ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2022
No. 21-1171

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS; MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.; NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review from the Federal Communications Commission

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JOINT REPLY BRIEF OF PETITIONERS

Stephen B. Kinnaird
PAUL HASTINGS LLP
2050 M Street, NW
Washington, DC 20036
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Petitioners

Richard Kaplan
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1 M Street, SE
Washington, DC 20003
(202) 429-5430
rkaplan@nab.org
jtimmerman@nab.org

Counsel for National Association of Broadcasters

February 11, 2022

[Additional Counsel Listed on Inside Cover]

Robert E. Branson
David Honig
MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.
1250 Connecticut Avenue, NW
7th Floor
Washington, DC 20036
(202) 261-6543
rbranson@mmtconline.org
dhonig@mmtconline.org

Counsel for Multicultural Media, Telecom and Internet Council, Inc.

James Winston
NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS
1250 Connecticut Avenue, NW
Suite 700
Washington, DC 20036
(202) 463-8970
jwinston@nabob.org

Counsel for National Association of Black Owned Broadcasters

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GLOSSARY

APA	Administrative Procedure Act
Act	Communications Act of 1934, as amended
DOJ	Department of Justice
Draft Order	[Draft] Report and Order, *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, FCC-CIRC2104-06, MB Docket No. 20-299 (rel. Apr. 10, 2021)
FARA	Foreign Agents Registration Act
FCC or Commission	Federal Communications Commission
JA	Joint Appendix
NAB	National Association of Broadcasters
Notice	Notice of Proposed Rulemaking, *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, 35 FCC Rcd 12099 (2020)
Order	Report and Order, *Sponsorship Identification Requirements for Foreign Government- Provided Programming*, 36 FCC Rcd 7702 (2021)

SUMMARY OF ARGUMENT

The Order on review[1] exceeds the Commission's statutory authority, defies this Court's precedent, violates the First Amendment, and is arbitrary and capricious.

1. The Order contravenes the statute. The Commission posits that "[p]ursuant to section 317(c) of the Act, the licensee bears the responsibility to engage in 'reasonable diligence' to determine *the true source* of the programming aired on its station," Order ¶ 37, (JA___) (emphasis added), and thus mandates independent investigation of government websites. But the broadcaster's statutory duty is far narrower. Congress required only that each broadcaster "shall exercise reasonable diligence *to obtain from its employees, and from other persons with whom it deals directly*" information necessary to disclose to the public the person who paid for the programming. 47 U.S.C. § 317(c) (emphasis added). The Commission cannot ignore the restrictions Congress has placed upon a broadcaster's duty of diligence.

This Court narrowly construed the broadcaster's duty in *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983). It held that "the language of section 317" does not "impose any burden of independent investigation upon licensees," *id*. at 1454,

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

and "is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast," *id*. at 1449. *Loveday* binds both the Commission and the panel, and the statutory text compels its construction.

The Commission contends that, even if Section 317(c) does not authorize the Order, it has independent authority to "prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. § 317(e). But a grant of power "to carry out" Section 317(c) is not authorization to erase express statutory restrictions on the broadcaster's duty.

2. The Order violates the First Amendment. Compelled speech is content-based regulation, and thus the Order survives only if narrowly tailored to further a sufficiently important governmental interest.

The regulation's extraordinary reach and sheer pointlessness make the compulsion of speech not narrowly tailored. The Government cannot bear its burden of showing that the Order effectively redresses real harms without burdening more speech than necessary. The mandatory investigation redresses a phantom harm *never known to occur*: namely, a foreign governmental entity registered under the Foreign Agents Registration Act ("FARA") or a U.S.-based foreign media outlet registered under Section 722 of the Communications Act who leased broadcast time without disclosure. And such harm also is *highly unlikely to occur* (since foreign agents, under threat of criminal penalties, must disclose their

foreign principal in all programming and supply copies of that programming to the Department of Justice ("DOJ")). Nonetheless, the Order requires broadcasters to conduct investigations of *every* programming lease, even infomercials and local programming. Virtually all lessees, who are overwhelmingly domestic, will deny truthfully that they or others in the programming production or distribution chain are foreign governmental entities, thus triggering the duty to investigate. There is a minuscule chance that a lessee will be found in the FARA or Section 722 databases. Even if one were, the databases would not yield the information required for the announcement: namely, the identity of the foreign governmental entity sponsoring the programming on behalf of a particular foreign country. The Commission had multiple narrower, equally effective alternatives that would have burdened significantly less speech.

3. The Order is arbitrary and capricious under the Administrative Procedure Act ("APA"). It imposes substantial burdens on thousands of broadcasters to address a phantom harm.

ARGUMENT

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

A. Section 317(c) Restricts the Broadcaster's Duty of Diligence to Obtaining Information from Persons with Whom It Deals Directly

When a station broadcasts any matter for which it is paid or promised valuable consideration, that station at the time of broadcast must announce the payor's identity. 47 U.S.C. § 317(a). Congress has prescribed a broadcaster's duty of diligence in gathering information necessary for that disclosure: Each station licensee "shall exercise reasonable diligence *to obtain* [the information] *from its employees, and from other persons with whom it deals directly* …." *Id*. § 317(c) (emphasis added).

The Commission inaccurately states that the Order imposes merely a "name search requirement" that does not violate the statute. Resp. Br. 19. Rather, the Order imposes a broad "reasonable diligence" requirement: "[p]ursuant to section 317(c) of the Act, the licensee bears the responsibility to engage in 'reasonable diligence' to determine *the true source* of the programming aired on its station." Order ¶ 37, (JA___) (emphasis added). The independent investigation of two government sources is only one included step. Subsection (j)(1) of the regulation requires the broadcast station to announce, where applicable, that "[t]he [following/preceding] programming was [sponsored, paid for, or furnished], either in whole or in part, by [name of foreign governmental entity] on behalf of [name of

foreign country].” 47 C.F.R. § 73.1212(j)(1)(i) (first bracket added). The Commission broadly requires that “[t]he licensee of each broadcast station shall exercise reasonable diligence to *ascertain* whether the foreign sponsorship disclosure requirements in paragraph (j)(1) of this section apply at the time of the lease agreement and at any renewal thereof, *including*” five enumerated steps. *Id*. § 73.1212(j)(3) (emphasis added). One of those five steps is

> [i]ndependently confirming the lessee’s status, by consulting the Department of Justice’s FARA website and the Commission’s semi-annual U.S.-based foreign media outlets reports, if the lessee states that it does not fall within the definition of “foreign governmental entity” and that there is no separate need for a disclosure because no one further back in the chain of producing/transmitting the programming falls within the definition of “foreign governmental entity” and has provided an inducement to air the programming.

Id. § 73.1212(j)(3)(iv).

The investigation does not end with a “name search” (unless the lessee is not listed). The Order requires the broadcaster to determine whether the lessee is the agent of a foreign government, foreign political party, or an entity “directly or indirectly operated, supervised, directed, owned, controlled, financed, or subsidized, in whole or in part, by a government of a foreign country or a foreign political party.” Order ¶ 40 n.120, (JA__). For many FARA registrants, the inquiry into foreign agency may be complex because a given agent may represent a number (even hundreds) of foreign principals, not all of whom are foreign governments. Pet. Br. 10-11; *cf*. 22 U.S.C. § 611(b)(2), (3) (“foreign principal”

includes foreign person, corporation, partnership, or association). "If the lessee's name does appear on the FARA database, the licensee may need to review the materials filed as part of a given agent's registration to ascertain whether the lessee qualifies as a 'foreign governmental entity.'" Order ¶ 41, (JA___).

Even then, the FARA materials do not divulge the information necessary to make the announcement compelled in Section 73.1212(j)(1): namely, the principal that actually sponsored, furnished, or paid for the *specific* programming, and the foreign country on behalf of which it acted. Thus, the broadcaster's duty of diligence is not exhausted by investigating inconclusive materials in the FARA or Section 722 databases. The Commission says that, "[i]f the search does generate results, the broadcaster must 'exercise reasonable diligence' to *ascertain* whether an announcement is required," i.e., "investigate further in the Foreign Agents Registration Act database, …, ask the lessee more questions, or *take other appropriate steps*." Resp. Br. 11 n.4 (emphasis added and citations omitted), 28. This is an open-ended duty of investigation.

The validity of the Order does not turn on the scope of the independent-investigation requirement, however, because Section 317(c) does not permit the Commission to require *any* independent investigation. Congress used a qualifying

infinitive[2] to restrict the reasonable diligence the broadcaster must exercise: it need only "exercise reasonable diligence *to obtain from its employees, and from other persons with whom it deals directly*," the necessary information. 47 U.S.C. § 317(c) (emphasis added). Thus, the only diligence the broadcaster must exercise under Section 317(c) is to obtain information from those identified sources.

B. This Court's Binding Precedent Holds That a Broadcaster's Duty of Diligence Does Not Encompass Independent Investigations and Is Satisfied by Inquiries to Persons with Whom It Deals

This Court adopted exactly this construction in *Loveday*. Rejecting a claim that the licensee had a duty to investigate what company sponsored advertising on a referendum, this Court held that "the language of section 317, of itself, does not" "impose *any burden* of independent investigation upon licensees." *Loveday*, 707 F.2d at 1454 (emphasis added). Rather, "[i]n its terms, ... the 'reasonable diligence' required by subsection (c) … *is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast*." *Id*. at 1449 (emphasis added).

This Court also found the legislative history to support the text's plain meaning. Pet. Br. 27-29. From the Radio Act of 1927, through subsequent Commission regulations that Congress ratified in the 1960 amendment adding

[2] *See* "The qualifying infinitive," https://www.englishgrammar.org/qualifying-infinitive/ (last updated June 29, 2012).

Section 317(c), licensees never had a duty of independent investigation. *Loveday*, 707 F.2d at 1448-55. The Senate Report accompanying the 1960 amendment declared that "'reasonable diligence' would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer …." S. Rep. No. 1857, 86th Cong., 2d Sess. at 6 (1960). The Commission argues that this "statement says nothing about whether reasonable diligence may in some circumstances impose a licensee duty to investigate," Resp. Br. 25, but the *Loveday* Court did not share this view. The Court stated that "while [this passage] establishes that a licensee cannot discharge its duty by passively ignoring sponsorship information it might easily obtain, [it] nonetheless indicates that *a licensee need not go behind the information it receives to guarantee its accuracy*." *Loveday*, 707 F.2d at 1455 n.18 (emphasis added).[3]

Loveday's construction of Section 317(c), which binds both the Commission and the panel, is dispositive. If a court employing traditional tools of construction has already determined a statute's meaning in what now would be considered Step

[3] The Commission quotes only the first clause of this statement in *Loveday*'s footnote 18, omitting the second clause of the very same sentence that refutes its position. Resp. Br. 26. Moreover, contrary to its contentions, Resp. Br. 25 n.8, the Order is diametrically opposed to the DOJ's contemporaneous interpretation of Section 317(c) as enabling a broadcaster to make the announcement "*in good faith in reliance upon information furnished by the person making the payment*." H.R. Rep. No. 1800, 86th Cong., 2d Sess. at 21 (1960) (App. A, Comments of DOJ) (emphasis added).

1 analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), the agency is not free to depart from it. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982 (2005); *U.S. v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488-89 (2012) (plurality opinion that is precedential because it represents the narrowest grounds supporting the judgment) (holding that where pre-*Chevron* decision ascertained clear statutory meaning despite textual ambiguity, an agency could not adopt a contrary interpretation). Here, *Loveday* relied on the plain statutory language and legislative history, and declined "to find a power in the Commission to require more of licensees than it has required here unless there existed rather clear evidence that Congress intended to vest such a power." 707 F.2d at 1449 (relying not merely on deference). Because *Loveday* held that the statute unambiguously permits reliance on the information from those with whom a broadcaster deals directly, no gap exists in the statutory scheme that the Commission could fill. *See Home Concrete & Supply*, 566 U.S. at 488-89. This forecloses the Commission's claim that the Order's (unreasonable) interpretation of Section 317(c) is entitled to *Chevron* deference. Resp. Br. 21.

C. The Commission's Construction Improperly Erases Express Restrictions on the Broadcaster's Duty of Diligence

Even if statutory construction were an open question, which it is not, the Commission's statutory analysis falls flat.[4] The Commission states

> Section 317(c) of the Act requires a broadcaster to "exercise reasonable diligence" to obtain sponsorship information from "persons with whom it deals directly." 47 U.S.C. § 317(c). The Commission reasonably interpreted the statute to require a broadcaster to confirm that a party leasing airtime is not a "foreign governmental entity," by checking two government websites that list the names of such entities.

Resp. Br. 14. But the second sentence does not follow from the first; independently investigating government sources is not obtaining sponsorship information from persons with whom it deals directly. The Commission is not interpreting Section 317(c), but rather rewriting it to expand its authority.

The Commission states it is enough that "[t]he inquiries described here *concern* the entity with whom the licensee is dealing directly ..." Order ¶ 41 n.121, (JA__) (emphasis added). But that ignores that the statute commands diligence only in the performance of a specific act (i.e., "to obtain from its employees, and from other persons with whom it deals directly" the necessary information, 47

[4] The Commission devotes 12 pages to construing the statute and analyzing the legislative history, Resp. Br. 17-29, but this Court will search the Order in vain for similar analysis; the Order only distinguished *Loveday* and the statutory text in footnotes. *See* Order nn. 121, 132, (JA__,__). Contrary to the Commission's claims, Resp. Br. 29, no such analysis appears in the Notice of Proposed Rulemaking either. *See* Notice ¶¶ 4-13, 47 & n.134, 50 (JA__-__, __, __).

U.S.C. § 317(c)). It is "a cardinal principle of statutory construction that [a court] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). The Commission's interpretation improperly treats the qualifying infinitive of Section 317(c) as surplusage.

The Commission argues that the *expressio unius est exclusio alterius* maxim lacks force in the administrative context, Resp. Br. 22, citing precedent that a mandatory procedure in one statutory section does not prevent the agency from adopting a similar procedure under a different section. *See Cheney R.R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990); *Farrell v. Blinken*, 4 F.4th 124, 136 (D.C. Cir. 2021). "[I]n an administrative setting ... Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R.*, 902 F.2d at 69. But Petitioners do not rely on the *expressio unius* maxim (nor did *Loveday*). Rather, Petitioners rely on the statutory text *restricting* the reasonable diligence that broadcasters must exercise, which directly resolves the question of whether that duty encompasses independent investigations. For the same reason, this case is nothing like *Doe, 1 v. FEC*, 920 F.3d 866 (D.C. Cir. 2019) (cited Resp. Br. 22-23), 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 instead by *Colorado River Indian Tribes v. National Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006), which held 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 attempts to distinguish *Colorado River* as a case where Congress's grant of oversight authority to an agency precluded an inference that the agency could exercise audit authority. Resp. Br. 23-24. But here too the prescription that a broadcaster need only exercise reasonable diligence to obtain information from the persons with whom the broadcaster deals directly forecloses the Commission from imposing different means for obtaining the same information. The *Colorado River* principle that Congress's choice of means must be honored applies equally here.

The Commission contends that the statute permits "a limited investigation in particular circumstances," Resp. Br. 26, but the precise statutory language refutes that contention. 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 the language nowhere expressly "forbids" the particular type of investigation imposed by the Order. Resp. Br. 25. "[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); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994).

The Commission does not even acknowledge *Loveday*'s construction of the statute, instead averring that *Loveday* "is distinguishable on its facts." Resp. Br. 26. But a statutory construction is not distinguishable based on facts, and the Commission cannot escape *Loveday*'s holding that (as the statutory language declares) the broadcaster's duty of reasonable diligence "is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast." 707 F.2d at 1449.

The Commission's erasure of the qualifying infinitive in Section 317(c) means that the requirement of "reasonable diligence" is effectively unbounded. For example, an initial draft Order would have required that stations perform independent Internet searches to ascertain the true foreign sponsor following the searches of the government databases. FCC-CIRC2104-06 at 37, (JA__). After industry protest, the Commission declared that "a general Internet search of the lessee's name *should not be required*," Order ¶ 41 n.123, (JA__) (emphasis added), but now in its brief vaguely states that the broadcaster must still "take other appropriate steps" to ascertain the true sponsor in order to make the mandatory

disclosure. Resp. Br. 11 n.4. Although it chose not to require Internet searches, evidently the Commission believes it has the *power* to require those and other types of independent investigations, subject only to a reasonableness constraint.

The *Loveday* Court resisted this expansive interpretation of Section 317(c) not only because it contravened the statute's terms, but also because imposing a duty of investigation on broadcasters is unworkable and inconsistent with congressional intent. As the Court pointed out, "[b]roadcast companies are not grand juries. They have no power to subpoena documents or to compel the attendance of witnesses." 707 F.2d at 1457. Broadcasters do not have the power to determine the truth about private transactions of third parties, and investigations are unrealistic, burdensome, and potentially infringing upon free speech. *Id*. at 1458-59.

The Order has not averted these problems. Mandatory independent investigations into government databases are themselves unlawful, but they are also not exhaustive. The Commission improperly interprets Section 317(c) to impose a duty of "'reasonable diligence'" upon broadcasters "to determine *the true source* of the programming aired on its station," Order ¶ 37, (JA__) (emphasis added), and then announce publicly that a specific foreign governmental entity has sponsored, furnished, or paid for the programming on behalf of a specific foreign country. 47 C.F.R. § 73.1212(j)(1), (3). Investigating government databases will

not yield the information necessary to make that declaration, and it remains unclear how a broadcaster could ever determine the programming's true source even if it identifies the lessee as a registered foreign agent. Congress circumscribed the diligence that broadcasters must exercise to avoid just this problem; it required reasonable diligence in obtaining information from its own employees and those with whom it deals directly, and nothing more.

Furthermore, while agency interpretation cannot overcome plain statutory language or binding judicial precedent, tellingly the Commission cites no Commission ruling imposing *any* duty of independent investigation in the more than 60 years since Section 317(c)'s enactment. Indeed, its regulations have always *excluded* independent investigations from the duty of diligence (and still do for other forms of programming). Subsection (b) of Rule 73.1212 tracks the statutory language, providing that "[t]he licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section." 47 C.F.R. § 73.1212(b). Subsection (e) then provides,

> Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, *and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station*, the announcement shall disclose the identity of the person or persons or

> entity on whose behalf such agent is acting instead of the name of such agent.

Id. § 73.1212(e) (emphasis added). Thus, if a broadcaster does not know the principal, its duty of diligence extends only to inquiries to its employees or those with whom it deals directly, and not independent investigations. Only this construction comports with the statute and *Loveday*; the new requirement in subsection (j) of the regulation does not.[5]

[5] The Commission cites the Media Bureau's (not the Commission's) decision in *Trumper Communications of Portland, Ltd.*, 11 FCC Rcd 20415 (Media Bur. 1996), as holding that "licensees could not rely on paying party's assurances as to real party in interest that were contradicted by evidence from public filings." Resp. Br. 20. But that decision (even if assumed to be correct) does not suggest that "reasonable diligence" encompasses independent investigations. In *Trumper*, a third party had furnished the stations with public-filing evidence refuting the sponsor's claims regarding the real party in interest, *id.* at 20418; the Bureau never suggested the stations had to search outside sources for such information. Citing *Loveday*, the Bureau said, "The Commission and the courts have not interpreted these provisions as obligating broadcasters to act as private investigators to ascertain whether the persons with whom they deal are the true sponsors. Rather, unless furnished with credible, unrefuted evidence that a sponsor is acting at the direction of a third party, the broadcaster may rely on the plausible assurances of the person(s) paying for the time that they are the true sponsor." *Id.* at 20417. The Media Bureau has confirmed that *Trumper* addresses only circumstances where the broadcaster is furnished with information. *Complaints Against ACC Licensee, LLC*, 29 FCC Rcd 10427, 10427 (Media Bur. 2014) (dismissing complaints, but noting that the complainants had not "approached the stations directly to furnish them with evidence calling into question that the identified sponsors were the true sponsors").

D. The Commission's Rulemaking Power Under Section 317(e) Does Not Salvage the Order

The Commission asserts that, "[e]ven if the Court were to conclude that Section 317(c) does not provide a basis for the rule's name search requirement, Section 317(e) provides an independent basis for that requirement." Resp. Br. 21. That argument lacks force. Section 317(e) is not an independent power; it is merely a power to "prescribe appropriate rules and regulations t*o carry out the provisions of this section.*" 47 U.S.C. § 317(e) (emphasis added); *New England Power Co. v. Fed. Power Comm'n*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) (holding that similar rulemaking provisions "do not confer independent authority to act" and may not be exercised to "contravene any terms of the Act") (internal quotation marks omitted), *aff'd on other grounds sub nom Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (2014). A power to "carry out" Section 317(c) is not a power to negate the express restrictions in the statute. *See, e.g., Simon v. FEC*, 53 F.3d 356, 360 (D.C. Cir. 1995) (power to "'to make ... such rules ... as are necessary to carry out the provisions of [the Act]'" does not permit agency "to override the plain mandate of [the statute]") (citation omitted).

In sum, Congress circumscribed the inquiry broadcasters have to make under Section 317(c) to ascertain announcement information. Congress required only that each station licensee "shall exercise reasonable diligence to obtain" announcement information "from its employees, and from other persons with

whom it deals directly." 47 U.S.C. § 317(c). The Commission's contrary conception that "the licensee bears the responsibility to engage in 'reasonable diligence' to determine the true source of the programming aired on its station," Order ¶ 37, (JA__), and must independently investigate government databases, violates the statute. The Order must be set aside as exceeding statutory jurisdiction.

II. The Order Violates the First Amendment

As Petitioners have demonstrated, this Court (as it did in *Loveday*) should avoid substantial constitutional questions by narrowly construing Section 317(c) as its plain language and legislative history demand, or declare the Order in violation of the First Amendment. Pet. Br. 38-53. The Commission's defense of the Order's constitutionality falls short.

A. The Order Is Subject to Strict or at Least Exacting Scrutiny

The Commission claims that this Court should apply the "heightened rational basis" standard, under which certain content-neutral broadcast regulations will be upheld if "reasonably tailored to satisfying a substantial government interest." *Ruggiero v. FCC*, 317 F.3d 239, 245 (D.C. Cir. 2003) (en banc). But the Order prescribes the content of speech a broadcaster must make on its own behalf, and requires investigation of third party status to make that speech. *See* 47 C.F.R. § 73.1212(j)(1), (3); Order ¶ 35, (JA__). "Mandating 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). Because the Order is not content-neutral, it is subject to strict or at least exacting scrutiny. Pet. Br. 37-38.

B. The Order Is Not Narrowly Tailored to Serve a Sufficiently Important Governmental Interest

A regulation is narrowly tailored only if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citation omitted). The government bears the burden of "demonstrat[ing] that 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 Commission does not demonstrate that the harms it recites are real *or* that the Order will alleviate them to a material degree. It claims that a duty to investigate only foreign entities registered under FARA or Section 722 reduces a broadcaster's burden, Resp. Br. 34-35, but that just creates constitutional problems of a different dimension. The Order does not redress any propaganda by surreptitious foreign agents. The only possible harm that the Order's investigation mandates could address is misrepresentation by foreign registrants of their status as sponsors of broadcast programming. But that problem *has never been known to occur*. The Commission identified only a few reports of a foreign governmental

entity leasing broadcast time, but in no case do the reports identify a FARA or Section 722 registrant that failed to disclose the foreign sponsor. Pet. Br. 41-43.[6] Thus, the Commission structured its regulation not to cover the only "problems" it identified. Speculation that many FARA or Section 722 culprits may have gone "undetected" because of lack of prior "standardized guidance" from the Commission on how to identify them, Resp. Br. 36, is far- fetched. The Commission did not support this point in the Order on review, and regardless cannot sustain its burden of proof on narrow tailoring with baseless speculation.

Furthermore, the problem is *not likely to occur in the future*. Foreign registrants are not disguised foreign agents preying on unsuspecting audiences; they comply with the law and disclose themselves to the U.S. government. Every person required to register as a foreign agent under FARA must submit two copies of any informational materials distributed for or in the interests of a foreign principal to the DOJ, and those materials must contain a "conspicuous statement" that they are distributed on behalf of that principal. 22 U.S.C. § 614(a), (b). Willful failure to comply with the disclosure obligation is subject to criminal

[6] RM Broadcasting continued to lease airtime on radio stations after FARA registration, but there is no finding that it has not made the required disclosures. *See* Joe Chiodo*, Russian Radio Takes to Kansas City Airwaves,* KCTV News 5 (Feb. 13, 2020), https://www.kctv5.com/news/local_news/russian-radio-takes-to-kc-airwaves/article_638da88c-4eae-11ea-b931-ef157bacebfb.html (cited in Order ¶ 4 n.9, (JA__)); *see also* sources cited at Order nn.74, 178 (JA__, __).

sanctions. *Id*. § 618(a)(1). Unsurprisingly, foreign media agents that registered with FARA provide DVDs of their programming to the DOJ. *See* Committee to Protect Journalists, *Several foreign news outlets required to register as foreign agents in US* (July 2, 2019), https://cpj.org/2019/07/several-foreign-news-outlets-required-to-register/. It is highly unlikely that FARA registrants accepting a duty backed by criminal sanctions to identify the foreign principal in informational materials (including broadcast programming), and who provide copies of their programming to the DOJ, will misrepresent their status to broadcasters. The "dynamic" nature of the government databases, Resp. Br. 38, does not change the fact that the putative harms neither exist nor are likely to exist. The Order burdens speech with no discernible benefit and thus fails to serve a sufficiently important governmental interest. It may be true that "'[a]n agency need not suffer the flood before building the levee,'" Resp. Br. 36 (quoting *Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009)), but the Commission cannot ask broadcasters to build a levee in a desert.

The Commission also has not established that the Order redresses any actual or threatened harms with regard to U.S.-based foreign media outlets. FARA exempts a narrowly drawn category of U.S.-based press organizations from the definition of a "foreign agent" if they are 80% owned, managed, and directed by U.S. citizens and "not owned, directed, supervised, controlled, subsidized, or

financed, and none of its policies are determined by any foreign principal" or foreign agent. 22 U.S.C. § 611(d). In Section 722 of the Communications Act, Congress separately required any multichannel video (*e.g.*, cable or satellite) programming producer or distributor to U.S. consumers who would be a foreign agent under FARA of a foreign government or a foreign political party *but for this exemption* to register with the Commission as a "foreign media outlet." 47 U.S.C. § 624(a), (d)(2).

Given such exacting criteria, Section 722 registrants are rare. Only two entities have ever registered under Section 722, and none is registered now. *See* https://www.fcc.gov/united-states-based-foreign-media-outlets (listing historical registrants). The Commission has not identified any Section 722 registrant, past or present, that has leased *broadcast* programming on behalf of a foreign government, much less done so without proper disclosure. Yet each of the nation's 12,000-plus commercial broadcasters must train and pay staff to check *every one* of their existing, new, or renewed leases against the Commission's foreign media outlet reports, and keep records of their inquiries. 47 C.F.R. § 73.1212(j)(3)(iv)-(v), (l). And (as with the FARA search) this is an exercise in futility, since Commission reports contain no information enabling a broadcaster to determine if a foreign governmental entity represented by the outlet paid for the specific leased programming, or to make the specific announcement required by the Order. *See,*

e.g., 47 U.S.C. § 624(a) (requiring the outlet to report only its name and "[a] description of the relationship of such outlet to the foreign principal of such outlet, including a description of the legal structure of such relationship and any funding that such outlet receives from such principal").

The Order, moreover, is both underinclusive and overinclusive. The Commission claims it has jurisdiction over broadcasters under Section 317(c), Resp. Br. 39-40, but does not *disclaim* jurisdiction over other competitive media where the problem is more acute (including cable services). The Commission points to certain broadcaster-specific regulations of speech, Resp. Br. 40, but those concern an area (political advertising) in which broadcasters are heavily involved. The Commission has not identified leased-programming harms that would justify singling out broadcasters, and underinclusivity signals that the law does not truly advance the state's interest. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

The Order is also highly overinclusive, especially given the scant evidence of harm. Pet. Br. 44-47. The Order's investigational and disclosure requirements apply to every existing, new, or renewed lease, even infomercials, church-service broadcasts, and local programming where the risk of undisclosed foreign governmental sponsorship is vanishingly small. 47 C.F.R. § 73.1212(j)(3); Order ¶ 48, (JA__). Virtually all lessees will be domestic entities that will truthfully deny that they are foreign governmental entities, or that foreign governmental entities in

the production or distribution chain have provided an inducement for the programming. Yet, because every denial triggers an investigation, investigations will be necessary for virtually every lease, even though (as detailed above) neither the FARA nor Section 722 databases provide the information needed to enable a truthful declaration as to whether a foreign governmental entity paid for specific programming on behalf of a particular foreign country. The cumulative expense of repetitive, fruitless investigations is high. The Order violates the First Amendment because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486 (citation omitted).

Finally, multiple less restrictive alternatives would have burdened less speech, which refutes any claim of narrow tailoring. The Commission could have limited investigations to programming on matters of public controversy, a defined category under the statute. Pet. Br. 51-52. The Commission irrelevantly observes that the statutory reasonable-diligence requirement is not limited to such programming, Resp. Br. 43; the question is when "reasonable diligence" requires the extraordinary measure of independent investigations. The Commission notes the "risk of hidden foreign governmental sponsorship" in other areas like arts and cultural programming, Resp. Br. 16, 40-41, but those are not the harms the Order recounts. Having justified speech restrictions based on the dangers of foreign propaganda and misinformation that seek "to persuade the American public

without adequate disclosure of the true sponsor," *see* Order ¶¶ 3-4 & nn. 9, 10, 74, (JA__, __, __, __), the Commission could have tailored the Order accordingly.

The Commission also could have limited investigational duties to circumstances where the broadcaster would have "reason to believe" the lessee might be a foreign governmental entity, which would have eliminated much of the Order's pointless make-work. The Commission's complaint that this standard is unduly subjective or discriminatory, Resp. 41-42, is wrong, Pet. Br. 49- 51, and flies in the face of the Commission's longstanding "[d]eference … to the reasonable, good faith determinations of licensees" regarding disclosures in the analogous "political programming regulatory scheme." *Complaints Involving the Political Files of WCNC-TV, Inc*., 35 FCC Rcd 3846, 3849-3850 (2020).

Alternatively, the Commission could have enforced obligations on the foreign actors to make the appropriate disclosures to broadcasters (just as FARA does), and include the foreign country represented. Pet. Br. 52-53. The Commission claims that FARA does not prevent abuses, Resp. Br. 43, but it has no evidence that foreign registrants accepting their legal obligations under FARA or Section 722 have committed any abuses. The fact remains that broadcasters, even after investigating the government databases, have no access to information enabling them to make the Order's required announcement; the broadcaster will be forced to choose between making a potentially false announcement based on

imperfect information or rejecting the lease. Enforcing obligations on foreign lessees to enable broadcasters to make the statutory disclosures would be equally effective without the massive aggregate burdens on broadcaster speech and the potential chilling of legitimate speech. This is neither narrow nor reasonable tailoring.

The Order's stark mismatch of ends and means renders it unconstitutional under strict, exacting, or even heightened rational basis scrutiny.

III. The Order Violates the Administrative Procedure Act

The Commission unsuccessfully attempts to obscure the lack of record evidence demonstrating a problem warranting regulatory action by touting reliance on its "reasonable predictive judgement." Resp. Br. 44-45. Such judgments "must be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (internal quotations omitted). Support for the Order's predictive judgment is sorely lacking. Although it has authority to investigate potential violations of its existing sponsorship identification rules, the FCC relied on three news reports, as old as 2015, that two foreign governmental networks aired on radio stations. Resp. Br. 44. None identified a FARA or Section 722 registrant doing so without proper disclosure. The Commission's evidence—which concerns no "harms" that the Order

redresses—cannot justify requiring every commercial broadcast station to undertake independent investigations for every existing and future lease.

The FCC's reliance on *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021), Resp. Br. 44-45, is misplaced. There, in conducting a congressionally mandated periodic review of broadcast ownership rules, the Court deferred to the Commission's judgment because it had "repeatedly asked commenters to submit empirical or statistical studies" about the effect of rule changes, and "[i]n the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had." *Id*. at 1160. Here, despite having the ability to obtain more data, the Commission instead developed a rule from whole cloth based on amorphous "predictive judgment."

Excluding noncommercial broadcasters and commercial stations without leases, Resp. Br. 45, cannot cure the rule because it still unduly burdens thousands of stations that never have and never will air foreign governmental content. "Softening an arbitrary and capricious rule" by reducing the number of regulatees subject to it "does not necessarily cure it." *ALLTEL Corp. v. FCC*, 838 F.2d 551, 558-59 (D.C. Cir. 1988). The Commission's contention that no commenter asked it to exclude small broadcasters from the rule is similarly non-responsive, Resp. Br. 45, given that Petitioners and others raised the issue of harm to smaller broadcasters, new entrants, and minorities. Pet. Br. 12-13 & n.11. Moreover,

excluding small broadcasters still fails to limit the rule to situations, if any, portending a reasonable chance of public harm.

Finally, as explained above, the rule as drafted redresses a phantom harm *never known to occur* and *highly unlikely to occur in the future*. *See* 19-26, *supra.* The Commission has not, and cannot, justify the Order under the APA.

CONCLUSION

This Court should set aside the Order.

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Respectfully submitted,

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird
PAUL HASTINGS LLP
2050 M Street, NW
Washington, DC 20036
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Petitioners National Association of Broadcasters, Multicultural Media, Telecom and Internet Council, Inc., and National Association of Black Owned Broadcasters

/s/ Richard Kaplan
Richard Kaplan
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1 M Street, SE
Washington, DC 20003

/s/ Robert E. Branson
Robert E. Branson
David Honig
MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, INC.
1250 Connecticut Avenue, NW, 7th Floor
Washington, DC 20036

/s/ James L. Winston
James L. Winston
NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS
1250 Connecticut Avenue, NW, Suite 700
Washington, DC 20036

CIRCUIT RULE 32(A)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in its filing.

/s/ Richard Kaplan
Richard Kaplan
Attorney for Petitioner National Association of Broadcasters

CERTIFICATE OF COMPLIANCE

This brief 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 brief complies with the word-count limitation of Fed. R. App. P. 32(e) and this Court's October 25, 2021 scheduling order. This brief contains 6,325 words, not counting the parts excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

/s/ Richard Kaplan
Richard Kaplan
Attorney for Petitioner National Association of Broadcasters

CERTIFICATE OF SERVICE

I, Richard Kaplan, hereby certify that on February 11, 2022, I filed the foregoing Reply Brief 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.

/s/ Richard Kaplan

Richard Kaplan
Counsel for Petitioner National Association of Broadcasters