

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
*Bona Fide* News Interview Program ) MB Docket No. 26-124  
Exemption From Statutory Equal )  
Opportunities Requirements )

REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS

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**I. INTRODUCTION AND SUMMARY**

In response to commenters' submissions in this proceeding, the National Association of Broadcasters (NAB)<sup>1</sup> herein addresses the constitutionality of Section 315 of the Communications Act of 1934 (Act). Section 315 provides that, if a radio or television broadcast licensee permits any legally qualified candidate for public office to use its station, then the licensee must afford equal opportunities to all other legally qualified candidates for that same office in the use of its broadcast station.<sup>2</sup> To increase news coverage of political campaigns and events, Congress established four exemptions to the equal opportunities requirements. An appearance by a legally qualified candidate in (1) *bona fide* newscasts, (2) *bona fide* news interviews, (3) *bona fide* news documentaries (if the candidate's appearance is incidental to the presentation of the subjects covered by the documentary), or (4) on-the-spot coverage of *bona fide* news events (e.g., political conventions) is deemed not to be a use of a broadcasting station. Thus, a candidate's appearance in these four types of

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<sup>1</sup> NAB is the nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> 47 U.S.C. § 315(a).

exempted news-related programming does not trigger any equal opportunity requirements for the broadcaster.<sup>3</sup>

Last January, the Media Bureau in a public notice provided “guidance on the application of the statutory equal opportunities requirement and the *bona fide* news exemptions to broadcast television stations, including their airing of late night and daytime talk shows.”<sup>4</sup> On May 22, the Media Bureau requested public comment<sup>5</sup> on a petition for declaratory ruling that one television program (*The View*) qualifies for the *bona fide* news interview exemption under Section 315(a).<sup>6</sup>

As an initial matter, NAB has long counseled its members to comply with the equal opportunity requirements – providing detailed guidance on how to do so – and acknowledges the FCC’s role in ensuring its rules are followed. Here, the May Public Notice expressly asked whether the federal equal opportunities statute that underlies the FCC’s rules passes constitutional scrutiny, not just for *The View* but for all broadcast programming across the industry.<sup>7</sup> Given the multiple legally flawed responses to this inquiry, NAB now responds to commenters in this proceeding by providing our assessment of the industry-wide constitutional issues triggered by the equal opportunities statute and related FCC rules.

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<sup>3</sup> *Id.*

<sup>4</sup> *FCC’s Media Bureau Provides Guidance on Political Equal Opportunities Requirement for Broadcast Television Stations*, Public Notice, DA 26-68, at 1 (Jan. 21, 2026).

<sup>5</sup> *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*, Public Notice, MB Docket No. 26-124, DA-26-517 (May 22, 2026) (May Public Notice).

<sup>6</sup> *KTRK Television, Inc. and American Broadcasting Companies, Inc., Petition for Declaratory Ruling Under Section 315(a) of the Communications Act of 1934, as Amended* (May 7, 2026).

<sup>7</sup> May Public Notice at 2.

As NAB explains in detail below, that statute, Section 315 of the Act, and the FCC's parallel rule, 47 C.F.R. § 73.1941, violate the First Amendment on their face.<sup>8</sup> The statute and rule regulate broadcasters' speech in a way that plainly discriminates based on content and viewpoint, contrary to the Constitution. Those commenters, including Public Knowledge and United Church of Christ Media Justice Ministry, that contend Section 315(a) is content neutral and constitutional are incorrect.<sup>9</sup>

The entire foundation of the argument that the statute passes constitutional muster rests on the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, where the Court applied a lessened level of First Amendment scrutiny to broadcasters based on the media landscape as it existed in 1969.<sup>10</sup> *Red Lion's* holding was expressly limited to the factual context that was before the Court, at a time when broadcast stations were much more limited in number, spectrum was seen as scarce, and broadcast television and radio dominated mass media. As Justice Thomas explained nearly 20 years ago, "even if [the] Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion*," "dramatic technological advances have eviscerated the factual assumptions underlying those decisions."<sup>11</sup>

As both *Red Lion* itself and later cases made clear, *Red Lion's* relaxed First Amendment test was a bespoke accommodation of the unique role that broadcasting played

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<sup>8</sup> Rule 73.1941(a) restates the equal opportunity requirements and exemptions set forth in Section 315(a) of the Act without additional elaboration.

<sup>9</sup> Comments of Public Knowledge, MB Docket No. 26-124, at 42-43 (June 22, 2026) (claiming that Section 315 "stands on solid ground" constitutionally and is "content neutral"); Comments of United Church of Christ Media Justice Ministry, MB Docket No. 26-124, at 4-5 (June 22, 2026) (claiming that the equal time rule is "fully constitutional").

<sup>10</sup> 395 U.S. 367 (1969).

<sup>11</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 533 (2009) ("*Fox I*") (Thomas, J., concurring).

in the media market of the 1960s, which bears no resemblance to the abundant media marketplace of 2026. And as other areas of First Amendment law make clear, the government's right to restrict access to a public resource that private parties may use to speak cannot justify content- and viewpoint-based restrictions on that speech. *Red Lion* thus no longer governs First Amendment scrutiny of the equal opportunities statute, leaving the Commission and federal courts free to assess the First Amendment implications of broadcast regulations like equal opportunities under ordinary First Amendment principles.

Beyond the fundamentally altered factual landscape, *Red Lion*'s premise is irreconcilable with the Court's modern jurisprudence on editorial discretion. *Red Lion*'s suggestion that the government had an interest in ensuring that speech is "balanced," and that the government's interest in balance was sufficient to override the editorial discretion of private companies, is a relic of an approach the Court has since abandoned. For all these reasons, if presented with the question, the Supreme Court will likely overrule or otherwise repudiate *Red Lion*, thus removing the only basis for upholding the validity of Section 315 under the Constitution. Perhaps fear of this result explains why commenters such as Free Press and Public Knowledge argue that constitutional questions about Section 315 are outside the scope of this proceeding and that the Commission does not need to revisit *Red Lion*.<sup>12</sup>

But even assuming Section 315 of the Act could survive a facial First Amendment challenge, the Commission, contrary to certain commenters' suggestions, should maintain its historical approach to applying the *bona fide* news interview and other news-related exemptions under Section 315(a) to avoid raising additional constitutional concerns. The

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<sup>12</sup> Comments of Free Press, MB Docket No. 26-124, at 17-18 (June 22, 2026); Public Knowledge Comments at 40-43.

Commission and the courts have recognized for decades that Congress's fundamental purpose in enacting the four news-related exemptions was to encourage increased news coverage of candidates, campaigns, and elections and to give broadcasters the discretion to exercise their good faith news judgment in deciding which candidates and events to cover and in what formats. The FCC's long-standing approach to the scope and application of the news exemptions has promoted increased coverage of political campaigns and candidates, which is precisely what Congress intended. Suggestions made in the record for restricting the application of these exemptions by lessening deference to broadcasters' good faith judgment as to newsworthiness and their editorial discretion about political news coverage also would increase the First Amendment burdens of the equal opportunities statute and thus increase the likelihood that Section 315 would fail any as-applied constitutional challenge.

## II. THE EQUAL OPPORTUNITIES REQUIREMENTS VIOLATE THE FIRST AMENDMENT

Contrary to the position of certain commenters in this proceeding, the equal opportunity requirement in Section 315(a) is a content- and viewpoint-based regulation of core political speech. The only authority that has ever been thought to save Section 315(a) from its tension with the First Amendment is *Red Lion*.<sup>13</sup> But *Red Lion*'s holding was, by its own terms, confined to factual predicates of the 1960s – namely, spectrum scarcity and broadcasting's then-dominant role in mass media – that no longer exist. *Red Lion* thus no longer controls First Amendment scrutiny of content- or viewpoint-based broadcast restrictions such as the equal opportunities rule in today's media marketplace.

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<sup>13</sup> 395 U.S. 367 (1969).

## A. The Equal Opportunities Statute Requires Content and Viewpoint Discrimination and Cannot Survive Strict Scrutiny

Section 315(a) plainly discriminates on content and viewpoint and does not satisfy strict scrutiny. Subject to exceptions for various forms of “bona fide” news, Section 315(a) provides that “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, [it] shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”<sup>14</sup>

“Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional.”<sup>15</sup> A law is facially content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”<sup>16</sup> A law is viewpoint-based if it “seeks to dictate what particular ‘opinion or perspective’ individuals may express on [a] subject.”<sup>17</sup> Viewpoint discrimination is a particularly “egregious form” of content-based regulation that the government “must nearly always ‘abstain’ from.”<sup>18</sup> Both content- and viewpoint-discrimination trigger strict scrutiny, a demanding and rarely satisfied standard that requires the government to prove that a law is “narrowly tailored to serve compelling state interests.”<sup>19</sup>

Section 315(a) is content-based on its face. The equal opportunity requirement is triggered by a particular category of content: the “use” of the station by a “legally qualified

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<sup>14</sup> 47 U.S.C. § 315(a).

<sup>15</sup> *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461, 471 (2025) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

<sup>16</sup> *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (quotation marks omitted).

<sup>17</sup> *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (quoting *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995)).

<sup>18</sup> *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

<sup>19</sup> *Id.* (quoting *Reed*, 576 U.S. at 163).

candidate for any public office” – that is, electoral and political speech.<sup>20</sup> Whether Section 315(a)’s obligations attach turns entirely on what is being broadcast, and by whom. That is an “obvious” regulation of speech “by particular subject matter.”<sup>21</sup> The Act’s exemption scheme compounds the problem by exempting only specified types of “news” programming. Thus, Section 315(a) is steeped in content-based discrimination.<sup>22</sup> Claims to the contrary by Public Knowledge are risible.<sup>23</sup>

Section 315(a) also discriminates based on viewpoint. The “newsworthiness” inquiry vests government officials with discretion to decide which programs are legitimate “news” and which are not – and therefore which speakers must open their airtime to government-selected political candidates. In other words, Section 315(a) permits the government to decide which “ideas and beliefs [are] deserving of expression [and] consideration.”<sup>24</sup> That is precisely what the First Amendment forbids. The government “may not interfere with private actors’ speech to advance its own vision of ideological balance,” and may not require a

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<sup>20</sup> 47 U.S.C. § 315(a).

<sup>21</sup> *Reed*, 576 U.S. at 163.

<sup>22</sup> See, e.g., Comments of Information Technology & Innovation Foundation (ITIF), MB Docket No. 26-124, at 8 (June 22, 2026) (explaining that both the core equal opportunities requirement and the four news exemptions are content based).

<sup>23</sup> Public Knowledge Comments at 42 (claiming that “Section 315 (in conjunction with its exceptions) is content neutral”). Even beyond erroneously asserting that a clearly content-based statute is content neutral, Public Knowledge strains to defend the constitutionality of Section 315 by claiming that it, properly applied with its statutory exemptions, “can be understood as serving First Amendment *values* by encouraging coverage of candidates and public affairs.” *Id.* at 2 (emphasis added); see also *id.* at 43 (claiming that Section 315 “acts in service of the First Amendment”). For the reasons explained below, NAB disagrees that Section 315 can survive constitutional scrutiny and observes that Public Knowledge, as a former Supreme Court Justice warned against, has “los[t] sight of the First Amendment itself, and march[ed] forth in blind pursuit of its ‘values.’” *CBS v. Democratic Nat’l Committee*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

<sup>24</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

speaker to “create a different expressive product, communicating different values and priorities.”<sup>25</sup> And Section 315(a) explicitly regulates and compels political speech, which is at the core of the First Amendment because political speech is “indispensable to the discovery and spread of political truth.”<sup>26</sup>

As a content- and viewpoint-based regulation of speech, Section 315(a) can survive constitutional scrutiny only if it is narrowly tailored – i.e., it is the least restrictive means of serving a compelling governmental interest. As other commenters agree, neither element is satisfied.<sup>27</sup>

The Supreme Court has found “only one permissible ground for restricting political speech: the prevention of ‘*quid pro quo*’ corruption or its appearance,” and has consistently rejected other government interests, “[h]owever well intentioned.”<sup>28</sup> Section 315(a) does nothing to address *quid pro quo* corruption. The government interest that the equal opportunities requirement ostensibly serves – ensuring that the listening public hears a “balanced” presentation of political views – is one that the Supreme Court has twice held insufficient to justify commandeering a private speaker’s editorial choices. In *Miami Herald Publishing Co. v. Tornillo*, Florida’s asserted interest in “ensur[ing] that a wide variety of views reach[es] the public” could not justify a statute that forced newspapers to publish political

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<sup>25</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 741, 743 (2024).

<sup>26</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (quoting *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

<sup>27</sup> See ITIF Comments at 8-10; Comments of Protect The 1st, MB Docket No. 26-124, at 3 (June 22, 2026); see also Comments of The Foundation for Individual Rights and Expression (FIRE), MB Docket No. 26-124, at 33-34 (June 22, 2026) (asserting that the equal opportunities requirements cannot survive any level of First Amendment scrutiny).

<sup>28</sup> *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 305-6 (2022).

candidates' replies.<sup>29</sup> More recently in *Moody*, the Court reaffirmed that the government's desire to "achieve its own conception of speech nirvana" is "a preference [it] may not impose" through regulations on private speech.<sup>30</sup> The Supreme Court also has concluded that another type of "balance" – "leveling the playing field" for political candidates – cannot justify burdening political speech, thereby further calling into question the sufficiency of the government's interest served by Section 315's equal opportunities requirement.<sup>31</sup>

Nor is Section 315(a) narrowly tailored. The equal opportunities requirement is both overinclusive and underinclusive. For example, Section 315(a) would compel "equal opportunities" for every legally qualified candidate regardless of newsworthiness. In California's recent open gubernatorial primary, applying the rule would have forced stations to accommodate 61 candidates for governor and 16 candidates for lieutenant governor.<sup>32</sup> That would not expand political speech, but would lessen or extinguish it as stations decline to cover any candidate rather than dedicating equal airtime to all of them. Section 315(a) is also vastly *underinclusive* if the goal is to ensure a "balanced" media landscape. The statute applies only to over-the-air broadcasting while leaving untouched the cable, streaming,

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<sup>29</sup> 418 U.S. 241, 248, 258 (1974).

<sup>30</sup> 603 U.S. at 742-43.

<sup>31</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011) (rejecting under the First Amendment a state law that attempted to level the playing field by equalizing candidate resources); see also *FEC v. Cruz*, 596 U.S. at 305 (noting *Bennett* as one of the cases in which the Supreme Court rejected attempts to restrict political speech based on legislative aims other than prevention of *quid pro quo* corruption or its appearance).

<sup>32</sup> See <https://elections.cdn.sos.ca.gov/statewide-elections/2026-primary/cert-list-candidates.pdf>. The California Secretary of State's certified list of candidates for the June 2, 2026 primary election for state and federal offices totaled 53 pages, with some races for the House of Representatives having as many as 11 or 12 candidates. Other commenters have shown that the average number of candidates on ballots in federal primary and general elections has grown over the years, partly driven by court decisions allowing more third-party candidates to access ballots. Comments of TechFreedom, MB Docket No. 26-124, at 30-31 (June 22, 2026).

podcast, and social-media channels through which candidates increasingly reach voters today. As former FCC Commissioner Furchtgott-Roth observed more than 25 years ago, “[i]t is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection ... than would the exact same content broadcast over-the-air.”<sup>33</sup> The irony has only grown with the rise of internet streaming. A content- and viewpoint-based law that sweeps far more broadly than any legitimate interest requires, while ignoring the principal avenues used today for the candidate and political speech it supposedly balances, is the opposite of narrow tailoring.

## **B. *Red Lion* Cannot Save Section 315**

### **1. *Red Lion*'s Holding Is Expressly Limited to a Factual Context that No Longer Exists**

Outside the broadcast context, the Supreme Court has repeatedly rejected similar mandates that attempt to compel private speakers to disseminate, host, or associate with speech that they would prefer to exclude.<sup>34</sup> *Red Lion* was an outlier, upholding the fairness doctrine's personal-attack and political-editorial rules based on a First Amendment standard that was unique to broadcasters. But *Red Lion* did not announce a free-floating rule that broadcast speech receives diminished protection forever. Instead, the Court was clear that its holding was limited to the specific facts before it. “The extant facts that drove [the] Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist

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<sup>33</sup> *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8021, n. 11 (2001) (statement of Commissioner Furchtgott-Roth); see also *Fox I*, 556 U.S. at 532–33 (Thomas, J., concurring) (collecting similar statements regarding this irrational difference).

<sup>34</sup> See, e.g., *Moody*, 603 U.S. at 728–33 (explaining that the government may not force a private speaker to present views it wishes to exclude in order to rebalance the expressive marketplace); *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997) (declining to extend broadcast-specific reduced scrutiny to Internet speech); *Tornillo*, 418 U.S. at 256–58 (invalidating statute requiring newspapers to provide political candidates a right of reply).

today.”<sup>35</sup> Now that the factual assumptions on which *Red Lion* was predicated have evaporated, NAB and commenters agree that “the FCC cannot continue to implement a regulatory model premised on a [decades-old] snapshot” that is indisputably inconsistent with modern technology and market realities.<sup>36</sup>

*Red Lion* upheld the fairness doctrine’s personal-attack and political-editorial rules as they existed in 1969.<sup>37</sup> But the Court’s holding then was overtly “[i]n view of the scarcity of broadcast frequencies.”<sup>38</sup> The Court reasoned that – because spectrum was a “scarce resource which the Government has denied others the right to use” – licensees could be treated as government-selected “prox[ies]” or “fiduciar[ies]” obligated to serve the public as the government instructed, rather than as truly private speakers.<sup>39</sup>

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<sup>35</sup> *Fox I*, 556 U.S. at 534 (Thomas, J., concurring).

<sup>36</sup> *Comcast Cable Comm’ns, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring). See FIRE Comments at 26-34 (explaining that the spectrum scarcity theory is invalid and that *Red Lion* was based on the state of technology and the media marketplace as of 1969, which no longer exists); ITIF Comments at 5 (explaining that the scarcity-rationale cases are “clearly wrong” because Americans no longer depend on a small number of broadcasters for news and information, given that today there are far more broadcast stations, as well as websites, cable, podcasts, and other outlets providing millions of channels for Americans to receive news and hear from political candidates); TechFreedom Comments at 3-4 (asserting that the scarcity rationale is “obsolete” and that it is “likely only a matter of time before the Supreme Court strikes down *Red Lion*”).

<sup>37</sup> Those two rules subsequently were repealed by court mandate. *Repeal or Modification of the Personal Attack and Political Editorial Rules*, Order, 15 FCC Rcd 20697 (2000). The Court of Appeals for the District of Columbia Circuit had issued a writ of mandamus directing the Commission to repeal the personal attack and political editorial rules because the FCC had not explained how the public interest could benefit from rules that the court had found to interfere with journalists’ editorial judgment, entangle the government in the operations of the media, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment. *Radio-Television News Directors Ass’n (RTNDA) v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000).

<sup>38</sup> *Red Lion*, 395 U.S. at 400–01.

<sup>39</sup> *Id.* at 389–91, 400.

That fiduciary-based approach was a different First Amendment standard than would have been applied to print journalism, but the Court thought that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>40</sup> And the overwhelming “characteristic” of broadcast spectrum at the time – in the eyes of the Court – was that it was scarce and could not accommodate a sufficiently wide range of viewpoints. Accordingly, the Court reasoned that: “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>41</sup> In other words, a handful of licensees could be conscripted as government-supervised fiduciaries, but only because the Court understood spectrum to be so scarce, and broadcast media so dominant, that a few license-holders could otherwise “monopoliz[e]” the “marketplace of ideas.”<sup>42</sup>

Later cases confirmed that *Red Lion* was limited to that specific factual context and the Court’s specific concerns about the power of broadcast media as it existed in 1969. The Court has refused to extend *Red Lion* to other media for precisely that reason. For example, when asked to extend *Red Lion*’s reasoning to cable and the internet, the Court rejected both invitations – explaining that “cable television does not suffer from the inherent limitations

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<sup>40</sup> *Id.* at 386.

<sup>41</sup> *Id.* at 388; see also, e.g., *id.* at 390 (“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 on this unique medium.”).

<sup>42</sup> *Id.* at 390–92.

that characterize the broadcast medium”<sup>43</sup> and that the distinctive features of broadcast on which *Red Lion* was premised are “not present in cyberspace.”<sup>44</sup>

Critically, *Red Lion* did not treat either broadcast scarcity or broadcast’s role in the marketplace of ideas as permanent constitutional axioms. Instead, *Red Lion* examined technology as it existed in 1969. The Court entertained the argument that scarcity “no longer prevail[ed],” and answered only that it had not been shown that scarcity of broadcast frequencies was “entirely a thing of the past.”<sup>45</sup> The Court added that “[n]othing in this record .... convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated.”<sup>46</sup> The Court recognized that it would be “unwise to speculate on the future allocation of [spectrum] space” and create a permanent constitutional rule.<sup>47</sup> *Red Lion*’s holding was thus avowedly contingent on the state of the world as it existed in 1969 – not a categorical rule that broadcast speech would always receive reduced protection under the First Amendment.

The factual predicates on which *Red Lion*’s holding was contingent have since collapsed.<sup>48</sup> Spectrum scarcity is no longer a meaningful constraint that could conceivably justify government supervision and coercion of broadcasters’ political speech. Thirty years ago, the House Report for the 1996 Telecommunications Act explained that “the scarcity

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<sup>43</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-39 (1994) (also noting that “courts and commentators have criticized the scarcity rationale since its inception” and stating that the scarcity rationale, “whatever its validity in the cases elaborating it,” did not apply in the context of cable regulation).

<sup>44</sup> *Reno v. ACLU*, 521 U.S. 844, 868 (1997); see also *Fox I*, 556 U.S. at 532 (Thomas, J., concurring) (commenting on the Court’s refusal to expand *Red Lion* to other forms of media).

<sup>45</sup> *Red Lion*, 395 U.S. at 396.

<sup>46</sup> *Id.* at 399.

<sup>47</sup> *Id.* at 399.

<sup>48</sup> See, e.g., *Fox I*, 556 U.S. at 533 (Thomas, J., concurring).

rationale for government regulation [of broadcasting] no longer applies.”<sup>49</sup> Even as early as 1984, the Commission had found that “improvements in technology” and increased numbers of broadcast stations had eliminated the traditional scarcity rationale’s concern with the possibility of “monopolistic control.”<sup>50</sup> And in 1987, the FCC concluded that there was no “scarcity in the number of broadcast outlets” sufficient to warrant retaining the fairness doctrine.<sup>51</sup> Among other things, the Commission pointed to the “explosive growth in both the number and types” of broadcast outlets “in every market,” and “the advent and increased availability of such other technologies as cable and satellite television services” that had “dramatically enhanced” “the public’s access to a multiplicity of media outlets.”<sup>52</sup> The Commission also noted emerging technologies including “teletext, videotext[,] and home

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<sup>49</sup> H.R. Rep. No. 104-204, at 54-55 (1995) (citing significant increases in the number of radio and TV stations in just the past ten years, the development of new broadcast TV networks, and the “explosion of video distribution technologies,” including cable TV, wireless cable, and others).

<sup>50</sup> Report and Order, 100 FCC 2d 17, 19 (1984) (1984 Ownership Order), modified on other grounds, 100 FCC 2d 74 (1985) (also recognizing that the traditional scarcity rationale was “increasingly anachronistic” as a basis for differential treatment of broadcasting).

<sup>51</sup> *Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5054 (1987). *Syracuse Peace Council* also explained that the “concept of scarcity—be it spectrum or numerical—is irrelevant” to determining the appropriate First Amendment standard to be applied to broadcasting and that “the fairness doctrine, on its face, violates the First Amendment.” *Id.* at 5043, 5055. Over two dissents, the Commission later repudiated this approach to the First Amendment analysis in an order that the D.C. Circuit subsequently found inadequate to justify the FCC’s personal attack and political editorial rules. See *Repeal or Modification of the Personal Attack and Political Editorial Rules*, Order, 15 FCC Rcd 19973, 19979–80 (2000); *RTNDA v. FCC*, 229 F.3d at 271. But the FCC never abandoned *Syracuse Peace Council*’s separate conclusions that: (1) scarcity no longer poses a practical problem; and (2) in light of the lack of scarcity, the fairness doctrine no longer serves the public interest.

<sup>52</sup> *Syracuse Peace Council*, 2 FCC Rcd at 5051.

computers” that had “the potential of becoming substitute information sources in the marketplace of ideas.”<sup>53</sup>

Since then, the FCC’s predictions have become reality. Spectrum itself has become less scarce, as “technological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use.”<sup>54</sup> And broadcasting’s preeminence in the media marketplace has vanished with the rise of competing electronic media, especially the internet; online video streaming has now surpassed broadcast and cable viewership combined.<sup>55</sup> The Supreme Court itself has recognized that broadcast-centric ownership rules were products of “an early-cable and pre-Internet age when media sources were more limited,” and that “[t]echnological advances led to a massive increase in alternative media options, such as cable television and the Internet,” that “transformed how Americans obtain news and entertainment.”<sup>56</sup> Put simply, and as commenters observe, in 2026 Americans’ ability to send or receive political or other information and candidates’ ability to reach voters do not hinge on a scarce resource that excludes others – i.e., broadcast media – in the way that *Red Lion* assumed was true in 1969.<sup>57</sup>

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<sup>53</sup> *Id.* at 5053 (quotation marks omitted).

<sup>54</sup> Christopher Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 *Geog. L.J.* 245, 279 (2003).

<sup>55</sup> Nielsen, *Streaming Reaches Historic TV Milestone, Eclipses Combined Broadcast and Cable Viewing for First Time* (June 17, 2025), <https://www.nielsen.com/news-center/2025/streaming-reaches-historic-tv-milestone-eclipses-combined-broadcast-and-cable-viewing-for-first-time/>.

<sup>56</sup> *FCC v. Prometheus Radio Project*, 592 U.S. 414, 418-19, 421 (2021).

<sup>57</sup> *Red Lion*, 395 U.S. at 389-91. See, e.g., Comments of The Competitive Enterprise Institute, MB Docket No. 26-124, at 10-13 (June 22, 2026) (explaining that the factual predicate of the equal opportunities requirement has “collapsed” because broadcasters are no longer dominant, “political news and information is no longer scarce,” and candidates can reach voters through many different avenues that Section 315 does not touch); Protect the 1st Comments at 3 (observing that Americans now receive political information from “countless

Myriad Commission decisions as to spectrum allocation and its spectrum auctions also belie arguments that broadcast spectrum or outlets are scarce or that the ability of Americans to receive or communicate important information on public and political issues hinges on supposedly scarce broadcast spectrum. In conceiving and conducting the broadcast spectrum incentive auction over a decade ago, the FCC repeatedly determined that reducing the number of broadcast TV stations would benefit the public by reallocating spectrum to its “highest and best use” (i.e., broadband),<sup>58</sup> actively encouraged broadcasters to relinquish their spectrum,<sup>59</sup> and determined that it would not consider the potential “loss of television service or specific programming” as a factor in accepting bids for stations to relinquish their licenses.<sup>60</sup> And auctions for radio and TV licenses since 2009 do not show a scarcity of broadcast spectrum. In the auction of spectrum for full power TV stations in 2022, one-third of the construction permits (CPs) on offer remained unpurchased.<sup>61</sup> Similarly, in the last auction for FM and AM radio CPs in 2021, over 30 percent of the CPs on offer remained

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sources” and that political candidates have “countless ways” to speak to the electorate); ITIF Comments at 5 (discussing the “millions of channels” that Americans now use to receive news and hear from candidates and that the world in which Americans depended on a small number of broadcast stations is no more).

<sup>58</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6570 (2014).

<sup>59</sup> *Id.* (referring to the “unique” and “once-in-a-lifetime opportunity for broadcasters” presented by the auction).

<sup>60</sup> *Id.* at 6724.

<sup>61</sup> Auction 112 offered 27 full power television CPs, but the winning bidders only acquired 18 permits. See FCC, *Auction of Construction Permits for Full Power Television Stations; Status of Short-Form Applications to Participate in Auction 112*, Public Notice, AU Docket No. 21-449, DA 22-444 (Apr. 25, 2022); FCC, *Auction of Construction Permits for Full Power Television Stations Closes; Winning Bidders Announced for Auction 112*, Public Notice, AU Docket No. 21-449, DA 22-659 (June 23, 2022).

unsold.<sup>62</sup> In the five full power FM auctions prior to 2021, the FCC retained 147 unsold CPs, nearly one quarter (23.4 percent) of the total number of CPs offered.<sup>63</sup>

These auction results may reflect the abundance of broadcast – let alone non-broadcast – outlets today compared to the past. The number and type of radio and television stations in different services licensed by the Commission have increased notably since *Red Lion* was issued in 1969, when only 7,411 broadcast stations were licensed.<sup>64</sup> As of March 31, 2026, the FCC reported 21,626 stations, counting AM, FM (commercial and educational), full power television (commercial and educational), Class A television, low power television, and low power FM. This total number rises to 33,552 if FM and television translators are counted.<sup>65</sup> And this expansion in broadcast stations pales in comparison to the almost infinite online outlets and sources now available to Americans 24/7/365, via their smartphones, smart speakers, smart TVs, and tablet/laptop/desktop computers. Internet access is nearly universal and the “‘smart’ device triumph is nearly total.”<sup>66</sup> Even three decades ago, the Supreme Court observed that “content on the Internet is as diverse as human thought.”<sup>67</sup>

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<sup>62</sup> Auction 109 offered 139 CPs (135 FM permits and four AM permits), but the winning bidders acquired only 97 CPs. See FCC, *Auction of AM and FM Broadcast Construction Permits*, Public Notice, AU Docket No. 21-39, DA 21-780 (July 1, 2021); FCC, *Auction of AM and FM Broadcast Construction Permits Closes*, Public Notice, AU Docket No. 21-39, DA 21-983 (Aug. 12, 2021).

<sup>63</sup> See [www.fcc.gov/auctions](http://www.fcc.gov/auctions), results of full power FM auctions in 2009, 2011, 2012, 2013, and 2015.

<sup>64</sup> *Fox I*, 556 U.S. at 533 (Thomas, J., concurring).

<sup>65</sup> FCC, *Broadcast Station Totals as of March 31, 2026*, Public Notice, DA 26-336 (Apr. 10, 2026).

<sup>66</sup> Pew Research Center, *Internet, Broadband Fact Sheet* (Nov. 20, 2025) (reporting that 96% of U.S. adults overall use the internet and that use is nearly universal among younger demographic groups); Edison Research, *The Infinite Dial 2024*, at 7 (Mar. 28, 2024).

<sup>67</sup> *Reno v. ACLU*, 521 U.S. 844, 852 (1997).

Of course, the fact that a Supreme Court precedent is outdated is insufficient by itself to prevent the Court's holding from controlling the outcome in future cases.<sup>68</sup> But by its own terms, *Red Lion* does *not* require the pretense that broadcasting has been frozen in amber since the 1960s. As explained above, the Court's decision was explicitly premised on the Court's understanding of the media landscape, as it existed at the time, and the Court did not purport to establish a permanent rule. Notably, those commenters arguing that *Red Lion* still applies unchanged as though it were 1969, and still justifies content regulation of broadcasters in 2026, fail to recognize that decision's inherent limitations and ignore or dismiss the disappearance of its factual predicates.<sup>69</sup>

On analogous facts, the Supreme Court recently explained that First Amendment precedents premised on outdated technological premises do not create wooden rules when those premises no longer make sense. In *Free Speech Coalition, Inc. v. Paxton*, the plaintiffs challenged a Texas law requiring certain websites that publish sexually explicit content to verify the ages of their visitors.<sup>70</sup> Decades earlier, in *Reno v. ACLU* and *Ashcroft v. ACLU* ("*Ashcroft II*"), the Supreme Court had held that two seemingly similar laws violated the First

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<sup>68</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 375 (2024) (lower courts are "bound by even the Court's crumbling precedents").

<sup>69</sup> See United Church of Christ Media Justice Ministry Comments at 4-5 (rejecting idea that Section 315 raises First Amendment concerns and flatly stating that "*Red Lion* has never been overruled"); Public Knowledge Comments at 41, 43 (stating that the Supreme Court has "declined to revisit *Red Lion*" and that Section 315 survives scrutiny under that case); Comments of The Center for American Rights, MB Docket No. 26-124, at 29-30, 32 (June 22, 2026) (stating that the Supreme Court has "declined to revisit *Red Lion*" and citing that case as authority for the government regulating the programming that broadcasters carry); see also Center for American Rights Comments at 30 (arguing that *Red Lion* was not about scarcity in "information or news" but only in spectrum). But as explained at length above, the Court in *Red Lion* had specific concerns about the dominance of the broadcast media in 1969 and the perceived ability of a then much smaller number of broadcast licensees to "monopoliz[e]" the "marketplace of ideas." 395 U.S. at 389-90.

<sup>70</sup> 606 U.S. 461, 465 (2025).

Amendment.<sup>71</sup> The plaintiffs argued that *Reno* and *Ashcroft II* created a “comprehensive framework to govern all future attempts to restrict children’s access to online pornography.”<sup>72</sup> But those cases had addressed regulations of the “then-nascent internet,” prior to “the rise of the smartphone and instant streaming.”<sup>73</sup> And in *Ashcroft II*, the Court had reasoned that special filtering software “may well be more effective” than age-verification laws at preventing minors’ access to pornography – an assumption that might have made sense at the time, but was no longer as persuasive to the Court in *Free Speech Coalition*.<sup>74</sup>

In *Free Speech Coalition*, the Court acknowledged that *Reno* and *Ashcroft II* did not “cease to be precedential simply because technology has changed so dramatically.”<sup>75</sup> But “respect for past judgments also means respecting their limits.”<sup>76</sup> The Court emphasized the need to “appreciate the context in which [such] cases were decided.”<sup>77</sup> So, rather than assume that its prior decisions “spoke to the circumstances of this case simply because they both dealt with ‘the internet’ as it existed in the 1990s,” the Court upheld Texas’s challenged law – notwithstanding arguments that content-filtering software might be a less burdensome alternative to an age-verification law, the very argument that the Court found persuasive in *Ashcroft II*.<sup>78</sup>

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<sup>71</sup> 521 U.S. 844 (1997); 542 U.S. 656 (2004); 606 U.S. at 475–77.

<sup>72</sup> 606 U.S. at 489.

<sup>73</sup> 606 U.S. at 477, 489.

<sup>74</sup> *Ashcroft II*, 542 U.S. at 667–68; see Transcript of Oral Argument at 9–10, *Free Speech Coal., Inc. v. Paxton*, No. 23-1122 (U.S. Jan. 15, 2025) (question from Justice Barrett regarding how the “20 years since *Ashcroft [II]*” demonstrated that “content filtering isn’t working”).

<sup>75</sup> 606 U.S. at 491.

<sup>76</sup> *Id.* (quotation marks omitted).

<sup>77</sup> *Id.* at 489.

<sup>78</sup> *Id.* at 491, 497.

Here, too, *Red Lion* did not create a comprehensive, everlasting framework governing the application of the First Amendment to broadcasters. Instead, *Red Lion* addressed only the “questions . . . immediately presented” and “the specific circumstances of the cas[e]” before it.<sup>79</sup> Thus, *Red Lion* does not resolve the constitutionality of Section 315 as applied in today’s media environment.

## 2. Recasting *Red Lion’s* Rationale for Applying a Reduced Level of First Amendment Protection to Broadcasters Does Not Change the Result

Perhaps due to the “persuasive evidence that the scarcity rationale is no longer tenable,”<sup>80</sup> that rationale at various times has been relabeled in efforts to continue justifying broadcast content regulation and a lower level of First Amendment protection for broadcasters. One such effort – which has returned in this proceeding – claims that the public is the “owner” of the airwaves.<sup>81</sup> As former FCC Commissioner Glen Robinson has explained, this reference to public ownership of spectrum is often just another way to restate the scarcity claim – “the notion being that because the frequencies were scarce, their use had to be licensed and the licensing power was tantamount to public ownership of public property.”<sup>82</sup> But contending that the public “owns” the spectrum merely attaches a property label to the government’s assertion of regulatory power over radio frequencies.<sup>83</sup> It says

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<sup>79</sup> *Id.* at 489.

<sup>80</sup> *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

<sup>81</sup> See, e.g., L. R. BeVier, *Is Free TV for Federal Candidates Constitutional?*, at 3-4, American Enterprise Institute for Public Policy Research (1998) (explaining that supporters of broadcast content regulation make the “explicit claim that ‘the public’ owns the broadcast spectrum”).

<sup>82</sup> G.O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 *Duke L. J.* 899, 911-12 (1998).

<sup>83</sup> *Id.* at 912 (observing that the claim to “public ownership” of the airwaves is only a “trope” for the government’s claim to regulatory authority, explaining that “[n]either the means of radiation – a radio transmitter – nor the medium of conduction – space – have ever been regarded as public property,” and that claiming the government or the public “owns ‘property’

nothing relevant about broadcasters' First Amendment rights, let alone justifies reducing them,<sup>84</sup> contrary to some commenters who mistakenly assert that “public ownership” of broadcast spectrum warrants the imposition of most any content regulation on broadcast licensees.<sup>85</sup>

Attempting to buttress the sputtering spectrum scarcity rationale by repeating the mantra of public ownership as a justification for affording broadcasters lesser constitutional protection also cannot be squared with the holdings of *Red Lion* or later cases applying it. The notion that broadcasters were “proxies,” “fiduciaries,” or “trustees” for the public was premised not simply on the fact that they use spectrum, but on broadcast’s perceived dominance in the marketplace of ideas in the 1960s and concerns that broadcasters could silence competing viewpoints without a permissive approach to government oversight, a

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in the spectrum is simply a way of describing the government’s control of the uses of radio frequencies, in space”).

<sup>84</sup> See, e.g., ITIF Comments at 10 (explaining that the “term ‘public resource’ is not a ‘get out of First Amendment free’ card,” and while radio waves may be different from other media, that “makes no difference legally”).

<sup>85</sup> See, e.g., Public Knowledge Comments at 42 (citing “public ownership” of airwaves as justification for regulations impinging on broadcast speech alone); United Church of Christ Media Justice Ministry Comments at 4-5 (citing broadcasters’ use of a “scarce public resource” as justification for regulation of licensees, including but not limited to Section 315); Center for American Rights Comments at 30, 32 (stating that spectrum “belongs to the public” and referring to spectrum as “government property,” which allows the government to impose programming mandates on broadcasters); Comments of Media Research Center, MB Docket No. 26-124, at 2, 8-9, 11-12, 17 (June 22, 2026) (repeatedly using the phrases “public spectrum,” “public broadcast spectrum,” and “public resource” to justify government conditions affecting licensees’ First Amendment rights and to stress licensees’ lack of rights). These commenters reconfirm that the “shibboleth that the public owns the airways unfortunately has had more currency than explanation.” J.R. Wollenberg, *The FCC as Arbiter of “The Public Interest, Convenience, and Necessity,”* in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, 61, 78 (Max Paglin, ed., 1989).

factual predicate that no longer exists.<sup>86</sup> In *FCC v. League of Women Voters*, moreover, the Court explained that “*given spectrum scarcity*, those who are granted a license to broadcast must serve *in a sense* as fiduciaries of the public.”<sup>87</sup> In any event, *League of Women Voters* also emphasized that broadcasters retain First Amendment rights even under *Red Lion*’s relaxed analysis, holding that a statutory ban on “editorializing” by noncommercial educational broadcast stations violated the First Amendment.<sup>88</sup> Claims that the government may simply tell “broadcasters what they can and cannot carry” thus are inaccurate and contrary to Supreme Court precedent.<sup>89</sup>

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<sup>86</sup> See *Red Lion*, 395 U.S. at 389-91 (repeatedly using the words “monopoly,” “monopolize,” and “monopolization” to refer to broadcasters).

<sup>87</sup> 468 U.S. at 377 (emphases added); see also *id.* (noting that the only reason that broadcasting had “required some adjustment in First Amendment analysis” is that “broadcast frequencies are a scarce resource that must be apportioned out among applicants” (quoting *CBS v. DNC*, 412 U.S. 94, 101 (1973) (alterations adopted))).

<sup>88</sup> *Id.* at 402.

<sup>89</sup> Center for American Rights Comments at 32. See also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (stating that the “FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations”); FIRE Comments at 17-22 (explaining in detail that the FCC’s public interest authority never included the power to micromanage programming). Suggestions that licensee’s use of spectrum is conditioned on, or a *quid pro quo* for, licensees giving up First Amendment rights also are contrary to law. See, e.g., Media Research Center Comments at 9-10; Center for American Rights Comments at 32. The FCC previously rejected this argument, “[t]o the extent . . . that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis.” *Syracuse Peace Council*, 2 FCC Rcd at 5055. As the FCC explained, “[i]t is well established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right.” *Id.* at 5055 & n.201, citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (although no one has a constitutional right to receive a government benefit, the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech”). *Accord Rutan v. Republican Party*, 497 U.S. 62, 72 (1990); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (observing that the Court has said in a variety of contexts that “the government may not deny a benefit to a person because he exercises a constitutional right,” and stating that the unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up”).

It may still literally be true that spectrum is subject to the laws of physics and parceled out by the government. But the government's mere allocation function does not give it any need, or authority under the Constitution, to regulate the speech of licensees.<sup>90</sup> And as shown above, it is no longer true that broadcast spectrum is a scarce resource in the way that was relevant to *Red Lion's* First Amendment analysis.<sup>91</sup> Limited space and the government's ability to restrict access to public property are not, by themselves, enough to create a First Amendment free zone. To take an obvious example, there is a finite amount of space in public parks and on public roads, and the government can require licenses or permits for large events or parades.<sup>92</sup> But the government cannot restrict or compel the speech of those licensed to use public parks or roads or treat them as the public's "fiduciary" or "trustee" whose speech may be limited by government regulation because they use public property. And permitting schemes for such speech "must not be based on the content of the message."<sup>93</sup> Street preachers, parade organizers, and protesters using public resources are

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<sup>90</sup> See, e.g., *Syracuse Peace Council*, 2 FCC Rcd at 5055 (concluding that "there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good," and that "there is nothing inherent in the utilization of the licensing method of allocation that justifies the government acting in a manner that would be proscribed under a traditional First Amendment analysis"); ITIF Comments at 9 (observing that scarcity-rationale cases like *Red Lion* mistakenly and unnecessarily "conflated interference management with content management").

<sup>91</sup> See also FCC Media Bureau Staff Research Paper, J.W. Beresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, at 9 (Mar. 2005) (while *Red Lion* seemed to "assume[] that there is a tangible thing, radio spectrum, of which there is a scarce amount," that assumption is "simply incorrect as a matter of scientific fact," and the scarcity rationale "appears to be based on fundamental misunderstandings of physics"); G.O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 912 (1998) (explaining that "'spectrum' is merely a way of describing the forms of electromagnetic radiation; it is not a thing but a force").

<sup>92</sup> *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

<sup>93</sup> *Id.*

not subject to content- and viewpoint-based restrictions on their speech. There is no lawful reason to treat broadcasters' speech in a different and more restrictive manner.<sup>94</sup>

### **3. If the Supreme Court Is Presented with the Question, It Will likely Overrule or Otherwise Repudiate *Red Lion***

Even if *Red Lion* still governed a lower court's scrutiny of Section 315(a), it is highly unlikely that *Red Lion*'s holding would survive review by the Supreme Court today. “[S]tare *decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights.”<sup>95</sup> And *Red Lion* presents a “deep intrusion into the First Amendment

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<sup>94</sup> Finally, content-based or other regulations cannot be justified on the assertion that broadcasters got their licenses “for free.” Center for American Rights Comments at 32; see also Media Research Center Comments at 10-11 (citing the “massive government subsidy” received by broadcasters). This contention is incorrect. In the Balanced Budget Act of 1997, Congress required the FCC to award new commercial radio and TV licenses via auctions. Thus, for nearly 30 years, broadcasters have paid market price to the government for any permits for new stations. The vast majority of broadcasters, moreover – both before and after 1997 – paid full market price for their licenses by acquiring them on the secondary market via assignments of licenses and transfers of control. As early as 1983, FCC staff estimated that 71% of radio stations had changed hands through market purchases. 1984 Ownership Order, 100 FCC 2d at 19 n.3. A 2014 study showed that 92% of all existing full power TV station licensees had paid market rates to the collective tune of about \$50 billion for their licenses. See J.A. Eisenach, *The Equities and Economics of Property Interests in TV Spectrum Licenses*, Navigant Economics, at 10-11 (Jan. 2014), available at [https://www.nab.org/documents/newsroom/pdfs/011614\\_navigant\\_spectrum\\_study.pdf](https://www.nab.org/documents/newsroom/pdfs/011614_navigant_spectrum_study.pdf). Since that time, many more licensees have paid billions more to acquire their licenses in the secondary market, paying full market price. In any event, other entities, including DBS and cellular telephone licensees, received their initial licenses without paying the government (or anyone else) for them, and those licensees are unencumbered by broadcast-type restrictions. *Id.* at 2, 14-15. And regardless of how broadcasters obtained their licenses, they all had to invest in infrastructure, equipment, technological conversions (e.g., from analog to digital), programming, and personnel, without which no service can be provided. Broadcast licensees as a group further pay tens of millions in regulatory fees to the FCC every year and will be paying over \$53 million this year. See *Review of the Commission's Assessment and Collection of Regulatory Fees for Fiscal Year 2026*, Notice of Proposed Rulemaking, MD Docket No. 26-94, FCC 26-25 (Apr. 28, 2026). Content-based or other broadcast regulations therefore cannot be justified by claims about “free” licenses.

<sup>95</sup> *Janus v. Am. Federation of State, County, and Mun. Employees, Council 31*, 585 U.S. 878, 917 (2018).

rights of broadcasters.”<sup>96</sup> In today’s information economy, uniquely reduced First Amendment protections for broadcasters – and only broadcasters – are indefensible.<sup>97</sup> The content regulation that *Red Lion* permits would be “intolerable” if applied to the editorial processes of other forms of media.<sup>98</sup> “[I]t is no longer responsible for courts to apply a reduced level of First Amendment protection . . . on the indefensible notion of spectrum scarcity.”<sup>99</sup>

In addition to the changed factual landscape, *Red Lion*’s premise is irreconcilable with the Court’s modern jurisprudence on editorial discretion. *Red Lion* sustained the government’s power to use a spectrum licensee as a “proxy” or “fiduciary” that could be obligated to provide platforms to opposing voices and rebalance the content of speech on the licensee’s station.<sup>100</sup> Modern cases hold that the government “may *not* interfere with private actors’ speech to advance its own vision of ideological balance,” and that overriding “a private party’s expressive choices” – “say, by ordering the excluded to be included” –

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<sup>96</sup> *Fox I*, 556 U.S. at 531 (Thomas, J., concurring).

<sup>97</sup> Academic criticisms of *Red Lion* making similar arguments are legion. See, e.g., Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 Nw. J. Tech. & Intell. Prop. 1, 1–3 (2010); Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 CommLaw Conspectus 431, 432–40 (2007); Josephine Soriano, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion’s Scarcity Rationale?*, 15 B.U. Pub. Int. L.J. 341, 341–47, 355–56 (2006); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 Colum. L. Rev. 905, 926–30 (1997).

<sup>98</sup> *Telecomms. Rsch. & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (Bork, J.).

<sup>99</sup> *Action for Children’s Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); see also *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (noting the “persuasive evidence that the scarcity rationale is no longer tenable”); *Telecomms. Rsch. & Action Ctr.*, 801 F.2d at 508 (explaining that “[a]ll economic goods are scarce” and that the “universal fact” of scarcity cannot justify content regulation of broadcasting alone). As early as 1984, the FCC found that scarcity “fails to distinguish broadcasting in any practical sense from other businesses, including particularly the nonbroadcast media.” 1984 Ownership Order, 100 FCC 2d at 19.

<sup>100</sup> 395 U.S. at 389–91.

"confronts the First Amendment."<sup>101</sup> *Red Lion*'s suggestion that the government had an interest in ensuring that private speech is "balanced," and that the government's interest in balance was sufficient to override the editorial discretion of private companies, is a relic of an approach the Court has since abandoned.

The Supreme Court also has cast doubt on its own ability to draw fine-grained distinctions between technologies in applying the First Amendment. In *Citizens United v. FEC*, the Court refused to distinguish between video-on-demand and television ads.<sup>102</sup> The Court "decline[d] to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."<sup>103</sup> Such technological distinctions "might soon prove to be irrelevant or outdated by technologies that are in rapid flux," and determining where these lines should be "would require substantial litigation over an extended time," a process that "itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable."<sup>104</sup> In other words, the Supreme Court has rejected the enterprise of giving certain types of media lesser protection under the First Amendment – the core rationale of *Red Lion*.

Given the modern Supreme Court's rejection of the sort of distinctions underlying *Red Lion*, it is unsurprising that multiple Justices have already previewed *Red Lion*'s demise. Justice Thomas has invited reconsideration of *Red Lion* in an appropriate case. As Justice

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<sup>101</sup> *Moody*, 603 U.S. at 731–32, 741 (emphasis added); see also, e.g., *Tornillo*, 418 U.S. at 258; *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

<sup>102</sup> 558 U.S. 310, 326–27 (2010).

<sup>103</sup> *Id.* at 326.

<sup>104</sup> *Id.* at 326–27.

Thomas explained, *Red Lion* “relied on a set of transitory facts,” but “dramatic technological advances have eviscerated the factual assumptions underlying those decisions,” such that “[t]he extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today.”<sup>105</sup> Justice Ginsburg agreed, citing Justice Thomas’s concurrence in calling to reconsider the Court’s “wrong” decision in *FCC v. Pacifica Foundation*, which applied *Red Lion*.<sup>106</sup> Although Justice Ginsburg is no longer on the Court, her views would likely be influential on the current Court, and her agreement with Justice Thomas demonstrates that Justices with different methodological approaches to constitutional questions are aligned that *Red Lion* should be revisited.<sup>107</sup>

As other commenters agree, the Supreme Court, if presented with the question, is highly unlikely to endorse an outdated view of the First Amendment that provides lesser constitutional protection to a single medium that no longer can be considered dominant in the modern internet-centric media marketplace. As a result, content- and viewpoint- based statutes and regulations applicable only to broadcasting, such as Section 315 and the parallel FCC rule, would likely fail First Amendment scrutiny in a constitutional challenge.<sup>108</sup>

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<sup>105</sup> *Fox I*, 556 U.S. at 532-34 (Thomas, J., concurring).

<sup>106</sup> *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring) (citing *Pacifica*, 438 U.S. 726 (1978)).

<sup>107</sup> Additionally, although Justice Kavanaugh has not directly called for *Red Lion* to be overruled, he has made the analogous point that the video programming distribution market should not be regulated based on a decades-old “snapshot.” *Comcast Cable Commc’ns*, 717 F.3d at 994 (Kavanaugh, J., concurring).

<sup>108</sup> See FIRE Comments at 26-34 (explaining in detail that the scarcity rationale no longer justifies broadcast content regulation, the “conditions that once were used to justify differential First Amendment treatment of broadcasters simply do not exist,” and the equal opportunity requirements, which serve no purpose given today’s technologies and the realities of the current media marketplace, “cannot survive any level of First Amendment scrutiny”); ITIF Comments at 3-7 (discussing why the “scarcity-rationale cases are egregiously wrong” and “ripe to be overturned”); TechFreedom Comments at 2-11 (describing at length why Section 315(a) is “likely unconstitutional,” including the obsolescence of *Red Lion*).

### III. MAINTAINING THE PRESENT EXEMPTIONS UNDER SECTION 315 WOULD BE CONSISTENT WITH CONGRESSIONAL INTENT AND AVOID EXACERBATING THE STATUTE'S CONSTITUTIONAL PROBLEMS

Even assuming Section 315(a) of the Act and FCC rule 73.1941 could survive a facial First Amendment challenge, the Commission should reject commenters' arguments to the contrary and maintain its historical approach to the scope and application of the *bona fide* news interview or other exemptions to avoid raising additional legal and constitutional concerns. Doing so would be consistent with the intent of Congress and avoid further exacerbating Section 315's inconsistency with the First Amendment.

#### A. Decades of FCC Precedent, Confirmed by the Courts, Has Consistently Found that Congress Intended Section 315's News Exemptions to Afford Substantial Discretion to Broadcasters' Good Faith News Judgment

As explained above, Congress amended Section 315 of the Act in 1959 to provide four news-related exemptions to the equal opportunities requirement. "Congress's fundamental purpose in enacting these 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."<sup>109</sup> The courts have echoed the FCC's understanding, stating that "Congress wished to increase broadcaster discretion as a means of maximizing coverage of campaign activity."<sup>110</sup>

In applying the statutory exemptions, both the Commission and the (Mass) Media Bureau have found that various news interview programs, as well as news interview segments in a wide range of programming formats from traditional news talk shows to daytime and evening entertainment shows, qualify as *bona fide* news interview programming

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<sup>109</sup> *Request of ABC, Inc. for Declaratory Ruling*, 15 FCC Rcd 1355, 1356 (MMB 1999).

<sup>110</sup> *Kennedy for President Committee v. FCC*, 636 F.2d 417, 425 (D.C. Cir. 1980). *Accord Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976).

exempt from the statutory equal opportunities requirement. As other commenters also recount,<sup>111</sup> the Commission's and the Bureau's decisions consistently afforded deference to broadcasters' good faith judgments regarding the newsworthiness of interviewees or the topics to be discussed.<sup>112</sup>

As far back as 1964, for example, the Commission declared that whether the presentation by a candidate of a charitable message "in connection with a particular news-type program would meet the criteria" for exemption from the equal opportunities rule, "is, of course, one initially for the exercise of the good faith judgment of the broadcast licensee."<sup>113</sup> In affirming a 1975 decision in which the Commission expanded the scope of the exemption for coverage of *bona fide* news events, the U.S. Court of Appeals for the D.C. Circuit observed that Congress's adoption of the Section 315 exemptions had "increased the scope of broadcaster discretion to determine whether a news event was 'bona fide' and deserving of coverage."<sup>114</sup>

Going forward, the Commission consistently deferred to broadcasters' good faith editorial judgment regarding the newsworthiness of programming in finding that a broad range of programs met the standards for news exemptions from the equal opportunities rule. In 1984, for instance, the Commission found that *Donahue*, a less traditional interview

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<sup>111</sup> See, e.g., TechFreedom Comments at 14-17 and Appendix A; FIRE Comments at 23-25; Comments of Reporters Committee for Freedom of the Press and Radio Television Digital News Ass'n (RTDNA), MB Docket No. 26-124, at 2-3 (June 22, 2026).

<sup>112</sup> See, e.g., *Request by Multimedia Entertainment, Inc. for Declaratory Ruling*, Memorandum Opinion and Order, 56 Rad. Reg. 2d 143 at ¶ 11 (1984) (*Donahue Order*).

<sup>113</sup> "*Public Service*" Broadcasting under the "Equal Time" Requirements of Section 315 of the Communications Act of 1934, 40 FCC 390, 391 (1964).

<sup>114</sup> *Chisholm*, 538 F.2d at 359 (affirming *Petitions of Aspen Institute Program on Communications & Society and CBS, Inc., for Revision or Clarification of Commission Rulings Under Section 315(a)(2) and 315(a)(4)*, Memorandum Opinion and Order, 55 FCC 2d 697 (1975)).

program, qualified for the *bona fide* news interview exemption, concluding that “[c]ongressional intent is to defer substantially to the good faith news judgments of broadcast licensees.”<sup>115</sup>

Multiple other decisions have placed substantial weight on broadcasters’ editorial judgment regarding the newsworthiness of interviews and agreed with broadcasters that interviews in various television and radio programming qualified for the *bona fide* news interview exemption.<sup>116</sup> For instance, in a 2006 finding that the news interview segments of the *Tonight Show with Jay Leno* qualified for the exemption, the Media Bureau noted that the FCC’s history of decisions regarding the *bona fide* news interview exemption “stress that the Commission defers to the reasonable, good faith judgment of broadcasters regarding newsworthiness.”<sup>117</sup> In doing so, the Bureau again emphasized that “the prospect of the Commission making determinations as to whether particular kinds of news are more or less

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<sup>115</sup> *Donahue Order*, 56 Rad. Reg. 2d at ¶ 11. See also, e.g., *Request for Declaratory Ruling by Paramount Pictures Corporation, et al.*, 3 FCC Rcd 245, 246 (MMB 1988) (*Paramount Order*) (concluding that, “in light of the absence of bad faith or unreasonableness,” appearances by legally qualified candidates during *Entertainment Tonight* and *Entertainment This Week* should be accorded the *bona fide* newscast exemption, and stating that any other result would thwart “Congress’ intent to enhance news coverage of the political arena” and “place the Commission in the inappropriate position of arbitrating the bona fides of news coverage based on content”).

<sup>116</sup> See, e.g., *Request of Joyner Management Services, Inc., for Declaratory Ruling*, 11 FCC Rcd 22360 (MMB 1996) (*Tom Joyner Radio Program*); *Request of King World Productions, Inc. for Declaratory Ruling*, 9 FCC Rcd 6394 (MMB 1994) (*Rolanda*); *Request of Multimedia Entertainment, Inc. for Declaratory Ruling*, 9 FCC Rcd 2811 (MMB 1994) (*Jerry Springer*).

<sup>117</sup> *Equal Opportunities Complaint Filed by Angelides For Governor Campaign Against 11 California Television Stations*, 21 FCC Rcd 11919, 11923 (MB 2006) (denying equal time complaint by a Democratic candidate for governor of California stemming from the appearance of Republican Governor Arnold Schwarzenegger on the *Tonight Show*).

*bona fide* ‘would involve an unwarranted intrusiveness into program content and would be thus, at least suspect under the First Amendment.’”<sup>118</sup>

In short, for decades now, Commission and Bureau decisions regarding the *bona fide* news interview exemption and other news-related exceptions in Section 315 have consistently applied those exemptions to give “greater deference to a licensee’s good faith news judgment” so as to promote “greater news coverage of the political process,” as Congress intended.<sup>119</sup> This approach recognizes the constitutional concerns of the statutory requirement by providing broadcasters significant discretion in determining if the exemptions apply.

**B. Recommendations to Restrict the Scope of, or Apply Inappropriate Factors to, the Equal Opportunity Exemptions Would Further Increase the Vulnerability of Section 315 to Constitutional Challenges**

Given these myriad decisions across decades, the broadcast industry has reasonably relied upon this precedent in planning programming and coverage of political campaigns, candidates, and events. As explained above, Congress created exemptions to the equal time requirements “to facilitate broadcast coverage of political news,” affirmatively opting “in favor of broader coverage and increased broadcaster discretion.”<sup>120</sup>

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<sup>118</sup> *Id.*, quoting *Paramount Order*, 3 FCC Rcd 245-6 (MMB 1988). Accord *Petition of the Christian Broadcasting Network for Declaratory Ruling*, 23 FCC Rcd 7165, 7166-67 (MB 2008) (finding that the news interview portions of *The 700 Club* qualified for the *bona fide* news interview exemption).

<sup>119</sup> *Requests of Fox Broad. Co., Public Broad. Service, and Capital Cities/ABC, Inc. For Declaratory Rulings*, 11 FCC Rcd 11101, 11108 (1996) (observing that “[o]ver the last twenty years,” (i.e., since the mid-1970s), the FCC has applied the exemptions to allow for more diverse kinds of news programming to qualify, in “recognition of Congress’ primary goal in enacting the exemptions – to facilitate a better informed electorate”).

<sup>120</sup> *Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976). See also *Kennedy for President Committee v. FCC*, 636 F.2d 417, 424 (D.C. Cir. 1980) (explaining that in adopting the exemptions to § 315, Congress concluded that the objective of equal treatment of candidates “must be balanced against two others no less vital: encouraging maximum

Suggestions in the record to restrict the scope and application of the news exemptions, if adopted, would deter broadcast coverage of political campaigns and candidates, the exact opposite of Congress’s intent to promote “maximum coverage” of news events and preserve “licensees’ traditional independent journalistic judgment.”<sup>121</sup> Moreover, increased regulatory uncertainty as to the equal opportunities requirements and exemptions from them are particularly problematic, given the heightened constitutional sensitivities associated with regulations impacting speech about campaigns and other political matters.<sup>122</sup>

Ultimately, recommendations in the record that the Commission narrow the news exemptions to equal opportunity mandates by declining to defer to broadcasters’ good faith judgment as to the newsworthiness of material and their editorial decisions about political news coverage would exacerbate the First Amendment problems with Section 315 and

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coverage of all news events . . . and preservation of licensees’ traditional independent journalistic judgment with respect to broadcasting of such events”); *Requests of Fox Broad. Co., Public Broad. Service, and Capital Cities/ABC, Inc. For Declaratory Rulings*, 11 FCC Rcd 11101, 11108 (1996) (in recognizing “Congress’ primary goal in enacting the exemptions – to facilitate a better informed electorate through greater news coverage of the political process – the Commission has accorded greater deference to a licensee’s good faith news judgment”); *Request by Multimedia Entertainment, Inc. for Declaratory Ruling*, Memorandum Opinion and Order, 56 Rad. Reg. 2d (P & F) 143 at ¶ 4 (1984) (in “amending Section 315 to include four categories of exempt news programming, Congress contemplated and intended to encourage increased news coverage of political campaign activity,” and to “further this goal, Congress was prepared to give substantial discretion to the good faith news judgments of broadcast licensees”).

<sup>121</sup> *Kennedy*, 636 F.2d at 424; see also *Fulani v. FCC*, 49 F.3d 904, 913 (2d Cir. 1995) (stating that “Congress added the exemptions to the equal time provision in order to avoid deterring the broadcast media from providing the public with full coverage of political news events”).

<sup>122</sup> See *FEC v. Cruz*, 596 U.S. at 302 (stating that the “First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for public office”); *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (stating that regulations of political speech “trench[] upon an area in which the importance of First Amendment protections is at its zenith”).

parallel rule § 73.1941.<sup>123</sup> A few commenters, for example, have offered inappropriate considerations for determining whether any particular news or news interview program qualifies for a *bona fide* news exemption, including but not limited to the political contributions that the journalists or anchors involved have or have not made;<sup>124</sup> the voting records of those broadcast personnel;<sup>125</sup> the identities of “non-political” interviewees on a program, which do not concern equal opportunities for candidates;<sup>126</sup> and the precise percentage or number of interviewees identified as “right-leaning” or “left-leaning,” “Democrat-aligned” or “Republican-aligned,” even if they are not candidates or elected officials.<sup>127</sup> The implication that newscasts, news interviews, and news event coverage cannot be *bona fide* if perceived as too “liberal” or “conservative” must be rejected as contrary to the purpose of Section 315’s exemptions and constitutionally suspect.

The commenters suggesting these standards also indicate that the Fairness Doctrine or its equivalent should be applied to determining whether programs or coverage qualifies as *bona fide* news.<sup>128</sup> But the FCC eliminated the Fairness Doctrine in 1987, finding it “violates

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<sup>123</sup> See *Jones v. U.S.*, 526 U.S. 227, 239-40 (1999) (observing that the basic tenet that statutes should be construed to avoid constitutional questions “has for so long been applied by th[e] [Supreme] Court that it is beyond debate”).

<sup>124</sup> Center for American Rights Comments at 18-20.

<sup>125</sup> *Id.* at 19.

<sup>126</sup> Comments of The Bull Moose Project, MB Docket No. 26-124, at 2-3 (June 22, 2026).

<sup>127</sup> Media Research Center Comments at 5; Bull Moose Project Comments at 2.

<sup>128</sup> See Center for American Rights Comments at 16 & n.11 (citing broadcasters’ obligation “to afford reasonable opportunity for the discussion of conflicting views on issues of public importance,” which restates the Fairness Doctrine, as a standard for deciding whether a program qualifies as a *bona fide* news program); Media Research Center Comments at 10 (also restating the Fairness Doctrine for similar purposes).

the First Amendment and contravenes the public interest.”<sup>129</sup> Given its myriad constitutional problems and policy drawbacks, the Fairness Doctrine should not now be resurrected in the guise of determining what news programming is *bona fide*.<sup>130</sup>

These overly intrusive standards suggested by commenters for evaluating whether broadcast programming qualifies for an exemption under Section 315(a) would “intrude unnecessarily upon the editorial discretion of broadcasters,”<sup>131</sup> risk “enlargement of Government control” over broadcast discussion of public issues,<sup>132</sup> entangle the Commission in overseeing more of the “operations of broadcasters conduct,”<sup>133</sup> and chill news reporting and coverage of election-related activities at the heart of the First Amendment.<sup>134</sup> Such a

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<sup>129</sup> *Syracuse Peace Council*, 2 FCC Rcd at 5043. In 1989, the D.C. Circuit Court of Appeals affirmed the FCC’s conclusion that the Fairness Doctrine no longer served the public interest, without reaching the question of unconstitutionality. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

<sup>130</sup> Specifically, the FCC found that the Fairness Doctrine (1) chilled speech and pervasively and significantly impeded the broadcasting of controversial issues of public importance; (2) inhibited the expression of unpopular opinion; (3) placed the government into the intrusive and constitutionally disfavored role of scrutinizing program content; (4) created the opportunity for abuse for partisan political purposes; (5) imposed unnecessary costs on broadcasters and the FCC; and (6) was unnecessary because the public had access to a multitude of viewpoints without regulatory intervention, due to explosive growth in the number and types of information sources. *Syracuse Peace Council*, 2 FCC Rcd at 5043.

<sup>131</sup> *League of Women Voters*, 468 U.S. at 379.

<sup>132</sup> *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94, 126 (1973).

<sup>133</sup> *Id.* at 127.

<sup>134</sup> Even the potential for increased threats of complaints, given the burdens of responding to them and potential enforcement actions, would deter broadcasters from covering political news and events. “No rational firm – particularly one holding a government-issued license – welcomes a government audit.” *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998). See also *Free Press Emergency Petition for Inquiry Into Broadcast of False Information on COVID-19*, DA 20-385, at 3 (MB/OGC Apr. 6, 2020) (denying Free Press’s complaint about stations’ coverage of the COVID-19 pandemic and rejecting its invitation to expand construction of FCC rules “to enable government-led flyspecking of broadcasters’ editorial judgments”).

result would be contrary to the Constitution and court precedent.<sup>135</sup>

For these reasons, even if the statutory and regulatory equal opportunity requirements could survive a facial constitutional challenge, commenters agree with NAB that increasing these provisions' First Amendment burdens by restricting the scope of the exemptions relating to news and campaign coverage would increase the likelihood that Section 315 would fail any as-applied constitutional challenge.<sup>136</sup>

#### IV. CONCLUSION

In response to other parties making questionable constitutional contentions in this proceeding, NAB here has provided the Commission with a comprehensive argument as to whether the federal equal opportunities statute passes muster under the Constitution in the current media marketplace. As discussed above, and as the May Public Notice expressly inquired, Section 315 of the Act and the parallel rule, 47 C.F.R. § 73.1941, violate the First Amendment on their face. Suggestions in the record here by a limited number of commenters that the Commission should restrict the scope and application of the statutory equal

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<sup>135</sup> *CBS v. DNC*, 412 U.S. at 124 (rejecting claims by the Democratic National Committee and others that broadcasters could be required to accept editorial advertisements as an “erosion of the journalistic discretion of broadcasters in the coverage of public issues”); *League of Women Voters*, 468 U.S. at 381 (finding that the expression of editorial opinion “lies at the heart of First Amendment protection” and holding that a ban on editorializing by noncommercial educational broadcast stations violated the First Amendment); see also *RTNDA v. FCC*, 229 F.3d at 270 (issuing writ of mandamus directing FCC to repeal the personal attack and political editorial rules because FCC had not explained how the public interest could benefit from rules that the court had found to interfere with journalists’ editorial judgment, entangle the government in operations of the media, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment).

<sup>136</sup> See, e.g., Competitive Enterprise Institute Comments at 5-10; Reporters Committee for Freedom of the Press and RTDNA Comments at 1, 4; Comments of The Future of Free Speech, *et al.*, MB Docket No. 26-124, at 3-4 (June 18, 2026).

opportunity exemptions, if adopted, would be contrary to congressional purposes and increase the vulnerability of Section 315 to an as-applied constitutional challenge.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan  
Jerianne Timmerman  
Larry Walke

July 6, 2026