No. 05-15880

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

ANY AND ALL RADIO STATION [* * *] EQUIPMENT ASSOCIATED WITH OR USED IN CONNECTION WITH THE TRANSMISSIONS ON FREQUENCY 93.7 MHZ LOCATED AT 4521 20TH STREET, SAN FRANCISCO, CALIFORNIA 94114,
DEFENDANTS-APPELLANTS.

SAN FRANCISCO LIBERATION RADIO, *ET AL.*,
CLAIMANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

ROBERT S. GREENSPAN
(202) 514-5428
MARK S. DAVIES
(202) 616-5385
Attorneys, Appellate Staff
Department of Justice
Washington, D.C. 20530-0001

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JURISDICTIONAL STATEMENT

The United States is authorized by statute to seize and forfeit radio equipment used in unlicensed radio broadcasting. 47 U.S.C. § 510(a). The district court had jurisdiction to review the seizure under 28 U.S.C. § 1345 and 28 U.S.C. § 1355(a). On March 14, 2005, the district court entered a final order granting the government summary judgment. On May 6, 2005, claimants to the equipment filed a notice of appeal within the 60 days permitted by Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly granted the government's motion to forfeit certain radio equipment located at 4521 20th Street, San Francisco, California.

STATEMENT OF THE CASE

Mr. Richard Lewis Edmondson and others were operating an unlicensed radio station – "San Francisco Liberation Radio" – on the frequency of 93.7 MHz. The government filed under seal a complaint against the equipment, alleging that it was subject to forfeiture under 47 U.S.C. § 510. Appellants' Excerpts of Record ("ER") 1. The

government also sought a writ of entry and warrant of arrest to seize the equipment which was by then located at 4521 20th Street, San Francisco, CA. ER 19, 24. The district court issued the writ of entry (ER 22) and ordered the property seized (ER 24). On October 15, 2003, the equipment was seized by the United States Marshals Service. ER 26.

After the equipment was seized, the United States issued a public notice of forfeiture inviting those with interest in the seized property to file a statement. ER 26. A number of claims were filed, including claims by San Francisco Liberation Radio and individuals who listened to the station. See ER 169. Thereafter, claimants moved the court to dismiss the forfeiture action, but the district court denied the motion. ER 33-34. The district court then granted the summary judgment motion of the United States. ER 152.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. The Communications Act of 1934 seeks "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. § 301. The Act provides that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District * * * except under and in accordance with this [Act] and with a license in that behalf granted under the provisions of this [Act]." 47 U.S.C. § 301. The statute gives to the Federal Communications Commission (FCC) the power to issue licenses for radio broadcasting, but only "if [the] public convenience, interest, or necessity will be served thereby[.]" 47 U.S.C. § 307(a).

The government has a number of options in proceeding against those who violate the Communications Act's licensing requirement. For example, the statute provides that "[a]ny

electronic * * * device * * * used * * * with willful and knowing intent to violate section 301 * * * may be seized and forfeited to the United States." 47 U.S.C. § 510(a).[1] Such seizures are conducted "pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States." 47 U.S.C. § 510(b). See Fed. R. Civ. P. Supp. R. C(a) and Rule C(3)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims. In the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202 (2000), Congress set forth the government's initial burden of proof in civil forfeiture actions. Under CAFRA, the government must "establish, by a preponderance of the evidence, that the property is subject to forfeiture." 18 U.S.C. § 983.

In January 2000, the FCC adopted rules authorizing the licensing of Low Power FM (LPFM) radio stations. Report and Order, *Creation of Low Power Radio Service*, 15 FCC Rcd. 2205, 2206 ¶ 1

[1] The government can also bring a forfeiture action to collect a monetary penalty, 47 U.S.C. § 503, institute a criminal prosecution, 47 U.S.C. § 501, or file a civil action to enjoin noncompliance with statutory requirements. 47 U.S.C. § 401(a). Administrative sanctions, including cease and desist orders, are also available. 47 U.S.C. § 312(b).

(2000). Pursuant to the Radio Broadcasting Preservation Act of 2000 (RBPA), however, the FCC's rules were amended to provide that "[n]o application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor 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). The United States Court of Appeals for the District of Columbia Circuit ruled that the modified LPFM rules are permissible. *Ruggiero* v. *Federal Communications Commission*, 317 F.3d 239 (D.C. Cir.) (en banc), *cert. denied*, 540 U.S. 813 (2003).

B. Facts and Prior Proceedings

1. Most of the undisputed facts underlying this appeal are set out in the Affidavit of David Doon In Support of Complaint For Forfeiture In Rem. ER 6-18. Mr. Doon is a senior agent/engineer at the San Francisco Field Office, Enforcement Bureau, Federal Communications Commission.

The FCC has not issued a license for radio broadcasts on the 93.7 MHz frequency in San Francisco. ER 12. By its own admission, San Francisco Liberation Radio (SFLR) has long broadcast a radio station on that frequency. See SFLR Br., at 6 ("SFLR began broadcasting in or about 1993").

Initially, the station was operated by Richard L. Edmondson from a camper van located at 561 41st Avenue. ER 10. After several years, in 1998 the station voluntarily shut down after a federal district court enjoined a different San Francisco area station from operating without a license. ER 9. See *United States* v. *Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998), *aff'd,* 219 F.3d 1004 (9th Cir. 2000). In the interim, SFLR applied to the FCC for a license to operate a non-commercial FM station. ER 91.

In February 1999, SFLR resumed broadcasting. ER 9. See ER 49 (SFLR press release announcing "return[]" to broadcasting). At this time, FCC agents determined that SFLR was operating on the 93.7 MHz frequency from a two-story apartment building located at

561 41st Avenue. ER 11.[2] Mr. Edmondson refused to allow the FCC agents to inspect the radio equipment. ER 11. The agents told Mr. Edmondson that he should not operate a radio station without an FCC license, directed that he stop the broadcasts, and delivered a Notice of Unlicensed Radio Operation. See ER12. In March 1999, the San Francisco Field Office sent another Notice of Unlicensed Radio Operation to Mr. Edmondson explaining that his unlicensed operation violated the law. ER 105-106. The letter provided Mr. Edmonson with "ten (10) days from the date of this notice to respond with proof of your license or authority to operate." ER 106.

Thereafter, Mr. Edmondson submitted a written reply to the FCC's notice. He claimed authority to operate the station due to his pending license application. ER 107. The letter noted that he had been broadcasting "for most of the past six years" in a "clean and conscientious" manner. ER 107. His letter also argued that the First Amendment protected his right to broadcast. ER 108.

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[2] The agents determined that the field strength of the broadcasts was 1,799 times greater than the level permitted for non-licensed broadcasts. ER 11.

Numerous subsequent field measurements by FCC agents confirmed that SFLR continued to operate. ER 13 (detailing ten separate tests from March 1999 to March 2002). In October 1999, the FCC returned SFLR's license application as incomplete. See ER 109-110.

In June 2000, the FCC sent Edmondson another Notice of Unlicensed Radio Operation. Also in June, SFLR applied for permission to construct a low power FM broadcast station. ER 121. In 2001, the FCC dismissed the application. ER 121. As SFLR had engaged in the unlicensed operation of a radio station, the FCC's rules barred it from applying for a low power license.

In December 2002, FCC agents determined that SFLR had changed location. The agents noticed that 561 41St Avenue no longer had a transmitting antenna. ER 13. Instead, the agents determined that the source of the station was an antenna on the roof of a three story house at 4521 20th Street. ER 14.[3] The agents asked to inspect the station, but the owner of the house, Charlotte

[3] The field strength of the broadcasts was 3,598 times the level permitted without a license. ER 14.

Hatch, refused to allow the inspection. ER 15. The agents told Ms. Hatch that unlicensed operation of a radio station violated the law and issued her a Notice of Unlicensed Radio Operation. ER 15. The Notice "warned that operation of radio transmitting equipment without a valid radio station authorization" "constitutes violation of the Federal laws" "and could subject you as the operator of this illegal radio station" to "severe penalties." ER 51. The letter provided Ms. Hatch with "ten (10) days from the date of this notice to respond with proof of your license or authority to operate this radio station." ER 51.

In July 2003, the FCC's San Francisco Office received a reply to the Notice from SFLR's attorney. ER 16. The reply stated that SFLR had operated for 10 years without a license. ER 16, 119-121 ("A station known as 'San Francisco Liberation Radio' (SFLR) has been operating for 10 years."). SFLR stated that the RPBA was unlawful, and that the First Amendment protected SFLR's broadcasts. ER 121. The letter made "a formal request for notice of any judicial proceedings in the matter, *ex parte* or otherwise." ER 121.

In August 2003, and again in October 2003, FCC agents determined that SFLR was broadcasting on the 93.7 MHz frequency from 4521 20th St., San Francisco, CA. ER 17.

2. In October 2003, the government filed under seal a Verified Complaint for Forfeiture In Rem. ER 1. The complaint sought the seizure and forfeiture of "radio station equipment" and related equipment used with "willful and knowing intent" to violate 47 U.S.-C. § 301. At the same time, the government moved for an order issuing a warrant of arrest in rem for any and all radio station transmission equipment at 4521 20th Street, as well as a writ of entry to execute the warrant of arrest. ER 19, 24. After the court issued the requested writ of entry (and the clerk of court issued the arrest warrant), on October 15, 2003, United States Marshals seized the radio station transmission equipment. ER 25. The equipment had an estimated total value of $5,602. ER 31. As authorized by the Communications Act, the government took these steps before notifying counsel for SFLR of the seizure through a Public Notice of Forfeiture Action. ER 26.

In response to the public notice, SFLR and certain individuals filed statements of interest in the equipment. ER 169-170. The claimants moved to dismiss the forfeiture action, arguing that federal Due Process Clause and the First Amendment required a court to hold a hearing prior to the issuance of a warrant to seize the radio equipment. See ER 34. The district court rejected the due process argument. The court explained that a pre-deprivation hearing was not required in view of the "relative ease in moving or hiding personal property." ER 35. The court believed, however, that the First Amendment issue required further briefing. ER 36.

Thereafter, the United States moved for summary judgment on its claim for the forfeiture of the seized equipment. The United States described in detail the undisputed facts demonstrating that the equipment was used to intentionally violate the Communications Act. SFLR, the government noted, operated a radio station without a license for about ten years, despite at least four notices from the FCC that the broadcasts were illegal. In addition, SFLR's attorneys admitted that SFLR was broadcasting without a license, and SFLR

made numerous statements on its website and on its broadcasts demonstrating knowledge that the broadcasts were illegal.

The district court granted the government's motion and ordered the equipment forfeited. The court found that the United States "has presented substantial evidence demonstrating that SFLR willfully and with knowing intent operated an unlicensed broadcast in violation of 47 U.S.C. § 301 from 4521 20th Street, San Francisco, California." ER 154. "Therefore, the Court finds that summary judgment is proper regarding SFLR's violation of 47 U.S.-C. § 301." ER 155.

Moreover, the district court rejected SLFR's claim that the First Amendment requires procedural protections beyond those required by the Communications Act. ER 155. Distinguishing cases involving books and newspapers, the district court observed that "Courts have routinely rejected comparable First Amendment protection for the right to engage in radio broadcasts * * * ." ER 156, citing *Red Lion Broadcasting Co.* v. *United States*, 395 U.S. 367, 387

(1969), and *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227 (1943).[4]

SUMMARY OF ARGUMENT

1. SFLR makes no effort to challenge the district court's conclusion that the United States "has presented substantial evidence demonstrating that SFLR willfully and with knowing intent operated an unlicensed broadcast in violation of 47 U.S.C. § 301 from 4521 20th Street, San Francisco, California." Indeed, even a cursory review of the undisputed facts confirms the accuracy of the court's conclusion. There is no question that this equipment was willfully and knowingly used to violate the Communications Act.

2. SFLR's sole argument is that the federal due process clause requires a court hearing before the government may seize radio equipment used to violate the Communications Act. SFLR Br., at 5. The Sixth Circuit easily rejected this very argument. See *United Stat-*

[4] The court also rejected SFLR's argument based on the Fourth Amendment and its constitutional challenge to the RBPA. ER 6-8. SFLR notes these arguments only in a footnote to its fact statement (SFLR Br., at 15 n.2), and SFLR therefore has abandoned those arguments in this Court. See *Kohler* v. *Inter-Tel Technologies*, 244 F.3d 1167, 1182 (9th Cir. 2001).

es v. *Any and All Radio Station Transmission Equipment*, 218 F.3d 543 (6th Cir. 2000). Indeed, a straightforward application of the well-settled three-part due process inquiry establishes that SFLR received ample process.

SFLR argues strenuously that the First Amendment amplifies its private interest in the radio equipment. But, as the district court correctly recognized, there is no First Amendment right to broadcast without a license. As to the advantages of additional procedures, there is no serious suggestion that a judicial hearing would somehow show that SFLR's equipment was not used to violate the Act, particularly because SFLR was free to raise its arguments to the FCC. And, because the radio equipment is moveable, the government's interest weighs strongly against affording a judicial hearing prior to the seizure. In sum, the balance of factors tips strongly against requiring the government to provide a court hearing before seizing radio equipment used to violate the Communications Act.

STANDARD OF REVIEW

This Court reviews de novo a grant of summary judgment. *MetroPCS, Inc.* v. *City and County of San Francisco*, 400 F.3d 715, 720 (9th Cir. 2005).

ARGUMENT

THE DISTRICT COURT PROPERLY ORDERED THE RADIO TRANSMISSION EQUIPMENT FORFEITED

I. THERE IS NO DISPUTE THAT THE RADIO TRANSMISSION EQUIPMENT WAS USED TO KNOWINGLY AND WILLFULLY VIOLATE THE COMMUNICATIONS ACT

The government established by a preponderance of the evidence that the radio transmission equipment used in broadcasting at 93.7 MHz from 4521 20th Street is subject to forfeiture. Under the Communications Act, "[a]ny electronic * * * device * * * used * * * with willful and knowing intent to violate section 301 * * * may be seized and forfeited to the United States." 47 U.S.C. § 510(a). Here, SFLR's long history of unlicensed broadcasts on the 93.7 MHz frequency combined with the numerous warnings by the FCC to SFLR and its operators that the broadcasts were illegal demonstrate that the equipment was used

with willful and knowing intent to violate the Communications Act. SFLR's appeal brief does not dispute this evidence nor suggest that the Act was not violated. The district court was plainly correct in finding that the United States "has presented substantial evidence demonstrating that SFLR willfully and with knowing intent operated an unlicensed broadcast in violation of 47 U.S.C. § 301 from 4521 20th Street, San Francisco, California." ER 154.

II. SFLR WAS PROVIDED ADEQUATE PROCESS PRIOR TO THE RADIO EQUIPMENT'S SEIZURE

The FCC seized SFLR's radio equipment only after scrupulously adhering to the administrative and judicial procedures set out in the Communications Act. SFLR's sole argument on appeal is that the Fifth Amendment's due process clause demands that unlicensed broadcasters always receive a hearing in court before the government seizes radio equipment. See SFLR Br., at 5. As we now show, and as the Sixth Circuit has already held, the due process clause requires no such thing.

The due process clause is "flexible and calls for such procedural protections as the particular situation demands."

Mathews v. *Eldridge*, 424 U.S. 319, 334 (1976). In deciding how much process is due in any given situation, courts weigh "three distinct factors":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. See generally *National Association of Radiation Survivors* v. *Derwinski*, 994 F.2d 583 (9th Cir. 1993) (articulating and applying *Eldridge* factors).

Although SFLR repeatedly suggests that this case is controlled by *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), the Sixth Circuit, following precedent from this Court, has squarely rejected that claim. In *James Daniel Good Real Property*, the Supreme Court held that, absent exigent circumstances, the due process clause requires a judicial hearing before the government can seize real property. But, as this Court explained in

United States v. *$129,727. U.S. Currency*, 129 F.3d 486, 493 (9th Cir. 1997), the *Good Real Property* decision found "the distinction between non-movable real property and movable personal property dispositive." Thus, as the Sixth Circuit held in rejecting a challenge identical to the one brought by SFLR, the "Supreme Court's holding in *James Daniel Good Real Property* requiring that notice and a hearing be provided in forfeiture actions involving real property * * * does not apply to forfeiture actions involving easily movable personal property." *United States* v. *Any and All Radio Station Transmission Equipment*, 218 F.3d 543, 550 (6th Cir. 2000).

Applying the three *Eldridge* factors here, the balance supports the process authorized by the Communications Act. Recognizing that SLFR's business interest in the equipment is not sufficiently weighty, SFLR argues that the seizure of the radio equipment "implicate[s]" "First Amendment rights." SFLR Br., at 17, 28. But, as the district court correctly held, there is no First Amendment right to broadcast without a license. ER 156. In view 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.*, 436 U.S. 775, 799 (1978). See *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.

SFLR claims that the seized equipment includes radio broadcast content stored on a computer hard drive. See SFLR Br., at 19-20. The evidence shows that the computers, including programs stored on the hard drive, were used "for organizing, playing, and recording (storing, saving, downloading) various music and audio files" and thus the computers were "capable of providing audio programming for the station via the hard drive * * * ." ER 138. There is no question that this computer equipment, including the hard drives, was used to make illegal radio broadcasts. Because the seizure of equipment used to make illegal broadcasts does not implicate the First Amendment, seizure of the hard drive in this

case – a hard drive inextricably intertwined with the illegal broadcasts – does not implicate the First Amendment.

SFLR also suggests that its private interest in the equipment is somehow heightened by the First Amendment rights of those who listen to the broadcasts. But, just as there is no First Amendment right to broadcast without a license, so too there is no First Amendment right to listen to an unlicensed broadcast. Accord *United States* v. *Any and All Radio Station Transmission Equipment*, 204 F.3d 658, 666 (6th Cir. 2000) ("nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First Amendment right to broadcast them"). Otherwise, "anyone could operate an unlicensed radio station under the protection of its listeners' First Amendment rights * * * ." ER 156. As the district court correctly recognized, such a conclusion would "effectively" "overturn the Supreme Court's holdings in *Red Lion* and *National Broadcasting Company*." ER 156.

The second *Eldridge* factor – "the fairness and reliability of the existing [ ] procedures, and the probable value, if any, of additional procedural safeguards" (424 U.S. at 907) – does not assist SFLR. As

Eldridge explains, "[c]entral to the evaluation of any administrative process is the nature of the relevant inquiry." *Ibid*. Where the government seeks to seize radio equipment used to violate the Communications Act, the "nature" of this inquiry is simple: Whether the broadcaster has a license and, if not, whether the broadcaster engaged in broadcasts that require a license. As noted above, SFLR concedes that it does not have a license and concedes that it has been broadcasting without a required license. There is little risk of error in this type of proceeding.

Nevertheless, SFLR suggests (at 32 n.7) that additional procedures would have permitted it to note "omissions" in the government's complaint. But the multiple Notices of Unlicensed Operations gave SFLR ample notice of the issues the FCC was investigating. The notices also gave SFLR ample opportunity to submit whatever evidence or argument it thought appropriate. For example, SFLR suggests it would have argued in a judicial hearing that the transmitting equipment posed no danger to public safety and that SFLR transmissions did not interfere with any other station. SFLR Br., at 32-33 n.7. But, in response to FCC Notices,

SFLR had already made these points, arguing that it was broadcasting in a "clean and conscientious" manner. See ER 107-108, 119-121. Because the relevant arguments could have been, and in fact were, raised to the agency, there would have been no benefit to additional judicial process.

SFLR also suggest that additional process is warranted because the arrest warrant is issued by a court clerk. SFLR Br., at 32. In this case, a district court judge issued the Writ of Entry, ER 22, without which the arrest warrant would have been useless. In any event, the procedural rules governing seizures of movable property necessarily provide the government with a rapid process for seizing movable property. See Supplemental Rules For Certain Admiralty And Maritime Claims, Rule C(3)(a)(i) ("When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest * * * .").

As to the third factor, the government's interest weighs strongly against affording a judicial hearing prior to the seizure. SFLR argues that the due process clause requires additional

procedures before the government can seize property under the Communications Act. That argument would apply to every unlicensed broadcaster. Accordingly, the question is not whether the government in this case believed that SFLR's radio equipment would be moved if a judicial hearing was held. Instead, the due process analysis asks whether the government's interest in this type of case permits a post-seizure hearing. As the district court properly stated, "assessing whether or not the offending equipment *could* be moved easily outside of its jurisdiction" "is the appropriate analysis." ER 35.

This case well illustrates just how easy it is to move radio equipment. SFLR's equipment was first located in a camper outside of 561 41st Avenue, then moved inside that residence, and then later moved to the 4521 20th Street location. As Mr. Doon stated, "equipment used in this type of operation is usually highly portable" and thus delay "could result in removal of the equipment to another location * * * ." ER 18. Because radio equipment is so easily moved, Congress set out a procedure that permits the government to seize the property before a judicial hearing.

If SFLR's due process argument were accepted, the FCC would be required to participate in adversary hearings *before* every effort to seize equipment used to violate the Communications Act. Thus, owners of the property would have ample time to move, hide, or otherwise impede the government's efforts to seize the property. Similarly, the notice requested by counsel would have provided SFLR with an opportunity to impede the planned seizure. By making more difficult the seizure of property used to violate the Act, the procedures requested by SLFR would seriously undermine the agency's enforcement efforts, and thereby lead to the conflict among multiple broadcasters that the Communications Act was designed to prevent.

Although SFLR suggests alternative methods by which the government could have sought to stop the broadcasts, the government has a strong interest in retaining its statutory authority to seize property. Moreover, often, such as when multiple individuals have used the equipment and the equipment has been used at multiple locations, none of the alternative enforcement methods may be as effective as seizing the equipment. For example,

SFLR suggest that the government could have imposed a fine, posted a notice on the property, or sought an injunction. SFLR Br., at 34-35. But, while the government could have adopted those strategies, where different individuals have used the same mobile equipment at different locations despite repeated warnings, the surest route to eliminating the station may well be seizing the equipment.

As Mr. Doon's affidavit explains, the government has a strong interest in halting unlicensed broadcasting. "Unlicensed broadcasting threatens the integrity of the regulatory structure established in the Communications Act to prevent chaos in the radio spectrum." ER 17. The Communications Act's licensing requirements are the linchpin of the framework established by Congress for regulation of the nation's airwaves. The Act does not contemplate that private parties can arrogate to themselves the FCC's authority to allocate the scarce radio spectrum. Such unlicensed broadcasting threatens the FCC's orderly allocation of scarce resources and the clear communication of current and

future licensees. The seizure here plainly advances important government interests.

Indeed, the government's interest in seizing the radio equipment without notice to those operating illegal radio stations is so strong that the Sixth Circuit relied exclusively on this factor to reject the very argument SFLR makes here. In *Any and All Radio Station Transmission Equipment*, an unlicensed broadcaster argued, as SFLR does here, that "the seizure violated his Fifth Amendment right to due process because the warrant was issued after an ex parte hearing before a magistrate judge." 218 F.3d at 550. The Sixth Circuit summarily rejected that argument:

> In this case, the target of the government's forfeiture action was radio transmission equipment, which is movable persona[l] property. Immediate seizure was necessary to establish the district court's jurisdiction over the equipment, which could be moved easily outside of its jurisdiction, and to make sure that the equipment was not moved or hidden once notice of the forfeiture action was given. Therefore, in light of these exigencies *due process did not require notice and a hearing before seizure*.

Id. at 550 (citations omitted) (emphasis added).

In summary, the due process clause does not require a judicial hearing before the government seizes radio equipment knowingly and willfully used to violate the Communications Act. SFLR has no First Amendment interested in the seized equipment; the process provided to SFLR, including both an opportunity to present arguments to the agency and a post-seizure judicial hearing, is adequate to minimize any possible errors; and the government has a strong interest in avoiding pre-seizure notice to those who own movable property. This Court should follow the Sixth Circuit, and reject SFLR's due process argument.

* * *

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

ROBERT S. GREENSPAN
(202) 514-5428
MARK S. DAVIES
(202) 616-5385
Attorneys, Appellate Staff
Civil Division, Room 7261
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

OCTOBER 2005

STATEMENT OF RELATED CASES

Counsel is aware of no related cases.

CERTIFICATE OF COMPLIANCE

I hereby certify that, excluding the table of contents, table of authorities, and statement of related cases, the foregoing brief contains a total of 4,841 words, as counted by Corel WordPerfect 12, the word processing system used to prepare the brief.

_____

MARK S. DAVIES, Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2005, I filed and served the foregoing Brief for the United States by causing copies to be delivered by FedEx, postage prepaid to the Clerk of the Court and by First Class mail to:

Katherine Alfieri
P.O. Box 460238
San Francisco, CA 94146-0238
415-337-5100

F. Peter Franck
1115 Irwin Street, Suite 101
San Rafael, CA 94901
415-507-9960

Alan Korn
1840 Woolsey St.
Berkeley, CA 94703
510-548-7300

Mark R. Vermeulen
755 Florida Street #4
San Francisco, CA 94110.2044
415-824-7533

_____
Mark S. Davies