, 827 F2d 640, 642 (9th Cir 1987).

¹²¹ *Dunifer*, 219 F3d at 1007.

¹²² *Id.*

¹²³ 21 F3d 1488 (9th Cir 1994).

¹²⁴ *Dunifer*, 219 F3d at 1007–08.

¹²⁵ 597 F Supp 2d 1222 (D Or 2007).

¹²⁶ *Id.* at 1226–27. See also *Minority Television Project Inc v FCC*, 2007 WL 781974, *5 (ND Cal) (finding that the court lacked jurisdiction over constitutional challenges to regulations in a monetary forfeiture action).

¹²⁷ 59 F3d 1249 (DC Cir 1995).

¹²⁸ *Id.* at 1252.

addressed constitutional challenges to the forfeiture statute.¹²⁹ The court noted that an earlier case had found that “where a statute commits final agency action to review by the Court of Appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review.”¹³⁰ In this case, however, the district court had found “a general exception . . . for constitutional claims.”¹³¹ The court commented on the issue but did not resolve it. It explained that district court jurisdiction over the constitutional challenge to the forfeiture statute in this particular case was no threat to appellate jurisdiction.¹³² Specifically, the court said, somewhat opaquely, that because the district court had jurisdiction over the forfeiture actions, it had jurisdiction over challenges to the forfeiture statute.¹³³

While the DC Circuit’s position was established before *Maquina Musical*, the court indicates openness to the Sixth Circuit’s position. This openness is further supported by another case that emphasized the exclusiveness of district court jurisdiction over forfeiture actions.¹³⁴

3. The Second Circuit has commented on the jurisdictional issue but has not fully committed to a position.

The Second Circuit’s opinion in *Prayze FM v FCC*¹³⁵ contained evidence that the court is inclined toward the position of the Sixth Circuit.¹³⁶ *Prayze* did not address forfeiture but dealt with constitutional challenges to FCC directives as part of an action for a preliminary injunction.¹³⁷ The court recognized the jurisdictional uncertainty but chose not to settle the issue because “the FCC has sufficiently demonstrated that—in the current posture of the case—it would likely prevail.”¹³⁸ Where the district court had rejected the plaintiff’s constitutional challenges wholesale for lack of standing, however, the Second Circuit ignored the jurisdictional issue and found that the plaintiff did

¹²⁹ See *id.* at 1255–56.

¹³⁰ *Id.* at 1256, quoting *Telecommunications Research and Action Center v FCC*, 750 F2d 70, 72 (DC Cir 1984) (“TRAC I”).

¹³¹ *Children’s Television*, 59 F3d at 1256, quoting *TRAC I*, 750 F2d at 72.

¹³² *Children’s Television*, 59 F3d at 1256.

¹³³ *Id.* (“In other words, the district court’s jurisdiction over the plaintiffs’ challenge to the constitutionality of the forfeiture statute is no threat to the jurisdiction of the court of appeals because review of a Commission order imposing a forfeiture (in the defense against a collection suit) would itself be in the district court, not in the court of appeals.”).

¹³⁴ See *Pleasant Broadcasting Company v FCC*, 564 F2d 496, 500–02 (DC Cir 1977).

¹³⁵ 214 F3d 245 (2d Cir 2000).

¹³⁶ *Id.* at 250–51.

¹³⁷ *Id.* at 247–48.

¹³⁸ *Id.* at 251–52.

“have standing to bring a facial challenge to the regulations.”¹³⁹ While *Prayze* was a dispute over an injunction, the court’s reasoning, in addition to the reasoning in some district court cases,¹⁴⁰ suggests that the Second Circuit might be open to district court jurisdiction over constitutional defenses.

III. ANALYSIS AND SOLUTION

Notwithstanding the current constellation of confusing decisions, there is an evenhanded solution to the circuit split rooted in careful statutory construction: Under the Act, district courts can hear *certain* constitutional challenges to FCC directives as affirmative defenses to forfeiture actions. More precisely, they can hear as-applied constitutional defenses but not facial constitutional defenses. It is important to recall at this point that the split, and the solution presented, concern challenges to the constitutionality of the underlying regulation and *not* to either the actual seizure of the property or the statute.

This solution is novel, but it builds on intuitions and principles from existing law. Importantly, the notion of splitting constitutional challenges to solve the jurisdictional issue is suggested by cases that have analyzed similar challenges in non-FCC contexts. This solution is also supported by the structure of the Communications Act. Furthermore, the solution reduces the tension between the various jurisdictional grants and addresses the concerns raised by the Sixth and Eighth Circuits.

This Part proceeds in two steps. First, it analyzes the statutory provisions controlling forfeiture jurisdiction and appellate jurisdiction. Second, it argues that splitting the constitutional defenses that the district court can hear is the best way to resolve the current circuit split.

A. Analysis of the Statutory Grants of Forfeiture Jurisdiction

Even a close examination of the statutory language fails to resolve the circuit split. The forfeiture provisions do not provide an answer to the issue since defenses (constitutional or otherwise) are simply not discussed. Even if one considers the forfeiture provisions in light of § 402’s grant of appellate jurisdiction, a solution remains elusive.

¹³⁹ *Prayze*, 214 F3d at 251.

¹⁴⁰ See, for example, *United States v Any and All Radio Station Equipment*, 93 F Supp 2d 414, 420–21 (SDNY 2000) (considering whether an FCC regulation violated the First Amendment without discussing jurisdictional issues).

One might argue that the issue is really quite simple: Section 402 grants the appellate courts jurisdiction over challenges to FCC regulations. It is the beginning and end of the issue. But the language of § 402 is consistent with the intuition that, given district court jurisdiction over forfeiture cases, district courts should have jurisdiction over constitutional defenses raised in those cases. Indeed, courts have hesitated mightily before reading a statute to completely divest district courts of jurisdiction over either constitutional challenges or affirmative defenses, even where a jurisdictional bar is otherwise operative.¹⁴¹ Furthermore, seemingly clear provisions of the Communications Act itself have proven to be quite accommodating when important countervailing considerations are present.

As such, to simply conclude that § 402 solves the split is an overly hasty position that fails to adequately account for the nuances of the jurisdictional issue. Above all, the analysis demonstrates that the jurisdictional provisions are inconclusive; they neither provide a clear answer as to the status of constitutional defenses nor indicate where to draw the jurisdictional line between the district court and the appellate court when forfeitures are involved.

1. There are no internal limitations on FCC forfeiture jurisdiction other than those specifically enumerated by the statute.

Standing alone, the forfeiture provisions do not explain how courts should treat constitutional defenses. Instead, they appear to grant broad jurisdiction to the district court, encumbered only by a few, clearly articulated conditions. According to § 504, forfeitures “shall be recoverable . . . 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.”¹⁴²

This grant is subject to three provisos. First, the jurisdictional grant explicitly accounts for the optional administrative forfeiture process that § 503 creates.¹⁴³ Second, all trials under the provision are

¹⁴¹ See Part III.A.2.b.

¹⁴² 47 USC § 504(a).

¹⁴³ 47 USC § 504(a) (granting jurisdiction “except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title”). See also 47 USC § 503(b)(3) (setting forth an administrative review process).

to be de novo.¹⁴⁴ Third, the provision elucidates special rules for forfeiture involving ships.¹⁴⁵

Similarly, § 510 states that forfeiture of communications devices shall be effectuated “upon process issued pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States having jurisdiction over the property.”¹⁴⁶ The statute qualifies this in cases where the “seizure is incident to a lawful arrest.”¹⁴⁷

The presence of these explicit provisos strongly suggests that Congress knew how to qualify, limit, and channel forfeiture jurisdiction and declined to do so in the case of constitutional challenges.¹⁴⁸ This, in turn, suggests a particular way of framing the statutory interpretation issue: The enumerated qualifications attached to the forfeiture provisions should be seen as the sole internal conditions on the jurisdictional grant. Simply put, the provisions grant broad jurisdiction to the district courts over forfeiture actions and are not subject to an implicit internal limitation on constitutional defenses.

The general grant of forfeiture jurisdiction, 28 USC § 1355, is consistent with this conclusion. While cases specifically addressing constitutional challenges under § 1355 are uncommon, there are situations in which claimants put forward broad constitutional defenses and a court with jurisdiction under § 1355 considered them without issue.¹⁴⁹ Additionally, the language of the statute is absolute: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of *any action or proceeding* for the recovery or enforcement of *any fine, penalty, or forfeiture, pecuniary or otherwise,*

¹⁴⁴ 47 USC § 504(a) (“[A]ny suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo.”).

¹⁴⁵ 47 USC § 504(a) (“[I]n 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.”).

¹⁴⁶ 47 USC § 510(b).

¹⁴⁷ 47 USC § 510(b).

¹⁴⁸ When Congress sets forth different items that are members of an “associated group,” it may be justifiable to draw an inference that items not mentioned were “excluded by deliberate choice, not inadvertence.” *Barnhart v Peabody Coal Co*, 537 US 149, 168–69 (2003) (quotation marks omitted). While the forfeiture jurisdiction provisions are not a traditional statutory list, the same principle applies because Congress specifically addressed some issues and left others untouched.

¹⁴⁹ See, for example, *United States v 2,507 Live Canary Winged Parakeets (Brotogeris Versicolorus)*, 689 F Supp 1106, 1109, 1119–20 (SD Fla 1988) (addressing the claimant’s constitutional challenges to the Lacey Act as part of a forfeiture proceeding and finding jurisdiction under 28 USC § 1355); *United States v Miscellaneous Jewelry*, 667 F Supp 232, 233, 250 (D Md 1987) (ruling on a constitutional challenge to the Drug Abuse Prevention and Control Act in a forfeiture proceeding and holding that the court had jurisdiction pursuant to 28 USC § 1355).

incurred under any Act of Congress.”¹⁵⁰ This absolute language strongly supports an inference of generally sweeping jurisdiction, which would naturally extend to defenses. In general, then, the district courts can hear the full range of defenses that a defendant might bring against a forfeiture action, including constitutional challenges.

Finally, district courts generally have wide jurisdiction over the challenges that come their way. As the Ninth Circuit recognized, “[o]rdinarily, the district courts [] have subject matter jurisdiction to entertain constitutional and statutory defenses.”¹⁵¹ There is no general prohibition on the ability of district courts to hear the spectrum of defenses that a party could raise.¹⁵²

This reasoning does not mean that the forfeiture provisions remain unaffected by other jurisdictional provisions in the Communications Act. If the current split indicates anything, it is that the forfeiture provisions do not exist in a vacuum—they are shaped and interpreted in light of other parts of the statute. Given that these provisions do not reveal a solution to the constitutional defenses issue, the next step is to explore whether § 402—the grant of appellate jurisdiction—provides any guidance.

2. Section 402’s language does not resolve the forfeiture issue.

At first glance, the Eighth Circuit’s logic appears well founded: the statute states that the appellate courts generally have jurisdiction over challenges to rules and regulations, end of story. But this conclusion totally discounts the intuition, expressed by the Sixth Circuit, that district courts should have jurisdiction over constitutional defenses and that Congress would have made it eminently clear if it the case were otherwise.¹⁵³ Indeed, something seems amiss when a district court with proper jurisdiction is unable to hear *constitutional* defenses raised during the course of a proceeding to relieve a defendant of his property.

More importantly, the case law confirms this intuition. First, precedent indicates that district courts can retain jurisdiction over constitutional issues even in the face of other jurisdictional bars. Second,

¹⁵⁰ 28 USC § 1355(a) (emphasis added) (limiting district court jurisdiction only with respect to matters within the jurisdiction of the Court of International Trade under 47 USC § 1582).

¹⁵¹ *Dunifer*, 219 F3d at 1006. See also *Children’s Television*, 59 F3d at 1256 (suggesting that district courts generally have wide jurisdiction over constitutional challenges in the context of a challenge to a statute).

¹⁵² See 28 USC § 1331 (granting broad federal question jurisdiction to district courts without limiting the types of defenses that can be heard).

¹⁵³ See *Maquina Musical*, 204 F3d at 667.

there is a line of cases finding that otherwise applicable jurisdictional bars do not block a district court from hearing affirmative defenses to claims brought by the Government. Finally, even within the context of the Communications Act itself there have been cases where seemingly absolute language gave way to a constitutional challenge.

a) *Judicial reticence to decline jurisdiction over constitutional claims even when faced with jurisdictional bars.* Precedent confirms the core of the Sixth Circuit's intuition: district courts can retain some residuum of jurisdiction over constitutional issues even if there are other jurisdictional barriers. On a broad level, *District of Columbia Court of Appeals v Feldman*¹⁵⁴ suggested that district court jurisdiction can be molded to retain review of certain constitutional challenges even in the face of a broad jurisdictional bar. In *Feldman*, the Supreme Court found that while district courts lacked jurisdiction to consider "a state court's final judgment in a bar admission matter," they could hear "a general challenge to the constitutionality" of bar admission rules.¹⁵⁵

Other cases suggest that similar jurisdictional shaping is generally acceptable. In *McNary v Haitian Refugee Center, Inc.*,¹⁵⁶ the respondents brought constitutional challenges to Immigration and Naturalization Service practices in administering a special agricultural workers program.¹⁵⁷ The petitioners argued that the plain language of the Immigration and Nationality Act¹⁵⁸ barred district court jurisdiction over such challenges.¹⁵⁹ The Court, however, found room within the statute to allow district court review of "challenges to unconstitutional practices and policies used by the agency in processing applications," despite the designated review path for challenges to certain immigration applications.¹⁶⁰

In *Mace v Skinner*,¹⁶¹ Mace brought constitutional challenges against a range of Federal Aviation Administration (FAA) practices, including that they "violated Mace's due process and jury trial rights guaranteed under the Fifth and Sixth Amendments to the Constitution" by revoking his aircraft mechanic's certificate.¹⁶² The defendants

¹⁵⁴ 460 US 462 (1983).

¹⁵⁵ *Id.* at 483–84.

¹⁵⁶ 498 US 479 (1991).

¹⁵⁷ *Id.* at 487–90.

¹⁵⁸ Pub L No 82-414, 66 Stat 163 (1952), codified as amended at 8 USC § 1101 et seq.

¹⁵⁹ *McNary*, 498 US at 491–92.

¹⁶⁰ *Id.* at 491–94 (noting, among other things, that Congress could have used broader statutory language if it sought to bar challenges to the agency's procedures).

¹⁶¹ 34 F3d 854 (9th Cir 1994).

¹⁶² *Id.* at 856.

argued that Mace “cannot attack the constitutionality of agency actions or procedures in district court, because only appellate courts have the limited jurisdiction to review those agency actions.”¹⁶³ Despite this argument, the Ninth Circuit recognized a carve-out for district court review of certain constitutional claims, including Mace’s, in construing § 1006 of the Federal Aviation Act of 1958,¹⁶⁴ which grants the circuit courts jurisdiction over orders of the FAA.¹⁶⁵

Finally, several cases involving the Federal Trade Commission have also created a broader jurisdictional space for the district courts. Courts have recognized that the “statutory provisions covering review by courts of appeals do not in and of themselves preclude District Court jurisdiction in appropriate circumstances,” including constitutional claims that the Federal Trade Commission was violating due process.¹⁶⁶ Jurisdiction for such claims is found under “the general equity jurisdiction of the court” when the “agency [has] stepped so plainly beyond the bounds of its authority.”¹⁶⁷

Of course, the simple presence of a constitutional challenge is not enough to automatically invoke district court jurisdiction where it is otherwise barred.¹⁶⁸ Nevertheless, these cases indicate that when important countervailing considerations are present—equity, irreparable harm, or judicial expertise, for example—district court jurisdiction over constitutional challenges can be shaped to accommodate statutory grants of jurisdiction, even if there is no specific grant to the district court.

b) Jurisdictional bars and defenses to government action. Case law also suggests caution should be exercised in depriving district courts of their ability to hear affirmative defenses to claims brought by the government. In *National Union Fire Ins Co of Pittsburgh v City*

¹⁶³ *Id* at 858.

¹⁶⁴ Pub L No 85-726, 72 Stat 731, 795–96.

¹⁶⁵ *Mace*, 34 F3d at 857, 859–60.

¹⁶⁶ *R.H. Macy & Co v Tinley*, 249 F Supp 778, 782 (DDC 1965). See also *Pepsico, Inc v FTC*, 343 F Supp 396, 399 (SDNY 1972) (noting that courts have allowed district court review when an agency “has very clearly violated an important constitutional right”); *Coca-Cola Co v FTC*, 342 F Supp 670, 675–77 (ND Ga 1972) (explaining four narrow exceptions to the provision barring district court review of agency action, including an exception for when a constitutional right has been violated); *Knoll Associates, Inc v Dixon*, 232 F Supp 283, 285 (SDNY 1964) (stating that the district court “should not hesitate to step in” if the plaintiffs’ constitutional rights were violated despite the jurisdictional bar on district court review of agency action).

¹⁶⁷ *Tinley*, 249 F Supp at 782 (arguing that the district court’s equity jurisdiction does not disappear just because the petitioner can later obtain appellate review of the final order).

¹⁶⁸ See *Thunder Basin Coal Co v Reich*, 510 US 200, 215 (1994) (declining to extend district court jurisdiction because the petitioner could obtain adequate review of its constitutional claim through the statutory review scheme).

Savings, F.S.B.,¹⁶⁹ the Third Circuit reversed a district court determination that the court did not have jurisdiction over affirmative defenses raised to a claim made by the Resolution Trust Corporation (RTC).¹⁷⁰ The Financial Institutions Reform, Recovery and Enforcement Act of 1989¹⁷¹ (FIRREA) barred the courts from hearing “any claim or action for payment from . . . the assets of any depository institution for which the [RTC] has been appointed receiver.”¹⁷² The circuit court, however, determined that this provision did not bar affirmative defenses to such claims made by the RTC.

As part of its discussion, the court observed that “interpreting the jurisdictional bar [to block affirmative defenses] would . . . result in an unconstitutional deprivation of due process. Property which one stands to lose as a result of a lawsuit is a property interest protected by the Due Process Clause.”¹⁷³ To be clear, the court’s due process argument is quite general—it is not tied to the specific context of the RTC. Rather, the argument points out that there is a general constitutional deficiency in depriving an individual of affirmative defenses when their property is threatened. The court also pointed out that even though “parties could always file potential defenses and affirmative defenses in [an] administrative claims procedure,” such a path would not be “tenable.”¹⁷⁴ The court reasoned that even if a party knew that she had to submit her challenges through an alternate process, it would be nearly impossible, as she “cannot know what her defense is until she hears the claim leveled against her.”¹⁷⁵

The Third Circuit was not alone in following this path—the Ninth,¹⁷⁶ Tenth,¹⁷⁷ and Eleventh¹⁷⁸ Circuits all found that FIRREA’s jurisdictional bar did not operate to block affirmative defenses. While the correlation between these cases and the Communications Act is not perfect, the similarities are striking. Both situations involve seemingly complete statutory bars, an affirmative defense against a government

¹⁶⁹ 28 F3d 376 (3d Cir 1994).

¹⁷⁰ *Id.* at 392–95.

¹⁷¹ Pub L No 101-73, 103 Stat 183, codified as amended at 12 USC § 1811 et seq.

¹⁷² *National Union*, 28 F3d at 393, citing 12 USC § 1821(d)(13)(D).

¹⁷³ *National Union*, 28 F3d at 394.

¹⁷⁴ *Id.* at 395 (noting that the administrative process does not ensure that the defendants would get timely notice or would be apprised of the claims leveled against them before they had to submit their defenses).

¹⁷⁵ *Id.*

¹⁷⁶ See *Resolution Trust Corp v Midwest Federal Savings Bank of Minot*, 36 F3d 785, 790–93 (9th Cir 1993).

¹⁷⁷ See *Resolution Trust Corp v Love*, 36 F3d 972, 975–78 (10th Cir 1994).

¹⁷⁸ See *American First Federal, Inc v Lake Forest Park, Inc*, 198 F3d 1259, 1262–65 (11th Cir 1999).

claim, and, perhaps most importantly, the potential deprivation of a property interest.

c) *Flexibility in the Communications Act*. Finally, lest one believe that the Communications Act is immune from such jurisdictional tinkering, there are several cases—in addition to *Maquina Musical*—that demonstrate the Act’s flexibility. In *New York State Broadcasters Association, Inc v United States*,¹⁷⁹ the plaintiffs challenged an FCC declaratory ruling under § 402. The Government argued that “petitioners are precluded from making their constitutional arguments . . . because they were not presented to the [FCC] either in the first instance or in a petition for reconsideration” and jurisdiction was barred under 47 USC § 405.¹⁸⁰ The court acknowledged “that the literal words of section 405 provide for no exception.”¹⁸¹ Nevertheless, it still found that the circumstances of the case absolved the petitioners from the precise strictures of § 405.¹⁸²

Additionally, in *Washington Association for Television and Children v FCC*¹⁸³ the DC Circuit found that, despite the clear language of § 405, implied exceptions exist.¹⁸⁴ It noted that the “traditionally recognized exceptions to the exhaustion doctrine” applied to § 405 and, interestingly, that “[o]ther exceptions may also exist.”¹⁸⁵

While these cases did not construe § 402 or the forfeiture provisions, they do demonstrate that the Communications Act is flexible. Even the clearer provisions of the Act are not immune from being balanced against an array of other concerns. Ultimately, simply declaring that “the provision is clear” is inadequate when important countervailing considerations are present.

* * *

Taken together, these cases indicate discomfort with divesting a district court of jurisdiction over affirmative defenses and constitutional challenges, even in the face of apparently applicable jurisdictional bars.

¹⁷⁹ 414 F2d 990 (2d Cir 1969).

¹⁸⁰ *Id* at 994.

¹⁸¹ *Id*.

¹⁸² Specifically, the petitioners were asking the court to review an FCC declaratory ruling determining whether broadcasts of the New York State Lottery would violate 18 USC § 1304 without having raised the constitutional issue during the initial proceeding before the FCC or having asked the FCC to reconsider the ruling, as § 405 requires. *Id* at 991, 994. The court found that, given that a separate provision was involved and that the FCC was unable or unlikely to declare § 1304 unconstitutional, § 405 did not bar jurisdiction. See *id* at 994.

¹⁸³ 712 F2d 677 (DC Cir 1983).

¹⁸⁴ *Id* at 680–82.

¹⁸⁵ *Id* at 682. The exhaustion doctrine states that “claims not presented to the agency may not be made for the first time to a reviewing court.” *Id* at 680.

In the situation presented by the circuit split, not only is there a constitutional challenge to regulations and an affirmative defense involved, there is also a *specific* grant of jurisdiction to the district courts. While these cases do not definitively signify that the district courts should have full jurisdiction over all defenses, they do show that the facially obvious meaning of § 402 does not settle the issue. The language of § 402 might be broad, but there is also a clear grant of jurisdiction to the district courts and a clear inclination to hesitate before depriving district courts of the ability to hear constitutional defenses. Ultimately, the jurisdictional provisions themselves provide no way of alleviating this tension.

B. A Constitutional Approach

Even with the interpretive leeway granted by the ambiguous provisions, the Eighth and Sixth Circuits' approaches are analytically unsatisfactory. Neither circuit adequately addresses the tension that exists between the jurisdictional grants. The Eighth Circuit dismisses any claims of jurisdiction by the district courts based on an excessively hasty and overly literal reading of the appellate jurisdiction provisions of the statute.¹⁸⁶ The Sixth Circuit recognizes the intuitive force behind granting jurisdiction but fails to back up the intuition with case law and, more egregiously, disregards the importance of § 402.¹⁸⁷ Both approaches are overly blunt.

There is a distinction, however, that went unnoticed by the Eighth and Sixth Circuits: Constitutional challenges can be split into as-applied and facial challenges.¹⁸⁸ This division, in turn, suggests a solution to the forfeiture issue—courts can allow forfeiture defendants to raise as-applied constitutional defenses to FCC directives in district court but bar facial constitutional defenses.

1. Facial versus as-applied constitutional challenges.

Facial constitutional challenges are challenges in which a party seeks a declaration that some government instruction—whether a

¹⁸⁶ See *Laurel Avenue*, 207 F3d at 462–63.

¹⁸⁷ See *Maquina Musical*, 204 F3d at 667–68.

¹⁸⁸ The Second and DC Circuits mention this distinction but do not apply it to the jurisdictional issue. See, for example, *Prayze*, 214 F3d at 251–52 (distinguishing between facial and as-applied challenges for the purpose of determining standing); *Children's Television*, 59 F3d at 1256, 1259–60. Some district courts also mention the distinction but do not use it to resolve the jurisdictional issue. See, for example, *Minority Television Project Inc v FCC*, 2007 WL 781974, *4–5 (ND Cal) (dismissing facial and as-applied challenges in the same sentence); *United States v Evergreen Media Corp of Chicago, AM*, 832 F Supp 1183, 1184–86 (ND Ill 1993) (finding that the court had jurisdiction over both facial and as-applied constitutional challenges to the forfeiture provisions of the statute).

statute, regulation, or rule—is invalid in its entirety.¹⁸⁹ Simply put, the party argues that the instruction itself is generally unconstitutional, regardless of its application. It is a difficult challenge to bring because the party must demonstrate that “no set of circumstances exists under which the [instruction] would be valid.”¹⁹⁰

In contrast, as-applied constitutional challenges are challenges in which a party seeks a declaration that a Government instruction is invalid as applied to that party.¹⁹¹ The party contends only that the instruction is unconstitutional in the particular context of the case and not that the instruction is generally invalid or that it has no valid applications. The difference between the two challenges is important, as the Government’s ability to enforce the instruction changes depending on the challenge. If a facial challenge is successful, the Government cannot enforce the instruction at all.¹⁹² If an as-applied challenge is successful, the Government “may enforce the [instruction] in different circumstances.”¹⁹³

The distinction between as-applied and facial challenges is not entirely clear; there is a degree of pliability that can make the contours difficult to determine. This is not to say the distinction is academic, as the difference between as-applied and facial challenges is important and can determine the breadth of courts’ jurisdiction in particular cases. Nevertheless, two areas of uncertainty are important to clarify: first, the scope of an as-applied challenge and, second, whether the court or the claimant determines whether a challenge is facial or as-applied.

a) The scope of an as-applied challenge. An issue underlying the distinction between as-applied and facial challenges is the precise scope of the challenge. An as-applied challenge is ostensibly limited to the claimant bringing the challenge. In many cases, however, the results of such challenges apply to cases beyond that of the individual claimant.¹⁹⁴ An important question, therefore, is whether a challenge that implicates the validity of a government directive as applied to a discrete group is still an as-applied challenge. Recent cases indicate

¹⁸⁹ See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan L Rev* 235, 236 (1994).

¹⁹⁰ *United States v Salerno*, 481 US 739, 745 (1987).

¹⁹¹ Dorf, 46 *Stan L Rev* at 236 (cited in note 189).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See, for example, *John Doe #1 v Reed*, 130 S Ct 2811, 2817 (2010) (stating that plaintiffs’ challenge to Washington’s Public Records Act as applied to referendum petitions generally had characteristics of both as-applied and facial challenges); *Citizens United v FEC*, 130 S Ct 876, 892–93 (2010) (declining to resolve the case based on as-applied challenges because the Court could not do so without chilling political speech).

that when a claimant brings a challenge that implicates parties beyond that of the claimant before the court, the challenge is to be treated as a facial challenge.¹⁹⁵ It is worth noting, however, that there are certain circumstances in which the court itself might decide to go beyond the party bringing the as-applied challenge and declare a government instruction invalid as applied to a defined group.¹⁹⁶ Nevertheless, as a general matter, as-applied challenges are narrow—they only include those challenges that involve the specific set of circumstances applicable to the particular claimant before the court.¹⁹⁷

b) Determining whether a challenge is as-applied. Intimately connected with the scope issue is determining whether a particular challenge is as-applied or facial. Or, put differently, how does a court determine whether a particular challenge is aimed solely at the individual

¹⁹⁵ See, for example, *Doe*, 130 S Ct at 2817 (“The label is not what matters. The important point is that plaintiffs’ claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.”); *Croft v Perry*, 624 F3d 157, 164 (5th Cir 2010) (classifying plaintiffs’ claims as facial challenges because they were not limited to the particular circumstances of the plaintiffs); *Discount Tobacco City & Lottery, Inc v United States*, 674 F3d 509, 522 (6th Cir 2012) (finding that the plaintiffs’ claims were properly reviewed as facial challenges because the relief would reach beyond the plaintiffs, even though the plaintiffs labelled their claims as both facial and as-applied); *Asgeirsson v Abbot*, 773 F Supp 2d 684, 693 (WD Tex 2011). See also *Citizens United*, 130 S Ct at 892–93.

¹⁹⁶ See *FEC v Wisconsin Right to Life, Inc*, 551 US 449, 469–70 (2007) (positing that the Bipartisan Campaign Reform Act of 2002 was invalid as applied to advertisements that did not meet the articulated standard).

¹⁹⁷ See, for example, *Foti v City of Menlo Park*, 146 F3d 629, 635 (9th Cir 1998) (“An as-applied challenge does not implicate the enforcement of the law against third parties.”); *Frye v City of Kannapolis*, 109 F Supp 2d 436, 439 (MD NC 1999) (“[I]f successful in an as-applied claim the plaintiff may enjoin enforcement of the statute only against himself or herself in the objectionable manner.”); *Constitutional Law*, 16 Corpus Juris Secundum § 187 (West 2012):

An “as applied” challenge to the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations. The U.S. Supreme Court is reluctant to invalidate legislation on the basis of its hypothetical application to situations not before the Court.

But see Nathaniel Persily and Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court’s Recent Election Law Decisions*, 93 Minn L Rev 1644, 1647, 1673 (2009) (asserting that an as-applied challenge can lead to relief for the plaintiff and many others similarly situated). The broad interpretation of as-applied challenges forwarded in this article does not appear correct, however. First, the treatise it cites for the broad relief proposition does not indicate that as-applied challenges include those who are “similarly situated.” *Id* at 1646–47. Instead, the treatise only indicates that as-applied challenges in any particular case are limited to the parties before the court, but the treatise does not say that holdings in such cases cannot provide precedent for use in later cases. See Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* 1081 (Foundation 16th ed 2007). Second, the part of *Wisconsin Right to Life* cited by the article does not appear to be part of the Court’s holding, but instead a part of Chief Justice John Roberts’s opinion that only Justice Samuel Alito joined. See *Wisconsin Right to Life*, 551 US at 469–70.

standing before the court or if it has a broader sweep? Do courts defer to the claimant's characterization of the type of claim or do they have some power to determine the "true" scope of the challenge themselves?

Courts have expressed a preference for as-applied challenges and a dislike for the sweeping constitutional issues wrapped up in facial challenges. Recent Supreme Court cases indicate that both what the claimant says the challenge is and the remedy that the court is asked to provide can determine whether a challenge is facial or as-applied.¹⁹⁸

Essentially, this means that both courts and claimants have opportunities to shape whether a challenge is as-applied or facial. If the type of challenge is unspecified (for example, if the claimant just claims that a statute violates the First Amendment without specifying whether he means to bring an as-applied or facial challenge), the courts can determine its scope.¹⁹⁹ Nevertheless, claimants appear able to determine which type of challenge they are bringing, to an extent. Case law indicates that if the party clearly articulates that he is only interested in challenging a government directive as it is being applied in his particular circumstances, courts will limit themselves to the facts before them.²⁰⁰ Other cases, however, indicate that where a claimant is less clear and the court thinks that the claimant is seeking a remedy that would invalidate a governmental directive for entities beyond the claimant, the court will interpret the challenge as facial.²⁰¹ Creating an additional wrinkle in this already slippery matrix, *Citizens United v*

¹⁹⁸ See, for example, *Milavetz, Gallop & Milavetz, PA v United States*, 130 S Ct 1324, 1339 (2010) (accepting the claimant's characterization of their challenge as as-applied); *Doe*, 130 S Ct at 2817 (looking at the substance of the claim and the relief requested to determine whether it is facial or as-applied); *Citizens United*, 130 S Ct at 888–93 (looking at the inquiry necessary to adequately settle the claim to determine whether the challenge is as-applied or facial); *United States v Carel*, 668 F3d 1211, 1217–18 (10th Cir 2011) (explaining that the nature of a challenge depends on "how the plaintiffs elect to proceed").

¹⁹⁹ See, for example, *Croft*, 624 F3d at 161, 164 (determining that plaintiffs brought a facial challenge where plaintiffs claimed that the Texas pledge of allegiance violated the First Amendment).

²⁰⁰ See, for example, *Milavetz*, 130 S Ct at 1339 (agreeing to treat the challenge as an as-applied challenge after *Milavetz* so insisted); *Carel*, 668 F3d at 1216–18:

Because we construe Mr. Carel's challenge to § 16913 as an as-applied challenge, we address only whether applying § 16913 to the particular circumstances of his case violates the Constitution and we express no opinion concerning whether § 16913 might violate the Constitution as it applies to other federal sex offenders.

²⁰¹ See, for example, *Doe*, 130 S Ct at 2817 (holding that the challenge must satisfy the standards of a facial challenge where the parties disagreed about whether the challenge was facial or as-applied); *URI Student Senate v Town of Narragansett*, 631 F3d 1, 8–9 & n 5 (1st Cir 2011) (characterizing appellants' constitutional challenges as facial challenges despite plaintiffs' varying positions on the issue); *Croft*, 624 F3d at 163–64.

*FEC*²⁰² indicates that if determining the more general validity of a directive is “*necessary* to resolve a claim,” then courts should take the challenge as a facial challenge.²⁰³ Unfortunately, the line between these situations is not particularly clear.

Obviously, these “clarifications” create some blurring around the line between facial and as-applied challenges. More specifically, they raise the question of what courts should do in situations where a party is attempting to raise an as-applied challenge but it seems certain that adjudicating the challenge will implicate the validity of the government directive more generally. In situations where courts are faced with an ostensibly as-applied challenge (or where the challenge is not labeled) it appears that they could go one of three ways. First, they could limit themselves to the particular facts before them and ignore possible effects on other potential claimants. That is, they treat the challenge as a true as-applied challenge.²⁰⁴ Second, they could declare that the challenge is not a true as-applied challenge because resolving the issue as the claimant wants would necessarily involve settling it for others.²⁰⁵ As such, the claimant has the burden of supporting a facial challenge (a very hard task).²⁰⁶ Third, they could determine that a broad remedy is *necessary* to resolve the claim and, as such, that they need to consider a facial challenge (this was the situation in *Citizens United*²⁰⁷).

A major factor that determines which direction a court will take seems to lie in the particularity with which the claimant argues that his constitutional challenge is as-applied. The clearer it is that he is only interested in getting an adjudication as it applies to his very particular circumstances, the more likely it is that a court will similarly view the claimant’s challenge as as-applied. Of course, as *Citizens United* points out, claimants cannot simply forbid the court from considering the facial validity of a government statute—the court is not eternally bound by the characterization that the claimants give their own challenges²⁰⁸—but they can help ensure that a challenge is treated as as-applied by particularly and narrowly tailoring both the challenge and the relief sought.

Ultimately, this set of considerations probably limits the claimants more than the courts. The courts hold the power to determine

²⁰² 130 S Ct 876 (2010).

²⁰³ *Id.* at 893.

²⁰⁴ See *Milavetz*, 130 S Ct at 1339; *Carel*, 668 F3d at 1217–18.

²⁰⁵ See *Doe*, 130 S Ct at 2817.

²⁰⁶ See *id.*; *United States v Stevens*, 130 S Ct 1577, 1587 (2010).

²⁰⁷ See *Citizens United*, 130 S Ct at 893.

²⁰⁸ See *id.* at 893.

whether a challenge is as-applied or facial, and they are not limited by the labels placed on the challenge by claimants. At the same time, there is an aversion to adjudicating the large constitutional issues raised by facial challenges unless it is “necessary.”²⁰⁹ As such, if claimants want to level a successful as-applied challenge and avoid the difficulties associated with facial challenges, they need to be clear that they are limiting their challenge to the particular facts presented in their case.

2. The best way to solve the forfeiture issue is by allowing district courts to hear as-applied constitutional defenses but not facial defenses.

The as-applied–facial challenge distinction suggests a solution to the problem plaguing the circuit courts: under the Communications Act’s forfeiture provisions, district courts have jurisdiction over as-applied constitutional defenses to FCC regulations but not over facial constitutional defenses. This would not *bar* facial challenges to regulations but would merely require that these be heard exclusively by appellate courts.

This solution—offered by no court to date—sits between the decisions proffered by the Sixth and Eighth Circuits. The Eighth Circuit would likely reject this solution as too broad. The Sixth Circuit is more opaque: *Maquina Musical* is not clear about what type of challenge the defendant is brought the regulation and the court did not discuss the distinction. Regardless, this resolution is much narrower than that advocated by the court.²¹⁰

But this solution is supported by precedent. The Ninth Circuit case *Preminger v Principi*²¹¹ involved regulations promulgated by the Department of Veterans Affairs (VA), against which the plaintiffs raised both facial and as-applied challenges.²¹² The district court found that it had jurisdiction over the latter, but not the former, and the Ninth Circuit affirmed.²¹³ In particular, the court maintained that, under 5 USC § 703 and general federal question jurisdiction, federal courts retain broad jurisdiction over constitutional challenges unless Congress has provided for a specific judicial review path.²¹⁴ In this situation, Congress had given exclusive jurisdiction over challenges to most VA actions to

²⁰⁹ Id at 888–93.

²¹⁰ See *Maquina Musical*, 204 F3d at 666–67.

²¹¹ 422 F3d 815 (9th Cir 2005).

²¹² Id at 820 (involving a VA regulation that bans partisan activity on VA premises).

²¹³ Id at 820–21.

²¹⁴ Id at 821.

the Federal Circuit in 38 USC § 502: “Thus, Congress explicitly has provided for judicial review of direct challenges to VA rules and regulations only in the Federal Circuit.”²¹⁵ Despite this grant of direct review power and the loss of jurisdiction over facial challenges, the court held that it “retain[ed] jurisdiction to review an as-applied challenge. The *application* of a rule that is deemed to be (or that the Federal Circuit has held to be) valid to a particular party or individual is neither rule-making nor an action by the Secretary that requires notice and publication.”²¹⁶ In other words, when an agency applies a rule or regulation to a particular individual, that action is not, in itself, a new rule or regulation that is captured by the Federal Circuit’s exclusive jurisdiction.

Cases in other circuits corroborate this reasoning. The Fourth Circuit recognized that district courts can have jurisdiction over as-applied challenges even if a statutory review process does not allow jurisdiction over facial challenges.²¹⁷ Additionally, the Eleventh Circuit found that vesting review of regulations in a specific court divested other courts of jurisdiction over facial constitutional challenges to those regulations.²¹⁸

The FCC forfeiture cases bear two important similarities to the VA cases. First, they both involve constitutional challenges to regulations. Second, both involve statutes that provide jurisdictional paths for judicial review of rules and regulations. Given these striking similarities, the logic of *Preminger* is applicable to the forfeiture cases. The Act grants district courts broad jurisdiction over forfeiture actions and presumably would grant jurisdiction over constitutional defenses in the absence of § 402.²¹⁹ Section 402, however, has specified a particular judicial review path for FCC final orders—direct challenges to rules, regulations, and other final orders are to be brought before appellate courts.²²⁰ Thus, district courts’ forfeiture jurisdiction over constitutional challenges to FCC regulations brought as defenses to a forfeiture action is circumscribed. As such, the district court is barred from hearing facial defenses that implicate the validity of an entire FCC directive. Such generalized challenges are challenges to final orders that are properly within the purview of the appellate courts. A party would need to bring that challenge before the FCC and then appeal to the circuit court (unless direct review by

²¹⁵ *Preminger*, 422 F3d at 821.

²¹⁶ *Id.*

²¹⁷ See *Griffin v Department of Veterans Affairs*, 274 F3d 818, 825 (4th Cir 2001). See also *Griffin v Department of Veterans Affairs*, 129 F Supp 2d 832, 837–38 (D Md 2001).

²¹⁸ See *Hall v U.S. Department of Veterans’ Affairs*, 85 F3d 532, 533–35 (11th Cir 1996).

²¹⁹ See 47 USC § 504(a); *Prayze*, 214 F3d at 250.

²²⁰ See 47 USC § 402(a).

the appellate court were permitted).²²¹ Nevertheless, this does not divest the district court of jurisdiction over as-applied constitutional defenses that challenge how a directive is being applied to an individual in a specific case.

To be clear, this approach is not a pleading solution. It is not a recommendation that defendants frame their defenses as as-applied challenges in order to maximize their chances of being heard. Rather, this approach argues that the Act limits district court forfeiture jurisdiction to considering only as-applied constitutional defenses and bars them from hearing facial defenses. Thus, as discussed in Part III.B.1.b, parties cannot simply plead around the distinction. Nevertheless, this approach will obviously impact how a defendant should plead in particular cases and it implicates questions about how the district court should proceed in light of the slipperiness that exists at the border of as-applied and facial challenges. It is worth noting, however, that even were a defendant to plead strategically, the effect would be minimal. At worst, the defendant would strategically plead an as-applied challenge, which only affects that particular defendant. The congressional scheme reserving wholesale review of rules is still focused on the courts of appeals.

The earlier discussion of as-applied and facial challenges explored two issues that courts grapple with when addressing constitutional challenges—determining whether a challenge is as-applied or facial, and determining the scope of as-applied challenges. These questions arise in a wide range of circumstances, and district courts will inevitably have to grapple with them when applying the approach advocated above.

The first major question that a district court would face when confronted with a constitutional defense is determining whether the defendant is bringing an as-applied or facial challenge. On a general level, the determination process would not be significantly different from how it is done in any other case involving a constitutional challenge. Even though district courts are limited to considering as-applied challenges, the statute imposes no requirements on *how* a court should determine whether a challenge is as-applied or facial. As such, the general jurisprudence surrounding as-applied and facial challenges would control the determination process—the court would look at the characterization of the defense by the defendant and at what it would need to do to address the defense.²²²

²²¹ See Part I.D.3.

²²² See, for example, *Milavetz*, 130 S Ct at 1339; *Doe*, 130 S Ct at 2817; *Citizens United*, 130 S Ct at 888–93.

The second major question is what the court would do if an ostensibly as-applied defense potentially implicates parties not before the court. As seen in Part III.B.1.b, the court could pursue three paths. First, it could take the defendant's word at face value, treat the defense as an as-applied defense, and strictly limit its decision to his particular circumstances without considering possible effects on others. This approach is on prominent display in *United States v Carel*,²²³ where the court accepted that the claim was as-applied and expressly limited itself to the case before it.²²⁴ Importantly, this is the approach that many courts seem to follow.²²⁵ Second, the court could say that the defense is based on the same claim that anyone else would raise to challenge the regulation and, as such, constitutes a facial challenge.²²⁶ Third, the court could say that while the defendant might want to raise an as-applied defense, proper adjudication of the defense would necessarily involve considering its general validity.²²⁷ As such, the defense is actually a facial challenge. So far, this process is par for the course as far as constitutional challenges go.

The real difference lies in what happens once the court makes a determination as to the challenge the claimant is bringing. Normally, if the court decides that the challenge before it is actually a facial challenge, it raises the bar for the claimant—the claimant has the burden of demonstrating that there are no circumstances under which the government directive in question is constitutionally valid.²²⁸ Under the solution argued for above, if the district court in a forfeiture case follows the second or third approach—or otherwise finds that the constitutional defense implicates a facial challenge—they are barred from hearing the defense. Instead, the court essentially has to tell the defendant to take his constitutional claim to the FCC or to the appellate courts.

The preceding discussion clearly raises the question of what the defendant should do to help ensure that his as-applied challenge is taken as such by the court. As noted, despite the slipperiness between as-applied and facial challenges, many courts appear to simply take claims as characterized and explicitly limit their ultimate determinations accordingly. Problems appear to arise when claimants

²²³ 668 F3d 1211 (10th Cir 2011).

²²⁴ *Id.* at 1217–18. See also *Milavetz*, 130 S Ct at 1339 (analyzing the challenge as an as-applied challenge based on plaintiffs' insistence).

²²⁵ See, for example, *Preminger*, 422 F3d at 820–21 (accepting, without exploration, the claimant's characterization of the challenge); *Prayze*, 214 F3d at 250–52 (same).

²²⁶ See *Doe*, 130 S Ct at 2817.

²²⁷ See *Citizens United*, 130 S Ct at 893.

²²⁸ See, for example, *Doe*, 130 S Ct at 2817, citing *Stevens*, 130 S Ct at 1587. See also note 195.

frame their challenges broadly and call them “as-applied” or seek broad relief. As such, the key for a defendant appears to lie in carefully circumscribing the scope of their as-applied defense and tying it to the particular facts of their case.

Ultimately, the balancing act between taking the defense at face value and looking into whether it is “really” an as-applied defense is a good thing. It grants the notion of limiting the district courts to as-applied challenges some real teeth and prevents it from merely becoming a matter of switching the words a defendant uses when presenting his defense. More specifically, it grants the district courts a degree of discretion when considering defenses. As such, it reduces the chances that a defendant will be able to artfully plead his way out of the bar on facial challenges. Further, it helps ensure that the district court will not rule on the broader validity of the regulation. Finally, it forces defendants to be particular and narrow in their constitutional challenges.

3. The proposed solution is supported by the language and structure of the Communications Act.

There are several other important factors that support the solution advocated above. First, the solution proposed above meshes well with the provision in § 504 that forfeiture trials are de novo, which implies that the district court can hear all relevant issues related to forfeiture cases before it,²²⁹ and the lack of restrictions on the district court’s power to allow forfeiture under § 510.²³⁰ Additionally, the appellate courts retain the broad power over rules and regulations implicated by § 402.

Second, it does not render any provision superfluous. The jurisdictional provisions both speak categorically; they do not have “release” clauses that describe circumstances in which they are rendered inoperative. Yet, under the Eighth and Sixth Circuits’ approaches, either the jurisdiction of the district court or appellate court is unjustifiably impinged upon. That is, the respective jurisdictional provisions are not accorded the weight they are properly due.²³¹ Under the approach articulated above, the appellate courts retain their power to hear challenges to the validity of final orders and the district

²²⁹ 47 USC § 504(a). See also *Pleasant Broadcasting Co v FCC*, 564 F2d 496, 500 (DC Cir 1977) (arguing that § 504(a) clearly affords an opportunity for “full review” in a trial de novo).

²³⁰ 47 USC § 510(b).

²³¹ See *Corley v United States*, 556 US 303, 314 (2009) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (quotation marks omitted).

courts retain their power to hear defenses that are relevant to forfeiture actions.

Third, this approach does not read text into the statute. It does not require an implied “except for constitutional defenses” clause in the forfeiture provisions or an “except if the constitutionality of the final order is implicated in a forfeiture action” clause in the appellate provisions. Instead, it takes the statutory language as written and locates a fair balancing point between the various provisions.

Fourth, this approach is in keeping with the nuanced jurisdictional scheme that the statute creates. Specifically, it would not allow one jurisdictional grant to override the other (as the interpretations of the Eighth and Sixth Circuits do) and helps clarify the extent of both. It gives weight to the complexity of the statute rather than trying to simplify it unnecessarily or in a way Congress did not intend.

Finally, this interpretation meshes well with the Supreme Court’s admonition in *ITT* and similar cases. In *ITT*, the Court mandated that a litigant could not ask the district court to “enjoin action that is the outcome of the agency’s order.”²³² The respondents were raising the same claims before the district court that they had raised during their failed rulemaking petition before the FCC.²³³ In effect, they were mounting a surreptitious wholesale attack on the validity of the FCC’s denial of their rulemaking petition—they were not attacking a particular application of that order, but the order in its entirety. Under the scheme presented above, forfeiture defendants would be barred from mounting similar wholesale attacks on the validity of FCC directives in their defenses, but would be able to challenge the application of such directives in their particular cases.

4. Several policy considerations also support this approach.

While the legal reasons presented above lend primary support to the solution, there are several secondary reasons to adopt this construction of the statute. Namely, it balances the concerns of the circuits, clarifies the jurisdictional inquiry in a forfeiture action, and illuminates the jurisdictional mandate more generally.

²³² *ITT*, 466 US at 468–69. See also *Port of Boston Marine Terminal Assn v Rederiaktiebolaget Transatlantic*, 400 US 62, 69–71 (1970) (affirming that the district court did not have jurisdiction to review a Maritime Commission order because it was committed to the appellate courts); *Whitney National Bank in Jefferson Parish v Bank of New Orleans & Trust Co.*, 379 US 411, 421–23 (1965) (barring the litigants from avoiding statutorily prescribed administrative and appellate jurisdiction by attacking a Federal Reserve determination in a suit against the Comptroller of the Currency).

²³³ *ITT*, 466 US at 465–69.

Despite the unsatisfactory analyses in the Eighth and Sixth Circuits' opinions, both courts raise legitimate concerns about the status of forfeiture jurisdiction. The Eighth Circuit expressed concerns about short-circuiting appellate court jurisdiction by allowing defendants to use forfeiture jurisdiction as an evasive mechanism.²³⁴ The Sixth Circuit worried about barring constitutional defenses that a defendant would have access to absent explicit instructions from Congress barring such defenses.²³⁵ Under the approach presented above, both of these concerns are mitigated. A violator would still have the opportunity to raise a constitutional defense but in a limited fashion.²³⁶ Additionally, violators could not utilize forfeiture proceedings to evade the appellate courts' jurisdiction. If a defendant sought the wholesale invalidation of a particular FCC directive on constitutional grounds, the defendant would have to follow the procedures laid out in § 402. The district court would have no jurisdiction over such challenges.

One might contend that standing issues can prevent defendants from bringing as-applied constitutional defenses, even if a court has subject matter jurisdiction. This is highly unlikely, as standing applies to plaintiffs, not defendants.²³⁷ Furthermore, even if standing extended to forfeiture defendants, it would not automatically operate to block all as-applied defenses. The doctrine is applied on a case-by-case basis:²³⁸ where one party might lack standing because he never requested an FCC license, another party might have standing because he has the license but violated an FCC rule that applied to his license. And still another party might have standing absent a license because he successfully demonstrated the futility of applying for one.²³⁹ Indeed, in this respect, standing doctrine could be used by a district court to further ensure that truly bad-faith defendants do not abuse the court's jurisdiction. As stated, however, standing is unlikely to be an issue, as

²³⁴ See *Laurel Avenue*, 207 F3d at 463.

²³⁵ See *Maquina Musical*, 204 F3d at 667.

²³⁶ See *Preminger*, 422 F3d at 821.

²³⁷ See *Wynn v Carey*, 599 F2d 193, 196 (7th Cir 1979) ("The standing doctrine, which is derived from the Article III case or controversy requirements of the Constitution, applies only to plaintiffs."). See also 32A Am Jur 2d Fed Courts § 591 at 49 (2007) ("The standing requirement applies only to plaintiffs and not to parties intervening as defendants."); Francis M. Dougherty, ed, 14 *Cyclopedia of Federal Procedure* § 67:75 (West 3d ed 2012) ("The doctrine of standing applies only to plaintiffs."). Indeed, while the two forfeiture cases in which standing was utilized against the defendants were both affirmed, they were affirmed on subject matter jurisdiction grounds and the appellate courts never reached the issue of standing. See *United States v Neset*, 235 F3d 415, 420 (8th Cir 2000); *Dunifer*, 219 F3d at 1005 ("We do not reach the standing issue because we conclude that the district court lacked subject matter jurisdiction.").

²³⁸ See *Prayze*, 214 F3d at 251 (considering the facts of Prayze's particular situation to assess standing).

²³⁹ See *id.*

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it does not apply to defendants. Either way, this approach guards against parties utilizing the district courts to further a constitutional agenda properly brought before the appellate court.

Additionally, the solution also allows district courts and appellate courts to ask better questions about their own jurisdiction when faced with a forfeiture issue. It directs courts to look at the nature of the actual defenses that the defendant in a forfeiture action is raising. This would minimize the time courts spend grappling with the opaque provisions of a complicated statute. In addition to saving judicial resources, this approach also encourages a uniform interpretation of the Act's jurisdictional provisions. While it does not solve every jurisdictional issue that could arise, the solution brings some clarity to the Act and is a useful step towards a more coherent understanding of the statute.

CONCLUSION

Despite the jurisdictional confusion that inheres in the Communications Act, there is an evenhanded way to resolve the circuit split: allow district courts jurisdiction over as-applied constitutional challenges to FCC directives brought as defenses in forfeiture actions but bar jurisdiction over facial defenses. This approach has a strong legal foundation—it comports with the statutory language, is supported by case law addressing regulatory issues, and satisfies Supreme Court precedent. Importantly, this approach also addresses concerns raised by the Eighth and Sixth Circuits.

Beyond resolving a long-standing circuit split, this Comment is important for several additional reasons. As noted, the jurisdictional provisions of the Communications Act are complicated. Any sliver of lucidity, however particular, is useful in the battle against the Act's opacity. More fundamentally, forfeiture strikes at the heart of the system of property rights that American law cherishes—it allows the government to take away property without compensation. While few would question the government's right to exercise this power, its exercise needs to be closely watched. Admittedly, the forfeiture provisions of the Communications Act describe a rather specific sphere within which the power operates. At their core, however, the provisions still allow uncompensated government acquisition of property. Dispensing with a clarification of those provisions sets a dangerous precedent for exercises of the forfeiture power. It is essential that those subject to the Act know how to defend themselves against such actions to the fullest extent allowable. Anything less is a potentially dangerous expansion of government power and an affront to individual property rights.