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The Future of Free Speech in Argentina : Implications of the 2009 Media Law

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I. Introduction

Argentina's Law 26.522 did not make its way into the Civil Code quietly. For supporters, it marked a long-awaited victory for democracy; the government celebrated the legislation as a means of protecting a plurality of voices and Argentine culture. Opponents scoffed. They argued that President Kirchner was in fact using the legislation to target Argentina's largest media conglomerate and most vocal critic, Grupo Clarín. In the name of democracy, they warned, the government would once again silence dissidents by subjecting broadcast content to the unchecked power of public officials.

After it was passed, Law 26.522's content sparked controversy and public debate all the way to the nation's highest court, the Corte Suprema de Justicia de la Nación (Supreme Court). Law 26.522's most controversial provisions establish limits on how many licenses can be allocated to each media company and allow retroactive divestment of license ownership in excess of these limits. It also creates a regulatory board under executive control to oversee the implementation of these regulations.[1] The law underwent intense court battles and attracted international attention. After all, as the Supreme Court noted when it voted to uphold the Law in 2013, freedom of expression is—among the liberties enshrined in the Constitution—that which has the greatest potential, if not afforded due process and respect, to create a democracy in name only.[2] Ultimately, the court found the law to be constitutional on its face, but noted that its applications may leave media companies vulnerable to abuse of power.[3]

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[1] Mary Anastasia O'Grady, *Argentina's Kirchner Targets the Press*, Wall Street Journal, Oct. 25, 2009, http://www.wsj.com/articles/SB10001424052748703573604574493541233653908.
[2] *La Corte Suprema Declaró la Constitucionalidad de la Ley de Medios* [The Supreme Court Declares the Media Law Constitutional], Centro de Información Judicial, Oct. 29, 2013, http://www.cij.gov.ar/imprimir.html?nid=12394.
[3] *Id.*

The future of the law is still uncertain. When Mauricio Macri took office on December 10, 2015, he immediately enacted reforms to disassemble Law 26.522.[4] These became law on April 7, 2016. The question now arises whether the reforms are indeed more free-speech protective. To better understand the implications of the new regime, the *Citizens United v. FEC* decision in the U.S. Supreme Court provides context. Though the case involved campaign spending, it discussed at length the issues associated with media concentration in the hands of a few large parties. As Argentina starts to move toward a more *Citizens-United*-type market for media licenses, it raises serious concerns about whether President Macri is getting it right—especially given that *Citizens United* has come under fire in the United States for the same issues Law 26.522 purported to prevent: concentration of power in the hands of a few, undermining diversity of voices and undercutting democracy.

In the paragraphs that follow, I will describe the media landscape prior to 2009 and how Law 26.522 sought to change it. I will then explain how the 2013 Supreme Court decision may have been decided correctly under the facts presented. I argue as a normative matter, that the Law's passage enabled harmful practices and should be abrogated. Accordingly, President Macri's actions striking down Law 26.522 were necessary. However, moving toward a post-*Citizens United* regime is not the answer. Grupo Clarín's history of leveraging its monopoly to nurture its connection with the parties in power and maintain its dominance in the Argentine markets indeed poses a potential danger to Argentina's democracy. President Macri should draft an entirely new law that keeps a limit on market concentration but allows more free market exchange of licenses within those limits. The key is to eliminate the means by which the

[4] *Argentina's New President: A Fast Start*, The Economist, Jan. 2, 2016, http://www.economist.com/news/americas/21684823-mauricio-macris-early-decisions-are-bringing-benefits-and-making-waves-fast-start?fsrc=scn/fb/te/pe/ed/afaststart.

executive power can exercise discretion in awarding of licenses and thereby minimize the mechanisms that have allowed executive authority to coerce media companies into publishing content favorable to the state.

II. Media Law Landscape & Freedom of the Press in Argentina

Argentina's 1994 Constitution explicitly protects property and the freedom of speech. Both are foundational provisions for the protection of ownership of media licenses and free speech. Article 14 entitles all inhabitants of Argentina the right to "publish their ideas through the press without prior censorship."[5] Article 17 stipulates that property may not be seized "except by virtue of a sentence based on law" and that "expropriation for reasons of public interest must be authorized by law and previously compensated."[6]

Although freedom of speech is guaranteed and the government cannot expropriate property, the government has broad authority to regulate the media. This has been the norm since 1972, when the government first declared media law to be a "public interest" service in the National Telecommunications Law.[7] This classification carries legal significance under Argentine law. When a particular activity is designated a public interest service, the government has significantly greater latitude to act in that particular area. It can assert that the regulation is for the good of the collective whole, and the body enacting the regulations answers to the executive.[8]

A. Law 22.285

[5] Constitución de la Nación Argentina [Constitution] Nov. 1998, art. 14 (Arg.), https://www.constituteproject.org/constitution/Argentina_1994?lang=en.
[6] Constitución de la Nación Argentina [Constitution] Nov. 1998, art. 17 (Arg.), https://www.constituteproject.org/constitution/Argentina_1994?lang=en.
[7] Law 19.978; Alejandro María Massot, *Una Revista Crítica del Marco Regulatorio de la Radiofusión* [A Critical Review of Broadcast Media's Regulatory Framework] 2011 Revista de Derecho Administrativo [R.D.A.] 887 (2011)(Arg.), pp. 881-908.
[8] *Id*.

Before Law 26.522 was passed in 2009, the last major media legislation was promulgated in 1980 during Argentina's violently oppressive military dictatorship. The dictatorship, in the name of stability and patriotism, engaged in what is now known as the "Dirty War." From 1976-1983, the Dirty War resulted in the disappearance, torture, and murder of an estimated 30,000 suspected enemies of the government.[9] As the authoritarian regime began to decline, it resorted to media control as a means of maintaining its power. In 1980, it passed Law 22.285.[10] The law reaffirmed audiovisual media as a public interest activity. It restricted the number of licenses a private company could have in a given location to 24,[11] and provided that broadcasting regulations must serve the interest of national security.[12] Throughout the Dirty War, the regime used intimidation tactics, including threats and torture against the noncompliant, to secure ownership over licenses and thereby provided legal authority for control of the media. The law allowed the government and its allies to purchase large portions of Grupo Clarín under the guise of free market capitalism.[13] In reality, it was easier for the government to control public opinion when ownership was concentrated in the hands of its allies.[14]

It is important to note that although the replacement of Law 22.285 has symbolic value in that it formally severs a tie to the Dirty War, the government amended the law with more than

[9] *Argentina Convicts Former Military Officials for 'Dirty War' Crimes*, Amnesty International, Oct. 27, 2011, https://www.amnesty.org/en/latest/news/2011/10/argentina-convicts-former-military-officials-edirty-ware-crimes/.
[10] Law No. 22285, Sep. 19, 1980, B.O. 24506 (Arg.).
[11] See Massot, *supra* note 7.
[12] Christof Mauersberger, Whose Voice Gets On Air, Otto Suhr Institute of Political Science at the Free University of Berlin.
[13] See Massot, *supra* note 7.
[14] Jonathon Watts, *Argentina's President and Grupo Clarín go head-to-head over Media Law*, The Guardian, Oct. 20, 2009, http://www.theguardian.com/world/2013/aug/20/argentina-supreme-court-media-law.

400 regulations and revisions until it entirely replaced Law 22.285 the Audiovisual Media Law in 2009.[15]

B. The Feud Between Cristina Kirchner and Grupo Clarín

Cristina Fernandez de Kirchner, former president of Argentina, took office in December 2007. Her campaign largely focused on international relations and created the sense that she was disengaged from domestic issues. At the very least, she did not campaign on media law reform. That changed in 2008 when her critics' fears about her disconnect with the people materialized in a major conflict with the agricultural sector.[16] Grupo Clarín, which owned a significant majority of the media licenses at the time, criticized her administration's tax on oilseed exports and accused the government of violently suppressing protest against the policy.[17, 18] This conflict, though not the only one that flared up during the Kirchner administration, is widely credited with triggering Kirchner's push for media reform and ultimately the introduction of Law 26.522.

The conflict only intensified during the fight over the law's passage. Even supporters of the new legal regime disapproved of the government's tactics of "promulgating this law aggressively and, at times, insensitively."[19] The government unabashedly used the slogan "Clarín miente" (Clarín lies) in official advertising.[20] A more sinister attack targeted Ernestina Herrera

[15] Martín Becerra and Guillermo Mastrini, *The Audiovisual Law of Argentina and the Changing Media Landscape*, International Association for Media and Communications Research, 2 The Political Economy of Communication (2014), http://polecom.org/index.php/polecom/article/view/31/213.
[16] *Farming Conflict in Argentina: Cristina Kirchner Confronts the Goose that Lays Golden Eggs*, Knowledge at Wharton: University of Pennsylvania, Jun. 25, 2008, http://knowledge.wharton.upenn.edu/article/farming-conflict-in-argentina-cristina-kirchner-confronts-the-goose-that-lays-the-golden-eggs/.
[17] *Id.*
[18] Tihomir Gligorevic, Argentina: Audiovisual Ministers Ousted and Media Law Dismantled, InSerbia Network Foundation, Dec. 31, 2015, http://inserbia.info/today/2015/12/argentina-audiovisual-ministers-ousted-and-media-law-dismantled/.
[19] *Id.*
[20] *Freedom of the Press 2015: Argentina*, Freedom House (2015), https://freedomhouse.org/report/freedom-press/2015/argentina.

de Noble, a majority stakeholder in Grupo Clarín. In the wake of the media company's criticism of Law 26.522, Kirchner renewed earlier accusations that Herrera Noble's two adopted children and renewed earlier accusations that they were children of abducted dissidents.[21] During the dictatorship, children born to abducted mothers were illegally adopted to military families. After DNA tests and a legal battle that originally began in 2002 and was not fully resolved until January 4, 2016, Herrera Noble was ultimately cleared of illegal adoption charges.[22] These intimidation tactics raised legitimate questions about the real motivation behind the new law.

On December 7, 2012, yet another dispute made it to the courts. A federal court enjoined the enforcement of Law 26.522's divestment provision—which revoked already-awarded licenses from owners with licenses in excess of the legal limits—until a separate court could rule on its constitutionality.[23] Grupo Clarín regarded this as a major victory because the head of the regulatory body, Martín Sabbatella, had threatened to auction off portions of Clarín's assets that exceeded the legal limits if Grupo Clarín failed to produce plans to divest its license holdings by the December 7th deadline.[24] The injunction once again postponed the implementation of the new law.

Kirchner publicly expressed her frustration with the recalcitrance of Grupo Clarín and the courts and drew up plans for drastic judicial reform. Among the most controversial elements of the judicial reform bill she proposed were provisions to restrict the use of injunctions against the state and to require that 12 out of the 19 magistrates responsible for appointing judges must

[21] *Id.*
[22] Hernán Cappiello, La jueza Sandra Arroyo Salgado sobreseyó a Ernestina Herrera de Noble en la causa por apropiación de niños durante la dictadura [Judge Salgado clears Ernestina Herrera de Noble in a suit for illegal adoption of children during the dictatorship], La Nación, Jan. 4, 2016.
[23] Eliana Raszewski, *Clarín Wins Argentine Media Law Stay in Feud with Fernandez*, Bloomberg Technology, Dec. 7, 2012, http://www.bloomberg.com/news/articles/2012-12-07/clarin-wins-argentine-media-law-stay-in-feud-with-fernandez-1-.
[24] *Id.*

affiliate with a political party and be publicly elected. The plans for reform were decisively struck down in the Supreme Court.[25]

C. Law 26.522: Debate, Passage & Content

In the eyes of the Kirchner administration, Law 26.522 represented the nation's opportunity to "settl[e] an old debt with democracy."[26] The "old debt" refers to the 7 years of government-orchestrated intimidation and violent threats against journalism during the Dirty War. Indeed, just after the law was passed, new accusations surfaced regarding Grupo Clarín's suspected connection to the military dictatorship. Kirchner accused three major media conglomerates, including Grupo Clarín, of working with the military to "seize" Papel Prensa, the country's largest print news source.[27] The unofficial report on which Kirchner relied allegedly showed that these companies forced the owner of Papel Prensa, Grupo Graiver, to sell.[28]

On the other side, critics of the law pointed to this latest accusation as a mere repetition of the same authoritarian tactics of the 1970s and 1980s.[29] Isodoro Graiver, whose deceased brother used to be the majority shareholder of Papel Prensa, denied any existence of foulplay and emphasized that the assets were sold "without threats, extortion, and in freedom."[30]

The intense debate presented two starkly different versions of the complicated history behind Argentina's relationship with the media. Does the Law "settle an old debt" and advance

[25] H.C., *Argentina's Judicial Reforms: Foiled*, The Economist, Jan. 21, 2013, http://www.economist.com/node/21579955/print.
[26] Mayra Pertossi, *Argentine Senate Overwhelmingly Approves Media Law*, Associated Press, Oct. 10, 2009, http://www.huffingtonpost.com/huff-wires/20091010/lt-argentina-media-law/.
[27] Papel Prensa held 75 percent of the newsprint market in Argentina as of 2010. Eliana Raszewski, Fernandez Says 1976 Sale of Papel Prensa Was Illegal, Bloomberg News, Aug. 24, 2010, http://www.bloomberg.com/news/articles/2010-08-24/fernandez-says-1976-sale-of-papel-prensa-was-illegal-to-seek-court-ruling.
[28] *Id.*
[29] *Id.*
[30] *US Closely Following Argentine Debate on Freedom of the Press*, MercoPress, Aug. 26, 2010, http://en.mercopress.com/2010/08/26/us-closely-following-argentine-debate-on-freedom-of-the-press.

the principles of democracy and plurality of voices, as its advocates maintain? Or is Law 26.522 yet another instance of the government using the media to advance its "co-op or conquer" agenda?[31]

(1) Senate Easily Passes Law 26.522 Into Law

One year after her public clash with Grupo Clarín, Kirchner passed Law 26.522 easily through the Peronist-controlled Senate by a 44-24 vote.[32] With anticipated defeats for the Peronist party in Congress on the horizon, Kirchner knew she had to pass the law before losing her Congressional majority.[33] If she waited until December, when she was projected to lose that majority, then the legislature was still unlikely to reach the two-thirds majority required to overturn the law.[34]

(2) Content of the Law[35]

Law 26.522 did three major things. First, it limited the amount of television and radio licenses that one company can control. Second, it created a regulatory board under the executive branch, known as the Federal Authority on Service for Audiovisual Communications (Autoridad Federal de Servicios de Comunicaciones Audiovisuales - AFSCA). Finally, it divided the airwaves into thirds, so that private for-profit companies can only broadcast one third of content.

(a) Limiting Licenses

That Law 26.522 brought more licenses under the regulatory regime was clear. The law set national, federal, and local limits on the number of frequencies or channels a single company

[31] *See* Watts, *supra* note 14.
[32] Mayra Pertossi, *Argentine Senate Overwhelmingly Approves Media Law*, Associated Press, Oct. 10, 2009, http://www.huffingtonpost.com/huff-wires/20091010/lt-argentina-media-law/.
[33] Kimberly Bennett, *Argentina high court rules anti-monopoly broadcast law constitutional*, Jurist, Oct. 29, 2013, http://jurist.org/paperchase/2013/10/argentina-high-court-rules-anti-monopoly-broadcast-law-constitutional.php.
[34] *Id.*
[35] *Argentina: New Media Law*, Library of Congress: Global Legal Monitor, Nov. 23, 2009, http://www.loc.gov/law/foreign-news/article/argentina-new-media-law/.

can occupy. Under the previous law, companies could own 24 free-to-air licenses. Under the new law, they could own just 10 total free-to-air radio or television licenses and up to 24 cable television licenses.[36] At no point could a single company's license ownership exceed 35 percent of the licenses.[37]

Additionally, the law reduced the length of time a licensee can hold the license before it must apply for renewal. Under Law 22.285, owners held the licenses for 15 years, with the option of a 10-year renewal for a total of 25 years.[38] Law 26.522 reduced the duration of ownership to two 10-year periods.[39] After the license has been awarded, it is non-transferrable.[40] Any sale of the license or divestment under Article 161 placed the license back in AFSCA's hands, as this was the entity charged with awarding licenses as well as policing and divesting them.[41] In this way, the law significantly limited the property rights of media companies.

(b) AFSCA

Under the law, a new purportedly autonomous regulatory body called AFSCA replaced the Federal Commission, which was the previous regulatory body formally under executive control.[42] AFSCA consisted of seven members; the executive branch had the authority to appoint two, Congress to designate three, and the federal committee headed by governors to appoint

[36] See Bennett, *supra* note 33; *See also* Gligorevic, *supra* note 18; Article 45, Law No. 26522, Oct. 10, 2009, B.O. 31756 (Arg.).
[37] Article 45, Law No. 26522, Oct. 10, 2009, B.O. 31756 (Arg.).
[38] Article 89, Law No. 26522, Oct. 10, 2009, B.O. 31756 (Arg.)
[39] Article 40, Law No. 26522, Oct. 10, 2009, B.O. 31756 (Arg.)
[40] Article 41, Law No. 26522, Oct. 10, 2009, B.O. 31756 (Arg.)
[41] See Massot, *supra* note 7.
[42] Marcela Valente, *Argentina: Opposition, Media Giants to Fight New Law*, Inter-Press Service News Agency, Oct. 12, 2009, http://www.ipsnews.net/2009/10/argentina-opposition-media-giants-to-fight-new-law/.

two.[43] In cities with a population of more than 500,000, the executive branch had the authority to assign licenses.[44]

AFSCA administered all "audiovisual" regulations, a power with considerably broad scope. Previously, radio and television were regulated separately from satellite and cable television. This new regulatory body had control over all these mediums under the new label of "audiovisual."[45] The broad label leaves serious ambiguity about the limits of the law. For instance, analogous media services that fall within the statute's definition of "audiovisual", like the Internet or Facebook, might be subject to regulatory control.[46] Therefore, the law dragged a broader range of media outlets under AFSCA and the more restrictive regulatory regime, and it is unclear just how far the label "audiovisual" reaches.

(c) Enforcing Diversity

Finally, the law divided the broadcast airwaves into thirds, as if the airwaves are a zero-sum resource. It reserved one third of the broadcast airwaves for the private for-profit sector, one third for the government, and one third for non-profit organizations including universities and indigenous groups.[47] AFSCA was required to allocate licenses in a way that maintained these allocations, regardless of any new technology that may compromise the categories.[48] Critics of the law said that dividing the media licenses for radioelectric airwaves is an outdated framework for audiovisual technology—yet another way the bureaucratic legal regime imposed regulation for the sake of control.[49]

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[43] Graciela Rodriguez-Ferrand, *Argentina: New Media Law*, Library of Congress: Global Legal Monitor, Nov. 23, 2009, http://www.loc.gov/law/foreign-news/article/argentina-new-media-law/.
[44] *Id.*
[45] See Massot, *supra* note 7.
[46] *Id.*
[47] Article 89, Law No. 26522, Oct. 10, 2009, B.O. 31756 (Arg.)
[48] *Id.*
[49] See Massot, *supra* note 7.

These changes presented significant challenges to Grupo Clarín. As Argentina's largest media conglomerate, it owned approximately 60 percent of the cable market, 25 percent of the Internet market, three provincial channels, ten radio stations, six other papers, a news agency and printing works.[50] At one point, it held 73 percent of Argentina's radio, television, and cable licenses[51] at 158 total licenses, though some sources say that number is closer to 230.[52] Its most profitable branch, Cablevisión, represented 89 percent of Grupo Clarín's profits and brought Grupo Clarín's 158 licenses far beyond the legal limits on license ownership of 24 total licenses under Law 26.522.[53] Grupo Clarín's assets, and thereby its parent group, therefore faced serious damage under this new legal regime.[54]

III. The Constitutionality of the Media Law

Grupo Clarín challenged Law 26.522 under Articles 14 & 17 of the National Constitution. It contended that Articles 41, 45, 48, and 161 of the law, which allowed the state to seize Grupo Clarín's licenses, were unconstitutional for two reasons. First, they violated Article 17 of the Constitution, which stipulates, "Expropriation for reasons of public utility must be authorized by law and previously indemnified."[55] Grupo Clarín argued that the limits on their license ownership impose significant burdens to Clarín's economic sustainability. Additionally, the seizures amounted to a threat to their Article 14 freedom of speech, which Grupo Clarín

[50] *See* Watts, *supra* note 14.
[51] Eliana Raszewski, *Fernandez Says 1976 Sale of Papel Prensa Was Illegal*, Bloomberg News, Aug. 24, 2010, http://www.bloomberg.com/news/articles/2010-08-24/fernandez-says-1976-sale-of-papel-prensa-was-illegal-to-seek-court-ruling.
[52] See Gligorevic, *supra* note 18.
[53] *See* Watts, *supra* note 14.
[54] *Id.*
[55] Constitution, Nov. 1994, art. 14, 17 (Arg.), https://www.constituteproject.org/constitution/Argentina_1994?lang=en.

asserted was invaluable and therefore incapable of being sufficiently compensated under Article 17.[56]

Second, Grupo Clarín argued that these provisions violated the constitutional guarantee of freedom of speech provided in Article 14 because they allocated too much power to the government to restrict the speech of those who are critical of the government. Primarily, they gave the executive the power to regulate through AFSCA, which could declare certain media groups noncompliant, order divestment of the assets that violated the legal limits, and award these licenses to compliant parties.[57] Grupo Clarín asserted that such power left little choice for the media to publish critiques of the government if they wanted to hold onto their businesses.

Grupo Clarín requested that these provisions be declared inapplicable to the licenses and signals already in its possession at the time the Law passed in 2009. The courts initially ruled against Grupo Clarín.[58] After a partially successful appeal to the Federal Civil and Commercial Court of Appeals, Grupo Clarín brought the unconstitutionality writ to the Supreme Court.

On October 29, 2013, the Supreme Court ultimately held that the Law was constitutional.[59] It rejected Clarín's argument about the discriminatory nature of the limits to license ownership.[60] It held that there was no prima facie discrimination because the law set limits equally on all media companies,[61] and that Grupo Clarín failed to show that the decrease in profits it faced under the Law,[62] or the harm to its "economic sustainability", constituted

[56] *See* Centro de Información Judicial, *supra* note 2.
[57] *Id*.
[58] Dr. Catalina Botero, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 3 Inter-American Comm'n on Human Rights 30 (2013), http://www.oas.org/en/iachr/docs/annual/2013/informes/LE2013-eng.pdf.
[59] Corte Suprema de Justicia de la Nación (CSJN)(National Supreme Court of Justice), 29/10/2013, "Grupo Clarín y otros c. Poder Exeucitvo Nacional / acción meramente declarativo," La Ley (2013-G-451)(Arg.).
[60] *See* Centro de Información Judicial, *supra* note 2.
[61] *Id*.
[62] *See* Dr. Catalina Botero, *supra* note 58, at 30.

discrimination in the application of the law.[63] Rather, the court said that loss of profits is an "unavoidable result of all business restructuring processes aimed at avoiding or limiting situations of concentration."[64]

To address the Article 45 restrictions on licenses for broadcast services that are not part of the radioelectric spectrum, the court emphasized deference to the state on this matter of public interest services.[65] It is within the legislature's power to determine what is necessary to regulate in order to achieve the purpose of "plurality and diversity" in the mass media.[66]

The highly publicized decision included significant detail about the competing interests of large media companies and the values of "democratic debate." It predicated its holding on the idea that "democratic debate requires greater pluralism and the broadest opportunities for expression by the diverse representative sectors of society" and emphasized that the law protects the "true exchange of ideas" in order to prevent the "impoverishment of public debate."[67]

A. National & International Reactions to the October 29th Ruling

Disagreement about the law among three general camps had developed long before the Supreme Court's ruling, and the verdict only fanned the flames of the intense dispute. One group sided with Grupo Clarín and criticized the law as yet another example of the Kirchner administration's "co-opt or conquer" attitude toward the media.[68] News outlets like the Wall Street Journal, New York Times,[69] and the American Enterprise Institute, as well as the

[63] *See* Dr. Catalina Botero, *supra*, note 58, at 31 (quoting Corte Suprema de Justicia de la Nación (CSJN)(National Supreme Court of Justice), 29/10/2013, "Grupo Clarín y otros c. Poder Exeucitvo Nacional / acción meramente declarative," La Ley (2013-G-451)(Arg.)), http://www.oas.org/en/iachr/docs/annual/2013/informes/LE2013-eng.pdf.
[64] *Id.*
[65] *See* Massot, *supra* note 7, at 18.
[66] *See* CSJN, *supra* note 2, at 3-4.
[67] *See* Dr. Catalina Botero, *supra* note 58.
[68] *See* Watts, *supra* note 14.
[69] Simon Romero and Emily Schmall, *Battle Between Argentine Media Empire and President Heats Up Over a Law*, The New York Times, Nov. 30, 2012, http://www.nytimes.com/2012/12/01/world/americas/media-law-ratchets-up-battle-between-kirchner-and-clarin-in-argentina.html.

internationally-recognized Committee to Protect Journalists, labeled the ruling as a threat to freedom of speech[70] and the latest in the administration's " campaign to silence the independent media, attack individual journalists, and favor its supporters."[71] As discussed above, the fraught relationship between Grupo Clarín and the Kirchner administration called in to question the purported democratic motives of the law.

Those who agreed with the Supreme Court's ruling warned that western media was getting it all wrong. They contended that Grupo Clarín supporters misunderstood Argentina's delicate history of media collusion with military dictatorships, which includes Grupo Clarín's close relationship with the government during the Dirty War.[72,73] Support came from human rights groups like the UN Human Rights Council and the Mothers of the Plaza de Mayo, who celebrated the decision and protested against any attempts to disarm the law. The report of the UN Special Rapporteur for Freedom of Expression also praised the media law[74] and was cited in the Supreme Court of Justice's decision. Hailing the law as a step forward for democracy and plurality of voices, Martín Sabbatella, head of AFSCA, outspokenly applauded the law from the beginning.[75] One legislator said it was fair because it gave media companies an "adequate but not dominant" position.[76] In summary, Law 26.522's supporters thought that the regulations

[70] *See* O'Grady, *supra* note 1.
[71] Robert Noriega, *Kirchner Stifling News Media in Argentina*, American Enterprise Institute, Oct. 23, 2013, http://www.aei.org/publication/kirchner-stifling-news-media-in-argentina/.
[72] Ramiro S. Fúnez, *Western Coverage Distorts Argentina's Media Law*, North American Congress on Latin America, Jan. 28, 2014, https://nacla.org/blog/2014/1/28/western-coverage-victimizes-argentinas- media-monopoly.
[73] *See* Romero, *supra* note 69.
[74] Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Fourteenth Session of the Human Rights Council*,
UN General Assembly, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010)(by Frank La Rue),
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/14/23.
[75] Guido Nejamkis and Anthony Esposito, *Argentina's Supreme Court Upholds Controversial Media Law*, Reuters, Oct. 29, 2013, http://www.reuters.com/article/us-argentina-clarin-court-idUSBRE99S0U820131029.
[76] Petrossi, *supra* note 20.

were more free-speech protective because they still gave large media corporations sufficient voice while making way for smaller and more diverse media sources.

A closer look at the decision reveals a much more appealing third party argument. This group suggested that perhaps the courts were not in the best position to strike the proper balance between the competing interests of democratic protections and over-regulation. They worried that the Court's ruling blessed a law that was problematic not because of its contact, but because of the intimidation tactics and clear political motives behind it. Indeed, the court did find that the law was not itself unconstitutional and warned against the use of the law as a tool for imposing the government's will. It was careful not to comment on the politics or the policy decisions, affording deference to the law as the product of an area designated as in the public interest.

In other words, the third response admits that Grupo Clarín is far from a sympathetic victim, but is concerned that the purported goal of plurality of voices is a façade, and that in fact such a bald faced affront to a vocal critic of the government could silence opposition in the future. Even José Alberto Mujica, the notoriously left-wing president of Uruguay who also has a complicated past with media control, expressed concerns about how democratic the law could be if its implementation had been so politically charged.[77] Perhaps the Inter-American Press Association's preliminary findings summarized the argument best when it stated that while it supported the law's underlying goal of preventing "excessive concentrations of media in a few hands," this principle had been "betrayed" and the media law became an "instrument used by the government to do away with its new worst enemy – Grupo Clarín."[78] This third kind of response is the basis for the recommendations I will make later.

[77] *See* Watts, *supra* note 14.
[78] Inter-American Press Association, *IAPA Issues Its Preliminary Conclusions on State of Press in Argentina*, Dec. 7, 2012, http://en.sipiapa.org/notas/1124781-iapa-issues-its-preliminary-conclusions-on-state-of-press-in-argentina#.

B. The 2013 Ruling Directly Contrasted with the *Citizens United* Ruling in the U.S. Supreme Court.

The ruling in the famous Supreme Court case, *Citizens United v. FEC*,[79] directly contrasts with the outcome of the 2013 Argentine Supreme Court case. Though *Citizens United* dealt specifically with campaign finance, both decisions addressed a strikingly similar issue: whether restricting market concentration in the media by large, wealthy media corporations is a permissible means of protecting a diverse public sphere or is instead an unconstitutional means of silencing speech. I will reserve judgment on whether *Citizens United* has turned out to be more protective of free speech in practice and instead highlight the similarities in the debates surrounding the two cases.

Much like the highly publicized and controversial 2013 Argentine Supreme Court ruling, *Citizens United* incited split reactions on whether it was the right outcome for free speech. Opponents say *Citizens United* creates "million-dollar megaphones"[80] that drown out the voices of ordinary Americans. They worried that it created incentives for representatives to answer to big donors rather than their less wealthy constituents.[81] This "antidistortion" rationale was the foundation for the Court's holding in *Austin v. Michigan Chamber of Commerce*.[82] In that case, the Court held that political speech could be banned based on corporate identity because the government had an interest in restricting speech from corporations who had gained an "unfair advantage in the marketplace by using resources amassed in the economic market place."[83]

Citizens United overturned the *Austin* ruling, in part because it had "dangerous and

[79] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[80] Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. News, Jan. 21, 2015, http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics.
[81] *Id.*
[82] 494 U.S. 652 (1990).
[83] *Citizens United*, 558 U.S. at 350 (quoting *Austin*, 494 U.S. 652 (1990)).

unacceptable consequences"[84] for media companies. Specifically, *Austin* tried to restrict media companies' ability to spend money on political campaigns. The Court held that this provision would harm freedom of the press because the law could suppress commentary from media companies based on their corporate identity. The Court rejected the antidistortion rationale employed in *Austin* because the First Amendment protects speech from the media and individuals, and they use money from the economic marketplace to fund their speech just as corporations do. Therefore, there were no clear distinctions between individuals', corporations', and the media's speech that could justify more restrictions for one of these entities than the others. The First Amendment must protect speech from all of these sources equally.[85]

Likewise, the Court rejected the exception for media companies in the campaign finance law for two reasons. First, the line between media and non-media companies has become blurred with the advent of the Internet, which would make it difficult to determine when to apply the media corporation exception.[86] Second, the exception required the court to grant the institutional press "constitutional privilege beyond that of other speakers."[87] In other words, the same principles that underpinned the Argentine Supreme Court's 2013 opinion—that the government had a constitutional interest in prohibiting the concentration of large media companies—were expressly overruled in *Citizens United*.

IV. The Issue of Executive Aggrandizement

The public debate surrounding Law 26.522 focused on the tension between the goal of facilitating a plurality of voices in the public sphere and the danger that, in the name of this goal, the government would or suppress voices critical of it, and undermine the operation of the free

[84] *Id.*, at 351.
[85] *Id.*, at 351.
[86] *Id.* at 352.
[87] *Id.* (citing *Austin*, 494 U.S. at 691 (1990)(SCALIA, J., dissenting)).

market. These issues are significant, but distract from the root of the threat to freedom of the press posed by the law: executive aggrandizement. The provisions that give executive the most discretion and limited oversight open up the opportunity for abuse of that authority.

First, the push for an expansive media law emerged in the midst of a public dispute between the Kirchner administration and Grupo Clarín. The passage of the law sent a clear signal that, although the media could publish damaging information about the government, ultimately the executive had the power to punish those who did. Kirchner's sudden mission to pass a sweeping media law in the wake of an intense feud with Grupo Clarín made a clear statement that such power can and will be carried out.[88]

Second, the mechanisms that regulated media licenses presented problematic opportunities for the executive power to assert control. AFSCA, the principal regulatory body, had seven members. The executive could appoint two representatives, the Congressional majority had the authority to appoint one, the Congressional opposition could designate two, and a federal committee of governors could select the final two. For three years after the enactment of the new law, however, the government stalled the appointment of board members from the minority party.[89] Therefore, in its early stages of enforcement, the board was entirely partisan and subject to unchecked executive control. And, in the nation's largest markets, where populations exceeded 500,000 people, the executive had the authority to assign licenses.[90] The media companies reaching the largest audiences, then, were acutely aware that their ability to maintain their licenses was threatened if they did not fall in line federal policy. Finally, the board

[88] Eliana Raszewski, *Clarín Wins Argentine Media Law Stay in Feud with Fernandez*, Bloomberg Technology, Dec. 7, 2012, http://www.bloomberg.com/news/articles/2012-12-07/clarin-wins-argentine-media-law-stay-in-feud-with-fernandez-1-.
[89] *See* Becerra, *supra* note 15.
[90] Graciela Rodriguez-Ferrand, *Argentina: New Media Law*, Library of Congress: Global Legal Monitor, Nov. 23, 2009, http://www.loc.gov/law/foreign-news/article/argentina-new-media-law/.

provided no transparency. It published no technical plan on how many licenses were available and no information on which licensees were taken in each region.[91] The lack of oversight enabled the Kirchner regime to focus enforcement on its political enemy, Grupo Clarín, while abandoning the "major underpinnings" and principles promised in the law.[92]

Third, dividing the spectrum into thirds significantly impacted the government's ability to indirectly censor public media companies through the distribution of advertisements.[93] Publicly-owned media companies rely more heavily on advertisements for funding, and the government controlled the distribution of advertisements. Therefore they were under more pressure to fill their content with pro-government messages,[94] lest they should lose out on the advertisements they need to stay afloat. As a result, two thirds of the airwaves were reserved for companies under the thumb of the federal government.[95, 96]

V. The future of the Media Law

The United States has one of the most free-speech protective jurisdictions in the world, and it is governed by *Citizens United.* This fact may allow Macri to gain support for making reforms that start to pull the media law regime toward a *Citizens United*-style free speech regime. However, in Argentina, this will not work because the Argentine legal system has far too many mechanisms that facilitate direct control by the state. The lack of transparency and a regulatory

[91] *See* Becerra, *supra* note 15.
[92] *Id.*
[93] *Id.*
[94] C5N provides a notable example of the result of a government-controlled news outlet publishing blatantly pro-Kirchner content. On the night of the 2015 presidential election, the cable news station reported that the incumbent party candidate Daniel Scioli "won by a wide margin" and announced that "he is Argentina's new president." In reality, he had only bested opposition leader Mauricio Macri by 3 percent, forcing the election into a runoff, which Macri ultimately won. John Otis, *How Argentine broadcast law rewards friendly outlets and discriminates against critics*, Committee to Protect Journalists, Nov. 6, 2015, https://cpj.org/blog/2015/11/how-argentine-broadcast-law-rewards-friendly-outle.php.
[95] *Id.*
[96] *See* Becerra, *supra* note 15.

board that is composed of a majority of members directly answerable to the executive are two major characteristics of the media law landscape that make a *Citizens United*-style rule ill-suited for Argentina's legal framework.

A. President Mauricio Macri's Disassembling & Controversies[97]

After the Supreme Court ruled on the matter in 2013, the Law was still far from settled. Grupo Clarín filed for and won a series of injunctions to prevent the implementation of Article 161.[98, 99] In short, the stalling tactics that prevented the government from enforcing Law 26.522 before the Supreme Court ruling once again allowed Clarín to sue and appeal its way to safety under President Mauricio Macri. [100]

Grupo Clarín's strategy turned out to be sound because President Mauricio Macri had long been a vocal critic of the Media Law during his campaign. In his capacity as Mayor of the City of Buenos Aires, Mauricio Macri criticized Law 26.522 and maintained that it was unconstitutional—even after the Supreme Court's decision.[101] He said that the law was an attempt to bully news outlets into compliance and limit free press, which in turn harms the public because it restricts the public's access to the "best information."[102] He took immediate steps to dismantle it during the first few weeks of his regime. On December 29, 2015, less than one month after he took office as President of Argentina, Macri issued a Necessary & Urgency

[97] Buenos Aires Herald Staff, *Federal Judges Step in To block Macri's Media Law Decree*, *Buenos Aires Herald*, http://www.buenosairesherald.com/article/206551/federal-judges-step-in-to-block-macri%E2%80%99s-media-law-decree.
[98] *AFSCA Appeals Clarín Injunction*, Dec. 11, 2014, http://www.buenosairesherald.com/article/176983/afsca-appeals-clar%C3%ADn-injunction.
[99] Buenos Aires Herald Staff, *Media Law: Clarín Appeals Constitutionality Ruling*, Buenos Aires Herald, Dec. 17, 2012, http://www.buenosairesherald.com/article/119635/media-law-clar%C3%ADn-appeals-constitutionality-ruling.
[100] Buenos Aires Herald Staff, *Supreme Court endorses Injunction in Favor of Clarín*, Buenos Aires Herald, Nov. 12, 2015, http://www.buenosairesherald.com/article/202821/supreme-court-endorses-injunction-in-favour-of-clar%C3%ADn
[101] *Macri Praises Civil and Commercial Court over Media Law Ruling*, Buenos Aires Herald, Dec. 8, 2012, http://www.buenosairesherald.com/article/118859/macri-praises-civil-and-commercial-court-over-media-law-ruling.
[102] *La oposición criticó el avance del Gobierno contra el Grupo Clarín* [Opposition Critical of Government's Moves Against Grupo Clarín], vLex Global, http://ar.vlex.com/vid/avance-gobierno-grupo-clara-n-538406506.

Decree (DNU).[103] A DNU allows a president to issue an executive order when Congress is not in session if the matter is "necessary and urgent." The decree is presumptively permissible until Congress votes to enact it into law or strike it down.

The DNU was a serious blow to the both the Law and the 2013 Supreme Court decision upholding it. The decree removes the most potent prongs of the law by amending Articles 41 and 45, among others. Section 20 of the DNU invalidated the one-year deadline for divestment of licenses originally imposed by Article 161 of Law 26.522.[104] It provided alternatives for noncompliant license holders by allowing for an extension on these license ownerships for up to 10 additional years and some became eligible for automatic renewals.[105]

Additionally, the decree increased the amount of market share a given company can own from 10 licenses to 15 in national markets, and from 3 to 4 in local markets (municipalities). Previously, under Article 161, the AFSCA seized any licenses that exceeded the statutory limits on ownership. This board had the power to grant these licenses, rather than allowing private parties to buy and sell.[106] The DNU established a free market for sale of audiovisual media licenses.[107]

The DNU also combined the AFSCA and AFTIC (which regulates telecommunications) into one regulatory board, known as the National Communications Body (Ente Nacional de

[103] Decree No. 267, Jan. 4, 2016, B.O. 33288 (Arg.), http://www.infoleg.gob.ar/infolegInternet/verNorma.do;jsessionid=683B5C06790A444AD9CD622333CA4B7E?id=257461.
[104] See Massot, *supra* note 7.
[105] *Id*.
[106] *Id.*
[107] *Congreso argentino avala "ley monopólica de medios" de Macri* [Argentine Congress Approves Macri's Monopolistic Media Law], Comunicación para la Integración, Apr. 7, 2016, http://integracion-lac.info/es/node/36563.

Comunicaciones – ENACOM). ENACOM consists of seven members, four of whom are selected by the president and can be removed without cause.[108, 109]

The DNU faced several conflicting rulings in the courts, including preliminary injunctions and calls for President Macri to justify his use of the DNU to amend this law. According to Judge Garbarino, one of the judges in the Buenos Aires Civil and Commercial Court who granted one of the injunctions, the law did not have " 'any defects that require necessary and urgent amendment.'"[110] He also said he saw no reason these amendments "could not wait to reach the necessary majorities established by our Constitution."[111] Despite these arguments, the Senate ultimately approved the changes on April 7, 2016.[112]

B. The reforms exacerbate the executive aggrandizement issues that threaten the freedom of the press.

In a message to the public, President Macri's Chief of Staff Marcos Peña announced, "Today, the war of the State against journalism ends and a policy of public communication of the 21st century begins."[113] According to Peña, the DNU de-activates the entire Law 26.522. The only initiative the administration will preserve is aiding small-scale media operations like those of cooperatives and universities.[114]

This dismantling of Law 26.522 and the movement away from the *Grupo Clarín* decision, then, superficially signal a shift toward a more U.S.-style, free speech-protective

[108] *See* Federal Judges Step In, *supra* note 97.
[109] *La Cámara de Diputados aprueba el decreto de Macri que modifica la Ley de Medios* [The House of Representatives Approves Macri's Decree, Modifying the Media Law], Noticias de América Latina y El Caribe (NDAM), Apr. 7, 2016, http://www.nodal.am/2016/04/la-camara-de-diputados-aprueba-el-decreto-de-macri-que-modifica-la-ley-de-medios/.
[110] *See* Federal Judges Step In, *supra* note 97.
[111] *Id*.
[112] *See* NDAM, *supra* note 109.
[113] *See* Gligorevic, *supra* note 18.
[114] *Id*.

regime. However, it would be incorrect to assume that transplanting a *Citizens United* regime into the Argentine media law landscape —simply because it adopts a *Citizens United* rule and diverges from the criticized practices of the Kirchner era—will automatically protect free speech. A strong argument could be made, in fact, that given the structure of the administrative state in Argentina and the lingering anxiety of repeating the military dictatorship-style media control, a *Citizens-United* style media regulation regime is inappropriate for Argentina. Certainly, the new law only preserves and strengthens the mechanisms of executive aggrandizement. It does so in several ways.

First, Macri's use of a DNU, rather than the traditional legislative channels, exacerbates, rather than remedies, the empowering of the executive. It allowed him to side step the legislative process to unilaterally push his own agenda, subject only to ex-post approval by the Senate.

In addition, the DNU establishes ENACOM, which streamlines executive control over a much larger sector and allows at-will removal of appointees, of which the executive designates a majority. It does nothing to alleviate the issue of executive control over media companies that reach over 500,000 audience members.

The DNU does have some promise. It allows more free market exchange for media licenses and removes the executive's power to divide the airwaves into thirds, alleviating the issue of advertisements as a means of censorship.

Executive aggrandizement, however, still poses a significant threat to the freedom of the press in Argentina—and overall appears to be exacerbated by President Macri's reforms.

V. Conclusion

Law 26.522 presents the latest controversy in a long history of complicated relations between the government and the media in Argentina. The law's content and the Supreme Court

battle over its constitutionality highlight the inherent tension between the desire to guarantee to the press freedom to publish without fear of censorship, and the concern that large media companies can monopolize popular discourse.

However, what Law 26.522 suggests is that the real threat to freedom of speech is executive aggrandizement. In other words, laws that aim to ensure a diversity of voices do not threaten free speech per se. The threat arises when a law like Law 26.522 provides too much room for executive aggrandizement. Under that law, the executive's ability to use advertising to control public media companies, its resulting influence over two thirds of the airwaves, and its control over the regulatory body that granted and divested licenses all provided it ample opportunity for the executive to control media messages.

Although it may be attractive to propose that Argentina simply disassemble these measures and install a law that looks like a post-*Citizens United* regime, such a solution fails to reach the true source of the problem: executive aggrandizement. Indeed, with President Macri's DNU, the chokehold on Grupo Clarín is loosened, but the executive retains (in fact, augments) its opportunities to influence the media.

To address the problem properly, Argentina should pass an entirely new law. By making a clean break from both Law 26.522 and 22.285, Argentina can eliminate problematic connections to a past of government censorship and create a fresh start for free speech protections.

Limiting the ownership of media licenses will help sever ties from a harrowing past of media censorship, but a more independent regulatory board should enforce these restrictions.[115]

[115] This may be the one area where Argentina could borrow a page from the United States playbook. The Federal Election Commission consists of "six members appointed by the President and confirmed by the Senate. Each member serves a six-year term, and two seats are subject to appointment every two years. By law, no more than three Commissioners can be members of the same political party, and at least four votes are required for any official

Additionally, the law should eliminate the loopholes that allowed executive control to remain beneath the surface, i.e. advertising distribution control and executive authority in locales with larger populations. Further, media licenses should be exchanged in a more free market manner in which divestment does not mean the licenses fall back into the government's hands. The government can set restrictions on the overall market share, as human rights groups have agreed that Argentine media monopolies can have harmful effects on the "plurality of voices." The key is to implement them in a way that restricts opportunities for executive control.

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Commission action. This structure was created to encourage nonpartisan decisions. The Chairmanship of the Commission rotates among the members each year, with no member serving as Chairman more than once during his or her term." *About the FEC*, Federal Election Commission, 2016, http://www.fec.gov/about.shtml.

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