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Roger and Ann Worthington Essay Contest Submission

After carefully considering the proposal to fine networks and broadcasters who knowingly or negligently disseminate false information, I have come to the conclusion that it ought not be implemented. I base my conclusion on a number of practical, legal, and ethical concerns.

First, there are practical issues with implementing the fines. Concerns of implementation are important because no goal, no matter how laudable, ought to be pursued if its achievement is impossible and its pursuit harmful. I will discuss difficulties and harms for both malicious falsity and insufficient research.

To be maliciously false a statement must be false *and* carry the intention of harm. Information that is harmful but true should not be punished, as there is a strong public interest in the free flow of true information no matter how shocking or offensive it may be. The first hurdle with demonstrating falsity is separating factual statements and statements of opinion. This can, in theory, be done: information that can be proven true or false should be considered factual while information that is not falsifiable is a matter of opinion. This seemingly simple rule is complicated in implementation.

A number of statements are presented as factual that are, in reality, not falsifiable. Stating that a candidate “intends” to enact a certain policy is not falsifiable: intent cannot be known, only approximated or assumed. Some commentator might see clear evidence in a candidate’s speeches or proposals that he or she will outlaw firearms, and the absence of any such implementation does not prove that there was no original intention. This loophole is damaging to the efficacy of the proposed restrictions. Often, non-falsifiable statements are the ones that have the most effect on an audience’s emotions, and these emotions might translate into actions. Eliminating the possibility of preventing

an entire category of harmful speech will significantly undermine the benefits of the proposed restrictions. Moreover, because intentions are not entirely knowable, the Commission will have a steep burden of proof in demonstrating malice. This burden will again decrease the benefits of the proposed regulations and significantly increase the costs of proving a contemptible statement was made. Journalists, who often interpret scant information, blur the line between fact and opinion. The FCC has never been, nor should it ever be, the final word on journalistic propriety.

The second class of targeted speech, insufficiently researched stories, requires some clear standard of sufficiency, which I do not believe exists. First, journalists need to report breaking news stories. These stories are, by definition, preliminary and without a strong factual basis. Commentators share information as soon as they receive it and fill the gaps with their own analysis. Any bar that is set for sufficient research must be very low so it does not interfere with the publication of breaking news stories, which are the lifeblood of 24-hour news and keep the public current on new developments. Second, journalists regularly rely on anonymous sources for their information, and so the diligence of their research can be based on a foundation to which external investigators have no access. Anonymity allows whistle-blowers to speak freely about institutions in power. This free speech is necessary for social accountability, and penalizing anonymous sourcing or deterring its use even slightly is counter to the ends of democracy.

If it were possible to draw a distinction between permissible reports and reports that would be targeted by new regulations, there is the separate challenge of identifying and investigating allegedly impermissible media statements. I see three possibilities: the Commission could investigate statements only when harm resulted; the Commission

could rely on public requests for investigation; the Commission could internally monitor, identify and investigate allegedly inaccurate stories. Each of these is problematic. Focusing only on statements to which a crime has been attributed is inappropriate, because two audiences might react differently to the same misinformation. This separates the speech act from the crime and thus ought to separate the speaker from punishment. The second option, relying on public requests, would be pernicious, as viewers are most likely to report statements with which they disagree. The FCC will be in the position of deciding between the factual merits of interest groups and political parties. This is not the role of the Commission, which exists to improve, not stifle, communication. The last option, using in-house investigators, would allow for training and consistency. It would also, however, require an expansion of the Commission that is unlikely to gain support in a political climate skeptical of government power and too expensive for governors stabilizing a reeling economy.

Even if it were possible to implement the new regulations, I believe they are unconstitutional. The legality of the proposed fines hinges on the possibility of distinguishing false or insufficiently researched stories from speech protected by the First Amendment. The Supreme Court has ruled time and again that only speech that is in-itself harmful or leads to some imminent, unavoidable harm is unprotected by the First Amendment. Defamation, for instance, is unprotected because it is harmful in-itself: it damages a reputation or creates some other tangible ill. The statements cited by the Chairman only become harmful when another person—a listener or viewer—acts on those statements. The proposal, then, borrows elements from two types of illegal speech, defamation and incitement, without carrying the requisite components of either. It shares

with defamation the condition that falsity can be punished without being harmful in-itself and with incitement that a speaker can be held liable for the actions of another without meeting the conditions for incitement.

In *Brandenburg v. Ohio* (1969), the Supreme Court ruled that only speech likely to incite imminent lawless action could be punished. Falsely shouting “Fire!” in a crowded theater is likely to cause imminent harm because a rational person hearing the speech will react by trying to escape. Declaring that the President will outlaw firearms does not share this characteristic. While it is theoretically possible that harm will result, as it did in Oklahoma, the harm is neither imminent nor direct. The man who kills police officers is still culpable in a way that people rushing out of a theater would not be, and killing police officers is not a natural response to disagreement with a policy. Unlike defamation, then, the speech is not itself harmful and, unlike incitement, the resultant harm is neither likely nor imminent.

Moreover, the method the FCC would use to impose fines would violate the First Amendment in another way. The new fines are intended to deter false or negligent statements. Like the punishment for profanity, the fines would be laid out beforehand and then applied to specific cases. This is a form of prior restraint on speech: a class of statements would be illegal, like theft or murder are illegal, and then punishment would be imposed on statements that fit into that class. In *Near v. Minnesota* (1931), the Supreme Court ruled that this type of restraint was unconstitutional. In its decision, the Court spoke out against a “chilling effect” that might arise if speech could be subjected to punishment. The proposed FCC fines would have this chilling effect. For instance, a broadcaster might not disclose information of public interest if he or she is concerned that

disclosure would open them or their network to punishment. The existence of these fines would, in itself, stifle the free exercise of speech.

Because the proposed restrictions target speech short-of-incitement and do so before statements are uttered, it is likely that the courts would scrutinize them. Regardless of the ruling, the cries of censorship against the Commission, especially by commentators associated with groups out of power, will greatly diminish our credibility and influence. Though false statements are frustrating and, at times, can be linked to violence, society still has recourse through conventional law enforcement. If the speech targeted is directly and imminently inciting violence or maliciously defaming an individual, existing laws enable redress. If the speech act is not harmful in these ways, it is neither within the FCC's power nor interests to penalize it.

While I understand the desire to increase accountability in media, the harm prevented by punishing a few commentators would be outweighed by the harm caused by chilling free speech. The killer in Oklahoma will be punished as a killer, and the rioters in New Jersey will be punished as rioters. Punishing the speech that inspired these actions, especially when the speech is not a direct incitement but only tangentially connected to a crime, would infringe on the freedom of the press. Our targeting of the broadcasters would harm the very foundation of our democracy, an informed public, and I cannot support the proposed policy.