ORAL ARGUMENT NOT YET SCHEDULED

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

NATIONAL ASSOCIATION OF BROADCASTERS, MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC., and NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS,	)	
Petitioners,	)	Case No. 21-1171
v.	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

REPLY BRIEF ON MOTION FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

The Order on review[1] exceeds the Commission's statutory authority, defies this Court's precedent, and is unconstitutional. It imposes a duty to investigate government databases when this Court has construed the governing statute not to require any inquiry beyond the persons with whom a broadcaster deals directly. While each individual investigation may be circumscribed, the regulation's extraordinary reach and sheer pointlessness make this content-based compulsion of speech not narrowly tailored and thus violative of the First Amendment. An investigation will be required for *every* programming lease, even commercial and local programming (since virtually every lessee will deny, virtually always truthfully, that it or another person in the production or distribution chain is a foreign governmental entity, thus triggering the duty to investigate). The object of the mandatory investigation is to redress a phantom harm *never known to occur* (namely, a Foreign Agents Registration Act ("FARA") registrant or Commission-registered foreign media outlet leasing broadcast time without disclosure) and that is *highly unlikely to occur* (since foreign registrants already comply with the law and face criminal penalties for not disclosing their programming sources). And on the remote chance that a lessee turns out to be an undisclosed foreign governmental

[1] Mot. Exh. 1, Report and Order, *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, 36 FCC Rcd 7702 (2021) ("Order").

entity, the databases would not yield the information required for the announcement: namely, the identity of the foreign governmental entity sponsoring the programming. The Commission had multiple narrower alternatives that would have burdened significantly less speech. Petitioners therefore have a reasonable likelihood of success on the merits in invalidating the Order. Petitioners also have demonstrated that their members will suffer irreparable harm, and that the balance of hardships and the public interest strongly favor a stay.

ARGUMENT

I. Petitioners Are Likely to Prevail on the Merits

A. The Order's Independent Investigation Requirements Violate Section 317(c) of the Communications Act

When a station broadcasts any matter for which it is paid or promised valuable consideration from any person, that station must at the time of broadcast announce that the matter is paid for or furnished by such person. 47 U.S.C. § 317(a). Congress has prescribed broadcasters' duty of diligence in gathering the information necessary for that disclosure: Each station licensee "shall exercise reasonable diligence *to obtain from its employees, and from other persons with whom it deals directly* in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section." *Id.* § 317(c) (emphasis added).

The Opposition fails to acknowledge this Court's interpretation of Section 317(c) in *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983), which held that "the language of section 317" does not "impose any burden of independent investigation upon licensees," *id.* at 1454, and "is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast," *id.* at 1449. The Commission avers that *Loveday*'s facts are distinguishable, Opp. 14, but a statutory construction is not distinguishable based on facts. The Commission, Opp. 13, plucks out one statement in *Loveday*'s legislative history discussion that does not aid its cause (namely, that "a licensee cannot discharge its duty by passively ignoring sponsorship information it might easily obtain," 707 F.2d at 1455 n.18). The relevant question is from whom a licensee must obtain that information. The next clause in the same sentence of *Loveday* answers that question: "a licensee need not go behind the information it receives to guarantee its accuracy." *Id.* The Commission fails to acknowledge that *Loveday* construed Section 317(c) based on its plain language and legislative history in *Chevron* Step 1 analysis, and that precedent is binding on this Court and the Commission. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); Mot. 11.

Even if *Loveday* had not resolved the issue, the Commission's statutory analysis falls flat. Contrary to its argument, Opp. 11-12, Petitioners do not rely on the *expressio unius est exclusio alterius* maxim (nor did *Loveday*). *See Cheney R.R.*

Co., Inc. v. ICC, 902 F.2d 66, 68-69 (D.C. Cir. 1990) (cited, Opp. 11-12) (rejecting invocation of that maxim and holding that a mandatory procedure in one statutory section did not prevent the agency from adopting a similar procedure under a different section). Rather, Petitioners rely on the statute's qualifying infinitive *restricting* the reasonable diligence that broadcasters must exercise: *i.e.*, each station licensee "shall exercise reasonable diligence *to obtain from its employees, and from other persons with whom it deals directly* …." 47 U.S.C. § 317(c) (emphasis added); Mot. 10-11. This is nothing like *Doe, 1 v. FEC*, 920 F.3d 866 (D.C. Cir. 2019) (cited, Opp. 13), where the agency had statutory power to investigate illegal contributions and disclosed the basis of its decision in addition to statutorily mandated disclosures. This case is governed by *Colorado River Indian Tribes v. National Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006), holding that "[a]gencies are … bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.* at 139 (internal quotation marks omitted).

The Commission contends that the statute permits "a limited investigation in particular circumstances," Opp. 13, but the statute does not "impose *any burden* of independent investigation upon licensees," and "is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast." *Loveday*, 707 F.2d at 1449, 1454 (emphasis added). It thus matters not that "[t]he statute

nowhere says that a broadcaster cannot be required to 'confirm' the information that the broadcaster obtains from persons with whom it deals directly," Opp. 11. "[This] court has repeatedly rejected the notion that the absence of an express proscription allows an agency to ignore a proscription implied by the limiting language of a statute." *S. Cal. Edison Co. v. F.E.R.C.*, 195 F.3d 17, 24 (D.C. Cir. 1999).

The plain language, legislative history, and *Loveday* all should ultimately result in Petitioners' victory; they certainly warrant a brief stay pending review.

B. The Order Violates the First Amendment

The Commission claims that the Order's constitutionality should be reviewed under a lenient standard applied to certain content-neutral broadcast regulations. Opp. 15. But the Order demands specific disclosures by particular speakers, and "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Thus the Order is subject to strict or at least exacting scrutiny. Mot. 13-14. It is irrelevant that Petitioners have not challenged Section 317(c) itself (*see* Opp. 14-15); the statute's less onerous requirement, requiring no investigation, might be deemed narrowly tailored. But burdensome requirements to investigate independently a third party's status, and then make

compelled disclosures, changes the First Amendment balance. Under any form of scrutiny, the Order is unconstitutional. Mot. 13-22.

Loveday recognized that constitutional concerns would arise if Section 317(c)'s diligence requirement extended to independent investigations. 707 F.2d at 1459. The Commission thinks it avoided that thicket by circumscribing the required investigation, Opp. 14, 16 n.4, but it merely created constitutional problems of a different order. To sustain a restriction on speech, the government must demonstrate "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The Order's mandated investigation will only determine if FARA registrants or Commission-registered foreign media outlets misrepresented their (or their foreign principals') status as foreign governmental sponsors of programming to broadcasters. But that problem *has never been known to occur.* The Commission identified only three instances where a foreign governmental entity leased broadcast time, but in neither case was the entity a FARA registrant or Commission-registered foreign outlet. Mot. 15-16. The Commission structured its regulation *not* to cover the only three "problems" identified.

Furthermore, the problem is *not likely to occur in the future*. Foreign registrants are not surreptitious foreign agents; they comply with the law. And they have a FARA duty (backed by criminal sanctions, Mot. 5) to identify the foreign

principal in informational materials (including broadcast programming); they have no reason to misrepresent their status to broadcasters. Mot. 20. No basis exists for imagining a hidden iceberg, Opp. 17, in these waters, and the databases' "dynamic" nature, *id.*, 17-18, does not change the fact that the putative harms neither exist nor are likely to exist. The Order burdens speech with no discernible benefit, thereby failing to serve a sufficiently important governmental interest.

This regulation also has vast (over)reach. The Order applies to every lease, even infomercials and church-service broadcasts. Virtually all lessees will be domestic entities that will truthfully deny being foreign governmental entities, thus triggering an investigation for every existing lease, new lease, or lease renewal. *See* Mot. Exh. 1 ¶¶ 42, 48. The cumulative expense of repetitive, fruitless investigations is high. And, while sometimes an individual investigation will be minimal, that is not always so (some FARA registrants represent hundreds of different foreign principals). *See* Petitioners' Initial Merits Br. 10-11.

FARA data, moreover, only provide information on potential principals' identity and activities, Mot. Exh. 1 ¶ 17 n.55, and do not disclose which of the listed foreign governmental principals (if any) is connected to specific programming or has provided "inducement to air the programming," *Id.*, App. A (47 C.F.R. § 73.1212(j)(2)(iii)). The Order requires broadcasters to investigate, determine, and announce the program payor's identity, *id.* § 73.1212(j), but the

FARA and Commission websites do not contain information needed for broadcasters' mandated announcements. Finally, multiple less restrictive alternatives would have burdened less speech. Mot. 18-21. Because the Commission cannot "burden substantially more speech than is necessary to further" its "legitimate interests," *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citation omitted), the Order is likely unconstitutional and a stay should be granted.

II. Petitioner Showed Irreparable Harm and That a Stay Will Serve the Public Interest

The Petitioners have demonstrated the requisite risk of irreparable harm. The Commission's claim that there is "no risk" of "imminent" harm is ironic, Opp. 7, given that the timing of the rules' effectiveness is largely within its control. The Commission initiated and completed the 60-day comment period for Paperwork Reduction Act ("PRA") review on July 21 and September 20, 2021, respectively, and could have commenced the Office of Management and Budget ("OMB") 30-day review process in September, but chose not to do so.[2] If this Court denies the Petitioners' stay request, the Commission could immediately initiate OMB's review. The Commission's attempt to hide behind OMB review is of no moment;

[2] In the interim, Petitioners had filed their petition for review in this Court (August 13) and requested the Commission to stay the Order (September 10).

indeed, the Commission's delays favor granting the stay, because any stay will likely last only a few months (Mot. 23-24).

Petitioners' members also face imminent harm because broadcasters will be subjected to the rules' undue burdens prior to their effective date. Even before the rules become effective, broadcasters must train existing (and in some cases hire) staff to conduct the requisite diligence, engage counsel to develop new contractual language for future leases and to revise existing leases, negotiate lease amendments (which may cause lessees to renegotiate unrelated contractual terms), and complete investigations of every existing lessee. Prudent broadcasters cannot pause until the uncertain effective date to expend resources to comply.[3]

The Commission's argument that declarants' estimated costs of compliance with the five-step diligence standard[4] do not "rise to the level of irreparable injury" is likewise without merit. Opp. 8-9. The costs of "significant regulatory and administrative burdens" to comply with unlawful government regulations can constitute irreparable injury. *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 33-39 (D.D.C. 2020) (rejecting agency claims and finding that training,

[3] The Commission controls the timing of the effective date after OMB review. The Order directs Commission staff to announce the effective date in the Federal Register following OMB approval, Mot. Exh. 1 ¶ 79, so the rules could be effective immediately upon announcement.

[4] Mot. 6.

communication, and legal compliance costs constituted irreparable injury); *see also Pennsylvania v. President U.S.*, 930 F.3d 543, 574 (3d Cir. 2019) (finding that "unredressable financial consequences" of complying with government regulations constituted irreparable harm), *reversed and remanded on other grounds, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

Petitioners are not required to prove that compliance costs will decimate broadcasters' businesses. *See District of Columbia*, 444 F. Supp. 3d at 38-39 (rejecting agency's arguments that plaintiffs must substantiate claims of loss and establish their significance relative to plaintiffs' operations because "[n]o such proof requirement has ever been adopted in this Circuit"). Petitioners presented quantified evidence of the substantial time and resources broadcasters will expend to comply with the Order absent a stay.[5] These costs, especially for smaller broadcasters, are not nominal but "significant regulatory and administrative burdens" constituting irreparable injury.[6]

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[5] *See, e.g.,* Mot. Exh. 3 ¶¶ 4-10; Mot. Exh. 4 ¶¶ 5-12; Mot. Exh. 7 ¶¶ 4-10.

[6] Cases cited by the Commission are plainly distinguishable. The plaintiffs in both cases sought mandatory injunctions, requiring more stringent review. *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 398 (D.D.C. 2020) ("[A] party seeking such a mandatory injunction [must] 'meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or *that extreme or very serious damage will result from the denial of the injunction*.'") (emphasis added);

The Commission disregards the uncertainty the invasive new rules will inject into broadcaster-lessee relationships. Declarants explained that amending lease agreements "may open the door to negotiations" about other lease terms, including prices.[7] The Order's mandates also may introduce "distrust" into "longstanding relationships"[8] with programming partners, particularly with minority programmers supplying content oriented toward racial/ethnic minorities.[9] Changes to leases' terms and disrupted programmer relationships cannot be reversed, even if Petitioners ultimately prevail.

Moreover, as discussed at 5-8, *supra*, and Mot. 13-22, the Order unlawfully compels and chills speech; thus, a broadcaster complying with the rules will suffer irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (losing "First

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Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d 30, 36 (D.D.C. 2000) (a mandatory injunction request must be reviewed "with even greater circumspection than usual"). Petitioners are not subject to such enhanced scrutiny. Moreover, the plaintiffs in these cases alleged injuries very different than those faced by Petitioners' members. The *Dallas* plaintiffs alleged emotional harm and economic losses they would have suffered even absent the challenged government action and minor storage fee losses, and failed to provide relevant evidence. *See Dallas*, 453 F. Supp. 3d at 400-401. The multibillion-dollar *Mylan* plaintiff claimed lost revenue. The court regarded claims for injunctive relief based on speculative "assertions about lost opportunities and market share" to warrant greater scrutiny. *Mylan*, 81 F. Supp. 2d at 42-43.

[7] Mot. Exh. 3 ¶ 11; Mot. Exh. 4 ¶ 13; Mot. Exh. 5 ¶ 10; Mot. Exh. 6 ¶ 10; Mot. Exh. 7 ¶ 11.

[8] *Id*.

[9] Mot. Exh. 8 ¶ 7.

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Finally, the balance of hardships and the public interest weigh in favor of a stay, Mot. 22-24. No public interest benefit results from implementing an ineffectual rule violating the Communications Act and the First Amendment.

CONCLUSION

For the foregoing reasons, the Motion for stay pending judicial review should be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

This reply complies with the word-count limitation of Fed. R. App. P. 27(d)(2)(A). This motion contains 2593 words, not counting the parts excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I, Richard Kaplan, hereby certify that on January 10, 2022, I filed the foregoing Reply Brief on Motion for Stay Pending Judicial Review with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system which will serve participants in this case who are registered CM/ECF users.

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