No. 21-1171

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

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

OPPOSITION TO MOTION FOR STAY PENDING JUDICIAL REVIEW

INTRODUCTION

Respondent Federal Communications Commission opposes the motion for a stay pending review filed by the National Association of Broadcasters and two other organizations (collectively, "NAB") of the Commission's order adopting sponsorship identification requirements for broadcast programming provided by foreign governmental entities. *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Report and Order, 36 FCC Rcd 7702 (2021) ("*Order*").

As the Commission explained, the new rule constitutes a "minimal extension" of longstanding broadcast sponsorship identification regulations to foreign government-sponsored programming. *Order* ¶ 72. NAB does not take issue with the Commission's sponsorship identification regulations in general, or with the importance of ensuring that the public is aware when the sponsor of broadcast programming is a foreign governmental entity. Instead, they train their fire on a single, straightforward administrative requirement – that broadcasters perform a name search on two government websites in order to confirm that the party to whom a broadcaster leases air time is not a foreign governmental entity.

NAB has not satisfied the stringent requirements for a stay pending review. NAB does not allege that the harm it claims from the rule is imminent – the rule will not go into effect until the Office of Management and Budget approves the information collection, a process that may take several more months. And even when the rule goes into effect, NAB has not shown that it will cause irreparable injury.

NAB has also failed to show a likelihood of success on the merits of its claims. The Commission reasonably interpreted the statutory term "reasonable diligence" to require a name search to confirm that an entity who leases air time is not a foreign governmental entity. The rule also does not offend the First Amendment rights of NAB's broadcaster members. NAB does not challenge the underlying disclosure obligations, and the added speech burden of the rule's administrative requirements

is minimal. The balance of hardships and the public interest likewise disfavor a stay. Accordingly, the motion for stay pending review should be denied.

BACKGROUND

A. Statutory and Regulatory Background

From its beginning, the Communications Act of 1934 ("Act") has provided that a broadcast licensee that airs any "matter" for which "any money, service or other valuable consideration" has been "directly or indirectly" given or promised to the licensee by "any person" must announce that the broadcast was "paid for or furnished … by such person" at the time of the broadcast. Pub. L. No. 73-416, § 317, 48 Stat. 1064, 1089 (1934) (currently codified at 47 U.S.C. § 317(a)). As amended, the Act specifies that the licensee must "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). And the Act authorizes the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. § 317(e). Pursuant to this statutory grant, the Commission for many years has administered a general set of broadcast sponsorship identification rules. *See* 47 C.F.R. § 73.1212.

B. Proceedings Below

1. In 2020, the Commission proposed to update its sponsorship identification rules by adopting "specific disclosure requirements for broadcast programming that

is paid for, or provided by a foreign government or its representative." *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Notice of Proposed Rulemaking, 35 FCC Rcd 12099, 12100 ¶ 3 (2020). In doing so, the Commission cited evidence that foreign governments often "pay for the airing of [broadcast] programming, or provide it to broadcast stations free of charge, and the programming may not contain a clear indication, or sometimes any indication at all … that a foreign government has paid for, or provided, the content." *Id*. ¶ 1. In the Commission's judgment, "the American people deserve to know when a foreign government has paid for programming, or furnished it for free, so that viewers and listeners can better evaluate the value and accuracy of such programming." *Id*. ¶ 2.

2. In April 2021, the Commission adopted its disclosure proposal with modifications. While the agency's notice had tentatively concluded that the proposed disclosure rules "should apply in any circumstances in which a foreign governmental entity directly or indirectly provides material for broadcast or furnishes material to a station free of charge," the Commission "narrow[ed]" the adopted rule's "focus to address specifically those circumstances in which a foreign governmental entity is programming a U.S. broadcast station pursuant to the lease of airtime." *Order* ¶ 24. The FCC concluded that limiting the new rule to programming aired pursuant to a lease would address the principal area of concern while minimizing burdens on broadcasters. *Id.* ¶¶ 3, 12, 29, 70.

The new rule requires a specific announcement whenever the preexisting regulations require sponsorship identification and program matter is provided by a foreign governmental entity pursuant to a lease of airtime. 47 C.F.R. § 73.1212(j). "Foreign governmental entity" means (1) a "'government of a foreign country,'" (2) "'foreign political party,'" and (3) a registered "'agent'" of a "foreign principal" that is a "government of a foreign country" or a "foreign political party" (or is owned, controlled, or financed by such an entity) as defined by the federal Foreign Agents Registration Act (FARA), and (4) a "'United States-based foreign media outlet'" under the Communications Act. *Id.* § 73.1212(j)(2);[1] 47 U.S.C. § 624 (requiring such media outlets to file periodic reports with the FCC, which reports to Congress on such outlets semi-annually).

To determine if the new rule requires an announcement, a licensee must "exercise reasonable diligence" when it enters and renews a lease agreement. 47 C.F.R. § 73.1212(j)(3). Specifically, the licensee must inform the party who leases air time (the "lessee") of the rule and inquire if the lessee (1) qualifies as a foreign governmental entity or (2) knows of such an entity involved in producing or distributing the programming that provided an inducement to air the programming.

[1] We cite herein to the Federal Register version of the rule, 86 Fed. Reg. 32221, 32238-39 (June 17, 2021), the internal numbering of which differs from the version appended to the *Order*.

Id. If the lessee responds "no" to these inquiries, the licensee must confirm that the lessee's name is not listed in the Department of Justice's FARA database or the FCC's report of U.S.-based foreign media outlets. *Id.* If the search does not generate any results, the licensee can safely assume that the lessee is not a foreign governmental entity and no further search is needed. *Order* ¶ 41.[2]

3. On September 10, 2021, NAB filed for a stay of the *Order* pending judicial review with the Commission. The Commission's Media Bureau issued an order denying that request on December 8, 2021. Order Denying Stay Petition, DA 21-1518 (Media Bur. Dec. 8, 2021) (*Stay Denial*) (Mot. Exh. 2).

ARGUMENT

To obtain a stay pending review, NAB must show that (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm absent a stay, (3) other parties will not be harmed by a stay, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). NAB must make "a clear showing" that it is entitled to such an "extraordinary remedy." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). NAB has not met this exacting standard.

[2] If the search generates results, the licensee must "exercise reasonable diligence." 47 C.F.R. § 73.1212(j)(3). It may investigate further in the FARA database, *see Order* ¶ 41, ask the lessee more questions, or take other appropriate steps.

I. NAB HAS NOT DEMONSTRATED IRREPARABLE HARM.

As a threshold matter, the stay motion does not meet the "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Injury "must be both certain and great," and "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)(per curiam). NAB's claimed harm is neither imminent nor irreparable. The lack of irreparable injury is "grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy*, 454 F.3d at 297.

A. There is no risk of "imminent" harm. *Wisc. Gas*, 758 F.2d at 674. Because the rule contains information collection requirements subject to Office and Management and Budget ("OMB") review under the Paperwork Reduction Act, the rule will not go into effect until the OMB review process has been completed. *Order* ¶ 79. "The OMB review process requires a sixty-day notice and comment period followed by another thirty-day notice and comment period, after which OMB review may take up to sixty additional days." *Stay Denial* ¶ 45; https://pra.digital.gov/clearance-process/. The Commission has not commenced the thirty-day notice and comment period yet. Thus, as NAB acknowledges, the rule will not be effective "before late February," Mot. at 24, and possibly much later.

Thereafter, licensees will have six months to bring existing leases into compliance. *Order* ¶ 48.

Further, NAB's claimed harms can be mitigated by rapid resolution of this case on the merits. *See Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 513 (D.D.C. 2018) (no irreparable harm where the harm would not arise immediately and could be mitigated by expedited resolution on the merits). Briefing is already underway. By NAB's own account, "this case likely will be scheduled for argument in April or May," and decided within a few months. Mot. at 24. Thus, NAB has not demonstrated "a clear and present need for equitable relief to prevent irreparable harm." *Wisc. Gas Co.*, 758 F.2d at 674.

B. The claimed harm also does not rise to the level of irreparable injury. NAB contends that the new rule will impose unrecoverable compliance costs. Mot. at 21-22 & Exhs. 3-8. For irreparable harm, however, economic loss "must be 'more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff.'" *Dallas Safari Club v. Bernhardt*, 453 F.Supp.3d 391, 401 (D.D.C. 2020) (quoting *Mylan Pharms., Inc. v. Shalala*, 81 F.Supp.2d 30, 42 (D.D.C. 2000)); *Wisc. Gas*, 758 F.2d at 674. NAB does not claim that the compliance costs of broadcasters who lease air time will be so great relative to their overall budgets as to "significantly damage [their] business[es] above and beyond a simple diminution in profits." *Mylan Pharms.*, 81 F.Supp.2d at 43. And the "ordinary compliance costs" that NAB alleges

do not constitute irreparable harm. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980).[3]

C. NAB further alleges that broadcasters will be irreparably harmed by the loss of First Amendment rights. Mot. at 22. But "the deprivation of constitutional rights constitutes irreparable injury only to the extent such deprivation is shown to be likely." *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018). And as we show below, *see* Part II.B. *infra*, NAB is not likely to succeed on its First Amendment claims.

II. NAB IS UNLIKELY TO SUCCEED ON THE MERITS.

A. Statutory Authority

Section 317(c) of the Communications Act requires a broadcast licensee to "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" the licensee to make the sponsorship identification announcement required by the Act. 47 U.S.C. § 317(c). In the *Order*, the Commission determined that in the context of its foreign sponsorship disclosure rule, "reasonable diligence," among other things, requires the broadcaster to confirm that a broadcast

[3] Claims that "some broadcasters may determine that the heavy compliance burdens imposed by the Order outweigh the benefits of airing certain sponsored content," Mot. at 22, are too vague and speculative to establish irreparable harm. *Wisc. Gas*, 758 F.2d at 674 ("Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.").

lessee is not a foreign governmental entity "by consulting the Department of Justice's FARA website and the Commission's semi-annual U.S.-based foreign media outlet reports for the lessee's name." *Order* ¶ 35; 47 C.F.R. § 73.1212(j)(3)(iv). The Commission found that this "straightforward and limited search requirement[]" "will help ensure that the licensee is cognizant of whether the entity seeking to lease time on its station is a foreign governmental entity" without "pos[ing an] undue burden" on such licensees. *Order* ¶ 45.

1. That requirement does not violate the statutory mandate that a licensee "exercise reasonable diligence" to obtain sponsorship information "from … persons with whom [the licensee] deals directly in connection with any program or program matter for broadcast." 47 U.S.C. § 317(c). Diligence connotes "persistent application to an undertaking," AMERICAN HERITAGE DICT. OF THE ENGLISH LANGUAGE (5th ed. 2011) 507, and reasonable diligence is that "expected from someone of ordinary prudence under circumstances like those at issue." *Stay Denial Order* ¶ 12 (quoting *Diligence*, BLACK'S LAW DICTIONARY (11th ed. 2019)). The Commission thus sensibly found that to comply with a broadcaster's reasonable diligence obligation, the broadcaster may not take at face value a lessee's response that it is not a foreign governmental entity when that response is readily verifiable. Instead, the Commission concluded, the broadcaster must double-check the lessee's response by

consulting the Department of Justice's FARA database and the Commission's foreign media outlet reports to make sure the lessee's name does not appear.

NAB argues that the statutory phrase "to obtain from … other persons with whom it deals directly" "delimit[s] the broadcaster's duty of diligence." Mot. at 10. This is "an overly narrow reading of the statute," as the Commission concluded. *Order* ¶ 41 n.121. The statute nowhere says that a broadcaster cannot be required to "confirm" the information that the broadcaster obtains from persons with whom it deals directly under Section 317(c). 47 C.F.R. § 73.1212(j)(3). After all, the name search requirement is akin to "credit checks or other background checks … that one would reasonably expect any responsible business owner to conduct before entering into a contractual relationship with someone." *Order* ¶ 41 n.121; *cf. Stampley v. Altom Transp., Inc.*, 958 F.3d 580, 582 (7th Cir. 2020) (noting "the wisdom of the old Russian proverb popularized by President Reagan: 'Trust, but verify.'").

NAB assumes that, by specifying that a broadcast licensee must obtain sponsorship information from its employees and persons with whom it deals directly, Congress implicitly forbade the FCC from imposing an obligation to confirm the information the licensee obtains from those sources. This is, in substance, a call to the *exclusio unius est exclusio alterius* canon of statutory construction. But that canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not

directly resolved." *Cheney R.R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). Nothing in the statute's language or history suggests that Congress intended to divest the FCC of the power to require confirmation of sponsorship information obtained from persons with whom licensees deal directly in appropriate circumstances. *See United States v. WHAS, Inc.*, 385 F.2d 784, 788 (6th Cir. 1967) (FCC not precluded "from adopting a [r]egulation calculated to require a station to make reasonable efforts to go beyond a named 'sponsor' for a political program in order to ascertain the real party in interest for purposes of announcement."). Indeed, it would make little sense for Congress to have specified that broadcasters should employ "reasonable diligence" in obtaining the information necessary to make a sponsorship announcement, 47 U.S.C. § 317(c), but nonetheless permitted them to turn a blind eye to ready evidence undermining the information's credibility. And if the meaning of Section 317(c) were less clear, the Commission's reasonable reading would still be due deference. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) ("an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail").

Finally, even if a broadcaster's obligation under Section 317(c) is only "to obtain the information from those identified sources" in that provision, *i.e.*, station employees and those with whom it deals directly, Mot. at 10-11, the name search requirement represents a valid exercise of the Commission's authority to implement

the statute under Section 317(e). 47 U.S.C. § 317(e); *Order* ¶ 72 & n.194. That section gives the Commission the power broadly to "prescribe appropriate rules and regulations to carry out the provisions of this section," including Section 317. Given that broad grant of rulemaking authority, the fact that the rule "requires more … than the governing statute … is no reason for rejecting it." *Doe, 1 v. FEC*, 920 F.3d 866, 871 (D.C. Cir. 2019); *cf. Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (statutory provisions barring an agency from supporting certain types of litigation did not preclude the agency from barring the support of others).

2. Relying on *Loveday v. FCC*, NAB contends that "'the language of section 317, of itself,' does not 'impose any burden of independent investigation upon licensees.'" Mot. at 9 (citing 707 F.2d 1443, 1454 (D.C. Cir. 1983)). The question is not whether the statute itself imposes a duty of independent investigation, however, but whether it forbids the Commission from interpreting "reasonable diligence" to require a limited investigation in particular circumstances. Even if the statute itself does not require "a licensee [to] go behind the information it receives to guarantee its accuracy," Mot. at 10, this Court observed that the legislative history of the reasonable diligence requirement "establishes that a licensee cannot discharge its duty by passively ignoring sponsorship information it might easily obtain." 707 F.2d at 1455 n.18.

Loveday also is distinguishable on its facts. The Court in that case *upheld* the Commission's determination that the broadcasters had "adequately discharged their obligation" under then-governing sponsorship identification rules. 707 F.2d at 1445. At that time, the FCC had "never indicated in enforcement proceedings that section 317 or its own regulations require a station to conduct any investigation or to look behind the plausible representations of a sponsor that it is the true party in interest." *Id.* at 1456-57. To be sure, the Court expressed concerns about the Commission's power to impose an obligation on broadcasters to perform a "searching" investigation of sponsorship information. *Id*. at 1457. But no such searching inquiry is required by the *Order*. Instead, the question here is whether, in light of instances of undisclosed foreign governmental sponsorship of broadcast programming, the FCC has the power to adopt a rule imposing a limited duty to name check two government websites. *Loveday* had no occasion to address—and thus cannot have disposed of—that question.

B. First Amendment

NAB also contends that the foreign sponsorship disclosure rule's administrative requirements violate the First Amendment. Mot. at 13-21. These arguments too are unlikely to succeed on the merits. The *Order* adopts a reasonably tailored rule to ensure that audiences are informed when foreign governmental entities sponsor broadcasts. NAB does not challenge the underlying disclosure

obligations, and the added burden of the rule's administrative requirements is minimal.

1. The foreign governmental sponsorship announcement rule is a reasonable condition on the privilege of broadcasting over the nation's limited airwaves. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"). Moreover, the rule simply requires disclosure. While disclosure "may burden the ability to speak," it does "not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (internal quotation marks omitted); *see Order* ¶ 73. As NAB concedes, "the courts apply less demanding scrutiny to disclosure obligations." Mot. at 13.

The rule is also content-neutral – it applies to broadcast programming "provided by any foreign government," regardless of the nature of the programming or whether the government's "interests are directly at odds with the United States." *Order* ¶ 23 (internal quotation marks omitted). Thus, contrary to NAB's contention (Mot. at 14), strict First Amendment scrutiny does not apply. Instead, the rule must be upheld so long as it is "reasonably tailored to satisfying a substantial government interest." *Ruggiero v. FCC*, 317 F.3d 239, 245 (D.C. Cir. 2003) (affirming statutory prohibition on granting a low-power FM radio license to persons who have operated an unlicensed radio station). But even if the rule were subject to the standard of

"exacting scrutiny" that has been applied to content-based broadcast regulations and to certain disclosure requirements outside the broadcast context (and that NAB urges in the alternative, Mot. at 14), the rule would be constitutional, because it is "narrowly tailored" to a "sufficiently important" government interest. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (plurality); *see Order* ¶ 69 (finding the rule satisfies the First Amendment "regardless of the level of scrutiny applied").

2. As the Commission found, "the government has a compelling interest in ensuring that the public is aware of when a party has sponsored content on a broadcast station." *Order* ¶ 69 & n.185. That interest is "even more important" where, as here, "a foreign governmental entity is involved." *Id.* ¶ 69 & n.186; *see id.* ¶ 26. NAB agrees, at least "[i]n the abstract." Mot. at 14.

The foreign sponsorship identification rule also is narrowly tailored to the government's interest. The rule focuses precisely on the problem the Commission confronted: the leased use of the nation's airwaves by foreign governmental entities without adequate disclosure. *Order* ¶ 3; *see id*. ¶¶ 69-71; *Stay Denial* ¶ 31.[4] The added

[4] The Commission "significantly narrowed the scope of the" rule from its initial proposal by limiting the rule to lease agreements – "the primary means … by which foreign governmental entities are accessing U.S. airwaves." *Order* ¶ 3; *see id*. ¶ 70. The Commission thereby excluded from the rule's coverage "broadcast stations that do not engage in such leasing agreements," including "virtually all non-commercial, educational broadcasters." *Id.* ¶ 70.

speech burden of the new rule's administrative requirements (NAB does not challenge the preexisting sponsorship identification regulations) is minimal at best.

3.a. NAB contends that the Commission "has not established a sufficiently important problem warranting nationwide regulation of *all* leased programming." Mot. at 14-16. But NAB does not contend that the risks of undisclosed broadcast sponsorship by foreign governments are unique to areas where abuses have been reported. Nor is "a wave of foreign broadcast propaganda" required to warrant action. *Id*. at 15. "An agency need not suffer the flood before building the levee." *Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). And given that the FCC seeks to address *undisclosed* foreign governmental sponsorship, reported abuses might be "the tip of the iceberg." *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 212 (1997) (Congress could reasonably forecast that a small number of bankruptcies among local broadcasters was "the tip of the iceberg"); *Stay Denial* ¶ 21. The FCC reasonably concluded that the evidence of undisclosed foreign governmental sponsorship reflected a significant problem calling for targeted action. *Order* ¶¶ 2-4, 69; *see id.* ¶¶ 1 n.1, 25 n.74.

NAB further contends that there have been no reported instances of undisclosed broadcast sponsorship by "foreign governmental entities *already registered* with the U.S. government." Mot. at 4; *id.* at 15-16. But "both the FARA website listings and the U.S.-based foreign media outlet lists are dynamic in nature,

and the entities appearing on those lists may change periodically." *Stay Denial* ¶ 22. Indeed, one entity involved in a reported instance of nondisclosure has since been forced to register as a foreign agent. *Order* ¶ 17 n.52.[5] Moreover, to the extent that a foreign governmental entity would have disclosed its identity without the rule, the rule ensures more meaningful disclosure. *See id.* ¶ 64.

b. NAB next argues that the rule is underinclusive because it does not apply to the Internet and cable television. Mot. at 16-17. The Supreme Court has rejected like arguments under exacting scrutiny. *Citizens United*, 558 U.S. at 368 (rejecting First Amendment challenge to statutory provision "because it requires disclaimers for broadcast advertisements but not for print or Internet advertising."). A rule "is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." *Trans Union Corp. v. FTC*, 245 F.3d 809, 819 (D.C. Cir. 2001) (internal quotation marks omitted); *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985) ("As a general matter, governments are entitled to attack problems piecemeal."). Moreover, needless to say, Section 317(c) grants the Commission

[5] NAB (Mot. at 16) misplaces reliance on *Initiative and Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1307-08 (D.C. Cir. 2005), in which the Court held that a regulation banning signature-gathering on postal property was not narrowly tailored because such activity was only occasionally problematic. Undisclosed foreign governmental sponsorship is always problematic. Moreover, the rule compels disclosure rather than banning such activity. *See* § II.B.1 *supra*.

power to impose sponsorship identification requirements only on licensees of broadcast stations.

Conversely, NAB argues that the rule is overinclusive because the agency "imposed no reasonable limit on the type of leased programming subject to the" rule. Mot. at 17-18. But the FCC explained that a rule applying uniformly to lease agreements would be more effective, and less open to discriminatory application, than one "based on the broadcaster's belief of who may have connections to a foreign governmental entity." *Order* ¶ 44 n.129; *see* Mot. at 18. NAB's assumption that leases involving certain types of programming "pose no substantial risk of undeclared foreign governmental sponsors" is unfounded. *Id.* at 18. For example, one reported instance included "a mix of news, music and cultural programs." Koh Gui Qing and John Shiffman, *Beijing's covert radio network airs China-friendly news across Washington, and the world* (Nov. 2, 2015), available at https://www.reuters.com/investigates/special-report/china-radio/ (cited in *Order* ¶ 1 n.1). And a requirement that a broadcaster inquire about leases involving programming of a particular content would raise more First Amendment issues, not fewer.

c. Finally, the Commission explained why proposed alternatives would be less effective. Mot. 18-21. The Commission rejected NAB's proposed "reason-to-believe" standard as "ineffectual and unenforceable." *Order* ¶ 44. NAB's assertion

that such a standard would be "objective" is wrong on its face, Mot. at 19, as the proposed standard would depend on a broadcaster's belief rather than "quick objective searches" of government websites. *Order* ¶ 44.

NAB also contends that the Commission alternatively could have limited the rule just to programming regarding "controversial issue[s] of public importance." Mot. at 19 (quoting 47 U.S.C. § 317(a)(2)). However, the statute not only authorizes the Commission to require a sponsorship announcement in such situations, but additionally *requires* one whenever programming is aired in exchange for "valuable consideration." 47 U.S.C. § 317(a)(1). The rule's "concern is not the content of the speech but providing transparency about the true identity of the speaker." *Order* ¶ 23.

NAB further contends that the Commission could have achieved its goal by instead "requiring the sponsor to disclose the required information to the broadcaster." Mot. at 20 (citing 47 U.S.C. § 508(a)-(c)). But Section 317(c) requires licensees themselves to "exercise reasonable diligence" to obtain sponsorship information. 47 U.S.C. § 317(c); *Order* ¶ 35. And there is no reason to believe this alternative would be effective when a third party's obligation "to communicate information to the licensee relevant to determining whether a disclosure is needed," *Order* ¶ 46—violation of which is subject to a $10,000 fine or imprisonment, 47 U.S.C. § 508(g)—has not prevented documented abuses of the underlying sponsorship identification regulations. *Stay Denial* ¶ 35.

NAB's contention that the rule "accomplish[es] nothing" because "[FARA] compliant entities" are likely to "divulge accurate information to stations," Mot. at 21, ignores the value of the specific disclosure required by the rule, 47 C.F.R. § 73.1212(j)(1); *see Order* ¶¶ 62-63 (explaining that the rule "provide[s] transparency to audiences of broadcast stations regarding the source of sponsored programming, while avoiding unnecessary duplication with the FARA requirements"), as well as the benefit of reminding lessees of the rule and ensuring that the sponsorship information they provide in response to licensee inquiries is "above board." Mot. at 20.[6]

III. THE BALANCE OF HARMS AND PUBLIC INTEREST DISFAVOR A STAY.

Lastly, a stay would disserve the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (where the government is the opposing party, the balance of harms and the public interest merge). The FCC reasonably determined that the challenged rule is necessary to ensure appropriate disclosure of broadcast sponsorship by foreign governmental entities. As we have shown, it does not violate the First Amendment rights of NAB's members, and is only a modest extension of the

[6] NAB states without elaboration that the rule is arbitrary and capricious for "the same reasons it violates the First Amendment." Mot. at 21. But for the reasons NAB's First Amendment arguments fail, their arguments are no more likely to succeed under the Administrative Procedure Act.

existing broadcast sponsorship identification regulations, which NAB does not challenge.[7]

There is, in short, no basis for suspending the targeted, straightforward steps the FCC has taken to "increase transparency and ensure that audiences of broadcast stations are aware when a foreign government, or its representatives, are seeking to persuade the American public." *Order* ¶ 3.

CONCLUSION

The Motion for Stay should be denied.

Dated: January 3, 2022

Respectfully submitted,

/s/ William J. Scher

P. Michele Ellison
Acting General Counsel

Jacob M. Lewis
Acting Deputy General Counsel

William J. Scher
Counsel

FEDERAL COMMUNICATIONS COMMISSION
45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

[7] NAB's contention that a "stay would only delay implementation of the rule for a few months" cuts *against* injunctive relief, reinforcing their failure to show imminent harm. Mot. at 23; *see* § I.A *supra*.

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/s/ *William J. Scher*
William J. Scher
Counsel for Respondent
Federal Communications Commission