**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| Petition by Disney's ABC Asking the FCC to Declare | ) | |
| that The View Qualifies as a Bona Fide News Interview | ) | MB Docket No. 26-124 |
| Program and Thus is Exempt from the Statutory Equal | ) | |
| Opportunities Requirements | ) | |

# Comments of TechFreedom

June 22, 2026

## Summary

The Media Bureau has fundamentally reinterpreted Section 315(a). That provision is likely unconstitutional: it burdens the speech of those who conduct political interviews—and of candidates who simply will not be interviewed—in some media, but not others. If there was ever any constitutional justification for such differential treatment, it disappeared long ago. The law is also unconstitutionally vague in failing to define "bona fide news," inviting the kind of selective and arbitrary enforcement the Commission is now engaged in.

The Commission had, for decades, avoided this constitutional problem by offering a clarifying interpretation of Section 315(a). The Notice issued in January abruptly withdraws that guidance without explanation or even acknowledging that it is doing so. This violates the Administrative Procedure Act and the Constitution's guarantees of due process. This reinterpretation of Section 315(a) also violates the First Amendment in multiple ways: It imposes what amounts to a prior restraint on speech. Its vague standard will result in fewer, not more, interviews of political candidates—less speech, not more. Its selective application effectively favors conservative talk show radio over left-leaning television talk shows. And it is part of a larger effort to retaliate against ABC and other broadcasters for their speech.

Requiring *The View* to submit for the Commission's determination that it is not "fake news"—and then wait for some undefined period of time—is merely part of a larger effort by the Commission, and this administration, to chill political speech it does not like (interviews with Democrats) and advance political speech it does like. This objective is flagrantly unconstitutional, and accordingly the Commission should grant *The View*'s petition immediately and desist from further manipulation of the marketplace of ideas.

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## Comments of TechFreedom

Pursuant to the Public Notice released by the Commission on May 22, 2026,[1] TechFreedom submits the following comments. In January, the Media Bureau ("the Bureau") issued another Public Notice (the "Notice"),[2] which "encourages" television broadcasters, cable channels, and talk shows—but not radio broadcasters and talk shows—to do what it said, in 2003, that they need not do: "seek formal declaration from the Commission" about their journalistic bona fides before interviewing political candidates.[3] The Notice also signals that the Commission will no longer "defer substantially to the good faith news judgments of

[1] Federal Communications Commission, FCC's Media Bureau Seeks Comment on Petition by Disney's ABC Asking the FCC to Declare That The View Qualifies as a Bona Fide News Interview Program and Thus Is Exempt from the Statutory Equal Opportunities Requirements, DA 26-517 (May 22, 2026).

[2] Federal Communications Commission, FCC's Media Bureau Provides Guidance on Political Equal Opportunities Requirement for Broadcast Television Stations, DA 26-68 (Jan. 21, 2026).

[3] Request of Infinity Broadcasting Operations, Inc., 18 FCC Rcd 18603 (MB 2003) ("Howard Stern").

broadcast licensees,"[4] and will instead somehow, by some unspecified methodology, assess whether candidates are being interviewed because of their newsworthiness or because of some partisan motivation—whether they are "fake news," according to Chair Brendan Carr.[5]

## I. Section 315(a) Is Likely Unconstitutional

Any discussion of government regulation of speech must begin with assessing whether the statute is constitutional. Whether Section 315(a)[6] is constitutional is a matter of some doubt, but if it is, its constitutionality depends on limiting principles that the Notice so casually abandons.

### A. Differential Treatment of Similar Media Is Presumptively Unconstitutional

Section 315(a) imposes special burdens on some speakers but not others: Its must-carry mandate applies to broadcasters and the shows they host, and programming originated by cable operators, but not national cable networks.[7] It does not apply to some of the most popular sources for political interviews: YouTube channels or podcasts such as the *Joe Rogan Experience*, which has 14.5 million followers, or *The New York Times*' *The Daily*,

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[4] Request by Multimedia Entertainment, Inc. for Declaratory Ruling, Memorandum Opinion and Order, 56 Rad. Reg. 2d 143, ¶ 11 (1984) ("Donahue").

[5] FCC, *January 2026 Open Commission Meeting*, YOUTUBE (Jan. 29, 2026, at 1:02:38), https://youtu.be/ydfrJQSq2G0?si=82MC0EC8-cnYLtx7&t=3758.

[6] 47 U.S.C. § 315(a).

[7] Section 315(a) applies to "broadcasting station," which includes a community antenna television system, 47 U.S.C. § 315(c), but "cable systems are subject to Section 315 only to the extent they 'originate' programming. Origination programming is defined in Section 76.5(p) of the Commission's Rules as cablecast material under the "exclusive editorial control of the cable operator." 47 C.F.R. § 76.5(p)." In re Request of. A&E Television Networks for Declaratory Ruling, DA 00-1341 at 1 note 2 (June 20, 2000). *See also* 47 C.F.R. § 76.205 (equal opportunities rule for cable operators).

which has 2.6 million followers.[8] Even acknowledging measurement differences, the top television late shows no longer dominate political discourse, averaging 2.38 million viewers per episode last year for *ABC's Jimmy Kimmel Live!*, 2.69 million for *The Late Show with Stephen Colbert*, and 1.33 million for *NBC's Tonight Show Starring Jimmy Fallon*.[9]

The Supreme Court has long held that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[10] The Notice purports to identify such a "special characteristic": "The federal equal opportunities regulations operate to prevent broadcast television stations, which have been given access to a valuable public resource (namely, spectrum), from unfairly putting their thumbs on the scale for one political candidate, or set of candidates, over another."[11] The Court is unlikely to uphold this rationale even as applied to broadcasters, but, in any event, it certainly does not apply to cable channels.

### B. *Red Lion*'s Scarcity Rationale Is Obsolete

To justify the Notice, the FCC will doubtless rely on *Red Lion Broadcasting Co. v. FCC* (1969).[12] That decision upheld the FCC's Fairness Doctrine, which required licensees to air

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[8] *See, e.g.*, Asley Carman (@ashleyrcarman), X (Mar. 21, 2024), https://x.com/ashleyrcarman/status/1770870899702387113; Ashley Carman, *Spotify Reveals Joe Rogan's Podcast Numbers*, BLOOMBERG (Mar. 21, 2024), https://www.bloomberg.com/news/newsletters/2024-03-21/spotify-reveals-podcast-numbers-for-joe-rogan-alex-cooper-travis-kelce.

[9] Jed Rosenzweig, *Here Are Final Late Night Ratings for Q4 2025*, LATENIGHTER (Jan. 9, 2026), https://latenighter.com/news/ratings/late-night-tv-ratings-q4-2025/.

[10] Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575, 585 (1983).

[11] *Notice* at 3.

[12] 395 U.S. 367 (1969).

opposing views on controversial matters of public importance.[13] "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed," said the Court. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[14]

The Supreme Court has not relied on *Red Lion* since *FCC v. League of Women Voters* (1984), which struck down restrictions on broadcasters' right to editorialize.[15] Thus, the Court has not ruled on whether *Red Lion*'s scarcity rationale is still valid. But ABC is correct the decision's "factual predicates" are obsolete.[16] In an era of media abundance, broadcasting is no longer the "unique medium" upon which *Red Lion* thought an "uninhibited marketplace of ideas" depended—as Justice Clarence Thomas argued in *Fox v. FCC* (2009).[17] Relatedly, Justice Ruth Bader Ginsburg thought that "[t]ime" and "technological advances …. show why" the Court's subsequent decision in *Pacifica v. FCC* (1978) "bears reconsideration."[18] It is likely only a matter of time before the Supreme Court strikes down *Red Lion*.[19]

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[13] *Id.* at 384, 400-01.

[14] *Id.* at 390.

[15] 468 U.S. 364.

[16] Petition for Declaratory Ruling of KTRK Television, Inc. & American Broadcasting Cos., Inc., FCC Docket No. 26-124, at 5, 10 (filed May 7, 2026), https://www.fcc.gov/ecfs/document/10522087167981/1 ("*The View Petition*").

[17] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) (Thomas, J., concurring) ("*Fox I*").

[18] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 567 U.S. 239, 249 (2012) ("*Fox II*") (Ginsburg, J. concurring) (citing Fed. Commc'ns Comm'n v. Pacifica Foundation, 438 U.S. 726 (1978)). While *Pacifica* involved indecency, and additional rationales for FCC regulation, notably the intrusiveness of broadcast media, it also rested on *Red Lion*. 438 U.S. at 748.

[19] Thomas W. Hazlett, Sarah Oh, and Drew Clark, *The Overly Active Corpse of* Red Lion, 9 NW. J. TECH. & INTELL. PROP. 1 (2010). https://scholarlycommons.law.northwestern.edu/njtip/vol9/iss3/1.

### C. Even If *Red Lion* Remains Good Law, It Cannot Justify the FCC's Reinterpretation of Section 315(a)

Even under *Red Lion*, the FCC must accord broadcasters "the widest journalistic freedom consistent with their public [duties]."[20] The Court recognized in *FCC v. League of Women Voters* that broadcasters retain "editorial initiative and judgment," and "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area."[21]

*Red Lion* allowed that "more serious First Amendment issues" would arise if the FCC refused "to permit the broadcaster to carry a particular program or to publish his own views" or selectively enforced equal opportunities rules,[22] which is, in a different way, what the Notice does.[23] While upholding the Fairness Doctrine, the Court promised to "reconsider" it if it later had "the net effect of reducing, rather than enhancing, the volume and quality of coverage."[24] Each application of *Red Lion*, said the *League of Women Voters* Court, "requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case."[25] The Court concluded that the "public's 'paramount right' to be fully and broadly informed on matters of public importance"—the original rationale for the

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[20] CBS v. Democratic Nat'l Committee, 412 U.S. 94, 110 (1973).

[21] 468 U.S. 364, 378, 398.

[22] Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 396 (1969). The Court mentioned the possibility of selective under-enforcement: "a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves," *id.*, but selective application of the equal opportunities rule is no less pernicious.

[23] *See infra* at 38 (summarizing the Notice's selective application of its new interpretation to disfavored television talk shows).

[24] *Red Lion*, 395 U.S. at 393.

[25] Fed. Commc'ns Comm'n v. League of Women Voters, 468 U.S. 364, 381 (1984).

Fairness Doctrine—was "not well served by the restriction" on editorializing, which would "diminish, rather than augment, 'the volume and quality of coverage' of controversial issues."[26] Just so here.

### 1. There Is No Legitimate Government Interest in Balancing Speech

The *League of Women Voters* Court found that "ensuring adequate and balanced coverage of public issues" is a "substantial governmental interest."[27] But the Court has repeatedly rejected asserted government interests in "leveling the playing field" for speech.[28] It once again rejected such an interest in *Moody v. NetChoice* (2024): "the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas."[29]

*Moody* involved state laws regulating "fairness" and "bias" of social media platform content moderation. The Court never mentioned *Red Lion*; but its holding was clear: "this Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased, rather than to leave such judgments to speakers and their audiences."[30] The *Moody* Court repeatedly stated that the problem was the "government" interfering with "speech," not with any particular medium: "On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its

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[26] *Id.* at 399.

[27] *Id.* at 380.

[28] Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011). *See also* Buckley v. Valeo, 424 US 1 (1976).

[29] *Moody*, 603 U.S. 707, 732 (2024).

[30] *Id.* at 719.

own conception of speech nirvana."[31] The Court reaffirmed that, "'whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary.'"[32]

Only obliquely did *Moody* refer to broadcasting: the "government can take varied measures, like enforcing competition laws, to protect" "a well-functioning sphere of expression, in which citizens have access to information from many sources."[33] This sentence cited *Turner v. FCC* (1994), which upheld cable operators' obligations to carry local broadcasters.[34] A footnote observed that the government's interest in *Turner* was "not the alteration of speech," but the survival of broadcasting.[35] That is, the "special characteristic" justifying differential treatment[36] of cable operators was that they exercised a unique "bottleneck" power over the programming available to subscribers because they controlled "the physical connection between the television set and the cable network."[37] Critically, there was little danger that must-carry mandates would favor certain content or viewpoints: Cable operators' objection wasn't about the content they were compelled to carry, but *economic*: they lost control of some of their limited channel capacity.[38]

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[31] *Id.* at 741-742.

[32] *Id.* at 733 (quoting Brown v. Entertainment Merchants Assn., 564 U.S. 786, 790 (2011)).

[33] *Id.* at 732.

[34] *Id.* at 733 (citing Turner, 512 U.S. 622, 647 (1994)).

[35] *Id.* at 742.

[36] *Turner*, 512 U.S. at 623 (distinguishing Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

[37] *Id.* at 656.

[38] *Id.* at 645.

*Moody* thus drew a red line between policing business practices—which might *indirectly* enhance viewpoint diversity—and interfering with editorial judgment,[39] which the Court barred completely: "in case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm."[40] "That principle," the Court said, "works for social-media platforms as it does for others."[41] Thus, while the FCC might indirectly pursue *Red Lion*'s goal of an "uninhibited marketplace of ideas" through economic or structural regulation, it cannot directly regulate "bias," "distortion," "balance," or "fairness." Combating these simply is not a legitimate government interest.

*Moody* dealt with a Florida law that barred "deprioritizing posts by or about political candidates."[42] But the Court clearly indicated that this provision violated the First Amendment rights of newspapers to decide what speech to host, just as the Court, in *Miami Herald Publishing Co. v. Tornillo* (1974),[43] struck down another Florida law that "required a newspaper to give a political candidate a right to reply when it published 'criticism and attacks on his record.'"[44]

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[39] *See generally* Berin Szóka, *The First Amendment's Red Line*, CONCURRENCES (Nov. 2025), https://techfreedom.org/wp-content/uploads/2025/11/Berin-Szoka-Part-VIII-The-First-Amendments-red-line-between-the-expressive-and-commercial-realms.pdf.

[40] *Moody*, 603 U.S. at 733.

[41] *Id.* at 719.

[42] *Moody*, 603 U.S. at 720 (citing Fla. Stat. § 501.2041(2)(h) (2023)).

[43] 418 U.S. 241.

[44] *Id.* at 2400.

### 2. There Is No Legitimate Government Interest in Requiring Rights of Reply Even for Political Candidates

The Supreme Court in *Moody* went further: "Suppose, for example, that the newspaper in *Tornillo* had granted a right of reply to all but one candidate. It would have made no difference; the Florida statute still could not have altered the paper's policy. Indeed, that kind of focused editorial choice packs a peculiarly powerful expressive punch."[45] *Moody* repeatedly emphasized the right of private media providers to decide which content to host, including content involving political candidates.

This is clearly inconsistent with the Supreme Court's ruling in *CBS v. FCC* (1981), the last time the Court touched on Section 315.[46] *CBS* involved Section 312(a)(7), which was enacted in 1971 and "essentially codified the Commission's prior interpretation of § 315(a)"[47] by authorizing the Commission to revoke a broadcast license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station … by a legally qualified candidate for Federal elective office…."[48] Thus Section 312(a)(7) provides an enforcement mechanism, in extreme cases, of Section 315(a). Section 312(a)(7) has also undergirded the FCC's "reasonable access" rule, which governs the purchase of airtime by candidates.[49] *CBS* upheld that rule because it "properly balances the First Amendment rights of federal candidates, the public,

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[45] *Id.* at 732.

[46] 453 U.S. at 397.

[47] CBS, Inc. v. Fed. Commc'ns Comm'n, 453 U.S. 367, 385 (1981).

[48] 47 U.S.C. § 312(a)(7). This provision is broader, covering the purchase of airtime, but also providing a powerful enforcement mechanism for Section 315(a)'s equal opportunities rule ("reasonable access").

[49] 47 C.F.R. § 73.1944.

and broadcasters."[50] The *CBS* Court read *Tornillo* narrowly as rejecting only "general right of access to the media," and held that "Section 312(a)(7) creates a limited right to 'reasonable' access that pertains only to legally qualified federal candidates, and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced."[51] The Florida law at issue in *Moody* was essentially similar, except that it applied to legally qualified state candidates during a campaign.[52] Yet *Moody* clearly held the law unconstitutional even if it was more "limited" than the right of reply struck down in *Tornillo*. Thus, *Moody* calls into question the holding of *CBS*.

### 3. The Government Cannot Achieve an Illegitimate Interest in Reshaping Speech Through an Unconstitutional Condition

The Notice asserts a quid pro quo: "The federal equal opportunities regulations operate to prevent broadcast television stations, which have been given access to a valuable public resource (namely, spectrum), from unfairly putting their thumbs on the scale for one political candidate or set of candidates over another."[53] Elsewhere, Carr has claimed that the "duty of fairly and impartially informing the public audience" is an "obligation that broadcasters take on voluntarily, in exchange for the privilege of holding a license to operate

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[50] 453 U.S. at 397.

[51] 453 U.S. at 396.

[52] Fla. Stat. § 501.2041(2)(h) ("A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate as defined in s. 106.011(3)(e), beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate."). *See also* Fla. Stat. § 106.011(3)(e) ("A person who files qualification papers and subscribes to a candidate's oath as required by law.").

[53] *Notice* at 3.

using the public airwaves."[54] But if achieving "fairness" or "balance" in media is not a legitimate interest, as *Moody* says,[55] Carr's quid pro quo is an unconstitutional condition.

#### 4. Whatever Government Interest Might Apply, Regulation Must Be Narrowly Tailored to It

Similarly, even if the FCC could establish *some* legitimate interest under *Red Lion*, any condition must be narrowly tailored to that interest, as in *League of Women Voters.*[56] The Commission's past understanding of Section 312(a) is narrowly tailored to preventing shows from advancing the interests of particular candidates: It relies on certain objective characteristics, notably whether the show is regularly scheduled (as opposed to a simple gift of airtime to a candidate) and whether the host of the show has some control over the interview (as opposed to giving audience members an open mic to advance candidates of their choice). It leaves open the possibility that a candidate who requested, but was denied, equal opportunities after an interview of their rival could provide evidence that the show was acting for partisan reasons—which Angelides simply failed to do in *Jay Leno*. But the Notice's reinterpretation of Section 312(a) is far from narrowly tailored: It "burn[s] the house to roast the pig."[57]

## II. The Commission Has Overturned Decades of Guidance About Section 315(a)

Enacted as part of the Communications Act of 1934, Section 315 "imposed upon broadcasters a duty of absolute equality of treatment of competing political candidates in the

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[54] Federal Communications Commission, FCC Reminds Broadcasters of Their Public Interest Obligations, DA-26-530A1 (May 28, 2026).

[55] *See Moody*, 603 U.S. at 743.

[56] 468 U.S. 364, 380.

[57] Butler v. Michigan, 352 U.S. 380, 383 (1957).

'use' of broadcast facilities," requiring "equal opportunities to all other such candidates for that office," but "the FCC interpreted the equal time provision as inapplicable to the appearance of a candidate on a newscast."[58] In *Lar Daly* (1959), however, the FCC "interpreted the statute to mean that the equal time rule applied even to the appearance of a candidate on a regularly scheduled newscast."[59] This "radical departure from its prior interpretation … created a national furor" that "strict application of the equal opportunities provision 'would tend to dry up meaningful radio and television coverage of political campaigns.'"[60] Lawmakers feared that the decision's "inevitable consequence" would be that "a broadcaster will be reluctant to show one political candidate in any news-type program lest he assume the burden of presenting a parade of aspirants."[61] Accordingly, in 1959, Congress added exemptions in Section 315(a) for bona fide newscasts, interviews, news documentaries, and "on-the-spot coverage."[62] Yet the Commission's approach to these exemptions initially remained restrictive. Beginning in 1975, the Commission steadily liberalized this approach, deferring to the judgments of broadcasters and programmers about newsworthiness. Now, the Notice abandons the approach of the last half century

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[58] Chisholm v. Fed. Commc'n Comm'n, 538 F.2d 349, 351-52 (D.C. Cir. 1976) (citing Allen H. Blondy, 40 FCC 284, 14 P & F Radio Reg. 1199 (1957); FCC, Use of Broadcast Facilities by Candidates for Public Office, Public Notice FCC 58-936, III-12; 105 Cong.Rec. 14459 (1959)).

[59] *Id.* at 352 (citing Columbia Broadcasting System, 18 P & F Radio Reg. 238, reconsideration denied, 26 FCC 715, 18 P & F Radio Reg. 701 (1959) (Lar Daly)).

[60] *Id.* (quoting S.Rep. No. 562, 86th Cong., 1st Sess. 10 (1959), U.S.Code Cong. & Admin.News 1959, 2564, 2572).

[61] McGlynn v. NJ Public Broadcast. Auth., 88 N.J. 112, 135 (1981) (quoting S.Rep.No. 562, 86th Cong., 1st Sess., U.S.Code Cong. & Ad.News 2564, 2571 (1959)).

[62] 47 U.S.C. § 315(a).

without really acknowledging that it is doing so or addressing the reasons for such deference, effectively returning to the pre-1975 restriction of political speech.

### A. The FCC Will Receive No Deference for Its Statutory Interpretation

The Notice reinterprets Section 315(a). It purports to divine Congressional intent, mentioning "Congress" ten times. In the past, the U.S. Court of Appeals for the D.C. Circuit has deferred to the FCC's interpretation of Section 315(a).[63] But *Loper Bright Enter. v. Raimondo* (2024) ended decades of deference to agencies on questions of statutory interpretation.[64] "Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate 'Cases' and 'Controversies,'" so "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[65] The Administrative Procedure Act "makes clear that agency interpretations of statutes—*like agency interpretations of the Constitution*—are not entitled to deference."[66]

Now, an agency's interpretation of statutes "may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[67] The Notice, however, offers no explication of facts to support any predictive judgment that its reinterpretation will lead to more political interviews overall.

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[63] Chisholm v. Fed. Commc'n Comm'n, 538 F.2d 349, 351 (D.C. Cir. 1976); Kennedy for President Comm., 77 FCC 2d 965, aff'd sub nom. Kennedy for President Comm. v. Fed. Commc'n Comm'n, 636 F.2d 417, 424 (D.C. Cir. 1980).

[64] 144 S.Ct. 2244 (overruling Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[65] *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177 (1803)).

[66] *Id.* at 2261.

[67] Loper Bright, 144 S.Ct. 2244, 2267.

An agency provides "guidance" to courts depending "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[68] The Notice's reinterpretation of Section 315(a) is completely at odds with what the FCC has said for over half a century. It provides no real "reasoning" for abandoning that approach, nor does it provide a cohesive analysis of Section 315(a) and its amendments to allow for a 180-degree turn in its statutory interpretation. It misreads the statute egregiously. It lacks the power to persuade any court.

### B. From 1975 to 2026, the Commission Steadily Increased Deference to the Discretion of Broadcasters and Programmers

The Commission initially held that debates did not qualify for the "on-the-spot coverage" exemption, and must include minor party candidates who had received miniscule percentages of the vote in previous elections,[69] which "thereby virtually eliminat[ed] the possibility that such debates would receive further broadcast coverage."[70] In *Aspen Institute* (1975), the Commission reversed course, allowing broadcasters to cover debates that included only major party candidates: "the undue stifling of broadcast coverage of news events involving candidates for public office has been unfortunate, and we believe this remedy will go a long way toward ameliorating the paucity of coverage accorded these news

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[68] *Id.* at 2259.

[69] The Goodwill Station, Inc., 40 FCC 362 (1962); National Broadcasting Co., 40 FCC 370 (1962). These two decisions "effectively excluded all debates from the Section 315(a)(4) exemption." Chisholm, 538 F.2d at 353.

[70] Aspen Institute Program on Communications, 55 FCC 2d 697, ¶¶ 10-11 (1975).

events…."[71] Congress, the Commission declared, wanted "to pursue the 'right of the public to be informed through broadcasts of political events,'" which required the 'widest possible dissemination of information.'"[72] Thus, "the public's interest in 'uninhibited, robust, wide-open' debate on public issues far outweighs the imagined advantages or disadvantages to a particular candidate."[73] The Commission refused to "make subjective judgments concerning the content, context and potential political impact of a candidate's appearance."[74]

In *Shirley Chisholm v. FCC* (D.C. Cir. 1976), the court upheld this more permissive approach: "Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion."[75] In *Henry Geller* (1983), the Commission affirmed this approach and went further, allowing not only third-party programmers but also licensees to host candidate debates: "although Congress expressed a concern that the freedom and flexibility accorded to broadcasters in their news programming might result in favoritism amongst candidates, Congress intended to permit that risk in order to foster a more informed electorate."[76] What mattered was that "exempting broadcaster sponsored debates should serve to increase the number of such events, which would ultimately benefit the public."[77]

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[71] *Id.* ¶ 40.

[72] *Id.* ¶ 37 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[73] *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

[74] Aspen Institute Program on Communications, etc., 60 FCC 2d 697, ¶ 38 (rejecting CBS's proposed distinction "between press conferences called by an incumbent candidate in his official capacity and those called in furtherance of his candidacy").

[75] Shirley Chisholm v. FCC, 538 F.2d 349, 366 (D.C. Cir. 1976).

[76] Petition of Henry Geller, 95 FCC 2d 1236, FCC 83-529, ¶ 19 (Nov. 16, 1983) ("*Henry Geller*").

[77] *Id.*

In *Donahue* (1984), the Commission relied on *Aspen Institute, Chisholm*, and *Henry Geller* to end the restrictive approach it had taken to the bona fide news exemption.[78] The Commission had previously "remained conservative in its analysis of news interview exemption requests …, essentially limiting the news interview exemption to what it viewed as more traditional question and answer formats like those cited in the legislative history ('Meet the Press,' 'Face the Nation' and 'Youth Wants to Know')."[79] *Donahue* rejected this approach because it "discourage[d] programming innovation by sending a signal to broadcasters that to be exempt an interview program should adhere only to the format of certain programs mentioned by Congress over twenty-five years ago."[80] Instead, the Commission embraced innovative formats like Phil Donahue's, provided the host maintained control of the studio audience.[81] This was enough to reduce the risk that had previously led the Commission to deny Donahue's prior petition for declaratory ruling that the show qualified for the bona fide news exemption: that "allowing members of the audience to make statements" could let them "advance the election of a particular candidate."[82] But "to encourage increased news coverage of political campaign activity,"[83] Congress "was clearly

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[78] *Donahue*, supra note 4, 56 RR 2d at 143.

[79] In re Request of ABC, Inc.; For Declaratory Ruling, 15 FCC Rcd 1355, 1357 ¶ 8, 1999 FCC LEXIS 6700, 18 Comm. Reg. (P & F) 1371, DA 99-2768, (1999) (*Dennis* Miller) (citing *Donahue*, 56 RR 2d at 146).

[80] *Donahue*, supra note 1, at *9 ¶ 7.

[81] *Id.* at *14 ¶ 11 ("Multimedia has well established procedures designed to assure that it retains journalistic control of the programs despite the audience participation.").

[82] *Id.* at *9 note 10.

[83] *Id.* at *1 ¶ 4.

willing to take risks with the few broadcasters who might choose to abuse the exemptions motivated by political bias."[84]

*Donahue* was the last decision by the Commission regarding the bona fide news interview exemption because it established a clear framework for applying Section 315 and the 1959 exemptions. Thereafter, the Commission delegated implementation of this framework to the Media Bureau.

### C. The Commission's Radical Departure from Decades of Precedent

In all these cases, the Commission, and the D.C. Circuit all said the same things. First, the predictive judgment: that coverage of political events would be *reduced* by construing the exemptions too narrowly, and that such coverage would be *increased* by construing them more broadly. Second, the statutory interpretation: that Congress preferred "broader coverage and increased broadcaster discretion" over the "risks of political favoritism by broadcasters,"[85] and would "permit that risk in order to foster a more informed electorate."[86]

The Notice says the opposite. First, it implies, without substantiation, that requiring that rivals be interviewed will result in more political candidates being interviewed—despite decades of the FCC expecting the opposite. Second, it claims that "inclusion of '*bona fide*' in each exemption category … reflects Congressional concern that broadcast stations would apply the exemptions *too broadly* in service of a political agenda," and that such an interpretation would "frustrate the original purpose of the equal opportunities requirement

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[84] *Id.*

[85] Shirley Chisholm v. FCC, 538 F.2d 349, 366 (D.C. Cir. 1976).

[86] *Henry Geller*, supra note 76, ¶ 19.

to maximize broadcast coverage of political events."[87] Yes, Congress intended "'that the programs be of genuine news value and not be used to advance the candidacy of a particular individual,'" as *Henry Geller* noted,[88] but the Notice misses the point of this decision and other decisions: that giving broadcasters more "freedom and flexibility" would "increase the number" of debates and thus "foster a more informed electorate."[89] Likewise, the Notice misses the point of *Aspen Institute* (1975): that allowing broadcasters to include fewer candidates in debates would mean more debates.[90]

In sum, the Notice signals a return to the Commission's pre-1975 approach, effectively nullifying all the intervening decisions. This is no less a "radical departure from [the Commission's prior interpretation]" than was the Commission's 1959 *Lar Daly* decision.[91] Yet it is certainly less explicit, remarkably thin in its explanation, shoddy in its reasoning, and barely proofread.[92]

Of course, the Bureau cannot, acting on delegated authority, overturn decisions of the Commission; that would require a vote by the full Commission[93]—and a reasoned

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[87] *Notice* at 2 (emphasis added).

[88] *Id.* (quoting *Henry Geller*, supra note 76, 95 FCC 2d at 1243).

[89] *Henry Geller, supra* note 76, ¶ 19. *See supra* note 15.

[90] *See supra* notes 71-73 and associated text.

[91] *Chisholm*, 538 F.2d at 352.

[92] The Notice "encourages all television broadcast stations to ensure that they are making all appropriate equal opportunity filings in accordance with section 73.1943 of the FCC's rules," but cites "47 C.F.R. § 17.1943" after citing the correct rule three times. Compare *Id.* at 4 (emphasis added) and note 21 with *Id.* 1-2 notes 5-7.

[93] The Commission "may, by published rule or by order, delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual employee." 47 U.S.C. § 155(c)(1). This provision also contains a limitation: "Any such rule or order may be

explanation.[94] To conceal that it is doing so, the Notice does not even mention *Donahue*, and mentions *Aspen* and *Henry Geller*, as if they supported its excessive caution. That the Bureau is changing the FCC's position is clear: The Supreme Court has recognized that it is no less a change in an agency's position "when an agency acts 'inconsistent[ly]' with an 'earlier position,'"[95] has "expand[ed] the scope of its enforcement activity,"[96] or "'abandon[ed a] decades-old practice' applied in enforcement actions"[97]—all of which the Bureau is doing—than when the agency has "rescinded a prior regulation"[98] or expressly "'disavow[s]' prior 'inconsistent' agency action as 'no longer good law.'"[99]

### 1. The Notice Implicitly Overrules Not Only *Jay Leno* (2006) but Decades of Commission Decisions

The Notice purports to overrule only *Jay Leno* (2006)—the Bureau's last decision on a Section 315(a) complaint.[100] But when this decision said that "[o]ur decisions stress that the Commission defers to the reasonable, good faith judgment of broadcasters regarding

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adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office." 47 U.S.C. § 155(c)(1). A bureau therefore lacks the authority to withdraw guidance issued by the Commission, as such authority is not delegated to it.

[94] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30 (2020) (quoting Encino Motorcars, LLC v. Navarro, 579 U. S. 211, 136 (2016))

[95] Food & Drug Admin. v. Wages & White Lion Invs., LLC, 145 S.Ct. 898, 918 (2025) (quoting Encino Motorcars, 579 U.S., at 224).

[96] *Id.* (quoting *Fox I*, 556 U. S. at 517).

[97] *Id.* (quoting Encino Motorcars, 579 U. S., at 218).

[98] *Id.* (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 41-42 (1983) ("Revocation [of motor safety standards] constitutes a reversal of the agency's former views as to the proper course.").

[99] *Id.* (quoting *Fox I*, 556 U.S. at 517).

[100] *Id.* at 3-4 ("[*Jay Leno*] was also contrary to [*Jack Paar*]") (referring to Equal Opportunities Complaint Filed by Angelides for Governor Campaign Against 11 California Television Stations, Order, 21 FCC Rcd 11919 (MB 2006) ("Jay Leno")).

newsworthiness,"[101] it was referring to a consistent body of Commission decisions—and court decisions—dating back to *Donahue* about the news interview exemption, and to *Aspen Institute*, *Chisholm*, and *Henry Geller* more generally.[102] By overruling *Jay Leno*, the Notice implicitly undermines the ability of broadcasters to rely on any of the decisions discussed above.

The Notice first questions *Jay Leno* because it "was the first time that [the news interview exemption] had been applied to a late night talk show, which is primarily an entertainment offering."[103] In fact, either the Commission or the Bureau had issued rulings applying the exemption to several shows that were primarily "entertainment offerings," including *Donahue*, *Howard Stern*,[104] *Sally Jessy Rafael*,[105] and *Jerry Springer*.[106] That *Jay Leno* was the first "*late night* talk show" to receive such a ruling is as irrelevant as distinguishing between shows aired on weekdays rather than weekends.[107] Moreover, the overall nature of the program matters only to the *newscast* exemption (Section 315(a)(1)); the news i*nterview*

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[101] Equal Opportunities Complaint Filed by Angelides for Governor Campaign Against 11 California Television Stations, Order, 21 FCC Rcd 11919, 11923, ¶ 10 (MB 2006) ("Jay Leno").

[102] *See, e.g*., *Donahue*, *supra* note 4 at *13-14 ¶ 11 ("Congressional intent is to defer substantially to the good faith news judgments of broadcast licensees."); In re Request of ABC, Inc.; For Declaratory Ruling, 15 FCC Rcd 1355, 1999 FCC LEXIS 6700, 18 Comm. Reg. (P & F) 1371, DA 99-2768, at *5 (1999) (*Dennis Miller*) ("Congress' fundamental purpose in enacting [Section 315(a)'s bona fide news exemptions] was to encourage increased news coverage of political campaigns and to give broadcasters the discretion to exercise their good faith news judgment in deciding which candidates to cover and in what formats.").

[103] *Jay Leno*, *supra* note 101, ¶ 11.

[104] *Howard Stern*, *supra* note 3.

[105] Request of Multimedia Entertainment, Inc., 6 FCC Rcd 1798 (MMB 1991) ("*Sally Jessy Raphael*").

[106] Request of Multimedia Entertainment, Inc., 9 FCC Rcd 2811 (MMB 1994) ("*Jerry Springer*").

[107] Such a distinction would, of course, be contrary to the Commission's recognition that Congress wanted increased coverage of political activity. *See supra* at 2.

exemption (Section 315(a)(2)) turns only on the nature of the interview segments.[108] Even a show that primarily offers entertainment can feature bona fide news interviews, as the Commission has held consistently in all these cases.

The Notice implies that *Jay Leno* was wrongly decided because it was "contrary to a 1960 Commission decision that declined to [apply the news interview exemption to] the Jack Paar program, which was also referred to as 'The Tonight Show.'"[109] But as *Jay Leno* explained, "*Jack Paar* is not relevant … because it was decided using standards that are no longer in force"—*i.e.*, since *Donahue*—namely that his show was characterized as a "variety program."[110] Like *Donahue*, *Jay Leno* recognized that "exempting less conventional interview formats as bona fide news interviews is consistent with Congress' intent in adopting the exemptions to increase news coverage of the political campaign process."[111] The Notice appears to say otherwise, that "entertainment" shows—or, perhaps, "late night entertainment shows," depending on the caprice of the Bureau—will no longer be eligible for the news interview exemption. In doing so, it undermines, if not overrules, *Donahue* as well as *Jay Leno*.

The Notice does not address in any way what *Jay Leno* said about the rationale for deferring to "the reasonable, good faith judgment of broadcasters regarding newsworthiness."[112]

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[108] *See, e.g.*, *Jay Leno*, *supra* note 101, at 5 ¶ 11 ("the news interview portions of 'The Tonight Show with Jay Leno"' meet the criteria for exemption as a bona fide news interview." (emphasis added)).

[109] *Notice* at 3-4.

[110] *Donahue*, *supra* note 4.

[111] *Jay Leno* at 4 (quoting In re Request by Multimedia Entertainment, Inc. for Declaratory Ruling, 1984 FCC LEXIS 2665, 56 Rad. Reg. 2d (P & F) 143, FCC 84-237).

[112] *Jay Leno*, *supra* note 101, at 5, ¶ 10.

### 2. The Notice Overrules *Howard Stern* (2003): Prior Clearance Is Now "Encouraged"

One thing is unmistakably clear from the Notice: television broadcasters and programs can no longer rely on what the Bureau said in *Howard Stern* (2003): "licensees airing programs that meet the statutory news exemption, as clarified in our case law, need not seek formal declaration from the Commission … that such programs qualify as news exempt programming under Section 315(a)."[113] The Notice says the opposite: "the FCC has not been presented with any evidence that the interview portion of any late night or daytime television talk show program on air presently would qualify for the *bona fide* news exemption."[114] Moreover, the Notice calls into question the "case law" that *Howard Stern* encouraged broadcasters to rely upon.

## D. The *CBS* Court Understood Deference to Broadcasters' Editorial Judgment as Essential to Avoiding a Vague Application of Section 312(a)(7)

As explained, the Supreme Court's *CBS* (1981) decision[115] is likely overruled by *Moody*, but whatever weight the Court's decision might have depended on three factors that distinguish the case from the FCC's reinterpretation of Section 312(a). First, the Court upheld the FCC's decision that the television networks violated Section 312(a)(7) by failing to make time available to President Jimmy Carter to announce his re-election campaign because they had failed to apply the "objective factors" the Commission had previously announced for

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[113] *Howard Stern*, *supra* note 3. While this sentence refers to "news exempt programming," the rest of the decision clearly discusses the news interview exemption.

[114] *Notice* at 4.

[115] 418 U.S. 241.

assessing such requests.[116] The Commission has never provided any "objective factors" to assess whether the decision to interview a candidate is motivated by a "partisan purpose."

Second, the Commission assured the Court that it would "'provide leeway to broadcasters, and not merely attempt de novo to determine the reasonableness of their judgments' and that '[i]f broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions.'"[117] The Notice appears to do the opposite.

Third, Section 312(a)(7) is a much more draconian statute. It contains no exemptions for "bona fide news," and for good reason: It applies to all purchases of airtime on broadcasting stations, not to newscasts, interviews or debates. Thus, what the Commission said about the limits to its "deference" to broadcasters' judgment[118] do not apply to Section 315(a).

## III. The Notice Violates Administrative Law & Due Process

The Notice marks a clear change in the FCC's position.[119] To justify such a change, an agency must first "display awareness that it *is* changing position."[120] It cannot "depart from

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[116] *Id.* at 393. Those factors were "(a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request." *Id.* at 375.

[117] *Id.* at 396-97 (quoting In Re Complaint of Carter-Mondale Presidential Committee, Inc. against The ABC, CBS & NBC Television Networks, 46 Rad. Reg. 2d (P & F) 899 (1979), 74 F.C.C.2d 631, 672 (Nov. 20, 1979) (*Carter-Mondale*)).

[118] *Id.* at 387-88 ("if broadcasters adopt 'across-the-board policies' and do not attempt to respond to the individualized situation of a particular candidate, the Commission is not compelled to sustain their denial of access."). *See also Carter-Mondale*, at **12, ¶ 44.

[119] *See supra* at 18-19.

[120] Food & Drug Admin. v. Wages & White Lion Invs., LLC, 145 S.Ct. 898, 918 (2025) (emphasis original).

a prior policy sub silentio."[121] The Notice cannot even pass this test. It fails to mention *Donahue* or any of the subsequent decisions extending the news interview exemption to entertainment shows, especially *Howard Stern*. It mentions *Aspen Institute*, *Chisholm*, and *Henry Geller* only to cherry-pick from each a quote that fails to capture the essential points discussed above. It is not even clear that it is overruling *Jay Leno*, though that is the implication, saying the decision "was … contrary to a 1960 Commission decision that declined to make such a finding regarding the Jack Paar program."[122]

Astoundingly, the Notice says that "the FCC has not been presented with any evidence that the interview portion of any late night or daytime television talk show program on air presently would qualify for the bona fide news exemption"[123]—without mentioning *why*: because *Howard Stern* instructed programs not to apply for declaratory rulings. Accordingly, "the FCC has not ruled on a request for a declaratory ruling involving a bona fide news exemption in nearly ten years."[124] The Commission cannot possibly "display awareness"[125] that it is abandoning that instruction without mentioning the decision.

Second, the FCC must "offer 'good reasons for the new policy.'"[126] It need not "show 'that the reasons for the new policy are *better* than the reasons for the old one'" or "'provide a more detailed justification than what would suffice for a new policy created on a

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[121] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[122] *Notice* at 4.

[123] *Id.*

[124] FCC Issues Guidance on Talk Show Compliance with Equal Opportunities Rules, JDSUPRA (Jan. 30, 2026), https://www.jdsupra.com/legalnews/fcc-issues-guidance-on-talk-show-3577867/.

[125] Food & Drug Admin. v. Wages & White Lion Invs., LLC, 145 S.Ct. 898, 918.

[126] White Lion, 145 S.Ct. at 918 (quoting *Fox I*, 56 U.S. at 515).

blank slate," but it must "'be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[127] Yet the Notice provides no "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy."[128]

In addition, the FCC must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[129] The Notice fails utterly to acknowledge "'that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[130] Television broadcasters and talk shows have relied on *Jay Leno*, *Howard Stern*, and *Donahue* for decades, creating significant reliance interests. The Commission must consider and fully explain the reason why continued reliance on these precedents is no longer valid.[131] Yet the Notice fails to give them more than a passing glance.

Instead, the Notice asserts, vaguely, that "[c]oncerns have been raised"—it does not say by whom—"that the industry has taken the Media Bureau's 2006 staff-level decision to mean that the interview portion of *all* arguably similar entertainment programs—whether late night or daytime—are exempted from the Section 315 equal opportunities requirement under a *bona fide* news exemption."[132] Noting only that "these decisions are fact specific and

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[127] *Id.* (quoting *Fox II*, 556 U.S. at 515).

[128] *Id.*

[129] DHS v. Regents of the University of California (2020) (quoting Encino Motorcars, LLC v. Navarro, 579 U. S. 211, 136 (2016)).

[130] *Id*.

[131] *Id.* ("It would be arbitrary or capricious to ignore such matters.").

[132] *Notice* at 4.

the exemptions are limited to the program that was the subject of the request," the Notice declares that any "program or station that wishes to obtain formal assurance that the equal opportunities requirement does not apply (in whole or in part) is encouraged to promptly file a petition for declaratory ruling that satisfies the statutory requirements for a bona fide news exemption."[133] This is not an explanation; it does not even attempt to justify the Commission's new approach or why the Commission believes its new approach would result in increased coverage of political activity.

In short, the notice is unlawful and must be rescinded.

## IV. The Commission's Reinterpretation Violates the First Amendment

### A. What the FCC's Reinterpretation Does

Section 315(a) does not require pre-clearance with the FCC. Prior to the Commission's instruction in Howard Stern (2003),[134] broadcasters and programmers sought declaratory rulings because the statute's exemptions for "*bona fide* news" are, on their face, far from clear. The Commission initially resolved that ambiguity by focusing on rigid format requirements.[135] In *Donahue*, the Commission embraced "innovation" and erred on the side of more speech: as in *Henry Geller* (for candidate debates),[136] for candidate interviews,

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[133] *Notice* at 2. There is no "bona fide news exemption." There are two distinct exemptions: one for bona fide newscasts (Section 315(a)(1)) and the other for bona fide news interviews (Section 315(a)(2)).

[134] *Howard Stern*, *supra* note 3. While this sentence refers to "news exempt programming," the rest of the decision clearly discusses the news interview exemption.

[135] *See supra* note 79.

[136] *See supra* 76 and associated text.

Commission would "defer substantially to the good faith news judgments of broadcast licensees.").[137]

After *Donahue*, the Bureau consistently granted declaratory rulings based on representations made by programmers. For example, in 2008, it was enough that the Christian Broadcast Network "states that ... [t]he 700 Club [hosted by Billy Graham], its newscasts and news interviews, are not designed to further any candidate's campaign, and the appearances of candidates during those newscasts and interviews is designed to inform CBN viewers and not to further any candidate's campaign."[138] Beyond accepting such representations, the Commission added little, such as representations that "[l]ive guests speaking on news and political subjects are not given advance Notice of the questions to be asked,"[139] and that "neither the candidates nor their staffs have any control in the production or direction of the programs."[140] The Commission routinely accepted the absence of any contrary evidence as sufficient. The Commission summarized this approach in 1992:

> we have granted exemptions in reliance on representations made by production entities seeking the rulings, including representations made by non-licensee networks and other non-licensees. These representations have focused directly on the production procedures and journalistic policies that are followed by the producers to ensure that the format, topics addressed and

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[137] *Donahue*, *supra* note 4, at *13-14 ¶ 11; *Henry Geller*, supra note 76, at 1255.

[138] Declaratory Ruling in re Petition of The Christian Broadcasting Network, https://docs.fcc.gov/public/attachments/DA-08-1041A1.pdf; Staff Ruling in re Request of Joyner Management Services, Inc. For Declaratory Ruling, https://docs.fcc.gov/public/attachments/DA-96-1441A1.pdf (applicant "maintains that the 'Tom Joyner Radio Program' is moderated by Tom Joyner and that the editorial control of the program rests solely with Tom Joyner's good faith journalistic judgment and not by an intention to advance the candidacy of any particular candidate. Joyner Management further states that selection of interviewees is guided by newsworthiness of the persons to be interviewed or the topics they will discuss.").

[139] Petition of The Christian Broadcasting Network, DA 08-1041 (May 1, 2008), https://docs.fcc.gov/public/attachments/DA-08-1041A1.pdf.

[140] *Id.* at 2.

> participants are not controlled by candidates and are determined in the exercise of bona fide news judgment. If we were to continue to rely on such representations from parties seeking declaratory rulings from the Commission, even when made by non-licensees, we have no reason to think that abuses are likely to occur.[141]

Appendix A offers a complete record of such decisions.

The Notice fundamentally misunderstands this consistent body of decisions. To downplay the magnitude of its policy change, it overstates its prior scrutiny of exemption requests by implying that the Bureau conducted fact-specific assessments—asserting that in its 1999 application regarding Politically Incorrect with Bill Maher, "ABC *demonstrated* 'that [the show's] decisions about format, content and selection of participants are based on newsworthiness and not motivated by any partisan purpose.'"[142] But in fact, ABC's sole "demonstration" was that it merely *represent[ed]* that Buena Vista's decisions about format, content and selection of participants are based on newsworthiness and not motivated by any partisan purpose."[143]

Contrary to the FCC's decades-long policy that no prior authorization is required to conduct interviews, even on shows that offered primarily entertainment content, the Notice makes clear that the FCC now expects just that. The implications are profound, extending far beyond a handful of large national talk shows. The Notice seemingly reaches every broadcast television show in America—but not radio shows—right down to local talk shows and news

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[141] In the Matter of Request for Declaratory Ruling That Independently Produced bona fide News Interview Programs Qualify for the Equal Opportunities Exemption Provided in Section 315(a)(2) of the Communications Act, 7 FCC Rcd 4681, 4685, 1992 FCC LEXIS 3863, *29-30, 70 Rad. Reg. 2d (P & F) 1464 (1992).

[142] *Notice* at 3 n. 17 (emphasis added) (quoting ABC, Inc., Staff Ruling, 15 FCC Rcd 1355, 1358 (MMB 1999) (*ABC*)), available at https://transition.fcc.gov/Bureaus/Mass_Media/Orders/1999/da992768.doc).

[143] *ABC*, 15 FCC Rcd at 1.

programs, "encouraging" them to apply for confirmation of their journalistic bona fides to interview political candidates.

### B. The Commission's Reinterpretation Creates a Prior Restraint on Political Interviews

The Commission's reinterpretation of Section 315(a) effectively imposes a prior restraint—which den[ies] use of a forum in advance of expression,"[144] by effectively requiring broadcasters to seek the Commission's approval prior to interviewing political candidates. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" and are presumptively unconstitutional.[145]

While, on its face, the Notice merely "encourages" broadcasters to seek "formal assurance," the cost to a broadcaster who forgoes such assurance and gets it wrong effectively imposes mandatory government pre-approval for speech. The Supreme Court has recognized that in the context of onerous speech regulatory regimes carrying a risk of steep penalties and expensive enforcement actions, ostensibly voluntary "advisory opinion" processes effectively compel speakers to seek government permission before speaking and are tantamount to a prior restraint:

> [Although] prospective speakers are not *compelled* by law to seek an advisory opinion from the [agency] before the speech takes place, … given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of … liability and the heavy costs of defending against [agency] enforcement must ask a governmental agency for prior permission to speak. … These onerous restrictions thus function as the equivalent of prior restraint by giving the [regulator] power analogous to licensing laws implemented in 16th- and 17th-

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[144] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

[145] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558–59 (1976).

> century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."[146]

The Notice forces television broadcasters and talk shows into this precise, unconstitutional Hobson's Choice. Doing what the Notice "encourages"—petitioning for a declaratory ruling—would give the Bureau, *i.e.*, Chair Carr,[147] a pocket veto over speech. If television broadcasters and talk shows wait, before interviewing candidates, to "seek formal declaration from the Commission" about their journalistic bona fides,[148] the Bureau has no required (or promised) timeline in which it will issue an opinion. Absent any final agency action, it would be difficult, expensive and impracticably slow to try to compel agency action. Even minimal delays could render the newsworthiness of an interview irrelevant. The Bureau could well delay action until after either the primary election or the general election.

On the other hand, rigid compliance with the rule—providing equal opportunities to all rivals of any candidates interviewed—will often be impossible, in elections with a large field of candidates. This is especially true in "jungle primaries," as ABC rightly notes.[149] But it is also true more generally: Just since 2010, the average number of candidates per contested Congressional major-party primary has risen nearly 40%, from 5.2 to 7.3.[150] Since the mid-1960s, the number of third-party candidates on state ballots for presidential general

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[146] Citizens United v. FEC, 558 U.S. 310, 335 (emphasis added).

[147] Technically, Bureau Directors act on behalf of the Commission, but they are selected by the Chair and may be removed by him at any time without a vote of the full Commission. *See* REORGANIZATION PLAN NO. 11, https://babel.hathitrust.org/cgi/pt?id=mdp.39015069624875&seq=16.

[148] *Howard Stern*, *supra* note 3.

[149] *The View Petition*, *supra* note 16, at ii ("In California's upcoming gubernatorial "jungle primary," for instance, affording equal time would mean accommodating over 60 legally qualified candidates, regardless of their perceived newsworthiness.").

[150] Chris Raleigh, *Report: No One Guarding the House*, ELECTION SCIENCE (2026), https://election-science.org/research-hub/report-no-one-guarding-the-house.

elections has sharply increased, with the number of candidates available for voters to choose from doubling on average.[151] This liberalization in ballot access has been driven by the Supreme Court decisions upholding the right for third-party candidates to access ballots on constitutional grounds.[152]

Few, if any, broadcasters will be willing to host shows that conduct candidate interviews without what the Notice calls "formal assurance" from the Bureau.[153] The risks are simply too great—not merely penalties for violating the equal opportunities rule, but also license revocation.[154] Alternatively, the FCC could call in a broadcaster's license for "early renewal" and threaten to terminate the license early for a violation (whether real or manufactured), as it is currently doing to ABC. These risks are particularly acute in the current administration, as President Trump has repeatedly suggested that broadcasters should lose their licenses for criticizing him.[155] A broadcaster that has not obtained "formal assurance" will be at risk of retaliatory action, chilling its willingness to broadcast protected

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[151] Richard Winger, *How States Can Avoid Overcrowded Ballots but Still Protect Voter Choice*, 90 FORDHAM L. REV. 609, app. at 623-37 (2021).

[152] *See* Williams v. Rhodes, 393 U.S. 23, 34 (1968) (holding a high signature threshold for ballot access in Ohio to be an unconstitutional violation of the Equal Protection Clause); Lubin v. Panish, 415 U.S. 709, 712-19 (1974).

[153] *Notice* at 4.

[154] The Notice clearly threatens broadcasters with license revocation. The Notice cites 47 U.S.C. § 312(a)(7), *Notice* at 2 and n. 7, which empowers the Commission to revoke a broadcast license for "for willful or repeated" violation of the equal opportunity rule.

[155] *See, e.g.,* Donald J. Trump (@realDonaldTrump), TRUTH (Mar. 15, 2026), https://truthsocial.com/@realDonaldTrump/posts/116235861005528220; Donald J. Trump (@realDonaldTrump), TRUTH (Dec. 24, 2025), https://truthsocial.com/@realDonaldTrump/posts/115772922954148853; Donald J. Trump (@realDonaldTrump), TRUTH (Jan. 22, 2025), https://truthsocial.com/@realDonaldTrump/posts/113874735766176608; Donald J. Trump (@realDonaldTrump), X (Oct. 10, 2024), https://x.com/realdonaldtrump/status/1844514602467340701.

speech that might displease the President. As the Supreme Court recently noted, "the value of a sword of Damocles is that it hangs—not that it drops."[156]

Courts have long recognized that "the costs of responding to FCC inquiries or participating in license renewal hearings, as well as the uncertainties involved, independently exert a chilling effect on the licensee's willingness to court official displeasure."[157] This is true even when an agency "neither creates any new content restrictions …. nor establishes any new mechanism for enforcement of existing standards…."[158] With so much at stake, broadcasters will reasonably fear carrying talk shows that have not been granted, in effect, a license to conduct political interviews.

### C. The FCC's Reinterpretation Will Chill Speech

Because seeking pre-clearance could leave them in limbo indefinitely, rigid compliance (offering "equal opportunities" to all rivals of any candidate interview) will often be impossible, and the risks of continuing to interview candidates on the assumption that a show qualifies for the bona fide interview exemption are too great, most broadcasters and talk shows will simply refrain from interviewing candidates at all. Just as the Supreme Court warned in *Citizens United*, when the FCC "issues advisory opinions that prohibit speech, '[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of

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[156] First Choice Women's Res. Ctrs., Inc. v. Davenport, 146 S. Ct. 1114 (2026).

[157] Community-service Broadcasting of Mid-america, Inc. v. FCC, 593 F.2d 1110, 1116 (D.C. Cir. 1978).

[158] *Id.* at 1115.

an uninhibited marketplace of ideas.'"[159] Airtime that might have been spent interviewing political candidates will be used in some other way.

This is precisely the opposite of the Commission's rationale in *Donahue*: "to encourage increased news coverage of political campaign activity,"[160] Congress "was clearly willing to take risks with the few broadcasters who might choose to abuse the exemptions motivated by political bias."[161] Likewise, it contradicts what the Commission recognized in *Aspen Institute*: that Congress wanted "the 'widest possible dissemination of information'"[162] and that "the public's interest in 'uninhibited, robust, wide-open' debate on public issues far outweighs the imagined advantages or disadvantages to a particular candidate."[163]

### D. An Impermissibly Vague Standard

Section 315(a)'s exemption of "bona fide newscasts" and "bona fide news interviews" provides little useful guidance for broadcasters, and a wide, subjective berth for the FCC—magnifying the risk of abuse. The constitutional guarantee of due process requires that any interpretation of these terms provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" lest the statute "'operate[] to inhibit the exercise of' …. 'basic First Amendment freedoms'."[164] Government officials must not have unfettered discretion unbound to definite standards:"[I]f arbitrary

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[159] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010).

[160] *Donahue*, 56 Rad. Reg. 2d at 1 ¶ 4.

[161] *Id.*

[162] Aspen Institute Program on Communications, 60 FCC 2d 697, ¶ 37 (1975) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[163] *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

[164] Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961)).

and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters … on an *ad hoc* and subjective basis … ."[165]

There is ample evidence that the FCC will wield these vague and subjective terms in exactly this way—to punish expression disfavored by the Chair and the Administration. Chair Carr has glibly asserted that the Commission will determine whether a show is "fake news."[166] The Notice says the Commission will assess whether a show's "decisions on the content, participants, and format are based on newsworthiness, rather than partisan purposes, such as an intention to advance or harm an individual's candidacy."[167] The Notice also attempts to unduly limit its previous declaratory rulings regarding the exemption, claiming that they "are fact specific and the exemptions are limited to the program that was the subject of the request."[168] But it was precisely by accepting such representations and by refusing to probe motive that the Commission, for half a century, avoided engaging "intricate case-by-case determinations to verify whether political speech is banned," which *Citizens United* later prohibited.[169] Now, the Notice telegraphs the Chair's to investigate the content of broadcasts and make subjective determinations about the perceived political beliefs,

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[165] *Id.* at 108–09.

[166] Brendan Carr (@BrendanCarrFCC), X (Mar. 14, 2026), https://x.com/BrendanCarrFCC/status/2032855414233047172.

[167] *Notice* at 3 (citing Equal Opportunities Complaint Filed by Angelides for Governor Campaign Against 11 California Television Stations, Order, 21 FCC Rcd 11,919, 11923, ¶ 11 (MB 2006) (finding "that decisions as to format, content and participants are based on the producers' independent news judgment as to the participant's newsworthiness and not motivated by partisan purposes") ("Angelides for Governor").

[168] *Notice* at 4.

[169] 558 U.S. 310, 329.

biases, and motivations of speakers—in order to punish disfavored speakers and ideas. This the Constitution does not permit.

Prior decisions on complaints invoking the equal opportunities rule have acknowledged the constitutional problems posed by probing the editorial judgments and their motivations. In *Jay Leno* (2006), the Bureau cautioned that its role was not "to second-guess broadcasters about the relative newsworthiness of interviewees, but to decide if the broadcasters were reasonable in determining that the news interview segments of 'The Tonight Show with Jay Leno' fit within the news interview exemption."[170] Here, too, the Bureau refused to engage in any de novo inquiry, as it had said it would not do in *CBS*: "The campaign's assertion that Schwarzenegger's appearance was an attempt by Jay Leno to promote Schwarzenegger's campaign is based on little more than speculation."[171]

The Bureau explained its reluctance to engage in an assessment of the newsworthiness of interviewing Schwarzenegger by drawing an analogy to its 1988 ruling that "Entertainment Tonight" qualified as a *bona fide* newscast:

> "Congress did not note that *bona fide* news could be coverage of only certain substantive areas." It stated that the prospect of the Commission making determinations as to whether particular kinds of news are more or less *bona fide* "would involve unwarranted intrusiveness into program content and would be thus, at least suspect under the First Amendment." The ruling concludes that "[so] long as the program characteristics set out by Congress are met, our role is properly limited to determining whether a broadcaster was reasonable in deciding that a program fits within an exemption. Our role is not

[170] Angelides for Governor Campaign, 21 FCC Rcd 11,919, 11,923, 2006 FCC LEXIS 5689, *13-14, 15-16 (2006).

[171] *Id.* at *16-17.

> to decide, by some qualitative analysis, whether one kind of news story is more *bona fide* than another.[172]

The Supreme Court has consistently refused to assess what counts as "bona fide" or real "news" or journalism: "The press in its connotation comprehends every sort of publication which affords a vehicle of information and opinion."[173] If the FCC believes it can articulate criteria for defining "fake news" that would pass First Amendment muster, it should seek public comment on such criteria *before* attempting to punish any broadcaster or programmer. We think no such criteria could pass First Amendment muster, and that the Bureau and Chair know this—which the Notice articulates no criteria at all for divining "motivation" and "partisan purposes."

### E. Selective Application of the New Interpretation to Broadcast Television, Not Radio or Cable, Betrays the FCC's Unconstitutional Motive

Section 315 applies to all "licensees," both television and radio. Yet the Notice fails to mention radio, or a single case involving application of the equal opportunities rule to radio—most notably *Howard Stern*. Worse, it repeatedly misrepresents Section 315 as being specific to broadcast television.[174] and that these regulations "represent, in codified form, the decision by Congress that broadcast television stations have an obligation to operate in the public interest."[175] That obligation is, of course, shared equally by television and radio

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[172] Angelides for Governor Campaign at 5, ¶ 10 (quoting Request for Declaratory Ruling By Paramount Pictures Corporation, et al., 3 FCC Rcd 245, 245-46 (1988) ("Entertainment Tonight")).

[173] Lovell v. Griffin, 303 U.S. 444, 452 (1938).

[174] *See, e.g.*, *Notice* at 1 ("Decades ago, Congress made the decision to prevent covered broadcast television programs from being used to advance certain partisan political purposes."); *Notice* at 3 ("The federal equal opportunities regulations operate to prevent broadcast television stations, which have been given access to a valuable public resource (namely, spectrum), from unfairly putting their thumbs on the scale for one political candidate or set of candidates over another.").

[175] *Notice* at 3.

broadcasters. Indeed, it is also shared by cable operators for programming they originate, though not for carrying national cable networks.[176]

Pretending that the equal opportunities rules apply only to television, not radio or cable, serves to target the Notice against a medium disfavored by this administration for the operative line of the Notice: "the Media Bureau encourages all *television* broadcast stations to ensure that they are making all appropriate equal opportunity filings."[177]

The purpose of such disparate treatment is obvious: It leaves ensures that radio talk shows, which are overwhelmingly conservative, free to interview only Republican candidates, and avoids any need for the FCC to assess whether *The Sean Hannity Show*, *The Mark Levin Show*, *The Glenn Beck Program*, *the Dan Bongino Show*, and other such shows are driven by "partisan purposes."

This selective application of the law violates a basic precept of the First Amendment: "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[178] Furthermore, the "content preference" behind the Notice could hardly be more obvious: President Donald Trump has regularly

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[176] *See supra* note 7.

[177] *Notice* at 4.

[178] Reed v. Town of Gilbert, 576 U.S. 155, 157(2015); Turner Broadcasting System, Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 648 (1994); *see also* Citizens United v. Federal Election Comm'n, 558 U. S. 310, 340 (2010) ("[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content").

attacked television talk shows, while talk radio skews heavily conservative.[179] Chair Carr has made the same attacks on television broadcasters and talk shows.[180]

The Notice identifies no such special characteristic of television broadcasters or talk shows that could justify treating them differently from radio broadcasters or talk shows; indeed, it does not even acknowledge that it is treating them differently. Its failure to do so raises serious concerns about the Commission's motivation.

## V. The Commission Is Engaging in Unconstitutional Jawboning to Suppress Speech

The Notice appears to be aimed squarely at changing the content of, and altering perceived bias in the media—an impermissible goal whether accomplished by mandate or coercive threats. As the Supreme Court recently reaffirmed in *NRA v. Vullo* (2024), "the First Amendment prohibits government officials from relying on the 'threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression' of disfavored speech."[181] *Vullo* summarized decades of case law dating back to *Bantam Books, Inc. v.*

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[179] *See* Paul Matzko, *Talk Radio Is Turning Millions of Americans Into Conservatives*, NY TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/opinion/talk-radio-conservatives-trumpism.html.

[180] *See, e.g.*, PalmBeachPost, *FCC vs. Jimmy Kimmel: Brendan Carr condemns Charlie Kirk comments, challenges local broadcasters*, YOUTUBE (Sept. 19, 2025), http://bit.ly/3VKEXns; http://bit.ly/3VKEXns; Dominick Mastrangelo, *FCC reopens complaints against top broadcasters*, THE HILL (Jan. 23, 2025), http://bit.ly/46u2sr1 (reinstating complaints that the former leadership of the Commission closed in order to respect the First Amendment); Federal Commc'ns Comm'n, *FCC Establishes MB Docket No. 25-73 and Comment Cycle for News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS, New York, NY*, DA-25-107 (rel. Feb. 5, 2025), http://bit.ly/46u2tLB (reinstating complaints against CBS regarding editing of an election-season interview with then-presidential candidate Kamala Harris on *60 Minutes* and *Face the Nation*); Fed. Commc'ns Comm'n, *FCC Approves Skydance's Acquisition of Paramount CBS* (July 24, 2025), http://bit.ly/46T0xLQ (holding up the merger of Paramount (parent company of CBS) and Skydance until Paramount agreed to settle).

[181] National Rifle Association of America v. Vullo, 602 U.S. 175, 189 (2024).

*Sullivan* (1963)[182] against retaliation or "jawboning"—the use of a flimsy legal claim to reshape speech[183]—all of which the FCC flouts here. Together, *Bantam Books* and *Vullo* prohibit "the practice of constitutional evasion."[184] Whether *Red Lion* remains good law or not, the D.C. Circuit has accepted that *Bantam Books* applies to the FCC no less than any other government actor.[185]

### A. What *Bantam Books* and *Vullo* Prohibit

*Bantam Books* involved a Rhode Island state commission that notified a book distributor that books and magazines it distributed might be obscene, and "either solicited or thanked [him], in advance, for his 'cooperation' with the Commission, usually reminding [him] of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity."[186] While the Commission's power was "limited to informal sanctions—the threat of invoking legal sanctions" that could be imposed by someone else, "and other means of coercion, persuasion, and intimidation," the Court did not hesitate to "look through forms to the substance and recognize that informal censorship may

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[182] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

[183] *See* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015), https://scholarship.law.umn.edu/mlr/182/.

[184] *See, e.g.*, Genevieve Lakier, Enforcing the First Amendment in an Era of Jawboning, 3 [Forthcoming University of Chicago Law Review] (2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5162523 (summarizing the "the contested First Amendment law of jawboning").

[185] Action for Children's Television v. Fed. Commc'ns Comm'n, 59 F. 3d 1249, 1256 (D.C. Cir. 1995) ("Though we ultimately conclude that the FCC is not operating a scheme of informal censorship like the one held unconstitutional in Bantam Books, the possibility that the agency's actions might similarly run afoul of the first amendment demands prompt judicial scrutiny."). The court thus overruled the district court's refusal to "extend the Bantam Books ruling to a medium of expression that is so much more limited in the First Amendment protection it receives," Action for Childrens Television v. Fed. Commc'ns Comm'n, 827 F. Supp. 4, 18 (D.D.C. 1993).

[186] Bantam Books, Inc v. Sullivan, 372 U.S. 58, 62 (1963).

sufficiently inhibit the circulation of publications to warrant injunctive relief."[187] Because the book "distributor 'reasonably understood' the commission to threaten adverse action," its "'compliance with the [c]ommission's directives was not voluntary.'"[188] Rhode Island's commission had effectively subjected "the distribution of publications to a system of prior administrative restraints," and any such system bears a "heavy presumption against its constitutional validity."[189]

Likewise, *Vullo* prohibits "conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress speech."[190] After the Parkland, Florida school shooting, Maria Vullo, New York's attorney general, "pressured regulated entities to help her stifle the [National Rifle Association]'s pro-gun advocacy."[191] Privately, she threatened insurance companies that, if they did not cease selling insurance to the NRA she would pursue "technical regulatory infractions" against them.[192] Publicly, she was more coy: her "Guidance Letters reminded [the entities she regulated] of their obligation to consider their 'reputational risks,' and then tied that obligation to an encouragement for 'prompt actio[n] to manag[e] these risks.'"[193] Such "encouragement" was, in context, clearly coercive. It did not to the Court matter that Vullo's Guidance Letters were written "in an even-handed, nonthreatening tone and employed

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[187] *Id.* at 67.

[188] National Rifle Association of America v. Vullo, 602 U.S. 175, 189 (2024) (quoting *Bantam Books*, 372 U.S. at 66-68).

[189] 372 U.S. at 70.

[190] *Vullo* at 191.

[191] 602 U.S. 175 at 181.

[192] *Id*. at 183.

[193] *Id.* at 176.

words intended to persuade rather than intimidate."[194] *Vullo* likewise rejected the appellate court's conclusion that Vullo's Guidance Letters were not coercive because they "'did not refer to any pending investigations or possible regulatory action' and alluded only to business-related risks 'amid growing public concern over gun violence.'"[195] The Court recognized that a "threat need not be explicit" to be coercive.[196]

By the same token, in *Bantam Books*, it did not matter that the Rhode Island commission had no formal power to prosecute anyone; the Court had "to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."[197] The commission used "the threat of invoking legal sanctions [applied by someone else] and other means of coercion, persuasion, and intimidation" to suppress speech.[198] Even "informal censorship may," *Bantam Books* noted, "sufficiently inhibit the circulation of publications to warrant injunctive relief."[199]

### B. The FCC Is Jawboning Speech in Violation of *Vullo* and *Bantam Books*

The Notice is remarkably similar to Vullo's "Guidance Letters."[200] It is part of a larger pattern of threats made by Chair Carr that are so obviously coercive that even after Sen. Ted Cruz (R-TX), who chairs the Senate Committee responsible for overseeing the FCC,

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[194] *Id.* at 185.

[195] *Id.*

[196] *Id.* at 188.

[197] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

[198] *Id.*

[199] 372 U.S. at 67.

[200] *Vullo*, 183-84.

recognizes them as "mafioso" threats to something "right out of *Goodfellas*," essentially: "nice bar you have here, it'd be a shame if something happened to it."[201] The Notice comes on top of other similar threats, notably the FCC's recent written "reminder" about broadcasters' public interest obligations.[202]

## VI. What the Commission Should Do

The Commission should return to the recognition that led Congress to enact the exemptions in 1959: that "strict application of the equal opportunities provision 'would tend to dry up meaningful radio and television coverage of political campaigns'"[203] and that "a broadcaster will be reluctant to show one political candidate in any news-type program lest he assume the burden of presenting a parade of aspirants."[204] The specific concern at the time was about forcing the inclusion of minor party candidates;[205] that concern is much greater today as such candidates are much more commonly on the ballot,[206] given the substantial loosening of ballot access laws since the 1960s.[207] But today, there are additional

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[201] Coral Murphy Marcos & Robert Mackey, *Ted Cruz Compares Threats to ABC by FCC Chair to those of Mob Boss,* The Guardian (September 19, 2025), https://www.theguardian.com/us-news/2025/sep/19/ted-cruz-jimmy-kimmel-abc-fcc-mafia

[202] Federal Communications Commission, FCC Reminds Broadcasters of Their Public Interest Obligations, DA-26-530A1, (May 28, 2026).

[203] Chisholm v. Fed. Commc'ns Comm'n, 538 F.2d 349, 353 (D.C. Cir. 1976) (quoting S.Rep. No. 562, 86th Cong., 1st Sess. 10 (1959), U.S.Code Cong. & Admin.News 1959, 2564, 2572).

[204] S.Rep.No. 562, 86th Cong., 1st Sess.. 2564, 2571 (1959).

[205] This concern remained under the Commission's early, rigid applications of the equal time rule. *See supra* notes 69 and 70 and associated text.

[206] This would qualify them for the rule under 47 C.F.R. § 73.1940(b)(1).

[207] *See supra* notes 151 and 152 and associated text.

reasons "strict application of the equal opportunities" rule would discourage candidate interviews: Today's major-party primaries feature increasing numbers of candidates.[208]

Of course, the Commission's concern is not hard to discern: it is that television talk shows do not interview enough Republican candidates (never mind that conservative radio shows essentially never interview Democratic candidates). The Commission has never articulated this view, and for good reason: it would obviously constitute speaker-based discrimination and, again, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[209] While the Supreme Court has upheld ballot laws, such a bans on fusion voting that "may, in practice, favor the traditional two party system,"[210] and campaign finance laws that treat minor and small parties differently,[211] it has never upheld any law requiring the carriage of speech by some major party political candidates but minor party candidates. It has said only that minor party candidates may be excluded from debates organized by public broadcasters.[212] The Commission should, accordingly, abandon any attempt to force television broadcasters to

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[208] *See supra* note 150 (increasing numbers of candidates overall) and 149 (jungle primaries in some states).

[209] Reed v. Town of Gilbert, 576 U.S. 155, 157 (2015); Turner Broadcasting System, Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 648 (1994); *see also* Citizens United v. Federal Election Comm'n, 558 U. S. 310, 340 (2010) ("[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content").

[210] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 366 (1997).

[211] Buckley v. Valeo, 424 U.S. 1, 34 (1976) ("the record is virtually devoid of support for the claim that the $1,000 contribution limitation will have a serious effect on the initiation and scope of minor party and independent candidacies.").

[212] *But see* Arkansas Educational Television v. Forbes, 523 U.S. 666, 691 (1998) (a candidate hosted by a state public broadcaster "was a nonpublic forum, from which [the broadcaster] could exclude [an independent candidate] in the reasonable, viewpoint-neutral exercise of its journalistic discretion.").

interview candidates from any specific party, or to do what *Moody* forbids: "'un-bias' what it thinks biased" or "change the speech of private actors in order to achieve its own conception of speech nirvana."[213]

To begin undoing the chilling of political speech, the FCC should take four immediate measures. First, the Bureau—or, better still, the Commission—should grant *The View*'s petition for declaratory ruling—immediately. Second, the Commission should rescind the Notice as inconsistent with past decisions issued by the Commission and thus an abuse of authority delegated to the Bureau, and because it the Notice fails to provide the "reasoned explanation" necessary for change in its interpretation of Section 315.[214] Third, the Commission should clarify that *Howard Stern* remains good law: "licensees airing programs that meet the statutory news exemption, as clarified in our case law, need not seek formal declaration from the Commission … that such programs qualify as news exempt programming under Section 315(a)."[215] Fourth, the Commission should reaffirm *Aspen Institute, Chisholm*, *Henry Geller*, and *Donahue*: that it will "defer substantially to the good faith news judgments of broadcast licensees."[216]

This would not require the Commission to do nothing. Case-by-case enforcement would still be possible. Granting *The View*'s declaratory ruling would not immunize the show from complaint any more than any such declaratory ruling has ever immunized any show from complaint. If a candidate requests airtime after their rival is interviewed, and their

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[213] 603 U.S. 707, 742 (2024).

[214] *Fox I*, 556 U.S. 502, 516 (2009).

[215] *Howard Stern*, *supra* note 3. While this sentence refers to "news exempt programming," the rest of the decision clearly discusses the news interview exemption.

[216] *Donahue*, *supra* note 4, at *13-14 ¶ 11.

request is denied, they can of course file a complaint with the Commission. Notably, no such complaint has been filed regarding *The View*. The complainant would, rightly, bear the burden of introducing evidence to prove that the show was acting to advance a particular candidacy. The Commission would, of course, have to justify changing its assessment of *The View*, either on factual grounds or in the criteria it used.

If the Commission believes past decisions issued *by the Commission* are improper, it should provide clear standards for how it will apply the bona fide news exemptions—not glib comments about "fake news."[217] The best way to do that is through a rulemaking. Of course, an agency is not *required* to seek public comment before changing positions taken in adjudicative orders;[218] it need only provide "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy."[219] But seeking public comment on vital matters affecting political speech should be uncontroversial. Justice Antonin Scalia recognized that Notice-and-comment was "probably the most significant innovation" of the APA.[220] A rulemaking would allow the Commission to seek public comment on whether Section 315(a) is constitutional, or how to apply the statute consistent with the requirements of the First Amendment and Due Process Clause. Such a rulemaking would be an essential part of the rulemaking Chair Carr himself has suggested to define the "public interest" standard.

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[217] *See supra* note 5.

[218] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[219] *Fox I*, 556 U.S. 502, 516 (2009).

[220] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989). *See also* 5 U.S.C. § 553.

Even if the FCC issues a policy statement rather than a rule, it should give broadcasters and programmers a "fair opportunity to ask the agency to reconsider and perhaps change its position"[221] by sharing taking comment on a draft policy statement before finalizing it, as recommended in the first Trump Administration by the Administrative Conference of the United States, an "independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure."[222] The FCC owes them this much: In general, "regulated persons sometimes feel that they have no choice other than to comply with a policy statement's position, even if they disagree with it."[223] Here, whatever "guidance" the Commission issues will serve as a de facto regulation.[224]

Whatever the Commission does, it must not leave broadcasters in limbo, hesitant to conduct political interviews.

So open one—now. But do not leave television talk shows adrift in the interim. Rescind the Notice and seek comment *before* revoking the guidance that they have long relied upon: that the Commission will defer to their editorial judgment and not expect them to seek prior approval before hosting candidate interviews.

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[221] Administrative Conference of the United States, *Agency Guidance Through Policy Statements*, Recommendation 2017-5 (Dec. 14, 2017), https://www.acus.gov/recommendation/agency-guidance-through-policy-statements.

[222] ADMIN. CONF. OF THE U.S., https://www.acus.gov/.

[223] Federal Trade Commission, *Statement of Commissioner Andrew N. Ferguson on the Franchise Policy Statement* (June 18, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-statement-on-franchise-policy-statement.pdf. Andrew Ferguson, Chairman of the Federal Trade Commission, has explained that agencies "go[] too far" when they "attempt to announce de facto rules through an ostensibly nonbinding Policy Statement, bypassing the procedural safeguards that govern our rulemakings and denying regulated parties the benefit of ex ante judicial review." *Id.*

[224] *See supra* at 33-34.

## VII. Conclusion

The Commission should grant *The View*'s petition and rescind the Notice. It should accept that *Moody* prohibits "forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm," and that this "principle works for social-media platforms as it does for others"—including broadcasting.[225] It should cease trying to "burn the house to roast the pig."[226]

Respectfully submitted,

_____/s/_____

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[225] *Moody*, 603 U.S. at 718.

[226] Butler v. Michigan, 352 U.S. 380, 383 (1957).

## Appendix A: An Exhaustive List of Post-1984 News Interview Decisions

This appendix includes all relevant FCC documents on Lexis that discuss a "bona fide news interview" and "Section 315(a)(2)," plus a few relevant cases discussing other exemptions.

### I. Court & Commission Decisions Establishing the Standard

- **Fox (1996)**[1]
  - The Commission held that, "in the absence of bad faith, it should defer to a broadcaster's good faith news judgment in deciding to broadcast an event," while retaining "an obligation to ensure that there exist reasonable safeguards against broadcaster favoritism."
- **Chisholm v. F.C.C. (1976)**[2]
  - The court held that, "absent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals."
- **Kennedy (1980)**[3]
  - The court reaffirmed that Congress placed "considerable reliance on the exercise of their journalistic discretion," such that "absent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals."
- **Donahue (1984)**[4]
  - The Commission relied on Petitioner's "good faith assertion that on these programs guests and topics are selected for their newsworthiness."
  - "By amending Section 315 to include four categories of exempt news programming, Congress contemplated and intended to encourage increased

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[1] In re Requests of Fox Broadcasting Co., PBS & Capital Cities/ABC, Inc., 11 FCC Rcd 11101 (1996); FCC 96-355A1.

[2] Chisholm v. F.C.C., 538 F.2d 349 (D.C. Cir. 1976).

[3] Kennedy for President Comm., 77 FCC 2d 965, aff'd sub nom. Kennedy for President Comm. v. FCC, 636 F.2d 417 (D.C. Cir. 1980).

[4] Multimedia Entertainment, Inc. (Donahue), 1984 FCC LEXIS 2665, 56 Rad. Reg. 2d (P & F) 143 (May 24, 1984).

news coverage of political campaign activity. To further this goal Congress was prepared to give substantial discretion to the good faith news judgments of broadcast licensees."

- "Congressional intent is to defer substantially to the good faith news judgments of broadcast licensees."

- **U.S. News and World Report / "The Next President" (1987)**[5]
  - The Commission had "no reason to question petitioner's assertion that it and KMSP will make good faith journalistic judgments in their selection of candidates to appear in 'The Next President' and will not use the series as a mechanism to favor or disadvantage any particular candidacies."
  - "Although not required under Section 315(a}(2), the producers of 'The Next President' have also represented to us that they intend to interview all significant and newsworthy candidates, selections of which are based on generally recognized journalistic criteria."
  - "Only where the scheduling of a program is used as a vehicle to advance the political aspirations of a participant would the Commission question its proximity to an election … However, 'he Commission may look beyond the particular scheduling of a program when circumstances raise doubts as to whether the program is a bona fide exercise of broadcaster's good faith news judgment.'"

## II. Bureau Decisions Applying This Standard

- **Jay Leno (2006)**[6]
  - Petitioner represents "that the producers of 'The Tonight Show with Jay Leno' ensure that such decisions are based on the participant's newsworthiness and are not motivated by partisan purposes."
  - "Our decisions stress that the Commission defers to the reasonable, good faith judgment of broadcasters regarding newsworthiness."
  - "[T]he Commission's role is not to decide whether one kind of news story is more *bona fide* than another but rather to determine whether a broadcaster's decision that a program fits a particular news exemption is reasonable. Similarly, our role in this case is not to second-guess broadcasters about the relative newsworthiness of interviewees, but to decide if the broadcasters were

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[5] In re Request of U.S. News & World Report, 2 FCC Rcd 7101, 1987 FCC LEXIS 2788, 63 Rad. Reg. 2d (P & F) 1779 (October 23, 1987).

[6] In re Equal Opportunities Complaint Filed by Angelides for Governor Campaign Against 11 California Television Stations, 21 FCC Rcd 11919, 2006 FCC LEXIS 5689 (MMB Oct. 26, 2006).

reasonable in determining that the news interview segments of "The Tonight Show with Jay Leno" fit within the news interview exemption."

- **700 Club (2008)**[7]
  - Petitioner states "that The 700 Club, its newscasts and news interviews, are not designed to further any candidate's campaign, and the appearances of candidates during those newscasts and interviews is designed to inform CBN viewers and not to further any candidate's campaign."
  - "We have no evidence before us of bad faith or unreasonableness on the part of CBN."
- **Governor Heineman's Call-In Show & Senator Ben Nelson's Call-In Show (2006)**[8]
  - Petitioner indicates that "neither the candidates nor their staffs have any control in the production or direction of the programs," and that the topics "are based on newsworthiness."
  - "As long as a program producer's decisions concerning a program are based on newsworthiness, as NBA has indicated, we are satisfied that the program is not designed to promote or harm a particular candidate."
- **Howard Stern (2003)**[9]
  - Petitioner "states that the news interview segments of 'The Howard Stern Show' satisfy the Commission's requirements for exempt bona fide news interview programming because the program is regularly scheduled; Infinity, which broadcasts the program, has control over all aspects of the show; Infinity's decisions on format, content, and participants are based on newsworthiness; and guests that happen to be political candidates are not selected to advance their candidacies."
- **A&E Biography (2002)**[10]
  - The Bureau found "nothing in the record to suggest that AETN's proposed presidential profiles are intended to advance or harm any particular candidate."

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[7] *In re* Petition of The Christian Broad. Network For Declaratory Ruling (700 Club), DA 08-1041 (MMB May 1, 2008).

[8] *In re* Request of Nebraska Broadcasters Association For Declaratory Ruling, DA 06-1917 (MMB Sept. 25, 2006).

[9] In re Request of Infinity Broadcasting Operations Inc. for Declaratory Ruling, DA 03-2865 (MMB Sept. 9, 2003).

[10] In re Request of A&E Television Networks For Declaratory Ruling, DA 00-1341 (MMB June 20, 2000).

- **Politically Incorrect with Bill Maher (1999)**[11]
    - The Bureau deferred "substantially to broadcasters' good faith journalistic judgment," declining to "second-guess broadcasters about the relative newsworthiness of the interviewees or the topics of discussion."
- **"Inside Edition" & "American Journal" / Rolanda (1994)**[12]
    - "Based on the information contained in King's request, it appears that the news interview segments of "Rolanda" are exempt from equal opportunities as bona fide news interviews."
    - "Moreover, according to King, all topics are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgement, with no intent to further any candidacy."
- **Matter of Fact with Fernando Espuela (2016)**[13]
    - Petitioner "asserts that topics are selected and guests are invited to appear on the basis of their newsworthiness, and not for the purpose of advocating for or against any candidate or position."
- **In Your Interest (1998)**[14]
    - Petitioner "states that … decisions concerning topics and questions are based on each station's reasonable good faith journalistic judgment of newsworthiness rather than an intention to advance any candidacy."
- **Hot Line (1991)**[15]
    - Petitioner "indicates that guests are chosen based on their newsworthiness."
- **Tom Joyner Radio Program (1996)**[16]
    - Petitioner "maintains that the 'Tom Joyner Radio Program' is moderated by Tom Joyner and that the editorial control of the program rests solely with Tom Joyner's good faith journalistic judgment and not by an intention to advance the candidacy of any particular candidate. Joyner Management further

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[11] In Request of ABC, Inc. for Declaratory Ruling, DA 99-2768 (MMB Dec. 10. 1999).

[12] In re Request of King World Productions, Inc., 9 FCC Rcd 6394, 1994 FCC LEXIS 5387, 76 Rad. Reg. 2d (P & F) 825 (MMB Oct. 31, 1994).

[13] In re Hearst TV Inc., 31 FCC Rcd 7191, 2016 FCC LEXIS 2214 (MMB Jun. 30, 2016).

[14] In re Request by Silver King Broadcasting Company For Declaratory Ruling, DA 88-700 (MMB May 6, 1988).

[15] Barbara E. Lewis (Hot Line), 6 F.C.C. Rcd. 7109, DA 91-1451 (MMB Dec. 2, 1991).

[16] In re Request of Joyner Management Services, Inc. for Declaratory Ruling, 11 FCC Rcd 22360, 1996 FCC LEXIS 4788 (MMB Aug. 26, 1996).

states that selection of interviewees is guided by newsworthiness of the persons to be interviewed or the topics they will discuss."

- **Anderson (2011)**[17]
  - Petitioner represents that "Anderson Cooper's decisions regarding the selection of guests for interview are based on their newsworthiness and are not motivated by partisan purpose."
- **Jerry Springer (1994)**[18]
  - "Based on the information contained in Multimedia's request, it appears that the news interview segments of Springer are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2) … Moreover, according to Multimedia, all topics are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy."
- **Capitol Ideas (1996)**[19]
  - "Based on the information contained in CRN's request, it appears that "Capitol Ideas" is a bona fide news interview program… CRN represents that it retains control over the program's topics through the moderator's participation. For instance, Willoughby, employing his news judgment, intervenes in the discussion when he believes such action is appropriate. Moreover, according to CRN, the spontaneous nature of the program precludes the Governor from having any control over the questions which are asked or the subjects that are addressed. Furthermore, it appears that the topics are selected based upon the caller's interests and concerns, rather than any particular agenda of the Governor."
- **Pacifica Radio Town Hall Meetings (1994)**[20]
  - "Based on the information contained in the Pacifica request, it appears that Town Hall Meetings is exempt from the equal opportunities obligation as a bona fide news interview program under Section 315(a)(2). … Pacifica also represents that it retains control over the program's topics and questions asked of the interviewees and that the program's host is able to control audience phone-in participation and program content during the program."

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[17] In re ANE Prods., Inc., 2011 FCC LEXIS 4867, DA 11-1946 (MMB Nov. 28, 2011).

[18] In Re Request of Multimedia Ent., Inc. (Jerry Springer), 9 F.C.C. Rcd. 2811, DA 94-631 (1994).

[19] In re Request of Capitol Radio Networks For Declaratory Ruling, 11 FCC Rcd 4674, 1996 FCC LEXIS 1976 (MMB Apr. 18, 1996).

[20] In re Request of the Pacifica Foundation, For Declaratory Ruling, 9 FCC Rcd 2817, 1994 FCC LEXIS 2776, 75 Rad. Reg. 2d (P & F) 598 (MMB Jun. 22, 1994).

- "We have no basis to question any of Pacifica's assertions and find that they satisfy the requisites of the news interview exemption."

- **Face to Face (1994)**[21]
  - "Based on the information contained in KQED's request, it appears that the "Face to Face" program is exempt from equal opportunities as a bona fide news interview under Section 315(a)(2) … According to KQED, all topics and participants are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy..."

## III. Additional News Interview Decisions

- **Sally Jessy Raphael (1991)**[22]
  - "Based on the information contained in Multimedia's request, it appears that the news interview segments of SJR are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2)…Moreover, according to Multimedia, all topics are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy."

- **NBC 11-Part Series / "Summer Sunday" (1984)**[23]
  - "NBC indicates that it will exclusively produce and control the program and its content. Furthermore, NBC represents that all persons selected to be interviewed and the topics to be discussed will be based on their newsworthiness and that any candidate interview will be presented solely for its news value and not to advance that individual's candidacy."
  - "[W]e have no information before us to suggest that "Summer Sunday" is designed as a vehicle to promote any particular candidacy."

- **Face Off (1985)**[24]
  - "it appears from RKO's representations that the selection of topics to be discussed and the persons to be interviewed will be based on their newsworthiness and the good faith journalistic judgment of WOR-TV."

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[21] In re Request of KQED, Inc. (Face to Face), 9 FCC Rcd 2813, 1994 FCC LEXIS 4037, 75 Rad. Reg. 2d (P & F) 597 (MMB Jun. 21, 1994).

[22] In re Request of Multimedia Entertainment, Inc. (Sally Jessy Raphael Show), 6 FCC Rcd 1798, 68 Rad. Reg. 2d (P & F) 1545 (MMB Apr. 1, 1991).

[23] In re Request by National Broadcasting Company, Inc., 56 RR2d 958, 1984 FCC LEXIS 2214 (MMB Aug. 3, 1984).

[24] In re Request by RKO General, Inc. (Face Off), 1985 FCC LEXIS 2826 (MMB Aug. 12, 1985).

- **On the Air with Ruth Ann Leach (1987)**[25]
    - The Bureau found the program "appears to satisfy these criteria" absent any analysis.
- **The Phoenix File (1988)**[26]
    - "Based on the information provided by KUTP, it appears that the news interview segments of "The Phoenix File" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2)."
- **Geraldo (1988)**[27]
    - "Based on the information contained in Tribune's request, it appears that "Geraldo" is exempt from equal opportunities as a bona fide news interview program under Section 315(a)(2) … according to Tribune, all decisions as to format, editing, content and participants are based on its good faith journalistic judgment and newsworthiness, and are not intended to advance any individual's candidacy."
- **Northwest / Town Hall (Fisher Broadcasting / KATU-TV Portland, 1988)**[28]
    - "Based on the information before the Commission and our precedent it appears that "AM Northwest," "Sunday Northwest," and "Town Hall" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2) … The licensee asserts that it produces and controls all three programs and that all decisions as to topics, guests, format, and content are made by KATU personnel based on good faith journalistic judgment."
- **Public People, Private Lives (1988)**[29]
    - "Based on the information provided by KCRA-TV, it appears that the news interview segments of "Public People, Private Lives" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). … The licensee asserts that it and its production subsidiary are jointly responsible for the production and control of the program. The licensee, with its production

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[25] In re Request by WTVF Nashville, Inc. (On the Air with Ruth Ann Leach), 2 FCC Rcd 7511, 64 Rad. Reg. 2d (P & F) 635 (MMB Dec. 29, 1987).

[26] In re Request of United Television, Inc. (KUTP-TV Phoenix) (The Phoenix File), 3 FCC Rcd 2726, 64 Rad. Reg. 2d (P & F) 1441 (MMB May 12, 1988).

[27] In re Request o Tribune Broadcasting Company (Geraldo), 3 FCC Rcd 6248, 1988 FCC LEXIS 2481 (MMB Oct. 17, 1988).

[28] In re Request of Fisher Broadcasting Company (KATU-TV Portland), 3 FCC Rcd 6279, 1988 FCC LEXIS 2477 (MMB Oct. 18, 1988).

[29] Kelly Broadcasting Company (KCRA-TV Sacramento) (Public People, Private Lives), 3 FCC Rcd 6783 (MMB Nov. 15, 1988).

subsidiary, makes the decisions about the format, content and participants of the program based on good faith journalistic judgment and newsworthiness, with the intent to provide information to its audiences on prominent public figures, rather than the desire to oppose or advance any candidacies."

- **America's Black Forum (1988)**[30]
  - "Based on NBC's request, it appears that "America's Black Forum" is exempt from equal opportunities as a bona fide news interview program under Section 315(a)(2) … Moreover, according to NBC, all decisions by both WRC-TV and Uniworld regarding the format, editing, content and participants are based on their good faith journalistic judgment and newsworthiness, and are not intended to advance any individual's candidacy."
- **Later with Bob Costas (1991)**[31]
  - "according to NBC, all guests are selected on the basis of their newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further the candidacy of any particular individual. In view of these considerations, it appears that "Later with Bob Costas" is exempt from equal opportunities as a bona fide news interview program under Section 315(a)(2)."
- **The Press / The Barbara Whitesides Show (1993)**[32]
  - "Based on the information contained in KFI's request, it appears that the news interview segments of the Press and Hewitt programs are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2) of the Act … KFI maintains that decisions regarding the news interview segments' format, content, and participants are based upon the producers' bona fide news judgment, with no intent to advance or harm the candidacy of any individual."
- **West 57th (1985)**[33]
  - "CBS represents that it will produce and control the program. CBS also indicates that persons to be interviewed on "West 57th" will be selected on the

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[30] In re Request of National Broadcasting Company, Inc. (WRC-TV Washington, D.C.) (America's Black Forum), 3 FCC Rcd 7225, 1988 FCC LEXIS 2509 (MMB Nov. 9, 1988).

[31] National Broadcasting Co., Inc. (Later with Bob Costas), 6 FCC Rcd 5200, 1991 FCC LEXIS 4694 (MMB Sept. 4, 1991).

[32] KFI Inc. (The Press; The Barbara Whitesides Show), 8 FCC Rcd 8561, 1993 FCC LEXIS 6141 (MMB Dec. 9, 1993).

[33] CBS Inc., 1985 FCC LEXIS 2506 (Oct. 1, 1985).

basis of their newsworthiness and not for purposes of advancing the candidacy of a particular person."

- **"1986" (1986)**[34]
  - "NBC represents that the selection of candidates to be interviewed on these segments will be based on their newsworthiness, and not for the purpose of advancing any individual's candidacy."
- **The Morning Program (1987)**[35]
  - "CBS represents that the selection of candidates to be interviewed on these segments will be based solely on their newsworthiness, and not for the purpose of advancing any individual's candidacy."
- **"Capital Edition" and "22:26" (1988)**[36]
  - "Within this framework, and based on the information WUSA has provided, it appears that the news interview segments of both "Capital Edition" and "22:26" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2)…Further, the licensee asserts that it produces and controls both programs, and that all decisions as to format, editing, content and participants are made by WUSA personnel, based on good faith journalistic judgment and newsworthiness, and not on an intention to benefit any particular candidate."
- **King Broadcasting / KING-TV Seattle (1991)**[37]
  - The "good faith" prong "places considerable reliance on the exercise of a broadcaster's journalistic discretion to determine 'newsworthiness' once it is determined an exempt news event is involved."
- **Who is Ross Perot (1992)**[38]
  - "[A]ccording to ABC, decisions as to the program's content and format, including the opportunity Perot was afforded to respond to the preceding program, stemmed from ABC's good faith journalistic judgment and newsworthiness, and was not designed or intended to favor Perot's candidacy. Fulani has not presented any evidence to the contrary."

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[34] National Broadcasting Co., 60 RR2d 1068, 1986 FCC LEXIS 3024 (MMB July 17, 1986).

[35] CBS Inc., 2 FCC Rcd 4377, 63 Rad. Reg. 2d (P & F) 483 (MMB Jul. 21, 1987).

[36] Detroit News, Inc. (WUSA-TV Washington, D.C.), 3 FCC Rcd 692, 1988 FCC LEXIS 154 (MMB Feb. 16, 1988).

[37] In re Request of King Broadcasting Company (KING-TV Seattle), 6 FCC Rcd 4998, 69 Rad. Reg. 2d (P & F) 1017 (MMB Aug. 22, 1991).

[38] Arthur R. Block, 7 FCC Rcd 6882, 1992 FCC LEXIS 5932, 71 Rad. Reg. 2d (P & F) 920 (MMB Oct. 21, 1992).

- **In re Requests of Fox Broadcasting Company, PBS, and Capital Cities/ABC, Inc. (1996)**[39]
    - "[T]he Commission has accorded greater deference to a licensee's good faith news judgment."
- **In re Complaint of Ross Perot against ABC, CBS, NBC, and Fox Broadcasting Co. (1996)**[40]
    - "ABC states that its news division controls the program and guests are selected on the basis of good faith journalistic judgment, not to favor any particular candidacies. Thus, in the absence of any indication to the contrary, "20/20" falls within the news interview exemption."
- **60 Minutes (1976)**[41]
    - The Commission concluded that the 60 MINUTES "news interviews with legally qualified candidates ... shall be considered to be bona fide news interviews within the meaning of the 315(a)(2) exemption" based on "the description of 60 MINUTES contained in [the petitioner's] letter."
- **Ed Vrdolyak / Ty Wansley (1997)**[42]
    - "Based on the information contained in Infinity's request, it appears that the guest interview portion and the listener call-in segment of EVTW qualify for a news interview exemption from equal opportunities pursuant to Section 315(a)(2) … it appears that the topics and guests selected are based upon their newsworthiness in the exercise of WJJD's good faith judgment rather than an intent to advance a particular candidacy."

## IV. Decisions Engaging with the record

These are Notable because the Bureau did not simply defer to the petitioner's representations—it independently examined the record (sample-period topic logs and guest lists) before granting the exemption.

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[39] In re Requests of Fox Broadcasting Company, 11 FCC Rcd 11101, 1996 FCC LEXIS 4544, 4 Comm. Reg. (P & F) 580 (MMB Aug. 21, 1996).

[40] In re Complaint of Ross Perot**,** 11 FCC Rcd 13109, 1996 FCC LEXIS 5519, 4 Comm. Reg. (P & F) 1092 (MMB Oct. 4, 1996).

[41] In re CBS, 58 F.C.C.2d 601, 36 Rad. Reg. 2d (P & F) 381 (MMB Feb. 19, 1976).

[42] In re Request of Infinity Broadcasting Corp. of Illinois, 12 FCC Rcd 773, 1997 FCC LEXIS 219 (MMB Jan. 14, 1997).

- **Briem (1985)**[43]
    - The Bureau found "substantially all of the topics covered during a sample period pertained to news events or news-related issues," noting that "ABC submitted a list of its news interview editions which aired from January to March 1985."
- **Michael Jackson Program [KABC-TV Los Angeles] (1984)**[44]
    - The Bureau found "substantially all of the topics covered during a sample period pertained to news events or news-related issues," and that "[a]n examination of the logs shows ABC's characterization of the newsworthiness of the topics to be accurate."
- **Larry King (1984)**[45]
    - Petitioner represents "that about 80% of 'King' features guests who discuss newsworthy topics"; on review of six months of submitted guest lists, "[a]n examination of these lists does not show Mutual's judgment about newsworthiness to be unreasonable."
- **Delicate Balance (1984)**[46]
    - The Bureau found the selections "appear to be based on their newsworthiness," and that "[a]n examination of this list supports a decision as to the newsworthiness of the issues and participants."

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[43] In re Request by American Broadcasting Companies (Briem), 1985 FCC LEXIS 2086 (MMB Dec. 31, 1985).

[44] In re Request by American Broadcasting Companies (Michael Jackson Program), 56 RR2d 1659, 1984 FCC LEXIS 1793 (MMB Oct. 23, 1984).

[45] In re Request by Mutual Broadcasting System, Inc. (Larry King Show), 56 RR2d 956, 1984 FCC LEXIS 2127 (MMB Aug. 15, 1984).

[46] In re Request by Media and Society Seminars, Inc. (Delicate Balance), 56 RR2d 1150, 1984 FCC LEXIS 2027 (MMB Sept. 5, 1984).