

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
News Distortion Complaint	)	MB Docket No. 25-73
Involving CBS Broadcasting Inc.,	)	
Licensee of WCBS, New York, NY	)	

**COMMENTS OF THE  
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION**

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**TABLE OF CONTENTS**

EXECUTIVE SUMMARY ..... ii

I. INTRODUCTION ..... 1

II. BACKGROUND ..... 3

III. THIS PROCEEDING IS AN ILLEGITIMATE SHOW TRIAL ..... 5

IV. CAR’S COMPLAINT DOES NOT EVEN ALLEGE NEWS DISTORTION ..... 10

    A. The News Distortion Policy Does Not Empower the FCC to Police Editing..... 11

    B. The CAR Complaint Is Fatally Deficient ..... 13

V. THE FIRST AMENDMENT LIMITS THE FCC’S ABILITY TO REVIEW NEWS  
JUDGMENT ..... 17

    A. The First Amendment Limits Regulation Under the Public Interest Standard..... 18

    B. The First Amendment Limits the News Distortion Policy ..... 24

    C. The First Amendment Limits Jawboning ..... 27

CONCLUSION..... 29

## EXECUTIVE SUMMARY

This proceeding is a political stunt. Neither the Center for American Rights' (CAR) complaint nor this Commission's decision to reopen its inquiry accords with how the agency has understood and applied its broadcast regulations *ever*. To the contrary, the Commission has made clear it "is not the national arbiter of the truth," *Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C.2d 143, 151 (1969), and it has strictly avoided the type of review sought here because "[i]t would involve the Commission deeply and improperly in the journalistic functions of broadcasters." *Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150, 152 (1971). The staff's initial dismissal of CAR's complaint was obviously correct.

For the Commission to reopen the matter and to seek public comment turns this proceeding into an illegitimate show trial. This is an adjudicatory question, not a rulemaking, and asking members of the public to "vote" on how they feel about a news organization's editorial policies is both pointless and constitutionally infirm. Prolonging this matter is especially unseemly when paired with FCC review of a pending merger application involving CBS's parent corporation and the fact that President Trump is currently involved in frivolous litigation over the same *60 Minutes* broadcast. In this context, this proceeding is precisely the kind of unconstitutional abuse of regulatory authority the Supreme Court unanimously condemned in *NRA v. Vullo*, 602 U.S. 175 (2024). However, having solicited public comments, the FCC is obligated to respond to the statutory and constitutional objections raised on this record.

The CAR complaint rests on a fundamental misunderstanding of the Commission's limited role in regulating broadcast journalism and fails to grasp the basic elements of the news distortion policy as the FCC historically has defined and applied it. This agency has never asserted the authority to police news editing and has rightly observed that it would result in a "quagmire" even

to try. *Hunger in America*, 20 F.C.C.2d at 150. The news distortion policy simply does not involve itself with “a judgment as to what was presented, as against what should have been presented,” *Network Coverage of the Democratic Nat’l Convention*, 16 F.C.C.2d 650, 657–58 (1969), yet that is CAR’s sole complaint. And even if CBS’s editorial decisions in *60 Minutes* fell within the range of activities governed by the news distortion policy, the CAR complaint is utterly deficient. It does not present any “extrinsic evidence” of news distortion as the policy requires, and the full unedited transcript of the interview in question shows the network’s editing did not alter the substance of the answers given. CAR’s complaint merely reflects its own editorial preferences, which cannot justify this inquiry.

Even if the FCC’s news distortion policy somehow authorized the Commission to act as editor-in-chief, as CAR imagines, the Communications Act and the First Amendment prohibit such intrusion into journalistic decisions. The Act expressly denies to the FCC “the power of censorship” as well as the ability to promulgate any “regulation or condition” that interferes with freedom of speech. 47 U.S.C. § 326. The FCC accordingly has interpreted its powers narrowly so as not to conflict with the First Amendment. And whatever limited authority the Commission might have possessed in the era the news distortion policy was created has diminished over time with changes in technology. Any attempt in this proceeding to apply a more robust view of the Commission’s public interest authority to include an ability to review and dictate individual news judgments would stretch the FCC’s public interest mandate to the breaking point.

Ultimately, no FCC policy can override the First Amendment’s fundamental bar against the government compelling editors and publishers “to publish that which ‘reason tells them should not be published.’” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (citation omitted). “For better or worse, editing is what editors are for; and editing is selection

and choice of material.” *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 120 (1973). The news distortion policy still exists only because of the exceedingly limited role the Commission has given it over the years, and this proceeding is not a vehicle for expanding its reach.

Finally, this proceeding itself is an exercise in unconstitutional jawboning. The Commission must heed the Supreme Court’s recent reminder that the “‘threat of invoking legal sanctions and other means of coercion ... to achieve the suppression’ of disfavored speech violates the First Amendment.” *Vullo*, 602 U.S. at 180. The purpose and timing of this inquiry are both obvious and unjustifiable. Launching a politically fraught investigation based on such a paper-thin complaint in these circumstances is alone a compelling example of regulatory abuse. But to resurrect the flimsy complaint after it was fully and properly interred by staff dismissal, and to do so in support of the President’s private litigation position, is all but a signed confession of unconstitutional jawboning. The Commission can begin to recover some dignity only by dropping the matter immediately.

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The Foundation for Individual Rights and Expression (FIRE) submits this comment in response to the Public Notice, *News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS, New York, NY*, DA 25-107 (Med. Bur. Feb. 5, 2025) (“*Public Notice*”).

**I. INTRODUCTION**

The *Public Notice* seeks comment on a complaint by the Center for American Rights (CAR) alleging “news distortion” by CBS Broadcasting Inc. (CBS) when it assertedly “edit[ed] its [*60 Minutes*] news program to such a great extent” that the “public cannot know what answer the Vice President actually gave to a question of great importance.”<sup>1</sup> The Commission had dismissed the complaint on January 16, 2025, on grounds it failed to make a viable allegation of “intentional” or “deliberate” falsification, as opposed to merely an editorial judgment protected under the First Amendment.<sup>2</sup> However, on January 20, the Commission seated a new Chairman,<sup>3</sup> and on January 22, it reinstated CAR’s complaint. After requesting and receiving an unedited

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<sup>1</sup> Center for American Rights, Complaint Against WCBS-TV at 6 (FCC filed Oct. 16, 2024), <https://drive.google.com/file/d/1kBqZo-10xBLE0Y1dhvBpzZnvcRUvH0H4/view> (“CAR Complaint”).

<sup>2</sup> Letter from Enforcement Bureau, FCC, to Daniel R. Suhr, Center for American Rights, GN Docket No. 25-11, at 2 (Jan. 16, 2025), [docs.fcc.gov/public/attachments/DOC-408899A1.pdf](https://docs.fcc.gov/public/attachments/DOC-408899A1.pdf) (“*WCBS Dismissal*”).

<sup>3</sup> Press Release, FCC, *Carr Issues Statement on Designation as Chairman of the FCC by President Trump* (Jan. 20, 2025), <https://docs.fcc.gov/public/attachments/DOC-409001A1.pdf>.

transcript and video of the interview from CBS, the Commission “determined that the public interest would be served by making the[m] available and by opening a docket to seek comment on the issues.” *Public Notice* at 1.

As a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought, the essential qualities of liberty, FIRE is keenly interested in protecting the free press, including in the broadcast medium. Since 1999, FIRE has protected expressive rights on campuses nationwide, and in June 2022 expanded its advocacy beyond the university setting to defend First Amendment rights both on campus and in society at large. This has included, among others, two priorities this case implicates: First, a vigorous defense of speakers targeted by strategic litigation that aims to burden critical speech into silence.<sup>4</sup> Second, a principled support for a robust, open, and free press and proverbial public square, unhindered by the political whims of government officials.<sup>5</sup> FIRE thus seeks to ensure the FCC does not exceed the scope of its authority in encroaching on broadcasters’ journalistic decisions. That editorial discretion is both their rightful

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<sup>4</sup> See, e.g., <https://www.thefire.org/cases/trump-v-selzer-donald-trump-sues-pollster-j-ann-selzer-consumer-fraud-over-iowa-poll> (FIRE’s defense of pollster against allegations that an outlier poll amounts to “consumer fraud”); <https://www.thefire.org/cases/adams-v-gulley-reddit-moderator-ordered-remove-posts-stop-criticizing-scientist-who> (FIRE’s defense of Reddit moderator ordered to remove posts, halt criticism of murder trial critic); <https://www.thefire.org/cases/mastriano-v-gregory-politician-tries-silence-critics-his-academic-scholarship> (FIRE’s defense of historian sued over academic scholarship); <https://www.thefire.org/cases/boren-v-gadwa-fire-defends-idaho-firewatcher-against-slapp> (FIRE’s defense of conservation officer sued for speaking out against a private airstrip permit).

<sup>5</sup> See, e.g., <https://www.thefire.org/defending-your-rights/legal-support/student-press-freedom-initiative> (home page of FIRE’s Student Press Freedom Initiative that defends and provides resources to student journalists); <https://www.thefire.org/cases/city-clarksdale-v-delta-press-publishing-company-inc-et-al> (FIRE’s defense of local paper of record against prior restraint *ex parte* TRO obtained by city council requiring takedown of editorial criticizing it); <https://www.thefire.org/research-learn/amicus-brief-support-petitioners-netchoice-v-paxton-and-respondents-moody-v> (FIRE *amicus* brief in social media compelled speech case); <https://www.thefire.org/research-learn/fire-comment-fcc-nprm-disclosure-and-transparency-artificial-intelligence-generated> (FIRE comment on FCC’s NPRM proposing disclosures for use of AI in political advertising).

domain and their constitutional right, as “[a] newsroom’s decision about what stories to cover and how to frame them should be beyond the reach of any government official.”<sup>6</sup>

## II. BACKGROUND

On October 7, 2024, the CBS news program *60 Minutes* broadcast an interview with Vice President Kamala Harris, who was then a candidate for president. Excerpts of the same interview aired on another CBS program, *Face the Nation*, the day before. The respective programs used different portions of Harris’s answer to the reporter’s question about whether Israeli Prime Minister Benjamin Netanyahu was listening to the Biden-Harris administration. On October 16, 2024, CAR filed a complaint against WCBS over the *60 Minutes* broadcast, claiming an “act of significant and substantial news alteration” in alleged violation of the FCC’s news distortion policy. CAR Complaint at 2. The complaint, one of three CAR filed against stations owned by major broadcasting networks in the late stages of the 2024 national election,<sup>7</sup> alleged CBS’s edits satisfied the threshold for “news distortion” and, given the national election context, the Commission’s requirement that violations involve “a significant matter.” *Id.* at 4.

In response to the filing, then-Commissioner Carr downplayed the possibility of an FCC investigation if CBS were to release a full transcript of the *60 Minutes* interview. For example, he said, “I don’t think this needs to be a federal case because I think CBS should release it ... then

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<sup>6</sup> Press Release, FCC, *FCC Commissioner Carr Responds to Democrats’ Efforts to Censor Newsrooms* (Feb. 22, 2021), <https://docs.fcc.gov/public/attachments/DOC-370165A1.pdf>.

<sup>7</sup> See also Center for American Rights, Complaint Against WPVI-TV (FCC filed Sept. 24, 2024), [https://drive.google.com/file/d/1hjHObYh\\_CVwRcpZLGc1aHrozUbpBcBhT/view](https://drive.google.com/file/d/1hjHObYh_CVwRcpZLGc1aHrozUbpBcBhT/view) (alleging news distortion by WPVI-TV in connection with American Broadcasting Company (ABC) coverage of presidential debate); Center for American Rights, Complaint Against WNBC (FCC filed Nov. 4, 2024), <https://drive.google.com/file/d/1P2eQRqp-UlkOiuYcsZYdMYi4Va3L2pwl/view> (alleging violation of equal time requirements by WNBC, in connection with appearance of Vice President Harris on *Saturday Night Live* on National Broadcasting Company (NBC)).

that would inoculate, entirely, CBS from that FCC complaint.”<sup>8</sup> In another, he told an interviewer “that’s the best way forward here: release the transcript and there’s no reason to have this before the FCC.”<sup>9</sup>

After the election, then-President-elect Trump sued CBS over the Harris interview. He alleged unlawful acts of “election and voter interference through malicious, deceptive, and substantial news distortion,” asserting a violation of the Texas Deceptive Trade Practices Act.<sup>10</sup> The lawsuit came against the backdrop of CBS parent company Paramount Global’s proposed merger with Skydance Media, for which Commission approval of the transfer of CBS’s FCC licenses is required,<sup>11</sup> and remains pending.

The Enforcement Bureau dismissed CAR’s complaint against CBS (and those against ABC and NBC), noting the Communications Act has prohibited the Commission from engaging in the “power of censorship,” or issuing regulations or conditions that “interfere with the right of free speech” from its founding. *WCBS Dismissal* at 1. Citing precedent that a news distortion complaint must include “extrinsic evidence that the Licensee took actions to engage in a deliberate and intentional falsification of the news,” *id.* at 2, the Bureau held CAR’s allegations insufficient to support an actionable enforcement matter. The Bureau noted the well-settled limitations on

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<sup>8</sup> Kristen Altus, *FCC Commissioner Urges CBS to Release the Transcript from Harris’ ‘60 Minutes’ Interview*, FOX BUSINESS NEWS (Oct. 22, 2024), <https://www.foxbusiness.com/media/fcc-commissioner-cbs-release-transcript-harris-60-minutes-interview>.

<sup>9</sup> Glenn Beck (@glennbeck), X (Oct. 21, 2024, 3:18 PM), <https://x.com/glennbeck/status/1848443828459504097>.

<sup>10</sup> See, e.g., Brooke Singman, *Trump Sues CBS News for \$10 Billion Alleging ‘Deceptive Doctoring’ of Harris’ ‘60 Minutes’ Interview*, FOX NEWS (Oct. 31, 2024, 4:39 PM EDT), <https://www.foxnews.com/politics/trump-sues-cbs-news-10-billion-alleging-deceptive-doctoring-harris-60-minutes-interview>.

<sup>11</sup> Ted Johnson, *FCC Chairman Brendan Carr Suggests That Skydance-Paramount Merger Review Is Far from Finished*, DEADLINE (Feb. 27, 2025, 6:34 PM), <https://deadline.com/2025/02/fcc-paramount-skydance-trump-1236303962/>.

enforcement actions that amount to “second guess[ing]” broadcasters and their constitutionally protected role. *Id.*

Six days later, however, the Bureau issued an Order reinstating the complaints against CBS, ABC, and NBC, on the asserted ground that the dismissals were “issued prematurely based on an insufficient investigatory record for the station-specific conduct,” such that “further consideration” is warranted.<sup>12</sup> Chairman Carr followed this by formally requesting the full unedited transcript of the *60 Minutes* interview. The network complied, then issued a press release announcing it had done so, posting the materials publicly and noting what the transcript and video showed: “Same question. Same answer. But a different portion of the response. When we edit any interview, whether a politician, an athlete, or movie star, we strive to be clear, accurate and on point.”<sup>13</sup> The instant *Public Notice* followed, with the Commission publishing the transcripts as well. *See Public Notice* at 1.<sup>14</sup>

### III. THIS PROCEEDING IS AN ILLEGITIMATE SHOW TRIAL

The *Public Notice* seeks comment on CAR’s news distortion complaint because of what it calls “demonstrated interest in this ongoing FCC matter” and to “permit broader public participation and thereby serve the public interest.” *Id.* But as noted above, this proceeding arises

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<sup>12</sup> *News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS*, Letter Order, GN Docket No. 25-11, at 1 (Enf. Bur. Jan. 22, 2025), <https://docs.fcc.gov/public/attachments/DA-25-85A1.pdf>.

<sup>13</sup> *CBS News to Comply with FCC Demand for “60 Minutes” Transcript and Video*, CBS News (Jan. 31, 2025, 7:06 PM EST), <https://www.cbsnews.com/news/cbs-news-fcc-60-minutes/>; *see also 60 Minutes Publishes Transcripts, Video Requested by FCC*, CBS News (Feb. 5, 2025, 3:02 PM EST), <https://www.cbsnews.com/news/60-minutes-publishes-transcripts-video-requested-by-fcc/> (clarifying the edits “ensure[d] that as much of the vice president’s answers to 60 Minutes’ many questions were included in our original broadcast while fairly representing those answers”).

<sup>14</sup> *See also* Brendan Carr (@BrendanCarrFCC), X (Feb. 5, 2025, 3:09 PM), <https://x.com/BrendanCarrFCC/status/1887232039021097265> (announcing “people will have a chance to weigh in”).

from an allegation that WCBS violated an FCC policy with a *60 Minutes* broadcast, seeking some sort of sanction based on CBS's editorial policies (with which the complainant disagrees). The Commission is inexplicably treating this as a "permit-but-disclose" proceeding pursuant to the *ex parte* rules, which is designed for things like informal rulemakings or declaratory rulings, 47 C.F.R. § 1.1206(a)(1)-(13), and *not* for adjudications, 47 C.F.R. § 1.1208 (restricted proceedings). The general public is not a "party" to enforcement proceedings, 47 C.F.R. § 1.1202(d)(1)(iii), and generally lacks standing in such matters.<sup>15</sup>

Then what is the point of all this? By seeking public comment, is the Commission seriously asking viewers and listeners, along with politically energized partisans, to "vote" on whether they think CBS's editorial choices ran afoul of FCC policies? Any such submissions are meaningless in helping the agency decide whether CBS violated any policies or what remedies might lie.<sup>16</sup> No matter how many comments pour in or how vociferously they opine on the network's editorial

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<sup>15</sup> Cf. *Parents Television Council, Inc. v. FCC*, 2004 WL 2931357, at \*1 (D.C. Cir. 2004); *In re Viacom, Inc.*, 21 FCC Rcd. 12223, 12226–27 (2006); *In re Emmis Commc'ns Corp.*, 21 FCC Rcd. 12219, 12221–22 (2006).

<sup>16</sup> As of March 7, 2025, over 7,640 comments had been submitted. Docket 25-73, [https://www.fcc.gov/ecfs/search/search-filings/results?proceedings\\_name=25-73&sort=date\\_disseminated,DESC](https://www.fcc.gov/ecfs/search/search-filings/results?proceedings_name=25-73&sort=date_disseminated,DESC) (last reviewed March, 7, 2025). They include such gems as Art Lukowski's comment that "edited interviews of Presidential candidates should be a crime as it misleads viewers and voters. NO EDITS"; Charles P. Hatter's proposal that "[t]here is an easy solution. An approved Artificial Intelligence program can monitor all broadcasters and affiliates including PBS, with heavy fines/suspensions for failure to abide by proper standards"; James Connell's conclusion that "CBS should lose their broadcast license [sic], and all involved parties at CBS should be subject to criminal investigations into election interference and prosecuted to the fullest extent of the law"; Mary Cummings' complaint that mainstream media outlets "have indoctrinated my adult children with their poison. CBS needs to have licensed [sic] pulled along with ABC, NBC, MSNBC, and CNN"; Julie Harrigan's opinion that "[e]diting is election interference"; Jerry Van Kooten's prescription that "[l]ost [sic] of license is just the first step"; Mick Gurgleballs' comment that "Brendan Carr is a partisan hack"; and this from Nestor Franco: "aahhhh my balls aaaaahh they're on fire." Remember FCC, you asked for this.

practices, they add *nothing* to the Commission’s understanding of the law or the facts.<sup>17</sup> And, because this proceeding focuses entirely on a news program’s editorial judgment, it runs headlong into the elementary rule that the right to “free speech [and] a free press ... may not be submitted to vote; they depend on the outcome of no elections.” *Barnette v. W. Va. Bd. of Educ.*, 319 U.S. 624, 638 (1943); *see Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“To the extent [a] referendum substitutes majority determinations for viewpoint neutrality it would undermine ... constitutional protection ....”).

Bottom line, the Commission’s request for public comment lacks any legitimate regulatory rationale, but its *realpolitik* purpose is sadly transparent. This proceeding is designed to exert maximum political leverage on the CBS network at a time when President Trump is engaged in frivolous litigation against it over the same *60 Minutes* broadcast,<sup>18</sup> with the FCC using other regulatory approvals the network needs to exert added pressure.<sup>19</sup> This is not just unseemly, it is

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<sup>17</sup> *See CBS Corp. v. FCC*, 663 F.3d 122, 135 & n.13 (3d Cir. 2010) (large and “unprecedented” number of complaints about Super Bowl halftime show had no bearing on whether broadcaster may have violated FCC rules).

<sup>18</sup> Amended Complaint, *Trump v. Paramount Global*, No. 2:24-cv-00236-Z (N.D. Tex. Feb. 7, 2025). Parallel to this proceeding, that lawsuit alleges CBS’s editing of the *60 Minutes* broadcast constitutes fraud in violation of the Texas Deceptive Trade Practices Act. *Id.* at 1. Like the “news distortion” allegation here, the claim is preposterous. In the United States there is no such thing as a claim for “fake news.” No court in any jurisdiction has ever held such a cause of action might be valid, and few plaintiffs have ever attempted even to bring such outlandish claims. Those who have done so were promptly dismissed. *E.g.*, *Hollander v. CBS News, Inc.*, 2017 WL 1957485, at \*1 (S.D.N.Y. 2017) (dismissing wire fraud claims based on allegedly false and misleading news stories about candidate Donald Trump), *vacated and aff’d on other grounds sub nom. Hollander v. Garrett*, 710 Fed. Appx. 35 (2d Cir. 2018); *Wash. League for Increased Transparency & Ethics v. Fox News*, 2021 WL 3910574, at \*1 (Wash. Ct. App. 2021) (dismissing claims under the Washington Consumer Protection Act against Fox News for allegedly false reporting about COVID-19). *Cf. Nat’l Inst. of Family and Life Advocs. v. Raoul*, 685 F. Supp. 3d 688, 695 (N.D. Ill. 2023) (enjoining application of Illinois Consumer Fraud Act to anti-abortion advocacy as “both stupid and very likely unconstitutional”).

<sup>19</sup> The *Public Notice* noted that the allegations in the complaint are being incorporated by reference into MB Docket No. 24-275 regarding the proposed transfer of control of Paramount Global (parent company of the WCBS licensee) to Skydance Media. *Public Notice* at n.1.

precisely the sort of unconstitutional abuse of regulatory authority the Supreme Court unanimously condemned in *NRA v. Vullo*, 602 U.S. 175 (2024). The Court held that regulators violate the First Amendment when they use their official powers over certain transactions in ways designed “to suppress the speech of organizations that they have no direct control over.” *Id.* at 197–98. Anyone who doesn’t think that this is what is happening here simply has not been paying attention.<sup>20</sup>

There is a name for this kind of thing—it is called a show trial. When proceedings become a performative exercise conducted to further a political purpose, they forfeit any claim to legitimacy. Show trials tend to be retributive rather than corrective and are designed to send a message, not just to their unfortunate victims, but as a warning to other would-be transgressors.<sup>21</sup> There is a dark and deadly history of such showcase proceedings in authoritarian regimes around the world, ranging from Stalin’s purges of perceived political opponents to China’s trials of “rioters and counterrevolutionaries” after the 1989 Tiananmen Square protests. In our own country, similar tactics were employed during the Red Scare with investigations and hearings aptly described by the Chairman of the House Committee on Un-American Activities as “the best show the committee has had yet.”<sup>22</sup> Those who staged the proceedings “were not seeking justice but staging a show trial to accuse, indict, and punish.”<sup>23</sup> And while the stakes of a sham FCC proceeding obviously differ, the perversion of the rule of law is the same.

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<sup>20</sup> This has long been a problem at the FCC regardless of which political party is in power. See Robert Corn-Revere, *Regulation and the Social Compact*, in *RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA* 43–68 (Robert Corn-Revere ed., 1997).

<sup>21</sup> *Show Trial*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Show\\_trial](https://en.wikipedia.org/wiki/Show_trial) (last visited Mar. 6, 2025).

<sup>22</sup> THOMAS DOHERTY, *SHOW TRIAL: HOLLYWOOD, HUAC, AND THE BIRTH OF THE BLACKLIST* viii (2018).

<sup>23</sup> *Id.* at x. Such tactics rarely look good in hindsight. “The legislative body that had lent the coercive power of the state to the Hollywood blacklist also suffered a swift decline in public esteem.” *Id.* at 346.

Having opted to open this proceeding and to create a record, however, the FCC will be judged by the legal arguments made herein. As noted, commenters' likes or dislikes of CBS's editorial policies are irrelevant, but the FCC is obligated to address the constitutional and statutory points raised even if some on the Commission find them "politically awkward." *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987). This is an adjudicatory proceeding, and the Commission is not free to overlook constitutional challenges to its authority. *Id.* at 873 (the FCC "may not simply ignore a constitutional challenge in an enforcement proceeding"); see 5 U.S.C. § 557(c) (in a formal adjudication, an administrative agency is obliged to consider and respond to substantial arguments a respondent presents in its defense). This is particularly true where "the Commission itself has already largely undermined the legitimacy of its own rule." *Meredith Corp.*, 809 F.2d at 873; see also *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

The Commission's burden to establish *this* proceeding's legitimacy is heightened where its staff had previously found the complaint against WCBS facially defective and dismissed it. It explained CAR's complaint rested entirely on conclusory statements and lacked extrinsic evidence of deliberate and intentional falsification of the news. See *WCBS Dismissal* at 2–3. The staff further observed that the complaint against WCBS violated longstanding First Amendment principles, and that "the Commission does not—and cannot and will not—act as a self-appointed free-roving arbiter of truth in journalism." *Id.* at 2 (quoting *Free Press Emergency Petition for Inquiry into Broadcast of False Information on COVID-19*, Letter, 35 FCC Rcd. 3032, 3033 (MB & OGC 2020) (rejecting petition to investigate and sanction broadcasters for airing comments by President Trump and others alleged to be "false or scientifically suspect")); cf. Press Release, *supra*, note 6 (news release with Commissioner Carr's response to efforts to censor newsrooms, stating, "A

newsroom’s decision about what stories to cover and how to frame them should be beyond the reach of any government official, not targeted by them.”).

This proceeding therefore is a test—not of *60 Minutes* and its editorial practices, but of the seriousness of purpose of those who believe they now can sit in judgment thereof. “Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. U.S. Const. art. VI, cl. 3. To enforce a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath ....” *Meredith Corp.*, 809 F.2d at 873; *see Vullo*, 602 U.S. at 180 (“Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.”). The Commission’s performance will be subject not just to review by courts, but ultimately by the judgment of history. As former Chairman Dean Burch wrote in an early news distortion case, when the agency “acts in adjudicatory proceedings” and commissioners’ roles are “quasi-judicial,” the Commission “has an obligation beyond the mere absence of demonstrable bias; it must avoid even the appearance of bias.” *Complaint Concerning the CBS Program “The Selling of the Pentagon,”* 30 F.C.C.2d 150, 154–55 (1971) (Separate Statement of Chairman Dean Burch). Anything less “diminishes the Commission’s standing.” *Id.* at 155.

#### **IV. CAR’S COMPLAINT DOES NOT EVEN ALLEGE NEWS DISTORTION**

The CAR Complaint not only “rests on a fundamental misunderstanding of the Commission’s limited role in regulating broadcast journalism,” *Free Press Emergency*, 35 FCC Rcd. at 3032, it fails to grasp even the basic elements of the news distortion policy. CAR’s professed concern in its tissue-thin submission is that CBS edited the Harris interview to make the candidate seem more articulate than she is. Complaint at 3 (“CBS has taken a single question and transformed Harris’ answer such that the general public no longer has any confidence as to what the Vice President actually said ....”). That isn’t news distortion under FCC policies—and never

was. CAR's complaint is nothing more than a nakedly political abuse of process that agency leadership is currently enabling.

**A. The News Distortion Policy Does Not Empower the FCC to Police Editing**

The mismatch between the news distortion policy as the Commission framed it and CAR's caricature of it is palpable. The FCC first articulated the policy's narrow focus in controversies surrounding the CBS documentaries *Hunger in America* and *The Selling of the Pentagon*, and in general network coverage of the 1968 Democratic National Convention. Some of the complaints in those cases were much like those made by CAR. Complaints alleged that "CBS 'coached' a doctor to 'make dramatic statements' on malnutrition in San Antonio" and that the filmed depiction "was not that of a baby dying of starvation but instead was of a baby born prematurely." *Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C.2d 143, 144 (1969). Some complained that network coverage of the turbulent DNC Convention "attempted to influence the course of the proceedings ... stirring controversy where none existed." *Complaints Concerning Network Coverage of the Democratic Nat'l Convention,* 16 F.C.C.2d 650, 651 (1969). And in the Pentagon documentary, complainants charged "CBS slanted or deliberately distorted its presentation of persons interviewed on the program" by "splicing answers to a variety of questions as a way of creating a new 'answer' to a single question." *The Selling of the Pentagon,* 30 F.C.C.2d at 150, 153.

The Commission not only rejected each of these complaints, it stressed that allegations about the "accuracy" of editing did not warrant any further investigation. *Id.* at 152–54 ("[W]e do not propose to inquire of CBS as to" its editing of interviews and "further action by this Commission would be inappropriate ...."); see *Democratic Nat'l Convention,* 16 F.C.C.2d at 660 ("[T]he actual disposition does not require extended treatment and comes within established

guidelines.”); *Hunger in America*, 20 F.C.C.2d at 147, 150 (declining to hold a hearing on allegations about CBS coaching interviewees and making clear that “in the future, we do not intend to defer action on license renewals because of the pendency of complaints of the kind we have investigated here”). Instead, it reaffirmed the “general rule ... that we do not sit to review the broadcaster’s news judgment, the quality of his news and public affairs reporting, or his taste.” *Democratic Nat’l Convention*, 16 F.C.C.2d at 654.

The guiding principle in each of these decisions is that allegations about misleading editing were not even the type of issue that might be considered news distortion. The Commission could not have been clearer on this point: “[W]hen we refer to appropriate cases involving extrinsic evidence, we do not mean the type of situation, frequently encountered, where a person quoted on a news program complains that he very clearly said something else.” *Hunger in America*, 20 F.C.C.2d at 151. “Our point is that this licensing agency cannot and should not dictate the particular response to thousands of journalistic circumstances.” *The Selling of the Pentagon*, 30 F.C.C.2d at 153. In short, “the judgment when to turn off the lights and send the cameras away is again not one subject to review by this Commission. We do not sit to decide: ‘Here the licensee exercised good journalistic judgment in staying’; or ‘Here it should have left.’” *Democratic Nat’l Convention*, 16 F.C.C.2d at 656. The news distortion policy simply does not involve itself with “a judgment as to what was presented, as against what should have been presented.” *Id.* at 657–58. Yet that is what the CAR Complaint is about. In fact, it is the *only thing* it is about.

But this is where the Commission drew a bright line, precisely to forestall such bureaucratic meddling in news judgment. The agency decided to “err on the side of removing any possible doubt as to [its] position on these matters.” *Id.* at 660. It explained that “for the Commission to review this editing process would be to enter an impenetrable thicket. On every single question of

judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion.” *The Selling of the Pentagon*, 30 F.C.C.2d at 153–54. Doing so would “constitute a venture into a quagmire inappropriate for this Government agency.” *Hunger in America*, 20 F.C.C.2d at 150. Accordingly, it concluded “in this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor’s role, including efforts to establish news distortions in situations where Government intervention would constitute a worse danger than the possible rigging itself.” *Id.* at 151.

### **B. The CAR Complaint Is Fatally Deficient**

Even if CBS’s editorial decisions in *60 Minutes* fell within the range of activities governed by the news distortion policy, the CAR Complaint is woefully deficient. The Commission recognized long ago it cannot be “the national arbiter of the truth,” *id.*, and its news distortion policy has an “extremely limited scope.” *Galloway v. FCC*, 778 F.2d 16, 21 (1985). Investigation is warranted only “where extrinsic evidence has been presented to the Commission suggesting that a licensee has staged or culpably distorted the presentation of a news event.” *Democratic Nat’l Convention*, 16 F.C.C.2d at 657.<sup>24</sup> When reviewing a complaint that a broadcaster has “deliberately distorted or slanted the news,” the Commission considers two factors. *Galloway*, 778 F.2d at 20. First, the alleged distortion must be “deliberately intended to slant or mislead,” as demonstrated by extrinsic evidence. *Id.* It is not enough for a complainant like CAR to simply “dispute the accuracy of a news report or to question the legitimate editorial decisions of the broadcaster.” *Id.*

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<sup>24</sup> As the Commission explained, the extrinsic evidence it contemplated was not about the news judgment in how to edit an interview. *Hunger in America*, 20 F.C.C.2d at 151. Rather it related to examples of fabrication, such as “where a ‘yes’ answer to one question was used to replace a ‘no’ answer to an entirely different question,” and not “splicing answers to a variety of questions as a way of creating a new ‘answer’ to a single question.” *The Selling of the Pentagon*, 30 F.C.C.2d at 153.

(internal citations omitted). Second, the alleged distortion “must involve a significant event and not merely a minor or incidental aspect of the news report.” *Id.*

Applying these factors, the Commission “determines in the first instance whether the evidence submitted raises a substantial question of fact.” *In re TVT License, Inc.*, 22 FCC Rcd. 13591, 13595 (2007). CAR’s threadbare complaint fails at the threshold. The crux of its news distortion allegation is straightforward and baseless. During the interview, *60 Minutes* correspondent Bill Whitaker asked former Vice President Kamala Harris a question about the Biden Administration’s relationship with Israeli Prime Minister Benjamin Netanyahu:

MR. BILL WHITAKER: But it seems that Prime Minister Netanyahu is not listening. The *Wall Street Journal* said that he -- that your administration has repeatedly been blindsided by Netanyahu, and in fact, he has rebuffed just about all of your administration’s entreaties.

VICE PRESIDENT KAMALA HARRIS: Well, Bill, the work that we have done has resulted in a number of movements in that region by Israel that were very much prompted by, or a result of many things, including our advocacy for what needs to happen in the region. And we’re not going to stop doing that. We are not going to stop pursuing what is necessary for the United States to be clear about where we stand on the need for this war to end.

CBS broadcast two excerpts of Vice President Harris’ answer on two separate programs: On *Face the Nation*, CBS aired the first sentence of Harris’ answer. On *60 Minutes*, CBS aired the last sentence of Harris’ answer. The bare assertion in the CAR Complaint that this routine editing “transformed Harris’ answer” into something it wasn’t is more than a stretch. It does no more than express the complainants’ own editorial preferences.

It is instructive to compare CAR’s barebones allegations with, *e.g.*, the far more specific ones at issue in the *Galloway* news distortion complaint centering on a *60 Minutes* broadcast about insurance fraud. In that 1979 episode, *60 Minutes* aired interviews with subjects who admitted to participating in various aspects of insurance fraud. During discovery in a separate libel action, CBS produced unaired footage that revealed the interviews had been variously staged or edited,

and those outtakes formed the basis of the news distortion complaint. *Galloway*, 778 F.2d at 18. The complete recordings demonstrated that *60 Minutes* had edited or concealed various aspects of the interviews — one interviewee had “playacted” by recreating a confession while on camera, for example, and CBS rearranged another subject’s answers with different questions for dramatic effect, omitting some answers. *Id.* at 19. But considering each instance, the U.S. Court of Appeals for the District of Columbia held the edits did not constitute actionable news distortion because they did not “affect the basic accuracy of the events reported.” *Id.* at 20 (cleaned up). So too here. CAR does not contend — and cannot, given the transcript’s release — that CBS’s editing of the Vice President’s answer affected the accurate portrayal of her response.

CBS’s choice to air separate portions of a single answer to the same question on separate programs is a legitimate editorial decision about the newsworthy components of Harris’ response, not an effort to deceive viewers. And CAR knows it. Ignoring the relevant agency standard, the complaint makes no argument that CBS’s edits are “deliberately intended to slant or mislead,” *id.* at 20, nor that the separate segments of Harris’ answers contradict or misrepresent what she said in any material way. While the complaint argues the timing of the interview and the subject matter of Whitaker’s question render Harris’ answer “incredibly consequential,” CAR fails to allege that CBS engaged in “deliberate distortion” of her reply, such as when “a ‘yes’ answer to one question was used to replace a ‘no’ answer to an entirely different question.” *The Selling of the Pentagon*, 30 F.C.C.2d at 153. The complaint alleges only that CBS distorted the news by airing different clips on different shows. As explained above, this fails *even to allege* news distortion.

To engage viewers and communicate newsworthy information in a timely and concise manner, news broadcasts need editing. Here, CBS edited a 45-minute interview with Harris into a 20-minute segment — “part of the typical editing and cross-promotion process that takes place for

a big interview,” like the one the network conducted with then-candidate Trump earlier that fall.<sup>25</sup> Editing interviews with newsmakers is standard practice, and this includes editorial discretion over broadcast interviews. When a network’s edits do not “affect the ‘basic accuracy’ of the answer” given by an interviewee, they are not “significant enough to violate FCC rules.” *Galloway*, 778 F.2d at 20 (cleaned up). As the transcript confirms, CBS’s edits did not involve “substitution of an answer to another question,” nor materially alter Harris’ answer to Whitaker’s question. *Id.* They therefore did not leave the public “deceived about a matter of significance.” *Id.* And as CAR’s complaint correctly acknowledges, “this Commission’s long-standing precedent” makes plain that CBS “retains the right to exercise news judgment when editing its material,” just as it did here. CAR’s complaint likewise admits that exercising news judgment via editing “is normal in the context of a news magazine style show” like *60 Minutes*. CAR Complaint at 2-3. In sum, CAR is alleging CBS engaged in standard journalistic practice.

Were the Commission to entertain CAR’s baseless complaint any further, it would impose an unreasonable and unworkable standard upon broadcasters. Of course, CBS is not the only network that edits interviews with politicians. During the campaign, for example, FOX repeatedly edited interviews with then-candidate Trump, editing answers to enhance coherence, eliminate digressions, and excise insults.<sup>26</sup> The network edited a separate interview on the program *MediaBuzz* to cut Trump’s false claims about the outcome of the 2020 presidential election. Like

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<sup>25</sup> David Bauder, *Trump’s Complaints About ‘60 Minutes’ Put a Spotlight on Editing at the Nation’s Top Newsmagazine*, ASSOC. PRESS (Oct. 10, 2024), <https://apnews.com/article/kamala-harris-trump-cbs-interview-edit-024c435a19fd37eee7a090ece76d925c>.

<sup>26</sup> Brian Stelter & Liam Reilly, *Fox News Edited Trump’s Rambling Answers and False Claims in Barbershop Interview, Full Video Shows*, CNN (Oct. 24, 2024), <https://www.cnn.com/2024/10/24/media/fox-news-edit-trump-barbershop-interview/index.html>.

CBS’s decision to air different segments of the Harris interview on different programs, FOX’s trimming of Trump does not constitute “news distortion.”

As Chairman Carr stated in an interview with Fox News last fall, “the news distortion rule is a very, very narrow rule at the FCC. In almost every case, it doesn’t apply because it could get into sort of editorial decisions that are protected by the First Amendment.”<sup>27</sup> That means networks are free to decide to air interviews with lawmakers in their entirety, as ABC News did with its 22-minute interview of former President Joe Biden last summer,<sup>28</sup> or to edit them in the manner FOX and CBS did. And the First Amendment prevents the FCC from telling them otherwise.

## **V. THE FIRST AMENDMENT LIMITS THE FCC’S ABILITY TO REVIEW NEWS JUDGMENT**

The *Public Notice* is premised on the conceit that compiling this record and investigating CBS for its news judgment is necessary to serve the “public interest.” But this ignores that the Communications Act expressly withholds from government the power to “interfere with the right of free speech by means of radio communication.” 47 U.S.C. § 326. This denies to the FCC “the power of censorship” as well as the ability to promulgate any “regulation or condition” that interferes with freedom of speech. *Id.* These policies “were drawn from the First Amendment itself [and] the ‘public interest’ standard necessarily invites reference to First Amendment principles.” *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 121 (1973). Consequently, the Supreme Court has stressed that “the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area.” *FCC v League of Women Voters of Cal.*,

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<sup>27</sup> Kristin Altus, *FCC Commissioner Urges CBS to Release the Transcript from Harris’ ‘60 Minutes’ Interview*, N.Y. POST (Oct. 23, 2024), <https://nypost.com/2024/10/23/media/fcc-commissioner-brendan-carrm-urges-cbs-release-kamala-harris-60-minutes-interview-transcript/>.

<sup>28</sup> Sahil Kapur, *A Defiant Biden, in Denial of the Polls and Calls to Step Aside: 3 Takeaways from the ABC Interview*, NBC NEWS (July 5, 2024), <https://www.nbcnews.com/politics/2024-election/takeaways-biden-post-debate-interview-abc-news-rcna160292>.

468 U.S. 364, 378 (1984). Although the Court historically interpreted the law to give some greater leeway to regulate broadcasting compared to traditional media, *e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the public interest standard has never permitted the level of intrusion into the editorial process that this proceeding represents.

**A. The First Amendment Limits Regulation Under the Public Interest Standard**

There is no basis for the FCC to assume the “public interest” mandate empowers it to dictate how a particular news broadcast should have been edited. From the beginnings of broadcast regulation, Congress and the FCC (and its predecessor agency, the Federal Radio Commission) appeared to approach regulation with the understanding that constitutional limitations prevent too great a reliance on specific programming mandates. One of the bills submitted prior to passage of the Radio Act of 1927 included a provision that would have required stations to comply with programming priorities based on subject matter. However, the provision was eliminated because “it was considered to border on censorship.” *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 597 (1981). Similarly, the FRC sought to “chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States ... on the other.” *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2313 (1960).

In 1960 the FCC emphasized that “[i]n considering the extent of the Commission’s authority in the area of programming it is essential [first] to examine the limitations imposed upon it by the First Amendment to the Constitution and Section 326 of the Communications Act.” *Id.* at 2306. After an extensive analysis of the meaning of the public interest, the FCC found that the required constitutional and statutory balance barred the government from implementing programming requirements that were too specific. It noted:

[S]everal witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise. The First Amendment while regarding freedom in religion, in speech, in printing and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein.

*Id.* at 2308 (citation omitted).

Recognizing these limits, the Commission concluded it could not “condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program.” *Id.* To do so, the Commission concluded, would “lay a forbidden burden upon the exercise of liberty protected by the Constitution.” *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)). To maintain a balance between a free competitive broadcast system, on the one hand, and the requirements of the public interest standard on the other, the Commission found that “as a practical matter, let alone a legal matter, [its role] cannot be one of program dictation or program supervision.” *Id.* at 2309.

Over the years the FCC has attempted to balance the constitutional imperative of the First Amendment with the public interest aspirations of the Communications Act. It has found that while it may “inquire of licensees what they have done to determine the needs of a community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.” *Id.* at 2308. In particular, public interest “standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast services in the public interest.” *Id.* at 2313. The Commission emphasized that it did “not intend to guide the licensee along the path of programming.” On the contrary, “the

licensee must find his own path with the guidance of those whom his signal is to serve.” *Id.* at 2316.

Recognizing this delicate balance, courts have noted that the Commission must “walk a ‘tightrope’” to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.” *Democratic Nat’l Comm.*, 412 U.S. at 117; *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir.1968). The Supreme Court has described this balancing act as “a task of a great delicacy and difficulty,” and stressed that “we would [not] hesitate to invoke the Constitution should we determine that the [FCC] has not fulfilled its task with appropriate sensitivity to the interest of free expression.” *Democratic Nat’l Comm.*, 412 U.S. at 102.

The Court found that the Communications Act was designed “to maintain – no matter how difficult the task – essentially private broadcast journalism.” *Id.* at 120. For that reason, licensees are held “only broadly accountable to public interest standards.” *Id.* Thus, the Supreme Court quoted the *1960 En Banc Policy Statement* to emphasize that “although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (“*Turner I*”) (citation and internal quotation omitted).

Specific program requirements generally are considered the most constitutionally suspect among those FCC broadcasting regulations impose. The D.C. Circuit has noted that the “power to specify material which the public interest requires or forbids to be broadcast ... carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike.” *Banzhaf*, 405 F.2d at 1095. Public interest requirements relating to specific program content create a “high risk that such rulings will reflect the Commission’s selection among tastes, opinions,

and value judgments, rather than a recognizable public interest” and “must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship.” *Id.* at 1096.<sup>29</sup>

The Supreme Court has emphasized “the minimal extent” that the government may influence the programming provided by broadcast stations. It stressed 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.” *Turner I*, 512 U.S. 622, 650–52. Similarly, the D.C. Circuit expressly avoided approving “a more active role by the FCC in oversight of programming” because it would “threaten to upset the constitutional balance struck in *CBS v. DNC.*” *Accuracy in Media v. FCC*, 521 F.2d 288, 296–97 (D.C. Cir. 1975); *see also Community-Service Broad. of Mid-America v. FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978) (*en banc*) (FCC and courts have generally eschewed “program-by-program review” schemes because of constitutional dangers.).

Any attempt in this proceeding to apply a more robust view of the Commission’s public interest authority to include an ability to review and dictate individual news judgments would stretch the FCC’s mandate to the breaking point. Moreover, the constitutional standard governing broadcast regulation that permitted some greater latitude articulated in *Red Lion* was predicated on “‘the present state of commercially acceptable technology’ as of 1969.” *News America Publ’g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388). Much has happened in the intervening five-and-a-half decades.<sup>30</sup>

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<sup>29</sup> *See also Public Int. Rsch. Grp. v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (“[W]e have doubts as to the wisdom of mandating ... government intervention in the programming and advertising decisions of private broadcasters.”); *Anti-Defamation League of B’nai B’rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) (“[T]he First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress ... limited the Commission’s power in this area.”).

<sup>30</sup> *See, e.g., Meredith Corp.*, 809 F.2d at 867 (“[T]he Court reemphasized that the rationale of *Red Lion* is not immutable.”); *see also Banzhaf*, 405 F.2d at 1100 (“[S]ome venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.”).

Since then, both Congress and the FCC have found the media marketplace has undergone vast changes. For example, the legislative history to the Telecommunications Act of 1996 suggested the historical justifications for the FCC’s regulation of broadcasting require reconsideration. The Senate Report noted that “[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism.” It explained that “the [Communications] Act was not prepared to handle the growth of cable television” and that “[t]he growth of cable programming has raised questions about the rules that govern broadcasters” among others.<sup>31</sup> The House of Representatives’ findings were even more direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years “and the scarcity rationale for government regulation no longer applies.”<sup>32</sup>

The FCC itself has reached similar conclusions over the years. In the mid-1980s, for example, the Commission “found that the ‘scarcity rationale,’ which ha[d] historically justified content regulation of broadcasting ... is no longer valid.”<sup>33</sup> Subsequently, an FCC staff report that took up where the 1987 Fairness Doctrine decision left off concluded that the spectrum scarcity rationale “no longer serves as a valid justification for the government’s intrusive regulation of traditional broadcasting.”<sup>34</sup> It added that “[p]erhaps most damaging to The Scarcity Rationale is

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<sup>31</sup> Telecommunications Competition and Deregulation Act of 1995, S. Rpt. 104-23, 104th Cong. 1st Sess. 2–3 (Mar. 30, 1995).

<sup>32</sup> Communications Act of 1995, H. Rpt. 104-204, 104th Cong. 1st Sess. 54 (July 24, 1995).

<sup>33</sup> *Meredith Corp.*, 809 F.2d at 867 (citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) (“1985 Fairness Doctrine Report”)); see *Syracuse Peace Council*, 867 F.2d at 660–66 (discussing *1985 Fairness Doctrine Report* and upholding FCC’s decision to repeal the fairness doctrine).

<sup>34</sup> John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* 8 (Media Bureau Staff Research Paper, Mar. 2005).

the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices.”<sup>35</sup>

Given these many changes, *Red Lion*’s luster as controlling precedent has faded. In *Turner I*, for example, the Court rejected the government’s bid to extend the principles of *Red Lion* to the regulation of cable television. After noting the Commission’s “minimal” authority over broadcast content, the Court pointed out that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation.” *Turner I*, 512 U.S. at 637 (emphasis added). Lower courts have likewise expressed doubts about its vitality and have closely scrutinized efforts to regulate broadcast content. In *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), for example, the D.C. Circuit vacated the Commission’s video description rules. The court interpreted the Commission’s powers narrowly because any regulation of programming content “invariably raise[s] First Amendment issues.” *Id.* at 805.<sup>36</sup>

Reviewing courts are most skeptical of the FCC’s constitutional authority when it comes to regulating news programming. In *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (per curium), for example, the D.C. Circuit ordered the Commission to repeal its personal attack and political editorial rules. The court held the FCC had the burden to justify rules that “interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media.” *Id.* at 270. The court ordered the FCC not to

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<sup>35</sup> *Id.* at 11. The report also concluded that alternative rationales for broadcast content regulations are similarly flawed. *Id.* at 18–28. For a more comprehensive discussion of various justifications for broadcast content regulation, see RATIONALES & RATIONALIZATIONS, *supra* n.20.

<sup>36</sup> See also *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (specific programming mandates raise serious First Amendment questions); *MD/DC/DE Broadcasters Ass’n. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) (same).

enforce the rules, noting it is “incumbent upon the Commission to ‘explain why the public interest would benefit from rules that raise these policy and constitutional doubts.’” *Id.* (citation omitted).

In short, the FCC cannot assert authority over a particular editorial decision by making talismanic references to the “public interest” or the “public airwaves” and expect to be taken seriously. Even at its zenith, the FCC’s authority over broadcast programming would not have permitted such an intensive intervention in news judgment, and what power it once possessed has been eclipsed.

### **B. The First Amendment Limits the News Distortion Policy**

The news distortion policy cannot trump the bedrock constitutional rule that prohibits the government from compelling editors and publishers “to publish that which ‘reason tells them should not be published.’” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (citation omitted). Under the First Amendment the “choice of material to go into a newspaper”—or news broadcast—must be determined by “‘editorial control and judgment,’ not official decree.” *Id.* at 258. As the Supreme Court explained in *CBS, Inc. v. Democratic National Committee*, “[f]or better or worse, editing is what editors are for; and editing is selection and choice of material.” 412 U.S. at 120; *see also Moody v. NetChoice, LLC*, 603 U.S. 707, 733 (2024) (“However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others.”). The CAR Complaint and this inquiry fly in the face of these elementary principles.

The news distortion policy was announced in 1969, the same year as *Red Lion*, not as a rule published in the Code of Federal Regulations, but as an FCC policy. *See Hunger in America*, 20 F.C.C.2d 143. Even then, at the public interest doctrine’s height, the Commission

recognized the news distortion policy had to conform to First Amendment limits. And, as explained in the previous section, many of the FCC's content regulations have been strictly limited or abandoned since that time. For example, in 1984 the Supreme Court struck down a ban on editorializing by public broadcast stations. *League of Women Voters of Cal.*, 468 U.S. at 373. Three years later, the FCC eliminated the fairness doctrine because of the obvious tension between the First Amendment and "having government officials second-guess editorial judgments." *Syracuse Peace Council*, 867 F.2d at 660. The next year, it abandoned two remaining vestiges of the fairness doctrine—the personal attack and political editorial rules. *Radio-Television News Directors' Ass'n.*, 229 F.3d 269.

The news distortion policy still exists only because of the exceedingly limited role the Commission has given it over the years. For that reason, the FCC generally has lived up to this promise when called on to apply the policy.<sup>37</sup> Understandably, enforcement actions for news distortion dropped off precipitously after the Commission began to scale back its intervention into matters of broadcast content in the 1980s because of First Amendment concerns. The FCC has applied a "particularly high threshold" for intervention in the news distortion cases area "because news and comment programming are at the core of speech which the First Amendment is intended to protect." *Liability of NPR Phoenix, L.L.C. Licensee*, 13 FCC Red. 14,070,

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<sup>37</sup> As a general matter, the FCC has been quite circumspect in its enforcement of the news distortion policy. One analysis of all such complaints filed with the agency during a 30-year period (1969-1999) found that it rejected complaints 90 percent of the time. See Chad Raphael, *The FCC's News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POL 485, 501 (Summer 2001) ("Of the 120 reported decisions on distortion in this period, the FCC found against broadcasters in 10% (12) of them."). This figure, while significant, vastly overstates the degree to which the Commission has been willing to regulate in this area, since the study used an expansive definition of a "finding" of news distortion and did not count unreported dismissals of complaints. It included complaints that resulted in "rhetorical rebukes of licensees," as in letters of admonishment. Tellingly, it identified only five cases in which news distortion complaints resulted in adverse licensing decisions, and those occurred only when "distortion was compounded by numerous other infractions." *Id.* at 502.

14,072 (Mass Media Bureau 1998); *see also Complaint of Denny Mulloy*, FCC 86-360, 1986 WL 290825 (Aug. 13, 1986).<sup>38</sup>

The agency has acknowledged “[i]t would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy—dependent always on journalistic judgment—across which broadcasters must not stray,” and that “[a]ny presumption on our part would be inconsistent with the First Amendment” and “would involve the Commission deeply and improperly in the journalistic functions of broadcasters.” *The Selling of the Pentagon*, 30 F.C.C.2d at 152. For example, in rejecting a complaint filed about a network news report by the CIA, the Commission noted it was being asked to “second-guess the journalistic judgment and editorial workings of ABC news” and stressed that “under no circumstances will the Commission engage in assessments of truth or falsity when considering whether news programming was deliberately distorted. Nor will it sit in judgment of the way particular news programming was handled.” *Complaints of Cent. Intel. Agency*, 58 Rad. Reg. 2d (P&F) 1544, 1549 (1985). The FCC described such choices as “the very essence of the journalistic process.” *Id.* Likewise, the FCC has also rejected a news distortion complaint alleging that major media organizations slanted the news at the CIA's request. *Complaint of Peter Gimpel*, 3 FCC Red. 4575 (1988).

This proceeding seeks to redefine the concept of news distortion to include editorial choices the FCC dislikes. Such a revisionist approach ignores the Commission's historically cautious practice designed to avoid interfering in editorial judgment. In its place, it proposes a far more

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<sup>38</sup> *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998), is not to the contrary. Although the court remanded the FCC's dismissal of a news distortion case to the agency, it did not propose “to determine just how much evidence the Commission may require or whether Serafyn has produced it.” *Id.* at 1220. Nor did the court consider any First Amendment issues. It found only that the Commission failed to adequately explain its decision. *Id.* at 1219.

interventionist theory of government authority irreconcilable with the First Amendment. As the Supreme Court recently warned, “[o]n 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 own conception of speech nirvana.” *Moody*, 603 U.S. at 741–42.

### **C. The First Amendment Limits Jawboning**

The Commission can run afoul of the First Amendment even if it does not follow through on any of the prohibited regulatory acts described above. This inquiry alone—particularly in being conducted in support of other pressure tactics—is enough. As the Supreme Court just reaffirmed in *Vullo*, the “‘threat of invoking legal sanctions and other means of coercion ... to achieve the suppression’ of disfavored speech violates the First Amendment.” 602 U.S. at 180; see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). This is not the FCC’s first rodeo when it comes to such tactics, and reviewing courts have been alert to the problem, especially when the Commission’s abuse of authority is as transparent as it is here. See Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119 (1967).

The D.C. Circuit has recognized the various ways a regulatory agency can put pressure on a regulated firm, “some more subtle than others.” *MD/DC/DE Broadcasters Ass’n.*, 236 F.3d at 19. In particular, it has observed that the FCC “has a long history of employing ... ‘a variety of *sub silentio* pressures and “raised eyebrow” regulation of program content... The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry ... all serve as means for communicating official pressures to the licensee.” *Id.* (quoting *Community-Service Broad. of Mid-America*, 593 F.2d at 1116). In this regard, an

investigation “is a powerful threat, almost guaranteed to induce the desired conduct.” *Id.*; see *Lutheran Church-Missouri Synod*, 141 F.3d at 353 (same).

Such concerns are particularly acute where the Commission’s review is used to reinforce the government’s ability to supervise content more intensively. Thus, in *Community-Service Broadcasting of Mid-America*, the D.C. Circuit struck down a statutory requirement that noncommercial broadcasters maintain an audio recording for 60 days of any program that discusses an issue of public importance. The majority invalidated the provision, holding it “places substantial burdens on noncommercial educational broadcasters and presents the risk of direct governmental interference with program content.” *Community-Service Broad.*, 593 F.2d at 1105.<sup>39</sup>

Although the decision in *Community-Service Broadcasting* turned on equal protection grounds because of the special requirement for noncommercial broadcasters, Judge Skelly Wright emphasized that the taping requirement “in its purpose and operation serves to burden and chill the exercise of First Amendment rights by noncommercial broadcasters.” *Id.* at 1110 (Wright, C.J.). He noted “the operation of the taping requirement serves to facilitate the exercise of ‘raised eyebrow’ regulation” because “it provides a mechanism, for those who would wish to do so, to review systematically the content of ... programming.” *Id.* at 1116. A chilling effect can exist even when a regulatory requirement “neither creates any new content restrictions ... nor establishes any new mechanism for enforcement of existing standards” to the extent the measure has the purpose of exerting greater control over content. *Id.* at 1115.

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<sup>39</sup> While that case was being litigated the FCC rejected a similar proposal that would have required commercial broadcasters to retain tapes of their programs. The Commission noted “the concern that the proposed rule might have a chilling effect on free speech and press cannot be easily dismissed” and deferred judgment on the constitutional issue because it was under review by the court in *Community-Service Broadcasting*. See *Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records, Third Report & Order*, 64 F.C.C.2d 1100, 1113 (1977).

All of which brings us to the current show trial, which is hardly a model of subtlety. For the Commission to launch a politically fraught investigation based on such a paper-thin complaint in these circumstances would have been a compelling example of unconstitutional jawboning all on its own. But to resurrect the flimsy complaint after it was fully and properly interred by staff dismissal is all but a signed confession of unconstitutional behavior. The Commission must immediately dismiss the CAR Complaint.

### **CONCLUSION**

The FCC should never have opened this proceeding. The initial staff decision dismissal of the CAR Complaint was well-grounded in precedent, plainly correct, and upheld for no defensible purpose. This proceeding is an illegitimate show trial, and for the FCC to conduct it flies in the face of recent—and unanimous—Supreme Court authority barring unconstitutional jawboning. *Vullo*, 602 U.S. at 180. Even if the proceeding had a legitimate purpose under the Communications Act, the inquiry into particular editorial choices far exceeds the Commission’s statutory and constitutional authority to regulate broadcast programming. This inquiry is a source of embarrassment for all concerned, and the Commission should terminate it forthwith.

FOUNDATION FOR INDIVIDUAL  
RIGHTS AND EXPRESSION

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