

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2002

No. 00-1100

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GREG RUGGIERO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS ON REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici. The following is a list of all persons who are parties, intervenors, and amici in this Court:

Petitioner - Greg Ruggiero.

Respondents - Federal Communications Commission

United States of America

(B) Rulings Under Review. The ruling under review is the Federal Communications Commission's Second Report and Order in In re Creation of Low Power Radio Service, 16 FCC Rcd. 8026, insofar as it implements Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act (RBPA), Pub. L. No. 106-553, Appendix B, 114 Stat. 2762 (2000). A summary of the Second Report and Order was published in the Federal Register on May 10, 2001. See 66 Fed. 23861 (2001).

(C) Related Cases. This case was originally consolidated with National Ass'n of Broad. v. FCC, No. 00-1054, which involved different issues and additional parties and amici. The two cases were deconsolidated by order dated February 8, 2002.

The constitutionality of Section 631(a)(1)(B) of the RBPA is also at issue in Prayze FM v. FCC, Civ. No. 3:98CV00375 (D. Conn. filed Feb. 28, 1998), and Radio Canyon Lake v. Ashcroft, Civ. No. SA-99-CA-0713-FB (W.D. Tex. filed July 2, 1999).

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GLOSSARY

FCC or Commission	Federal Communications Commission
House Hearing	<u>FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing Before the Subcomm. on Telecomm., Trade, & Consumer Protection of the H. Comm. on Commerce, 106th Cong., 2d Sess. (2000)</u>
House Report	H.R. Rep. No. 106-597, 106th Cong., 2d Sess. (2000)
LPFM	Low-power FM
RBPA	Radio Broadcasting Preservation Act

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JURISDICTIONAL STATEMENT

A summary of the FCC's first Report and Order was published in the Federal Register on February 15, 2000. 65 Fed. Reg. 7615 (2000). See Report and Order, Creation of Low Power Radio Service, 15 FCC Rcd. 2205 (2000) (JA 300), on reconsideration, 15 FCC Rcd. 19208 (2000) (JA 431). Petitioner filed a petition for review of that order in the U.S. Court of Appeals for the Second Circuit on February 23, 2000, within the sixty days permitted by 28 U.S.C. § 2344. Pursuant to the rules of the Judicial Panel on Multi-district Litigation, the petition was transferred to this Circuit and consolidated with National Ass'n of Broad. v. FCC, No. 00-1054, which challenged separate aspects of the same Report and Order.

A summary of the FCC's Second Report and Order, Creation of Low Power Radio Service, 16 FCC Rcd. 8026 (2001), was published in

the Federal Register on May 10, 2001. 66 Fed. Reg. 23861 (2001). Pursuant to an order of this Court, the parties filed supplemental briefs on April 23, 2001, addressing petitioner's constitutional claims as they related to the RBPA and the FCC's implementing regulations. The Court found that petitioner's brief, "in all but title, satisfie[d] the four statutory requirements for a petition for review" of the Second Report and Order, and accordingly "treat[ed] the brief as the 'functional equivalent' of a petition for review" of the Second Report and Order. Ruggiero v. FCC, 278 F.3d 1323, 1327 (D.C. Cir. 2001). This Court has jurisdiction over a timely filed petition for review of an FCC order pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

STATEMENT OF THE ISSUE

Whether Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act (RBPA), which requires the FCC to prohibit any person from obtaining a low-power FM radio license if that person "has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934," is constitutional.

STATUTES AND REGULATIONS

The text of the RBPA, and of the FCC's regulation implementing Section 632(a)(1)(B), are set forth in an Addendum to the Brief of Petitioner.

STATEMENT OF THE CASE

This is a challenge to the constitutionality of Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act (RBPA),

which prohibits persons from obtaining a low power FM radio license "if the applicant has engaged in any manner" in unlicensed broadcasting. Pub. L. No. 106-553, 114 Stat. 2762, Appendix B, § 632(a)(1)(B). On a petition for review filed by a person who had engaged in such broadcasting, a divided panel of this Court held that the statute and the FCC's implementing regulations were unconstitutional. Ruggiero v. FCC, 278 F.3d 1323, 1334 (D.C. Cir. 2002). On the government's petition for rehearing and rehearing en banc, the full Court vacated the panel's judgment, granted rehearing en banc, and directed the parties to brief the constitutionality of Section 632(a)(1)(B).

STATEMENT OF FACTS

A. Statutory and Regulatory Background.

Federal law has long prohibited persons from "us[ing] or operat[ing] any apparatus for the transmission of energy or communications or signals by radio" without a license from the FCC. 47 U.S.C. § 301. Broadcast licenses are to be granted only if the "public interest, convenience, and necessity will be served," 47 U.S.C. § 309(a), and only upon applications that "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b).

Unlicensed broadcasting is a serious offense, and the FCC has been vested with a broad array of powers to combat it. The Commission may seek an injunction, 47 U.S.C. § 401, issue a cease-and-

desist order, 47 U.S.C. § 312(b), or impose a monetary forfeiture, 47 U.S.C. § 503(b). Any equipment used "with willful and knowing intent" to engage in unlicensed broadcasting "may be seized and forfeited to the United States." 47 U.S.C. § 510(a). And persons who engage in willful and knowing violations of the Communications Act thereby subject themselves to criminal penalties, including fines and imprisonment. 47 U.S.C. § 501.

For many years, the FCC licensed a category of noncommercial educational radio stations, known as Class D stations, that were permitted to operate with a maximum of 10 watts of power. In 1978, in order to promote "the opportunity for other more efficient operations," the FCC halted the further licensing of such radio stations. Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C. 2d 240, 248-49, ¶¶ 23-24 (1978). Noncommercial educational FM stations were thereafter required to operate at a minimum power of 100 watts. 47 C.F.R. § 73.511(a) (2000).

In the ensuing years, a number of persons and entities began operating low-power FM radio stations without seeking or obtaining licenses. These "pirate" broadcasters "flout[ed] the broadcast licensing requirement" and "operated their stations in open defiance of the FCC's ban on low power FM radio broadcasting." Brief for Petitioner ("Pet. Br.") 7. As a result, the FCC was

forced to devote considerable resources to the enforcement of the Communications Act's basic broadcast licensing requirement.¹

1. The FCC's LPFM Character Qualification Rule.

Responding to petitions for rulemaking, the FCC in February of 1999 proposed to modify its low-power radio rules "to create two classes of low power radio service" – one operating at 1000 watts of power, and the other operating at 100 watts of power." See Notice of Proposed Rule Making, Creation of a Low Power Radio Service, 14 FCC Rcd. 2471, ¶ 1 (1999) (JA 160). In addition, the Commission sought comment on whether the agency should establish "a third, 'microradio' class of low power radio service that would operate in the range of 1 to 10 watts" of power. Ibid.

In proposing to license LPFM radio stations, the FCC addressed "the particular issue of previously and currently unlicensed

¹ See, e.g., Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002), petition for cert. filed, 70 U.S.L.W. 3726 (May 8, 2002) (No. 01-1662); United States v. Szoka, 260 F.3d 516 (6th Cir. 2001); United States v. Nese, 235 F.3d 415 (8th Cir. 2000), cert. denied, 122 S. Ct. 61 (2001); La Voz Radio de la Comunidad v. FCC, 223 F.3d 313 (6th Cir. 2000); United States v. Dunifer, 219 F.3d 1004 (9th Cir. 2000); United States v. Any and All Radio Station Transmission Equip. (Perez), 218 F.3d 543 (6th Cir. 2000); Prayze FM v. FCC, 214 F.3d 245 (2d Cir. 2000); United States v. Any and All Radio Station Transmission Equip. (Fried), 207 F.3d 458 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001); United States v. Any and All Radio Station Transmission Equip. (Strawcutter), 204 F.3d 658 (6th Cir. 2000); Radio Luz v. FCC, 88 F. Supp. 2d 372 (E.D. Pa. 1999), aff'd mem., 213 F.3d 629 (3d Cir. 2000) (Table). The Commission shut down 153 unlicensed radio stations in 1998, 154 such stations in 1999, and 25 such stations in the first two months of 2000. FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the H. Comm. on Commerce, 106th Cong., 2d Sess. 85 (2000).

operators." 14 FCC Rcd. at 2497, ¶ 65 (JA 186). The Commission explained that "[u]nlicensed radio operators not only violate the longstanding statutory prohibition against unlicensed broadcasting and our present rules on unlicensed broadcasting, but they also use equipment of unknown technical integrity." Ibid. "Illegal radio transmissions," the Commission stated, "raise a particular concern because of the potential for harmful interference to authorized radio operations, including public safety communications and aircraft frequencies." Ibid.²

The Commission emphasized that it "has repeatedly urged all unlicensed radio operators to cease broadcasting," and has used the legal tools at its disposal to shut them down. Id. at ¶ 66 (JA 186). "Nevertheless," the FCC stated, "despite repeated warnings by Commission officials and the Commission's successes in * * * litigation * * * some unlicensed broadcasters have persisted in their unlawful activity." Ibid.

² "For example," the Commission noted, "in March, 1998, the Commission closed down an unlicensed radio operation in Sacramento, California, that had disrupted air traffic control communications on four separate occasions." Ibid. The Commission also noted that it had also "shut down illegal broadcast operations that were causing harmful interference to air traffic control communications at the Miami and West Palm Beach, Florida, airports." Ibid. See also Any and All Radio Station Transmission Equip., 204 F.3d at 661 (interference complaint against pirate by licensed Toledo FM station). Because "uncertified equipment has on numerous occasions caused dangerous interference with aviation frequencies," the Commission proposed and then adopted a requirement that LPFM transmitters be FCC-certified. Id. at 2485, ¶ 35 (JA 174). See 15 FCC Rcd. at 2250-51, ¶ 116 (JA 345-46).

Observing that "[p]arties who persist in unlawful operation after the Commission has taken * * * enforcement actions could be deemed per se unqualified," the FCC sought "comment as to eligibility of such parties for a license in any new radio service," as well as "whether there are circumstances under which such a party could be considered rehabilitated." Ibid. The agency also sought "comment on the propriety of accepting as licensees of low power (or microradio) licenses parties who may have broadcast illegally but have promptly ceased operation when advised by the Commission to do so, or who voluntarily cease operations within ten days of this Notice in the Federal Register." Ibid.

In January of 2000, after considering the comments received, the FCC adopted rules authorizing the licensing of two noncommercial classes of LPFM radio stations – "one operating at a maximum power of 100 watts and one at a maximum power of 10 watts." Report and Order, Creation of Low Power Radio Service, 15 FCC Rcd. 2205, 2206 ¶ 1 (2000) (JA 300, 301). In doing so, the Commission decided to disqualify all but a narrow class of unlicensed broadcasters from the new LPFM service. The agency decided to "accept a low power applicant who * * * at some time broadcast illegally," only if it "certifie[d], under penalty of perjury, that: (1) it voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999, without specific direction to terminate by the FCC, or (2) it ceased engaging in the unlicensed operation of any facility within 24 hours of being advised by the Commission to do so." Id. at ¶ 54 (JA 321). See 15

FCC Rcd. at 2300 (JA 395) (adding 47 C.F.R. 73.854). The Commission explained that the rule on unlicensed broadcasters lay between the position of "many commenters * * * that anyone who has operated illegally should not be eligible for a license,"³ and those who "argue[d] for amnesty for unlicensed broadcasters." Id. at ¶ 52 (JA 320-21).⁴

On reconsideration, the Commission "affirmed [its] decision to apply [its] character qualifications policy with respect to former illegal broadcasters." Memorandum Opinion and Order on Reconsideration, Creation of Low Power Radio Service, 15 FCC Rcd. 19208, 19210 ¶ 4 (2000) (JA 433). The Commission also clarified its rules to make clear that "in no event will an unlicensed broadcaster be eligible for an LPFM license if it continued illegally broadcasting after February 26, 1999." 15 FCC Rcd. at 19245, ¶ 95 (JA 468). The Commission explained that its "rule on unlicensed broadcasters

³ See, e.g., Comments of North Cascades Broadcasting, Inc., at 8 (JA 236) ("Do not reward those who have chosen to live outside the rules"); Comments of Colorado West Broadcasting, Inc., at 2 (JA 238) ("To legitimize and assist these criminals is a slap in the face to every broadcaster who has worked honorably to build a good reputation and a quality business"); Comments of Omni Communications, Inc., at 5 (JA 241) ("If a 'pirate' believed in operating an illegal radio station not licensed, what would keep the 'pirate' from operating a legal radio station at unauthorized and illegal power or height?"); Comments of Wisconsin Rapids Broadcasting, LLC, at 3-4 (JA 248-49) (FCC proposal "would reward people who purposely violated the law to establish an unlicensed radio station"). See generally Comments of National Ass'n of Broadcasters, at 74-75 (JA 281-82) ("This type of behavior cannot be tolerated at any time").

⁴ See, e.g., Comments of National Lawyers Guild, at 3-5 (JA 268-70).

was based on our concern that past illegal broadcast operations reflect on the entity's proclivity to deal truthfully with the Commission and to comply with our rules and policies." 15 FCC Rcd. at 19245, ¶ 96 (JA 468). Any party ignoring a Commission order to cease unlicensed broadcasting, the Commission stated, "has demonstrated an unwillingness to comply with the Commission's rules and thus should not be rewarded with an LPFM license." Ibid.

2. The Radio Broadcasting Preservation Act.

The Commission's LPFM rules, including its decision to permit a narrow class of unlicensed broadcasters to remain eligible for LPFM licenses, generated substantial opposition in Congress. Soon after the Commission adopted its first Report and Order, Senator Gregg introduced a bill (S. 2068) to repeal the FCC's LPFM rules. Among the Senator's objections were that the rules would "make[] formerly unlicensed, pirate radio operators eligible for LPFM licenses," which would "reinforce[] their unlawful behavior and encourage[] future illegal activity by opening the door to new unauthorized broadcasters." 146 Cong. Rec. S 626 (daily ed. Feb. 10, 2000). In his view, by "[i]ntroduc[ing] * * * thousands of LPFM stations," the rules "not only reward[] illegal activity, but * * * undermine the integrity of the radio spectrum." Ibid.

A House committee held a hearing on a similar proposal for repeal. FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities, Hearing Before the Subcomm. on Telecomm. Trade, and Consumer Protection of H. Comm. on Commerce, 106th Cong., 2d Sess. (2000) (House Hearing). At that hearing,

Representative Oxley stated that he "most object[ed] to the provisions making former unlicensed, pirate radio operators eligible for low power licenses," agreeing that it would "reinforc[e] their unlawful behavior and encourag[e] new unauthorized broadcasts in the future." House Hearing, at 4. In addition, committee witnesses contended that LPFM licensees "will not possess the same incentive to abide by the rules as full-power broadcasters," noting that "the LPFM movement [has] roots in pirate broadcasting." Id. at 28-29 (prepared statement of Nat'l Ass'n of Broadcasters President Fritts and Bonneville Int'l Corp. President Reese). In reporting the bill, the committee concluded "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service." H.R. Rep. No. 106-597, 106th Cong., 2d Sess. 8 (2000) (House Report). See 146 Cong. Rec. H 2309 (daily ed. Apr. 13, 2000) (statement of Rep. Dickey) ("These individuals should not be rewarded for previous unlawful acts that interfered with authorized FM broadcasts").

The RBPA was ultimately enacted as part of fiscal year 2001 appropriations legislation. See Pub. L. No. 106-553, 114 Stat. 2762, Appendix B, § 632. Section 632(a)(1)(B) of the RBPA requires the FCC to modify its LPFM rules to "prohibit any applicant from obtaining a low power FM license if the applicant has engaged in

any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934."

In accordance with the statutory direction, the Commission modified its LPFM rules. Second Report and Order, Creation of a Low Power Radio Service, 16 FCC Rcd. 8026, 8030 (JA 512). The Commission's rules now provide that "[n]o application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, not any party to the application, has engaged in any manner including individually or with persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301." 47 C.F.R. § 73.854 (2001).

B. Prior Proceedings.

Petitioner Greg Ruggiero has engaged in unlicensed broadcasting. See Free Speech ex rel. Ruggiero v. FCC, 200 F.3d 63 (2d Cir. 1999). He instituted this case by filing a petition for review, on constitutional and statutory grounds, of the FCC's LPFM character qualification rule. After the case was briefed and argued, the RBPA was enacted. The parties were thereupon directed to file briefs "addressing petitioner Ruggiero's constitutional arguments as they apply to the [RBPA] and any implementing orders or regulations the Commission may issue." Order dated Jan. 8, 2001, at 1. The case was reargued, and in a 2-1 decision, a panel of this Court (Rogers, Tatel, JJ.; Henderson, J., dissenting) held that the RBPA's disqualification of unlicensed broadcasters from

the LPFM service was unconstitutional. Ruggiero v. FCC, 278 F.3d 1323 (D.C. Cir. 2002).

Relying on News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988), the panel majority applied heightened scrutiny to the RBPA's disqualification provision. 278 F.3d at 1331.⁵ The majority found the RBPA's provision, like that in News America, to be "astonishingly underinclusive," because "the provision bans low-power license applications only from broadcasters who have operated without a license, leaving the Commission free to evaluate applications from anyone else under its pre-existing, more permissive character qualification policy." Ibid. The panel majority also faulted the provision for "covering circumstances only marginally related to the purpose of increasing regulatory compliance" because it disqualified, among others, unknowing or rehabilitated violators." Id. at 1332.

Judge Henderson, dissenting, stated that "[t]his case is nothing like News America." Id. at 1334. She saw "no reason the legislature cannot permissibly tackle a single part of a perceived problem (including one touching on the First Amendment) through a statute, such as the one here, which is neither overinclusive nor underinclusive." Id. at 1335 n.2.

⁵ The majority found it unnecessary to "exact[ly] characteriz[e]" the appropriate level of scrutiny, finding "any that is appreciably more stringent than 'minimum rationality' requires invalidation of the challenged provision." Ibid. (citation omitted).

On the government's petition, this Court vacated the panel's judgment and granted rehearing en banc. (Order dated May 2, 2002). The Court thereafter directed the parties to file briefs addressing "only the constitutionality of the character qualification provision contained in the Radio Broadcasting Preservation Act of 2000." (Order dated May 14, 2002).

SUMMARY OF ARGUMENT

The Radio Broadcasting Preservation Act's disqualification of unlicensed broadcasters from obtaining LPFM licenses is constitutional.

1. Unlicensed broadcasting is a violation of the Communications Act's fundamental requirement that all persons who engage in broadcasting do so only in accordance with a license obtained from the FCC. 47 U.S.C. § 301. Unlicensed broadcasting not only ignores the carefully crafted scheme for allocating the Nation's airwaves, it threatens harmful interference with authorized radio services, including those serving public safety agencies and aircraft traffic control. Unlicensed broadcasting is not a sport; it is a serious violation of federal law, with potentially harmful consequences.

As the FCC recognized, illegal broadcasting reflects substantially and adversely on the likelihood that an entity will deal truthfully with the Commission and comply with its rules and policies in the future. In promulgating its LPFM rules, the Commission therefore disqualified all but a narrow class of unlicensed broadcasters from obtaining LPFM licenses.

In revisiting the FCC's LPFM rules, Congress went further. In the RBPA, Congress prohibited all persons who had engaged in unlicensed broadcasting from obtaining an LPFM license. Like the FCC, Congress was concerned that unlicensed broadcasting demonstrates that an applicant lacks the critical commitment to follow the most basic rules of federal broadcast regulation. But Congress was also concerned that permitting even a narrow class of unlicensed broadcasters to remain eligible for LPFM licenses would encourage regulatory noncompliance by others. The RBPA addresses both concerns by ensuring that the failure to abide by the Communications Act's central broadcast licensing requirement will carry lasting consequences for applicants for the limited number of LPFM licenses. The RBPA thus directly advances Congress's substantial interest in assuring the integrity of federal broadcast regulation.

2. The RBPA is not subject to heightened scrutiny. Barring invidious discrimination, the Constitution provides broad leeway for Congress to enact legislative distinctions. In this case, the federal government has extensive power to allocate broadcast licenses in the public interest, and content-neutral regulations that are a reasonable means of serving the public interest "do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." FCC v. National Citizens Committee for Broad., 436 U.S. 775, 802 (1978). The RBPA's disqualification provision is plainly content-neutral. It applies to bar LPFM applicants because of their conduct in broadcasting

without a license, and not because of the content of their broadcasts.

The RBPA also does not unfairly single out unlicensed broadcasters for disqualification. Unlicensed broadcasting is a fundamental violation of the Communications Act that at the time of the RBPA's passage, was especially associated with low-power radio. Under the circumstances, Congress was entitled to address the issue of compliance in the LPFM service, and its implications for the integrity of broadcast regulation in general, without having to determine whether the same rule could be applied to other violations, or applicants for other licenses.

The government need not "make progress on every front before it can make progress on any front." United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993). Instead, legislation may proceed "one step at a time," Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955), and "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

ARGUMENT

SECTION 632(a)(1)(B) OF THE RBPA IS CONSTITUTIONAL.

A. The Statute Advances The Government's Substantial Interest In Ensuring Compliance With The Communications Act And Its Broadcast Licensing Requirement.

The Communications Act's requirement that no person engage in radio broadcasting without a license from the FCC, embodied in 47

U.S.C. § 301, provides the fundamental underpinning for the federal government's regulation of the airwaves. That system of regulation is fatally undermined if persons can engage in broadcasting without regard to the Communications Act's comprehensive process for allocating and regulating radio licenses.

The FCC has long recognized that unlicensed broadcasting constitutes a serious and potentially harmful violation of the Communications Act. As it explained, "[u]nlicensed radio operators not only violate the longstanding statutory [and administrative] prohibition against unlicensed broadcasting," but "[i]llegal radio transmissions raise a particular concern because of the potential for harmful interference to authorized radio operations, including public safety communications and aircraft frequencies." 14 FCC Rcd. at 2497, ¶ 65 (JA 186). The Commission has accordingly used the full range of its authority to ensure that unlicensed broadcasters cease their illegal operations. *Id.* at 2497-98, ¶ 66 (JA 186-87). *See, e.g., Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002); see generally p. 5 n.1. supra.

In promulgating its LPFM character qualification rule, the FCC emphasized that it had "a critical need to ascertain whether a licensee will in the future be forthright in its dealings with the Commission and operate its station in a manner consistent with the requirements of the Communications Act and the Commission's rules and policies." 15 FCC Rcd. at 2226, ¶ 53 (JA 321). As it explained, "past illegal broadcast operations reflect on that entity's proclivity 'to deal truthfully with the Commission and to

comply with our rules and policies,' and thus on its basic qualification to hold a license." Id. at 2226, ¶ 54 (JA 321). The Commission suggested, however, that "[t]he reliability as licensees of parties who may have illegally operated for a time but * * * ceased operation after being advised of an enforcement action" was "not necessarily as suspect." NPRM, 14 FCC Rcd. at 2498, ¶ 67 (JA 187). Based on that assumption, the Commission decided not to disqualify unlicensed broadcasters from obtaining LPFM licenses if they had, prior to February 26, 1999, either ceased their operations "voluntarily," or "within 24 hours of being directed by the FCC to terminate unlicensed operation." 15 FCC Rcd. at 19263 (JA 486) (setting forth 47 C.F.R. § 73.854).

Congress, exercising its powers to amend federal law and to oversee the FCC's administration of the Communications Act, went further. The RBPA directs the FCC to prohibit "any" unlicensed broadcaster from obtaining an LPFM license. Pub. L. No. 106-553, 114 Stat. 2762, App. B, § 632(a)(1)(B).

Like the FCC, Congress was concerned "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public." House Report, at 8.⁶

⁶ As Judge Henderson observed in her dissent from the panel opinion, it is entirely "reasonable" and "logical * * * to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future," and it is for that reason entirely appropriate for Congress "to head them off." Id. at 1135. This is particularly so given that "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory (continued...)

But Congress was also concerned that permitting unlicensed broadcasters to remain eligible for LPFM licenses would undermine the integrity of the federal broadcast licensing system as a whole by encouraging unlawful behavior by others. As Senator Gregg stated, by "making formerly unlicensed, pirate radio operators eligible for LPFM licenses," the FCC was "reinforc[ing] their unlawful behavior and encourag[ing] future illegal activity by opening the door to new unauthorized broadcasters." 146 Cong. Rec. S626 (daily ed. Feb. 10, 2000) (remarks of Sen. Gregg). See House Hearing, at 4 (opening statement of Rep. Oxley) ("making former, unlicensed, pirate radio operators eligible for low power licenses" would "reinforc[e] their unlawful behavior and encourag[e] new unauthorized broadcasts in the future"). In Congress's view, by thus "reward[ing] illegal activity," the FCC's LPFM character qualification rule would "undermine the integrity of the radio spectrum." 146 Cong. Rec. at S626 (Sen. Gregg).

It was entirely reasonable for Congress, in drafting a statute addressing the FCC's LPFM character qualification rule, to limit its attention to unlicensed broadcasters. The RBPA was intended to modify the FCC's rule, which itself had been limited to unlicensed broadcasters and not to other persons of questionable compliance disposition. Moreover, as the extensive litigation and administrative history of this issue had shown, the problem of unlicensed

⁶(...continued)
system that is largely self-policing." Contemporary Media, Inc. v. FCC, 214 F.3d 187, 193 (D.C. Cir. 2000), cert. denied, 532 U.S. 920 (2001).

broadcasting had been visibly and directly associated with the low-power movement. See, e.g., Grid Radio, 278 F.3d at 1317; cases collected at p. 5 n.1 supra. See House Hearing, at 28-29 (prepared statement of E.O. Fritts and B.T. Reese) ("the fact is that the LPFM movement does have roots in pirate broadcasting"). And there was no evidence of a pressing problem regarding other persons of potentially poor regulatory character - such as "murder[ers]" or "child abus[ers]" (see Pet. Br. 28) - seeking to apply for low-power FM licenses.⁷ (Likewise, there was no evidence that unlicensed broadcasters posed a pressing problem outside the low-power arena.)

Congress also reasonably determined that only a permanent ban of unlicensed broadcasters from obtaining LPFM licenses would sufficiently serve its purposes. In Congress's view, even if individual unlicensed broadcasters might be able to demonstrate that they had been rehabilitated, the possibility that they would remain eligible for LPFM licenses would encourage others into the mistaken belief that noncompliance - indeed defiance - of fundamental regulatory requirements would carry no lasting consequences. The RBPA ensures that members of the broadcast community understand that failure to abide by the fundamental

⁷ Persons not covered by the RBPA's bar are subject to the FCC's character qualification policy, under which they are likely to be disqualified for such serious crimes in any event. See Contemporary Media, 214 F.3d at 193 (upholding revocation of station license held by company whose president and sole shareholder had been convicted of felony child abuse).

licensing requirement of the Communications Act - which among other things, is a federal crime, see 47 U.S.C. § 501 - does not pay.

Similar permanent disqualifications of those who violate federal law have been upheld by this Court and others. In DiCola v. Food and Drug Admin., 77 F.3d 504 (D.C. Cir. 1996), this Court upheld a statute that permanently prohibited persons convicted of drug regulation-related felonies from "providing services in any capacity to a person that has an approved or pending drug product application." See 21 U.S.C. § 335a(a)(2). As the Court explained, "[t]he permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation." 77 F.3d at 507. Accord Bae v. Shalala, 44 F.3d 489, 496 (7th Cir. 1995) (While such "permanent debarment" is "undoubtedly harsh, it is not disproportionate to the remedial goals of the [statute] or to the magnitude of [the] wrongdoing").

Likewise, in Dehainaut v. Pena, 32 F.3d 1066 (7th Cir. 1994), cert. denied, 514 U.S. 1050 (1995), the court upheld the indefinite debarment from Federal Aviation Administration employment of former air traffic controllers who were fired for participating in the 1981 PATCO strike. In doing so, the court rejected the contention that the debarment was "not rational because it denie[d] to [the fired controllers] a suitability determination that was available

to the thirty-eight previous classes of striking federal employees and would be available to convicted drug felons seeking federal employment." 32 F.3d at 1075. The fact that the debarment "advanced the legitimate government objectives of safety and efficiency in the administration of our nation's air traffic * * * suffice[d] to rebut the claim that the policies enacted in furtherance of the directive are irrational." Ibid. Because the RBPA's disqualification provision advances the government's interest in ensuring the compliance integrity of the federal system of broadcast regulation, its across-the-board disqualification of unlicensed broadcasters is similarly constitutional.

B. The Statute Is Not Subject To Heightened Scrutiny.

"Defining the class of persons subject to a regulatory requirement * * * 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." FCC v. Beach Communications, Inc., 508 U.S. 307, 316 (1993) (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)). "For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity," and will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate government purpose." Heller v. Doe, 509 U.S. 312, 319-20 (1993).

In this case, because of "[t]he physical limitations of the broadcast spectrum," as well as "problems of interference between broadcast signals," it has long been recognized that "Government allocation and regulation of broadcast frequencies are essential." FCC v. National Citizens Comm. for Broad. (NCCB), 436 U.S. 775, 799 (1978). See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388-89 (1969); National Broad. Co. v. United States, 319 U.S. 190, 226-27 (1943). As a result, "[t]he right of free speech does not include * * * the right to use the facilities of radio without a license." Id. at 227. Instead, under the Communications Act, licenses to engage in radio broadcasting may be granted only upon a showing, satisfactory to the FCC, that the "the public interest, convenience, and necessity will be served" thereby. 47 U.S.C. § 309(a).

"Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the 'public interest' does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the people as a whole . . . in free speech." FCC v. NCCB, 436 U.S. at 801 (quoting Red Lion, at 395 U.S. at 390). Content-neutral broadcast regulations that are "a reasonable means of promoting the public interest" thus "do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." FCC v. NCCB, 436 U.S. at 802.

In NCCB, the Supreme Court rejected statutory and constitutional challenges to the FCC's newspaper-broadcast cross-ownership

rules, which prohibited "common ownership of a radio or television broadcast station and a daily newspaper located in the same community." 436 U.S. at 779. In doing so, the Court emphasized that the "Commission * * * did not take an irrational view of the public interest when it decided to impose a prospective ban on new licensing of co-located newspaper-broadcast combinations." 436 U.S. at 797. The Court refused to find the denial of licenses to newspaper owners "had the effect of abridging the freedom of expression," emphasizing that the rules were "not content-related" and had not "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants." 436 U.S. at 800-801. The FCC's disqualification of newspapers from obtaining licenses to operate broadcast stations in the same community is closely analogous to the RBPA's disqualification of unlicensed broadcasters from obtaining LPFM licenses, and should be governed by the same rational basis standard.

1. The Statute Is Content-Neutral.

Like the newspaper-broadcast cross-ownership rules upheld in NCCB, Section 632(a)(1)(B) is entirely content-neutral. The provision disqualifies applicants for LPFM licenses because of their conduct - "engag[ing] * * * in the unlicensed operation of any station in violation of section 301 of the Communications Act," Pub. L. No. 106-553, 114 Stat. 2762, App. B, § 632(a)(1)(B) - and not because of the content of their broadcasts.⁸ Under the

⁸ Indeed, because the Communications Act forbids persons from
(continued...)

statute, the critical disqualifying criterion is the lack of a license to engage in broadcasting.

There is also no basis for suspecting that the RBPA's disqualification of unlicensed broadcasters has the effect of suppressing speech according to its content. Unlicensed broadcasters have operated, for example, a "gospel radio station," see Prayze FM v. FCC, 214 F.3d 245, 247 (2d Cir. 2000), a Spanish-language station, see Radio Luz v. FCC, 88 F. Supp. 2d 372, 373 (E.D. Pa. 1999), aff'd mem., 213 F.3d 629 (3d Cir. 2000), and a dance music station with news and information for the gay community, see United States v. Szoka, 260 F.3d 516, 520 (6th Cir. 2001). All are disqualified under the RBPA, regardless of the content of their programming, because they engaged in unlicensed operations. By the same token, however, nothing in the RBPA prevents other qualified LPFM applicants who have not engaged in unlicensed broadcasting from offering precisely the same radio formats.

FCC v. League of Women Voters of Calif., 468 U.S. 364 (1984), which applied heightened First Amendment scrutiny to a statutory ban on "editorializing" by public broadcasters, is thus entirely inapposite. The statutory provision at issue in that case was "specifically directed at a form of speech - namely, the expression

⁸(...continued)
using "any apparatus for the transmission of energy or communications or signals by radio" without a license, 47 U.S.C. § 301 (emphasis added), an unlicensed broadcaster violates the Act by broadcasting a signal - for example, a single tone - that has no communicative content at all.

of editorial opinion - that lies at the heart of First Amendment protection." 468 U.S. at 381. Moreover, by applying to editorials, the provision's ban was "defined solely on the content of the suppressed speech," *id.* at 383 - in contrast to the RBPA's disqualifying criterion, which has nothing to do with content. For the same reason, the scrutiny given to government regulation of the content of "commercial speech," *see, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183-95 (1999), has no application here.⁹

Ruggiero contends that the RBPA is directed at the "pirates' message of civil disobedience," and that such "viewpoint" discrimination is unconstitutional. Pet. Br. 30. But there can be no doubt of the government's general power to prohibit unlicensed broadcasting. *See, e.g., Grid Radio*, 278 F.3d at 1321. The RBPA's disqualification provision is directed against such broadcasting regardless of its motivation or the message intended to be communicated (if any) by such unlawful conduct. It is settled that

⁹ Ruggiero contends that "the rationale for deferential review of structural regulations such as the broadcast newspaper cross-ownership rules * * * does not apply" because the RBPA's disqualification provision is "behavioral." Pet. Br. 18. Ruggiero's sole support for such a distinction is a footnote by Judge Bazelon, "speaking only for himself," in *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 458 n.26 (D.C. Cir. 1980). However, *Leflore* involved a challenge to an FCC denial of license renewal based on a failure to carry out commitments regarding "non-entertainment programming" and concerns relating to station "format." 636 F.2d at 456-57. In recommending a "move away from behavioral regulation," Judge Bazelon sought to "minimiz[e] government attention to broadcast content." *Id.* at 458 n.26. The RBPA's disqualification provision is, by contrast, content-neutral.

an intention to engage in "civil disobedience" cannot provide a First Amendment immunity from an otherwise valid statute. See, e.g., Kahn v. United States, 753 F.2d 1208, 1216 (3d Cir. 1985) (tax protester engaged in civil disobedience "can be subjected to the rule of law for its infraction, even though she may perceive the laws to be 'unjust'"); United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970) ("it is commonly conceded that the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity"). See also United States v. Malinowski, 472 F.2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973) (rejecting argument "that violating a federal law which has a direct or indirect bearing on the object of [a] protest is conduct protected by the First Amendment").¹⁰

2. The Statute Does Not Unfairly Single Out Unlicensed Broadcasters.

That the RBPA's disqualification provision is directed at unlicensed broadcasters also does not mandate heightened scrutiny. Under the Equal Protection Clause, Congress is not required to "strike at all evils at the same time or in the same way." Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935). Instead, "reform may take one step at a time, addressing itself to

¹⁰ Nor was any "civil disobedience" compelled by the lack of alternatives to raise the same issues under the Communications Act. Rather than engaging in unlicensed broadcasting, those who disagreed with the Commission's low-power radio rules "could have petitioned for a rulemaking or applied for a waiver, and, if the Commission denied [the] request, challenged that denial in the appropriate circuit court." Grid Radio, 278 F.3d at 1321.

the phase of the problem which seems most acute to the legislative mind," and "[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). Statutes that "impose special obligations * * * and special burdens" on speakers ordinarily require "some measure of heightened First Amendment scrutiny." Turner, 512 U.S. at 641 (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583 (1983)). But the Supreme Court has held that this rule does not apply to "broadcast speakers" - or in this case would-be broadcasters - as to whom the Constitution permits "more intrusive regulation." Id. at 637.

Even where the First Amendment is involved outside the area of broadcast regulation, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996). In Blount, this Court rejected a First Amendment challenge to rules promulgated by the Municipal Securities Rulemaking Board that "restrict[ed] the ability of municipal securities professionals to contribute to and solicit contributions to the political campaigns of state officials from whom they obtain business," id. at 939, but did not "eliminate all possible methods by which underwriters may curry favor," and did not apply to the heads of "banks with municipal securities departments or subsidiaries." Id. at 946.

Once it has been established that "the proffered state interest actually underlies the disputed law * * * there is no occasion for any inquiry into whether some broader restriction on speech would more effectively advance the specified set of legislative aims." Fraternal Order of Police v. United States, 173 F.3d 898, 904 (D.C. Cir.), cert. denied, 528 U.S. 928 (1999). Nor does the First Amendment require government to "make progress on every front before it can make progress on any front." United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993). Accord Moser v. FCC, 46 F.3d 970, 974 (9th Cir.), cert. denied, 515 U.S. 1161 (1995). See Mariani v. United States, 212 F.3d 761, 774 (3d Cir.), cert. denied, 531 U.S. 1010 (2000) ("The requirement that the regulation alleviate the harm in a direct and material way is not a requirement that it redress the harm completely"). See also Buckley v. Valeo, 424 U.S. 1, 105 (1976) ("a statute is not invalid under the Constitution because it might have gone farther than it did") (citation omitted).

This Court's narrow decision in News America Publ., Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988), upon which the panel majority relied, does not support heightened scrutiny here. In News America, this Court invalidated a statute that prohibited the FCC from extending existing waivers of its newspaper-television cross-ownership rules, a prohibition that, as the panel majority acknowledged, "affected only two such waivers, both held by a single publisher/broadcaster, Rupert Murdoch." 278 F.3d at 1330. See News America, 844 F.2d at 804-811. The statute thus

"impinge[d] on a closed class, consisting exclusively of Murdoch," who was "not only the sole current member of the class, but [was] the sole party that [could] ever be a member." Id. at 810 & n.13. By contrast, the RBPA disqualifies all who have engaged in unlicensed broadcasting at the time of their LPFM license applications; it thus includes persons who will by the time of their LPFM application have engaged in unlicensed broadcasting, as well as those who have already done so.

Equally important, the News America court was troubled by the extensive and adverse focus on a single individual, identified by name, in the legislative history of statute before it, see 844 F.2d at 806-10, which, the court suggested, "might support" inferences of "censorial intent" by Congress. Id. at 809-10. In this case, there is not the slightest evidence in the legislative history of an illicit legislative motive - much less the "thorough[] excoriat[ion]" that Rupert Murdoch received. See 278 F.3d at 1335 n.3 (Henderson, J., dissenting).¹¹

¹¹ In a final one-sentence aside, Ruggiero contends that the RBPA's character qualification provision "not only violates the First Amendment, but also likely the constitutional prohibition against bills of attainder." Pet. Br. 32. Ruggiero's belated and half-hearted assertion, which is reflected in none of his numerous previous filings, is insufficient to present the bill of attainder issue to this Court. In any event, as this Court has repeatedly emphasized, for legislation to constitute a bill of attainder, it must single out a class of persons for "punishment." BellSouth Corp. v. FCC, 162 F.3d 678, 683 (D.C. Cir. 1998); BellSouth Corp. v. FCC, 144 F.3d 58, 62 (D.C. Cir. 1998), cert. denied, 526 U.S. 1086 (1999). The RBPA's disqualification of unlicensed broadcasters - like the disqualification of newspaper owners in FCC v. NCCB - is not punishment within the meaning of the Bill of Attaind-
(continued...)

* * * *

Even where intermediate First Amendment scrutiny is required, the courts are not to "invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 217-18 (1997). Even more clearly under rational basis review, Congress is not required "to have chosen the least restrictive means of achieving its legislative end." Heller, 509 U.S. at 330. As long as a statute "'rationally advances a reasonable and identifiable governmental objective, we must disregard' the existence of alternative methods of furthering the objective 'that we, as individuals, perhaps would have preferred.'" Ibid. (citation omitted). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." Beach Communications, 508 U.S. at 314 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

¹¹ (...continued)
er Clause. See BellSouth, 144 F.3d at 65; Dehainaut, 32 F.3d at 1071-73.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review and uphold the constitutionality of Section 632(a)(1)(B) of the RBPA.

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CERTIFICATE OF COMPLIANCE

I hereby certify that, excluding the table of contents, table of authorities, glossary, statutory addendum, and certificates of counsel, the foregoing brief contains a total of 7,629 words, as counted by Corel WordPerfect 9, the word processing system used to prepare the brief. The brief uses 12-point Courier, a monospaced type, with no more than 10.5 characters per inch.

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of July 2002, I filed and served the foregoing Brief for Respondents on Rehearing En Banc by causing copies to be delivered to the Clerk of the U.S. Court of Appeals for the D.C. Circuit by hand, and by Federal Express overnight delivery to:

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