No. 17-5076

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FBME BANK LTD., *et al.*,
Plaintiffs-Appellants,

v.

STEVEN MNUCHIN,
in his official capacity as Secretary of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:15-cv-01270-CRC

REPLY IN SUPPORT OF EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS FOR STAY PENDING APPEAL

Peter S. Spivack
J. Evans Rice III
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

HOGAN LOVELLS US LLP

Derek L. Shaffer
William A. Burck
Jonathan G. Cooper
777 Sixth St NW, 11th Floor
Washington, DC 20001
(202) 538-8000

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Counsel for Plaintiffs-Appellants FBME Bank Ltd. and FBME Ltd.

INTRODUCTION

FBME's instant submission is simply that this Court should continue a stay that has, without incident or objection, preserved the *status quo* for over 20 months. Doing so will enable this Court to adjudicate fundamental questions about FinCEN's exercise of novel, worrisome powers under § 311. Lifting the stay, by contrast, will enable FBME Bank to be wiped out—as so many foreign banks have been—before this Court completes its review and decides whether FinCEN's Rule is valid.

It is telling that the Government brushes aside the merits. The opposition brief ("**Opp.**") rests largely on scare tactics, saving the merits for last. Opp. 14–20. The Government's longstanding actions, however, speak louder than its freshly-minted words. FinCEN waited a year between proposing a rule and issuing it; took no appeal from the preliminary injunction in August 2015; and never protested the ensuing stays that extended well into this year. Opportunism best explains why the Government suddenly opposes the prospect of one additional stay enabling appellate review. Again, FBME is glad to brief the merits expeditiously. All we ask is that FBME be permitted to remain on life

support while quickly pursuing its merits arguments—arguments that point to the invalidity of the Rule in multiple, conspicuous respects, and at the very least pose serious questions deserving of this Court's considered judgment.

ARGUMENT

I. FBME Will Likely Prevail

A. Procedural Defects

First, the Government tacitly concedes that FinCEN lacked precedent to submit *unclassified* SARs *ex parte* while withholding them from FBME. The SARs were and remain "central" to FinCEN's determination. *FBME III*, 209 F. Supp. 3d 299, 333 (D.D.C. 2016); Opp. 1, 5, 13 (repeatedly alleging that FBME undertook hundreds of millions of dollars of suspicious transactions based on SARs, despite absence of adversarial testing). Notably, the Government does not deny that withholding critical unclassified information violates both the APA, *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008), and due process, *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 318–21 (D.C. Cir. 2014); *States Marine Lines, Inc. v. Federal Maritime Commission*, 376 F.2d 230, 232–33 (D.C. Cir. 1967).

As for this Court's prohibition on submitting unclassified information *ex parte* absent express statutory authorization, *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *affirmed by an equally divided Court*, 484 U.S. 1 (1987), the Government's only response is that the Bank Secrecy Act supplies requisite authorization. Opp. 17. But the Act authorizes *standard withholding*—insulating SARs against FOIA and similar requests. The Act contains nothing like § 311(f), which authorizes FinCEN to *submit* "***classified*** information" to "the reviewing court ex parte and in camera." 31 U.S.C. § 5318A(f) (emphasis added). By submitting ***un***classified information *ex parte*, FinCEN transgressed both *Abourezk* and Congress's express prescription in § 311(f) that *classified* materials alone may be submitted *ex parte* in § 311 proceedings.

Second, the Government contends that other notice defects—its withholding of allegations that FBME associated with Hezbollah in 2015 and obscured information in late 2014—were harmless. Opp. 16. As FBME explained, however, such explosive allegations *must always* be disclosed under this Court's decisions, especially given how pivotal they are. Motion 16–17. Comparing what are now top-billed

allegations against FinCEN's 2015 notice of its current rule, ADD00172–75, reveals that FinCEN in 2015 withheld notice that *any* particular development or allegation outside the 2014 notices was under consideration and should be the focus of responsive comment by FBME.

Third, the Government insists that reliance on secret evidence "does not make FinCEN a biased or unfair decisionmaker" for purposes of due process. Opp. 17. But the Supreme Court flagged in *Withrow v. Larkin*, 421 U.S. 35, 58 (1975), and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 618 (1993), that a due-process problem arises when, as here, an agency bases its decision on evidence neither subjected to adversarial testing nor reviewed *de novo* by any neutral arbiter. The problem looms especially large in the egregious circumstances of this case, including the taint resulting from FinCEN's review of FBME's privileged materials. Motion 22–23.

Fourth, the Government passingly suggests due process should not attach because FBME is foreign. Opp. 12 n.4, 15, 17. In fact, FBME holds liens on lots encompassing 600 acres in North Carolina, which periodically generate cash; with FinCEN's § 311 action blocking

any transfer, over $290,000 in FBME's funds have been left sitting in a lawyer's IOLTA account in North Carolina. ADD00202 ¶ 38; ADD00292–94 ¶¶ 24–37. Under the sweeping terms of FinCEN's Rule (detailed below at pages 11–12), FBME will be cut off from these funds. FBME has a Fifth Amendment "property interest" in its IOLTA funds because North Carolina law so provides. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164–72 (1998); North Carolina Rule of Professional Conduct 1.15 (IOLTA funds are "client property"); *see also National Council of Resistance of Iran v. U.S. Department of State*, 251 F.3d 192, 201 (D.C. Cir. 2001) ("small bank account" triggers due process). Notably, because this case was decided on summary judgment, FBME is entitled to all reasonable inferences on any due-process question. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014). Moreover, a "close question" about due process suffices to warrant a stay. *See Gordon v. Holder*, 721 F.3d 638, 644–45 (D.C. Cir. 2013).

Fifth, the Government claims that it satisfied its § 311 consultation obligations despite failing to consult the actual officers specified by statute because the statute "does not prohibit" consulting with their "representatives." Opp. 19. Such reasoning could obtain only

if the Government identified lawful delegations of the consultation responsibility from the named officers to the consulted representatives. *Cf.* 71 Fed. Reg. 38202, 38203 § 2(a)(6) (July 5, 2006) (delegation by Secretary of State of consultation duty). Because the Government identifies no such delegation, it failed to comply with the express terms of § 311, requiring consultation with the "Secretary of State," the "Attorney General," and the "Chairman of the Board of Governors of the Federal Reserve System"—*not* their unauthorized representatives. 31 U.S.C. § 5318A(c)(1), (a)(4)(A), (b)(5). Furthermore, *even as to those unauthorized representatives*, the Government's claim to consultation derives *solely* from a suspect, untested, *post hoc* declaration, which is insufficient to ground summary judgment. *See Hess v. Schlesinger*, 486 F.2d 1311, 1313 (D.C. Cir. 1973).

B. Substantive Defects

First, the Government contends FinCEN could conclude that FBME had a high volume of SARs activity without benefit of any benchmark or point of comparison for assessing SARs volume. Opp. 18. Here, arbitrariness and caprice are palpable; there no way to say whether or not an absolute figure is "high," taken in a vacuum.

Motion 24. What is more, FinCEN seemingly recognized in its supplement that FBME's SARs rate comes out *low* as "compared to other Cypriot financial institutions." ADD00193.

Without citing any authority supporting FinCEN's "we know a high SARs rate when we see it" *ipse dixit*, the Government simply posits that FBME's SARs rate is "under-inclusive" because FBME's alleged obscuring of information in 2014 "*may* have undermined the ability of U.S. financial institutions to detect all of FBME's suspicious activity." ADD00192–93 (emphasis added); Opp. 18–19. Not only is the Government relying on an after-the-fact allegation that FBME had zero opportunity to contest, but it is resorting to fanciful reasoning—there is no explanation *how*, even in theory, FBME could have constrained SARs reports by *other* banks. In any event, the agency must rely on record evidence, not conjecture. *See Delaware Department of Natural Resources & Environmental Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015). And FinCEN's *post hoc* conjecture cannot possibly justify skewed, ungrounded analysis of the actual SARs data FinCEN invoked to sanction FBME.

Last, the Government warns that providing a benchmark would enable evasion of money laundering controls. Opp. 18. Such reasoning is perverse and would justify *any* regulator withholding notice of *any* threshold. It should be a *feature*, not a *bug*, if announcing a baseline *reduces* suspicious transactions below whatever baseline FinCEN deems appropriate. Furthermore, as FBME has noted without contradiction (ECF 89-1 at 7; ECF 96 at 4), banks never know their SARs rates, must focus on day-to-day compliance efforts, and would not have bright-line protection merely because they fall below a benchmark.

Second, the Government confirms that FinCEN failed to consider the extent to which FBME is "used for legitimate business purposes," as required by 31 U.S.C. § 5318A(c)(2)(B)(ii). The Government's brief fixates exclusively on supposedly *illegitimate* uses of FBME—the subject of a *different* statutory factor, *see* § 5318A(c)(2)(B)(i)—without citing anything illuminating the extent of FBME's *legitimate* business. Opp. 19. Failing to consider a statutory factors is arbitrary and capricious. *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209, 1216–17 (D.C. Cir. 2004). Failing to balance regulatory *costs* (from eradicating legitimate business) against

perceived benefits is likewise arbitrary and capricious. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

II. FBME Faces Irreparable Injury

The Government scarcely denies that FBME faces irreparable harm, offering no competing evidence. Instead, the Government urges this Court to ignore the ways that effectiveness of the Rule will, in practice, doom FBME abroad. By the Government's account, irreparable harm does not matter unless it flows *de jure* from agency action, rather than *de facto*. Opp. 9–11. But this Court recognizes that injury caused by third parties is attributable to agency action when that agency action is "at least a substantial factor motivating the third parties' actions." *Tozzi v. U.S. Department of Health & Human Services*, 271 F.3d 301, 308 (D.C. Cir. 2001); *see also Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

Here, there is uncontested proof that implementing the Rule will be a "substantial factor motivating the third parties' actions" against FBME, both for foreign regulators and correspondent banks. As to regulators, Mr. Ayoub-Farid Saab attests that FBME previously persuaded the Bank of Tanzania not to liquidate FBME while

implementation was stayed and under challenge, but Bank of Tanzania representatives indicated they "would liquidate FBME if the Second Final Rule is finalized." ADD00200–01 (Saab Declaration ¶¶ 29–33). Nor is that consequence surprising: it is precisely what has befallen other foreign banks subjected to § 311. Motion 6–7 (collecting instances).[1]

As to correspondent banks, the Government's point is no more correct here than it was below. *FBME I*, 125 F. Supp. 3d 109, 127 (D.D.C. 2015) (rejecting Government's argument in granting preliminary injunction). The Government tries to distinguish foreign banks that maintain U.S.-dollar correspondent accounts—such as Commerzbank and Raiffeisen, ADD00296 (Reimer Declaration ¶ 2)—from U.S.-based banks that maintain such accounts, arguing only the former are legally bound. Opp. 10. Yet the Rule explicitly prohibits U.S. banks from transacting with *any* banks that maintain correspondent accounts "for, or on behalf of, FBME," and instructs U.S. banks to notify

[1] *Dellums v. U.S. Nuclear Regulatory Commission*, 863 F.2d 968, 976 (D.C. Cir. 1988), is inapt. There, a South African lacked standing to challenge agency action that blunted the effectiveness of the Anti-Apartheid Act because it was "unforeseeable" that the requested relief would end apartheid. *Id.* Here, a stay would, according to proof and experience, prevent FBME's liquidation.

their "foreign correspondent account holders" of this prohibition, the obvious consequence of which is that foreign banks will liquidate their correspondent accounts held for FBME. ADD00187.[2] The Government does not deny that the consequence will be precisely as FBME warns and as FinCEN intended: implementation of the Rule will cause FBME's remaining foreign correspondent banks to "cut off any persisting affiliation with FBME," render FBME's remaining account balances "effectively inaccessible," and leave FBME without a "reliable process . . . to make claims to those accounts." ADD00297 (Reimer Declaration ¶¶ 6–7).

Indeed, the Government surely anticipates that implementation of the Rule *will* impact FBME. That is why it now opposes a stay that dates back to August 2015. By no stretch of the imagination can the Government credibly argue *both* that the Rule will have no effect on FBME *and* that the Rule must be implemented immediately.

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[2] FinCEN earlier trumpeted how imposing the fifth special measure will "indirectly" cause the "international financial community" to act against FBME. FinCEN, Press Release, *FinCEN Severs Access to U.S. Financial System for FBME Bank Ltd.* (July 23, 2015), https://goo.gl/TnLUo2.

The existential threat FBME faces constitutes classic irreparable harm and compelling basis for a stay. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (possibility of "bankruptcy" constitutes irreparable harm warranting interim relief "for otherwise a favorable final judgment might well be useless"); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (similar); Motion 26 (collecting more cases).

III. Absence Of Harm To Others

The Government asserts that the remaining factors weigh against a stay, claiming an urgent "interest in preventing future abuses by formalizing FBME's exclusion from the U.S. financial system." Opp. 14. That submission is irreconcilable, however, with the Government's own conduct since 2014.

Rather than issue the Rule without notice and comment under 5 U.S.C. § 553(b)(3)(B), as agencies may do if necessary for security, *see Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), FinCEN noticed its proposed rule in July 2014, then waited a *full year* before issuing the First Final Rule in July 2015. ADD00163. After the district court preliminarily enjoined the Rule, FinCEN did not "appeal the injunction,

move for reconsideration, or continue to defend its rulemaking," but instead sought a voluntary remand while the injunction remained in force. *FBME II*, 142 F. Supp. 3d 70, 71 (D.D.C. 2015). After the district court stayed the Second Final Rule pending further deliberations, and then again pending another remand, FinCEN did not protest in the slightest. If implementing the Rule were so urgent, the Government would not have taken the winding, leisurely path it has over nearly three years. Certainly the Government can claim no serious injury now from pausing mere weeks or months so as to permit expedited review.

Finally, the Government identifies no evidence that FBME today—in its highly regulated, closely supervised, severely crippled state—poses any appreciable money-laundering risk. While urging this Court to afford "very little weight" to FBME's evidence on this point, Opp. 14, the Government's rationale once again rests on the cryptic allegation—FBME "took various measures to obscure information"—that the district court recognized FBME had neither notice of nor meaningful opportunity to contest. *FBME III*, 209 F. Supp. 3d at 318–19. In any event, any supposed "measures to obscure information" occurred in "late 2014," ADD00178, well before 2015 and 2016, when

many of the instant controls on FBME arose, *see* ADD00198–99 (Saab ¶¶ 17–20).[3]

[3] The Government selectively quotes *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978), as supposedly obviating the traditional stay test "in a case concerning foreign policy." Opp. 13. What *Adams* actually holds is that the traditional test may not apply when "requested immediate injunctive relief *deeply* intrudes into the *core concerns* of the executive branch." 570 F.2d at 954 (emphasis added). *Adams* involved a requested order *mandating* the Secretary of State to act. *Id.* at 952. This stay, in contrast, would merely preserve the longstanding *status quo* pending traditional judicial review, without deeply intruding on any core executive concern.

CONCLUSION

For the foregoing reasons, this Court should stay the Second Final Rule pending appeal.

Dated: April 24, 2017

Respectfully submitted,

HOGAN LOVELLS US LLP

Peter S. Spivack
J. Evans Rice III
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

QUINN EMANUEL URQUHART & SULLIVAN LLP

/s/ Derek L. Shaffer
Derek L. Shaffer
William A. Burck
Jonathan G. Cooper
777 Sixth Street NW, 11th Floor
Washington, DC 20001
(202) 538-8000

Attorneys for Plaintiffs FBME Bank Ltd. and FBME Ltd.

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 27(d)(1)(E), 27(d)(2)(C), and 32(g)(1), I certify that the foregoing motion is proportionately spaced using 14-point Century Schoolbook font and contains 2588 words, excluding the parts of the brief exempted from length limits by Rules 27(d)(2) and 32(f).

/s/ Derek L. Shaffer
Derek L. Shaffer

Counsel for Plaintiffs-Appellants
FBME Bank Ltd. and FBME Ltd.

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2017, I electronically filed the foregoing reply with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Derek L. Shaffer
Derek L. Shaffer

Counsel for Plaintiffs-Appellants
FBME Bank Ltd. and FBME Ltd.