

CA No. 12-1196

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

GLENN A. BAXTER,

Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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BRIEF OF APPELLEE UNITED STATES OF AMERICA

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Conferred by 28 U.S.C. § 515

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### **JURISDICTIONAL STATEMENT**

Original Jurisdiction. United States District Courts have original jurisdiction over civil actions in which the United States is the plaintiff, 28 U.S.C. § 1345, and over actions for the enforcement of forfeitures assessed by statute, 28 U.S.C. § 1355. The United States may seek recovery in District Courts of forfeitures assessed by the Federal Communications Commission pursuant to 47 U.S.C. § 504(a).

Appellate Jurisdiction. This Court has jurisdiction over timely appeals of final judgments entered by a United States District Court. 28 U.S.C. §§ 1291, 1294. In cases where the United States is a party, an appeal is timely if it is filed within 60 days after entry of final judgment. Fed.R.App.P. 4(a)(1)(B). Here, the District Court entered final judgment on February 1, 2012 (Docket #47)<sup>1</sup> and the notice of appeal was timely filed on February 8, 2012 (Docket #48).

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<sup>1</sup>Docket #\_ refers to the District Court record on appeal.

STATEMENT OF ISSUES PRESENTED

- I. Whether this Court Should Affirm the District Court's Summary Judgment Decision Regarding Baxter's Undisputed Failure to Provide Information the FCC Requested?
  
- II. Whether this Court Should also Affirm the District Court's Decision to Grant Summary Judgment to the Government Regarding Baxter's Conceded Interference with Other Amateur Radio Communications?

**STATEMENT OF THE CASE**

This is an appeal from a final judgment entered by the United States District Court for the District of Maine (Hon. John A. Woodcock, Jr.), which granted summary judgment to the United States on two counts of its complaint seeking enforcement of a forfeiture assessed by the Federal Communications Commission ("FCC" or "Commission") against Baxter for violations of Section 308 of the Communications Act, 47 U.S.C. § 308(b), and Section 97.101(d) of the FCC's rules, 47 C.F.R. § 97.101(d) (Docket ##38, 46, 47).

In March 2006, the FCC issued an order assessing a forfeiture of \$21,000 against Baxter for five separate violations of the Communications Act and FCC rules (Docket #4-2). Baxter did not pay the forfeiture, and on October 25, 2010, the United States filed this case against him to enforce the FCC's order (Docket #1). Due to the death of an essential witness, the United States filed an amended complaint on November 5, 2010, which sought enforcement of the forfeiture order based on of four of the original five violations, totaling \$18,000 (Docket #4).

The United States moved for summary judgment on three of the four remaining counts (Docket #23), and the District Court granted summary judgment on two of those counts, ordering

enforcement of forfeitures totaling \$10,000 (Docket #38). The District Court ordered the remaining two counts to go to trial (Docket #39), and the United States moved to dismiss those remaining counts voluntarily (Docket #40). The District Court granted the request (Docket #46) and entered final judgment for \$10,000 in favor of the United States (Docket #47). Baxter now appeals.<sup>2</sup>

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<sup>2</sup> Baxter also filed a counterclaim against the United States, Docket #5, which the district court dismissed on the government's motion, Docket ##12, 26. Baxter has not appealed that order.

### **STATEMENT OF FACTS**

This is an FCC enforcement case against an amateur radio licensee who repeatedly violated FCC rules and failed to provide substantive responses to FCC inquiries (Docket ##1, 4). The FCC repeatedly warned Baxter (Docket ##32-3, 24-9, 24-7), but Baxter failed to provide a substantive response, and monitoring of his broadcasts revealed that he had failed to correct his actions (Docket ##24-6, 24-8, 24-22, 24-21). The FCC issued Baxter a Notice of Apparent Liability (Docket #4-1), but Baxter again failed to provide a substantive response (Docket #24-20). The FCC then issued a Forfeiture Order (Docket #4-2) and commenced District Court litigation for enforcement (Docket ## 1, 4). Baxter now appeals the District Court's decision to grant summary judgment regarding two of Baxter's violations: (1) his failure to respond to FCC queries; and (2) his interference with other broadcasters (Docket #23).

#### **FCC Response to Public Complaints**

Baxter is the licensee of amateur station K1MAN (Forfeiture Order; Docket #4-1). Beginning in the early 2000s, the FCC received numerous complaints that K1MAN was interfering with other amateur licensees' radio transmissions. *Id.* ¶3. By letter dated April 14, 2004, the Commission warned Baxter that his interference was a violation of the FCC's rules and that he was not allowed to use his station for pecuniary purposes

(Docket #32-3) (citing 47 C.F.R. §§ 97.101(d) & 113(a)(3)). The agency also warned Baxter that a failure to ameliorate the ongoing violations would lead to an enforcement action. *Id.* at page 3.

By letter dated September 15, 2004, the FCC's Enforcement Bureau sent Baxter a follow-up letter noting that both violations had continued (Docket #24-9). The letter explained that Baxter had interfered with radio transmissions by the Salvation Army in disaster relief efforts. *Id.* at page 1. The Enforcement Bureau requested that Baxter provide information indicating the steps he planned to take to correct the violations and to specify "what methods of station control you have implemented" for K1MAN. *Id.*

By letter dated October 14, 2004, Baxter responded to the Bureau's letter (Docket #24-6). Baxter ignored the Bureau's request for information and dismissed its concerns, asserting that "[n]o corrective actions are necessary" and that "[n]o changes are needed with regard to station control." *Id.* Baxter added that "K1MAN is in full compliance with all FCC rules, state laws, and federal laws. I encourage you to take 'enforcement actions' and look forward to seeing you in court(s)." *Id.*

By letter dated October 29, 2004, the FCC (1) informed Baxter of several additional allegations of interference; (2) gave Baxter an additional 20 days to provide the information requested in the September 15 warning letter; and (3) requested additional information regarding the new instances of interference (Docket #24-7). In response, Baxter simply incorporated his earlier submission and provided no further information (Docket #24-8).

#### **FCC Monitoring**

After Baxter failed to provide the requested information, FCC personnel began to monitor his station broadcasts (Larrabee Declaration ¶¶6, 9, 10, 17, 20; Docket #24-22)(King Declaration ¶9; Docket #24-21). Despite the multiple earlier warnings against interference, the monitoring revealed that Baxter transmitted from his station on top of other ongoing transmissions, thereby interfering with those ongoing transmissions, on November 27, 2004 (Larrabee Declaration ¶17; Docket #24-21), December 8, 2004, *Id.* ¶10, and March 31, 2005 (King Declaration ¶9; Docket #24-21). FCC monitoring personnel also heard Baxter transmit information regarding his website, which advertises various products for sale, subscriptions to a newsletter published by Baxter, and commercial services offered by Baxter, on November 25, 2004 (Larrabee Declaration ¶6),

December 1, 2004. *Id.* ¶21, and March 30, 2005 (King Declaration, Docket #24-21 ¶8).

**Notice of Apparent Liability and Forfeiture Order**

Before the FCC may levy a forfeiture penalty, the agency is required to issue a "notice of apparent liability" ("NAL"), pursuant to 47 U.S.C. § 503(b)(4). On June 7, 2005, the FCC's Enforcement Bureau issued Baxter a NAL for a \$21,000 monetary forfeiture based on five violations of FCC rules (NAL; Docket #4-1). The Bureau determined: (1) that on November 27, 2004, December 8, 2004, and March 31, 2005, Baxter "commenced transmitting on top of existing communications" - i.e., interfered with other transmitters - in violation of the prohibition on interference contained in 47 C.F.R. § 97.101(d) (NAL ¶13; Docket #4-1); (2) that on November 25, 2004, December 1, 2004, and March 30, 2005, Baxter transmitted communications in which he had a pecuniary interest, in violation of 47 C.F.R. § 97.113(a)(3), *Id.* ¶14; (3) that Baxter "failed to provide information" requested by the Bureau in violation of Section 308(b) of the Act, *Id.* ¶15; (4) that Baxter had engaged in impermissible "one-way" transmissions, in violation of 47 C.F.R. § 97.113(b), *Id.* ¶16; and (5) that Baxter had failed to maintain proper operation and control of his station, in violation of 47 C.F.R. § 97.105(a), *Id.* ¶17.

By letter dated June 12, 2005, Baxter responded to the NAL that he "welcomes these court actions" since he has been trying to "face off" with the FCC for 15 years, and that "[m]any heads are finally going to roll" (Docket #24-20). On March 29, 2006, the Enforcement Bureau issued its Forfeiture Order (Forfeiture Order; Docket #4-2), which concluded that, in the absence of "any substantive responses to the apparent violations," *id.* ¶18, the Bureau determined that Baxter had committed the violations set forth in the NAL, *id.* ¶13, and imposed a forfeiture of \$21,000. *Id.* ¶16.

#### **District Court Litigation**

On October 27, 2010, the United States filed a Complaint (Docket #1) regarding Baxter's five FCC violations: (1) willfully and repeatedly failing to respond to a Bureau directive; (2) willfully and repeatedly causing interference with ongoing communications; (3) willfully and repeatedly broadcasting communications in which Baxter had a pecuniary interest; (4) willfully broadcasting impermissible one-way communications; and (5) willfully failing to exercise station control (Docket #1 at pages 2-3). The United States requested imposition of a total forfeiture amount of \$21,000 (Docket #1 at page 5).

On November 5, 2010, the United States filed a First Amended Complaint (Docket #4) that was limited only to the first four FCC violations: (1) willfully and repeatedly failing to respond to a Bureau directive; (2) willfully and repeatedly causing interference with ongoing communications; (3) willfully and repeatedly broadcasting communications in which Baxter had a pecuniary interest; and (4) willfully broadcasting impermissible one-way communications (Docket #4 at 8). For those four violations, the United States requested a total recovery of \$18,000 (Docket #4 at 10). With respect to the previously alleged fifth violation, the United States voluntarily declined to pursue the additional \$3,000 monetary forfeiture due to the death of the only FCC agent to observe Baxter fail to exercise station control (Docket #23 at 10).

On May 18, 2011, the United States moved for summary judgment regarding the first four FCC violations: (1) willfully and repeatedly failing to respond to a Bureau directive pursuant to 47 U.S.C. § 308(b); (2) willfully and repeatedly causing interference with ongoing communications pursuant to 47 C.F.R. § 97.101(d); (3) willfully and repeatedly broadcasting communications in which Baxter had a pecuniary interest pursuant to 47 C.F.R. § 97.113(a)(3); and (4) willfully broadcasting impermissible one-way communications, in violation of 47 C.F.R.

§ 97.113(b) (Docket #23 at 6-8). On June 1, 2011, Baxter responded (Docket ##28-29). On June 23, 2011, the United States filed its summary judgment reply, which conceded that there were disputed issues of fact regarding the fourth violation (impermissible one-way communications), which was subject to a \$4,000 forfeiture amount (Docket #32 at page 6). Accordingly, the United States' reply confirmed that for the purpose of summary judgment, it was requesting a total of \$14,000 (\$18,000 minus \$4,000) as follows: \$3,000 for the failure to respond; \$7,000 for the interference; and \$4,000 for the pecuniary interest (Docket #32 at pages 6-7).

### **District Court Decision**

On January 10, 2012, the District Court granted summary judgment in favor of the United States regarding the first two violations and imposed forfeiture amounts, respectively, of \$3,000 and \$7,000, for a total of \$10,000 (Docket #23 at 38). With respect to the third violation, regarding Baxter's pecuniary interest, the Court denied summary judgment due to the disputed issues of material fact (Docket #38 at 1). The three violations are discussed in turn.

#### **1. Baxter's Failure to Respond**

With respect to the charge of failure to respond to an FCC request for information, in violation of Section 308 of

the Act, the District Court found as a matter of undisputed fact that the FCC Enforcement Bureau's September 15, 2004 letter to Baxter "request[ed] information regarding his method of station control and what actions, if any, he was taking in response to several complaints of broadcasting interference" (Dist. Ct. Op. at 15). Also undisputed was that Baxter's response "did not contain any ... detailed information about the methods of station control ... nor the actions he planned in response to the complaints of station interference" beyond a "blanket statement" that the station was "in compliance with FCC rules." *Id.* Despite the FCC's requests for information, the District Court held, "Mr. Baxter simply stiff-armed the FCC." *Id.* at 25. No genuine issue of fact existed on the question of Baxter's "stonewalling," the District Court found; rather, "[t]he record makes clear that [Baxter] made no attempt to provide the FCC with any detail" about the requested information, in violation of 47 U.S.C. § 308. *Id.* The District Court determined that \$3,000 was a reasonable forfeiture for the violation. *Id.* at 27.

## **2. Baxter's Interference**

With respect to interference, the District Court noted the government's evidence that FCC monitoring personnel observed interference on the three dates charged (Dist. Ct. Op. at 28-

29). That evidence was not contradicted, *id.* at 30, and indeed was supported by Baxter's admissions that his transmissions could cause "incidental interference to ongoing communications." *Id.* at 29-30. Indeed, Baxter admitted that until 2009 he transmitted at set times and frequencies whether or not other amateur operators were using those frequencies at the same time. *Id.* The interference was "willful and malicious," the District Court held, in light of the multiple warnings issued to him by the FCC. *Id.* at 31.

The District Court rejected Baxter's legal defense that he was entitled to interfere with other users' communications because his transmissions constituted published and scheduled "information bulletins" allowed under FCC regulations. *Id.* at 30. "Contrary to Mr. Baxter's contentions," the District Court held, "FCC regulations do not carve out an exception for amateur operators who publish their intent to transmit in advance." *Id.* at 30-31. "Club stations" may transmit information bulletins, but "Mr. Baxter's transmissions were not club station transmissions." *Id.* at 31. Moreover, the District Court held, the Commission's rule is clear that no amateur operator may interfere with a radio communication. *Id.* The District Court also determined that \$7,000 was a reasonable forfeiture for the violation. *Id.* at 33.

### **3. Baxter's Pecuniary Transmissions**

The District Court denied summary judgment on the charge that Baxter had engaged in pecuniary transmissions by advertising his website, which contained various commercial inducements. *Id.* at 36. The District Court held that the government had failed to produce evidence, such as a screenshot, from which the District Court could make an independent determination that Baxter's website was selling products. *Id.* at 37-38. Thus, the District Court determined, "there remains a genuine issue of material fact as to whether Mr. Baxter had a pecuniary interest in transmitting communications that directed listeners" to his website. *Id.* at 38.

### **Voluntary Dismissal of the Disputed Matters**

On January 19, 2012, the United States requested that the Court enter final Judgment in favor of the United States for \$10,000 with respect to the two claims resolved on summary judgment (Docket #40). As for the remaining disputed claims, the United States requested that they be voluntarily dismissed, with prejudice, and without costs or fees to any party, in order to avoid the need for further litigation on matters for which the time and expense exceeded the potential added recovery. *Id.* The District Court granted the motion (Docket #46) and entered Judgment in favor of the United States for \$10,000 (Docket #47). Baxter now appeals.

### SUMMARY OF THE ARGUMENTS

The District Court's judgment is so clearly correct that this Court should summarily affirm pursuant to Local Rule 27.0(c) ("At any time. . .the court may. . .enforce the judgment or order below. . .if it shall clearly appear that no substantial question is presented"). Based on the undisputed record, and the absence of legal error, this Court should affirm the District Court's decision to enter judgment in favor the United States, for \$10,000, regarding Baxter's two FCC violations.

First, with respect to Baxter's violation of Section 308(b) of the Communications Act, the undisputed evidence showed that the FCC asked Baxter multiple times to provide information regarding his method of station control and that Baxter failed entirely to provide that information. That failure was a direct violation of Section 308(b), which requires radio licensees to furnish information requested by the FCC. Baxter does not dispute the facts. Instead, he claims a Fifth Amendment privilege to withhold the requested information. Baxter failed to raise that argument before the District Court, and it is now waived. It is wrong in any event because this case involves a civil forfeiture proceeding against an FCC licensee who holds a government privilege that comes with the regulatory

responsibility to provide relevant information upon request. The District Court properly entered summary judgment for the government.

Second, with respect to Baxter's interference with the transmissions of other amateur radio operators, the undisputed evidence demonstrated that Baxter began operating his station while other users were on the air, thus interfering with the ongoing communications. Baxter submitted no evidence to dispute the declarations of FCC employees who witnessed the interference; to the contrary, he directly admitted that he caused interference. On that record, the District Court properly granted summary judgment to the government.

There is no merit to Baxter's claim that he was entitled to interfere by virtue of FCC regulations that authorize club stations to pay compensation to a station operator when the club station transmits "information bulletins" on a pre-scheduled basis. Those regulations have nothing to do with interference, which is specifically barred by FCC Rule 97.101(d), which provides that "no amateur operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal." Accordingly, on that issue as well, the District Court correctly entered summary judgment in favor of the government.

## ARGUMENT

This Court should affirm the District Court's decision to enter Judgment in favor the United States, for \$10,000, regarding Baxter's two FCC violations. The first violation was Baxter's undisputed failure, contrary to FCC regulations, to provide the agency with requested information. As the District Court succinctly put it, Baxter simply "stiff-armed" the agency. On appeal, Baxter argues that he had a Fifth Amendment right not to respond to the FCC's inquiries, but that argument is meritless for an FCC licensee like Baxter, and it was not raised in the District Court in any event. The second violation was Baxter's conceded interference with the transmissions of other amateur radio operators. On appeal, Baxter contends that he was entitled to interfere, but Baxter's conduct was specifically prohibited by FCC regulations. Accordingly, the District Court correctly entered summary judgment in favor of the government.

**I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION REGARDING BAXTER'S UNDISPUTED FAILURE TO PROVIDE INFORMATION THE FCC REQUESTED**

**A. Standard of Review**

This Court reviews a District Court's grant of summary judgment *de novo*, "construing the record in the light most favorable to the non-movant and resolving all reasonable inferences in that party's favor." *Prescott v. Higgins*, 538 F.3d 32, 39 (1st Cir. 2008). Nonetheless, the Court "may

ignore conclusory allegations, improbable inferences, and unsupported speculation." *Id.* (internal quotation marks and citations omitted). Summary judgment is appropriate where the record reveals "no genuine issue as to any material fact" and "the movant [in the District Court] is entitled to judgment as a matter of law." *Vineberg v. Bissonnette*, 548 F.3d 50, 55 (1<sup>st</sup> Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). Reversal of the District Court's grant of summary judgment is warranted only if "the evidence on record is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *Prescott*, 538 F.3d at 39 (quoting *Maymí v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1<sup>st</sup> Cir. 2008)).

#### **B. Statutory and Regulatory Overview**

Congress enacted the Communications Act ("the Act"), 47 U.S.C. § 151, et seq., in order to "maintain the control of the United States over all the channels of radio transmission," 47 U.S.C. § 301. To carry out that function, Congress created the FCC, 47 U.S.C. § 151, and empowered the agency to grant licenses for use of the electromagnetic spectrum, 47 U.S.C. § 307(a). Congress specified that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with [the Act] and with a license" granted by the FCC. 47 U.S.C. § 301. To protect the integrity of radio communications, Congress also

declared that "[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act." 47 U.S.C. § 333.

Congress granted the FCC substantial regulatory authority to fulfill its mission. Among other things, the Commission may assign frequency bands to different services, prescribe the nature of the service to be rendered by various classes of stations, regulate the equipment used for radio transmissions, establish the geographic area and times during which stations may operate, prescribe qualifications for licensees, suspend the license of any operator who is found to have violated the Communications Act or any FCC regulation or who has interfered with another station's signals, inspect any radio installation, and enact any rules and regulations necessary to carry out the provisions of the Act. 47 U.S.C. § 303(a)-(r). To obtain information necessary to carry out its functions, the Commission may "require from a[] . . . licensee . . . written statements of fact to enable it to determine whether . . . such license [should be] revoked." 47 U.S.C. § 308(b).

Pursuant to its statutory authority, the Commission has established the Amateur Radio Service, known colloquially as "ham radio." See 47 C.F.R. Part 97. The Commission's Part 97

rules set forth in detail the technical and legal parameters of amateur service. Four of those rules are pertinent:

- Rule 97.101(d) forbids an amateur licensee to "willfully or maliciously interfere with or cause interference to any radio communication or signal," 47 C.F.R. § 97.101(d);
- Rule 97.113(a)(3) prohibits "[c]ommunications in which the station licensee ... has a pecuniary interest," 47 C.F.R. § 97.113(a)(3);
- Rule 97.113(b) prohibits (with certain exceptions) "broadcasting" and "one-way communications" (i.e., radio transmissions that are not part of a mutual exchange of messages with other amateur operators), 47 C.F.R. § 97.113(b);
- Rule 97.105(a) requires that a licensee "must ensure the immediate proper operation of the station," 47 C.F.R. § 97.105(a).

Congress has provided for the enforcement of the FCC's rules and the Communications Act in forfeiture proceedings. Specifically, Congress directed that "[a]ny person who is determined by the Commission ... to have willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission; [or] willfully or

repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act ... shall be liable to the United States for a forfeiture penalty." 47 U.S.C. § 503(b)(1).

**C. Baxter's Undisputed Failure to Provide Information**

The District Court correctly determined that Baxter violated 47 U.S.C. § 308(b) by failing to provide information requested by the FCC. The undisputed evidence showed that on September 15, 2004, Commission personnel asked Baxter to provide the agency with specific information regarding "what method of station control you have implemented for your amateur radio transmissions" (Docket #24-5). Baxter did not provide the requested information; instead he "stonewall[ed] the FCC" (Dist. Ct. Op. at 25), by stating only that "[n]o corrective actions are necessary at K1MAN" and that "[n]o changes are needed with regard to station control" (Docket #24-6). Upon being given a second chance to provide the requested information (Docket #24-10), Baxter again "simply stiff-armed the FCC" by repeating his initial answer (Dist. Ct. Op. at 25). "The record makes clear that [Baxter] made no attempt to provide the FCC with any detail." *Id.* Accordingly, the District Court correctly concluded that Baxter failed to comply with the FCC's request for information, and that Baxter's failure was willful due to the FCC's repeated requests for the information.

On appeal, Baxter does not challenge the District Court's conclusion that the undisputed evidence showed that Baxter failed to respond adequately to FCC inquiries in violation of Section 308(b). Baxter claims instead that he failed to respond to the FCC's inquiries because his answers "could and would be used as evidence in possible federal criminal charges" against him (Baxter Brief at 6 ¶15), and thus he claims to have had a Fifth Amendment privilege not to respond. Baxter raised no such claim either before the FCC or before the District Court, and he may not do so now.<sup>3</sup> "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1<sup>st</sup> Cir. 1991); accord *Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 12 (1<sup>st</sup> Cir. 2007).

The argument is wrong in any event. "The Fifth Amendment is not an impediment to the enforcement of a valid civil regulatory regime." *Rajah v. Mukasey*, 544 F.3d 427, 442 (2<sup>nd</sup> Cir. 2008). Baxter accepted the benefits of a government-issued radio license and thus must comply with the conditions placed on

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<sup>3</sup>Before the District Court, Baxter claimed that it was "impossible" for him to answer the FCC's inquiries about his methods of station control because there are "numerous ways of controlling an amateur station" (Dist. Ct. Op. at 25). Baxter does not pursue that claim in this Court.

that license - one of which is to provide information reasonably requested for valid regulatory purposes. "[S]tatements required as a condition of receiving a government benefit are not protected by the Fifth Amendment because they are not compelled," but are merely "a condition on the continued receipt of the government benefit." *Id.* at 442-443. That is particularly the case in the context of an investigation conducted by an administrative agency pursuant to its civil enforcement jurisdiction. *Id.*

There is no dispute as to the evidence supporting the District Court's finding that Baxter failed to provide information requested by the FCC, and the law is clear. Accordingly, the Court should affirm the District Court's grant of summary judgment on that claim.

**II. THIS COURT SHOULD ALSO AFFIRM THE DISTRICT COURT'S DECISION TO GRANT SUMMARY JUDGMENT TO THE GOVERNMENT REGARDING BAXTER'S CONCEDED INTERFERENCE WITH OTHER AMATEUR RADIO COMMUNICATIONS.**

The evidence before the District Court demonstrated conclusively that FCC personnel monitoring Baxter's station on three occasions observed transmissions from his station that interfered with ongoing communications by other radio operators (Larrabee Declaration ¶17; Docket #24-22); *id.* ¶10; (King Declaration ¶9; Docket #24-21). Baxter did not dispute that evidence; to the contrary, in his discovery responses, Baxter

admitted to interference (See Dist. Ct. Op. 29-30) (Baxter admitted in discovery that there is "interference to ongoing communications"). Baxter's legal argument to the District Court rested on the premise that he was entitled to transmit without regard to whether another station was using the same spectrum at the time (Dist. Ct. Op. 30) ("if - as Mr. Baxter argues - his transmissions were perfectly legal, it follows that he must have been transmitting" on the dates in question without regard to whether others were using the airwaves at the time).

On appeal, Baxter again fails to dispute the evidence of his interference. In light of "at least four notifications from the FCC alerting him that his method of broadcasting was causing interference" (Dist. Ct. Op. at 31), the District Court correctly held that Baxter's interference was "willful" and "malicious." On that record, the District Court correctly concluded that Baxter caused interference, in violation of 47 C.F.R. § 97.101(d).

Instead of challenging the District Court's factual findings, Baxter claims that he was entitled to interfere with other transmitters under the FCC's regulations. The claim is that 47 C.F.R. § 97.111(b)(6) authorizes the transmission of "information bulletins" without regard to whether another operator is on the air as long as the interfering transmission

is made according to a schedule that is published more than 30 days in advance pursuant to 47 C.F.R. § 97.113(d).

That contention fails. The Amateur Radio rules prohibit "one-way" transmissions - i.e., transmissions that are not part of an exchange between two amateur operators - "except as specifically provided" in another rule. 47 C.F.R. § 97.113(b). Section 97.111(b)(6), one of the two rules relied on by Baxter, authorizes the transmission of one-way "information bulletins" as an exception to the general rule.<sup>4</sup> Section 97.113(d), the other provision relied on by Baxter, provides as follows:

The control operator of a club station may accept compensation for the periods of time when the station is transmitting telegraphy practice or information bulletins, provided that the station transmits such telegraphy practice and bulletins for at least 40 hours per week; schedules operations on at least six amateur service MF and HF bands<sup>5</sup> using reasonable measures to maximize coverage; where the schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmission; and where the control operator does not accept any direct or indirect compensation for any other service as a control operator.

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<sup>4</sup> "Information bulletin" is defined in 47 C.F.R. § 97.3(a)(26) to mean a message "directed only to amateur operators consisting solely of subject matter of direct interest to the amateur service."

<sup>5</sup> "MF" and "HF" refer to frequency ranges defined in 47 C.F.R. § 97.3(b)(2) & (5).

47 C.F.R. § 97.113(d) (2007) (that provision is currently codified at 47 C.F.R. § 113(a)(3)(iv), but for ease of reference the original codification is cited).

Based on the plain language, neither of the sections relied on by Baxter authorizes (or has anything at all to do with) intentional interference. Section 97.111(b)(6) authorizes the transmission of information bulletins as a permissible one-way communication. Section 97.113(d) lists the circumstance under which when a station operator may accept compensation (Cross Declaration ¶5; Docket # 32-1).<sup>6</sup> Neither rule concerns or even mentions interference, which is barred entirely by Rule 97.101(d) ("no amateur operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal"). 47 C.F.R. § 97.101(d) (emphasis added). Furthermore, the evidence below showed that the FCC warned Baxter in both 2002 and 2004 that publishing a schedule does not give an amateur operator the right to interfere (Cross Declaration ¶¶5-6; Docket #32-1). The District Court thus correctly concluded that Baxter is "simply incorrect" that the FCC rules "carve out an exception [to the prohibition on

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<sup>6</sup> As the District Court pointed out, Rule 97.113(d) applies only to club stations, a category that does not apply to Baxter (Dist. Ct. Op. at 31).

interference] for amateur operators who publish their intent to transmit in advance" (Dist. Ct. Op. 30-31).

Baxter nevertheless contends that, pursuant to those rules, the American Radio Relay League (ARRL) has routinely caused interference by transmitting information bulletins pursuant to a published schedule (Baxter Br. 2-3). That contention, however, is not supported by the record. The only record evidence pertaining to interference caused by ARRL (Cross Declaration ¶3; Docket #32-1), demonstrates that "no interference complaint ... has been filed against" ARRL and that "ARRL has never been cited by the FCC for causing interference." *Id.* Defendant's apparent contention to the contrary is nothing more than "conclusory allegations" and "unsupported speculation" that "the Court may ignore." *Prescott*, 538 F.3d at 39.<sup>7</sup> There is thus no merit to Baxter's claim that the FCC has discriminated against him by allowing ARRL to cause interference while penalizing him for doing so (Baxter Br. 4).

Finally, Baxter contends that the District Court's grant of summary judgment contravenes the Seventh Amendment right to a

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<sup>7</sup> Baxter also appears to claim that a 1989 letter from a member of the FCC's staff authorized interference (Baxter Br. 2). He is wrong. As the Cross Declaration explains, the staff letter did not address interference "and could not pre-approve or determine the nature of future ... transmissions" made by Baxter (Docket 32-1 ¶4).

trial by jury (Baxter Br. 6). Baxter waived that claim by failing to raise it before the District Court, but it is wrong in any event, having been firmly rejected by this Court. *Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 10 (1<sup>st</sup> Cir. 2010) (citing favorably a decision describing the claim as "frivolous").<sup>8</sup>

### CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the District Court.

Dated: May 21, 2012

Respectfully submitted,  
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<sup>8</sup> Baxter also complains that the FCC's staff suggested that a pending license renewal application that Baxter filed with the agency might not be processed unless Baxter paid the amount due under the forfeiture order (Baxter Br. 6-7). That issue has nothing to do with the question of whether the District Court properly granted summary judgment. In any event, the Government has been informed by the FCC that it will not dismiss Baxter's license renewal application pending the outcome of this proceeding, so the matter is moot.

**United States Court of Appeals**  
FOR THE FIRST CIRCUIT

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No. 12-1196

UNITED STATES OF AMERICA

v.

GLENN A. BAXTER

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