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

In the Matter of The Walt Disney Company, American Broadcasting Company, KFSN Television, LLC, Licensee of KFSN-TV, Fresno, California KABC Television, LLC, Licensee of KABC-TV, Los Angeles, California KGO Television, Inc., Licensee of KGO-TV, San Francisco, California WLS Television, Inc., Licensee of WLS-TV, Chicago, Illinois WABC Television (New York), LLC, Licensee of WABC-TV, New York, New York WTVD Television, LLC, Licensee of WTVD-TV, Durham, North Carolina WPVI Television (Philadelphia), LLC, Licensee of WPVI-TV, Philadelphia, Pennsylvania KTRK Television, Inc. Licensee of KTRK-TV, Houston, Texas	)	MB Docket No. 26-131 **OPPOSITION TO PETITIONS TO DENY OF THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION**

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OPPOSITION TO PETITIONS TO DENY OF THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

The Foundation for Individual Rights and Expression (FIRE) submits this response to the Public Notice, *FCC's Media Bureau Establishes Pleading Cyle and Ex Parte Procedures for the Early Renewal Applications of the Walt Disney Company's ABC Licenses,* DA 26-541 (MB May 29, 2026).

FIRE is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought, the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide without regard to speakers' views through public advocacy, in cases implicating expressive rights and, more recently, before the Commission.[1] FIRE's work emphasizes, among others, two priorities this case implicates: First, a vigorous defense of speakers targeted by government overreach and strategic litigation that aims to burden critical speech into silence. Second, a principled support for a robust, open, and free press and proverbial public square, unhindered by the political whims of government officials. FIRE thus seeks to ensure the FCC does not exceed the scope of its authority to encroach upon broadcasters' journalistic and editorial decisions.

[1] FIRE filed comments in several dockets, specifically, *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*, MB Docket 26-124, https://docs.fcc.gov/public/attachments/DA-26-517A1.pdf; *In the Matter of News Distortion Complaint Involving CBS Broadcasting, Inc.*, MB Docket 25-73, https://www.fire.org/research-learn/fire-comments-fcc-news-distortion-complaint, and *In the Matter of Delete, Delete, Delete*, MB Docket 25-133, https://www.fire.org/research-learn/fire-comments-fcc-delete-delete-delete.

Introduction and Summary

"It is obvious to everyone what is going on—or should be."

FCC Commissioner Brendan Carr[2]

This proceeding challenging the renewal of the ABC Network's owned and operated television station licenses is a serious escalation of this Administration's efforts to intimidate the media. These began with informal actions that crossed the line into unconstitutional jawboning and now have ripened into official actions designed to punish ABC for independent journalism and entertainment programs the current Administration finds offensive. Nothing could be further from our constitutional traditions.

It is bedrock First Amendment law that "[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 v. NetChoice, LLC*, 603 U.S. 707, 741–42 (2024). The earliest lessons of our Republic confirmed that the government could neither be trusted to protect only "truth" nor empowered to punish "falsity." The Sedition Act of 1798 made it a crime to "write, print, utter or publish … any false, scandalous and malicious writing or writings against the government" with the intent to defame Congress or the President. Sedition Act of 1798, 1 Stat. 596. The Act was a reaction to what our current President

[2] *Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies,* 39 FCC Rcd. 1791, 1844 (2024) (dissenting statement of Commissioner Brendan Carr).

might describe as Adams Derangement Syndrome.[3] It "was less a piece of legislation than an act of vengeance by federalist lawmakers who decided to strike back at the republican newspapers that they felt had been demonizing their intentions and slandering their character."[4]

The Sedition Act expired by its own terms and was never tested in court, but the consensus of history is that it was fundamentally at odds with the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). As one of his first acts as President, Thomas Jefferson pardoned and remitted the fines of those convicted under the law, which he considered "a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 4 THE WRITINGS OF THOMAS JEFFERSON 555–56 (H.A. Washington ed., H.W. Derby 1861).

That experience with the nation's initial effort to prohibit false speech "first crystallized a national awareness of the central meaning of the First Amendment." *Sullivan*, 376 U.S. at 273. The consensus regarding the Sedition Act's invalidity has conditioned the "fabric of jurisprudence woven across the years." *Commonwealth v.*

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[3] "Most of those convicted [under the Sedition Act] would be prosecuted for criticizing Adams." CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON, AND THE MISFITS WHO SAVED FREE SPEECH 109 (Atlantic Monthly Press 2015). Representative John Allen of Connecticut advocated for the Act as being necessary to punish publication of "the most shameless falsehoods against the Representatives of the people." ERIC BURNS, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM 356–57 (2006).

[4] BURNS, *supra* note 3, at 356. *See* LEONARD LEVY, LEGACY OF SUPPRESSION 258 (Belknap Press of Harvard Univ. Press 1960).

Lucas, 34 N.E.3d 1242, 1253 (Mass. 2015). As the Iowa Supreme Court put it, "we need to look no further than the Sedition Act of 1798 to further understand that … unscrupulous individuals would use the coercive force of government to censor their critics and retain power." *Bertrand v. Mullin*, 846 N.W.2d 884, 900 (Iowa 2014).

Sound familiar?

This proceeding is premised on the false assumption that the Communications Act's public interest standard supersedes that history and that the FCC, as an extension of the White House, may put broadcasters on trial and withhold license renewals to those it deems "biased." Nothing about this is correct.

The probe into Disney and ABC's employment practices that was the catalyst for this proceeding is transparently pretextual and misapplies both federal antidiscrimination law and the FCC's employment rules. It has long been understood that in considering license renewals the FCC is not charged with an undifferentiated mandate to enforce the antidiscrimination laws: The FCC is not the Equal Employment Opportunity Commission (EEOC), and a license renewal proceeding is not a Title VII suit. It has been evident ever since this investigation was first announced that Chairman Carr was seeking to use it as a hook to regulate ABC's programming even if the inquiry was initially framed as being about employment practices.

Arguments of Petitioners supporting this EEO inquiry merely demonstrate how it is focused on broadcast content and violate the First Amendment. "The Speech Clause has no more certain antithesis" than to allow government to intrude on editorial decisions through enforcement of antidiscrimination statutes where "the ultimate point of forbidding … discrimination toward certain classes is to produce a society free of the corresponding biases." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 578–79 (1995).

Petitioners' further demands for non-renewal based on complaints that ABC's programming is "biased" or "fake news" cannot be reconciled the First Amendment or the Communications Act. The common theme of the various petitions to deny license renewal for ABC's owned and operated television stations is that the ABC network is politically motivated in its programming choices, and the FCC is empowered to impose an administrative "death penalty" as a result. President Trump may believe the law permits this, Brendan Carr in his current position may be willing to say as much, and petitioners may be motivated to advocate it as part of their ongoing culture war crusades—but that is not the law and never was. Both the Act and the First Amendment flatly prohibit empowering the FCC to be the nation's speech police.

The FCC's actions in this and other proceedings illustrate why its authority over broadcast programming, to whatever extent it once was justified, no longer can be allowed. Both the technological and structural assumptions underlying the Commission's role as an independent agency and a neutral enforcer of the public interest are no longer true and cannot justify this license renewal proceeding. The FCC was not designed to be an agency under the President's direct control with a servile apparatchik as its chairman. Yet that is what it has become.

Chairman Carr cloaks his actions as necessary measures under the Communications Act's public interest standard. But the opposite is true. The Supreme Court has repeatedly 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.*, 468 U.S. 364, 378 (1984). There is no evidence here the Commission is seeking to understand and apply this prime directive. And the Chairman's mechanical repetition of the term "public interest" cannot create substance where there is none. As Judge Richard Posner wrote in reviewing (and rejecting) another FCC misadventure, the Commission's justification in this proceeding "consists of boilerplate … and self-congratulatory rhetoric about how careful and thoughtful and measured and balanced the majority has been in … carrying out its responsibilities." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992). But "[s]tripped of verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin." *Id.* Same here.

Background

In general. This early renewal proceeding examining whether the Commission should renew eight television station licenses held by the Walt Disney Company, owner of the ABC Television Network (ABC), comes after an extraordinary 18-month period in which the FCC, under Chairman Brendan Carr, has been transformed from an agency that proclaimed "the Commission does not—and cannot and will not—act as a self-appointed, free-roving arbiter of truth in journalism"[5] into a government body that routinely threatens broadcasters for programming choices. During this time, the Commission has jettisoned its original statutory design as a bipartisan, independent regulatory agency and become an extension of the presidency that presumes the power to implement political whims in the name of the "public interest."

Current FCC leadership operates under the assumption that the public interest standard permits it to focus on particular programs or personalities and to threaten regulatory consequences, including license revocation. Worse still, this mindset equates the public interest with what pleases—or displeases—the President. Beginning in his first term, President Trump has called for the revocation of network "licenses" with some regularity.[6] As early as 2017, the President called for challenges to NBC's licenses because of what he called "fake news."[7] The President was irritated

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[5] *Free Press Emergency Petition for Inquiry Into Broadcast of False Information on COVID-19*, Letter, 35 FCC Rcd. 3032, 3033 (MB & OGC 2020).

[6] Of course, networks are not the licensees, but the President does not seem to know that. Yet his ire is generally directed toward networks and particular personalities who appear on them.

[7] *See*, *e.g.*, Jon Levine, *'Blatantly Unacceptable': Trump's Threat to NBC License Denounced by 2 Ex-FCC Commissioners*, THE WRAP (Oct. 11, 2017), https://www.thewrap.com/trump-fcc-licenses-nbc-news-commissioners-blatantly-unacceptable.

about news coverage of increases in the country's nuclear arsenal, and he has since broadened his threat to include other networks as well.[8]

The President's calls to revoke network "licenses" have increased in his second term. He called for revocation of ABC's TV licenses in 2024 because he objected to being fact-checked by the moderator of a presidential debate.[9] He called for revocation of CBS's licenses over the editing of an interview with then-Vice President Kamala Harris on *60 Minutes*.[10] In August 2025, the President said the Commission should revoke ABC's and NBC's licenses because they aired too many "bad stories" about him.[11] This was followed a month later by President Trump's statement urging revocation of networks' licenses because "[t]hey give me only bad publicity or press."[12] And in November 2025, President Trump called for revoking ABC's licenses because

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[8] *See*, *e.g.*, Blair Guild, *Trump refutes NBC Story, suggests challenging its broadcast license*, CBS NEWS (Oct. 11, 2017), https://www.cbsnews.com/news/trump-refutes-nbc-story-suggests-challenging-its-broadcasting-license.

[9] Dominick Mastrangelo, *Trump floats punishment for ABC after debate*, THE HILL (Sept. 11, 2024), https://thehill.com/homenews/media/4874106-trump-abc-debate-punishment/.

[10] Jon Brodkin, *Trump wants CBS license revoked; FCC chair explains that isn't going to happen*, ARS TECHNICA (Oct. 10, 2024), https://arstechnica.com/tech-policy/2024/10/fcc-chair-slams-trumps-call-to-revoke-cbs-and-abc-broadcast-licenses/.

[11] Matthew Keys, *Trump suggests pulling broadcast licenses of NBC, ABC stations*, THEDESK.NET (Aug. 25, 2025), https://thedesk.net/2025/08/trump-threatens-abc-nbc-broadcast-licenses-fcc/.

[12] Kathryn Watson, *Trump says TV networks covering him negatively should "maybe" have their licenses revoked*, CBS NEWS (Sept. 18, 2025), https://www.cbsnews.com/news/trump-says-tv-networks-should-maybe-have-their-licenses-revoked/.

a reporter asked him a question about the Epstein files.[13] A December 2025 social media post said that network licenses should be "terminated" because network newscasts and their "Late Night Shows" are "almost 100% Negative to President Donald J. Trump, MAGA, and the Republican Party."[14]

Just this month, the President asserted that ABC and NBC should lose their licenses because the networks had engaged in "fraud" for failing to carry live on-air the President's speech in which he spoke (yet again) about alleged election interference."[15] Far from being a basis for any sanction (much less license revocation), a network decision not to air a presidential address is the exercise of independent editorial judgment, the very thing the public interest standard expects of broadcast licensees. *See*, *e.g.*, *Ark. Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 124–25 (1973) ("For better or worse, editing is what editors are for; and editing is selection and choice

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[13] Irie Sentner, *Trump again threatens ABC's broadcast license, this time over Epstein questions*, POLITICO (Nov. 18, 2025), https://www.politico.com/news/2025/11/18/trump-again-threatens-abcs-broadcast-license-this-time-over-epstein-questions-00657264?.

[14] Kaia Hubbard, *Trump says broadcast licenses should be terminated if networks are "almost 100% Negative" about him*, CBS NEWS (Dec. 24, 2025), https://www.cbsnews.com/amp/news/trump-broadcast-licenses-terminated-100-negative/.

[15] Aaron Pellish, *Trump calls for revocation of ABC, NBC licenses over speech snub*, POLITICO (July 16, 2026), https://www.politico.com/news/2026/07/16/trump-calls-for-revocation-of-abc-nbc-licenses-over-speech-snub-01002580.

of material."). This was well understood by earlier administrations, such as when the networks declined the Biden Administration's 2022 request for airtime to address what the President called "threats on democracy," or when ABC, CBS, and NBC did not air President Obama's primetime speech on immigration.[16] Networks in those instances declined to air presidential speeches they determined to be political.

And in this regard, FCC chairmen in more normal times understood the President could not simply call for broadcast license revocations whenever he was displeased with network decisions. Instead, they reaffirmed the Commission's commitment to follow "the terms of the Communications Act and . . . other applicable legal principles," especially the First Amendment.[17] But these are not normal times, and Brendan Carr, the Commission's current chairman, no longer recognizes these constraints as he did as a commissioner. He has publicly indicated that the decision not to air the President's July 16 speech will be considered as part of the Commission's review of the ABC license renewals.[18]

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[16] *See* Paul Farhi, *As Biden warned about democracy's collapse, TV networks aired reruns*, WASHINGTON POST (Sept. 2, 2022), https://www.washingtonpost.com/media/2022/09/02/biden-speech-network-coverage-independence-hall/; Jaime Fuller, *Why the major networks didn't give President Obama primetime real estate for his immigration speech*, WASHINGTON POST (Nov. 21, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/11/20/why-the-networks-arent-giving-president-obama-primetime-real-estate-for-his-immigration-speech/.

[17] Jon Brodkin, *Six days later, FCC chair says Trump can't order FCC to revoke TV licenses*, ARS TECHNICA (Oct. 17, 2017), https://arstechnica.com/tech-policy/2017/10/ajit-pai-despite-what-trump-says-fcc-wont-revoke-broadcast-licenses.

[18] Anthony Orrico, *Jimmy Kimmel Nemesis Brendan Carr Has Ominous New Message For ABC*, HUFFPOST (July 23, 2026),

Of course, this is just the latest thing in the President's—and, by extension, Chairman Carr's—list of grievances against ABC. As is well known, Chairman Carr threatened the ABC network over a September 15, 2025 monologue on *Jimmy Kimmel Live!* that included a joke about MAGA reactions to Charlie Kirk's assassination, directing the network to "take action on Kimmel, or there is going to be additional work for the FCC ahead."[19] The Commission later issued a public notice seeking comment on whether ABC's *The View* qualified for a news exemption under the Section 315(a) equal opportunity rules.[20] And, most significantly, in the current proceeding, the FCC directed Disney and ABC to file license renewal applications for eight local stations years ahead of their original schedules, which were slated to expire between 2028 and 2031.[21]

ABC Early Renewal Proceeding. The Commission's asserted justification for initiating early renewal of the licenses of ABC's owned and operated television

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https://www.huffpost.com/entry/brendan-carr-fcc-abc-trump-speech_n_6a61623be4b0c2f78d01a65c.

[19] *See* Daniel Arkin & Kevin Collier, *Jimmy Kimmel suspension puts spotlight on Brendan Carr, Trump's FCC chair*, NBC NEWS (Sept. 18, 2025), https://www.nbcnews.com/business/media/jimmy-kimmel-suspension-brendan-carr-trumps-fcc-chair-rcna232091.

[20] *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, DA 26-517 (MB May 22, 2026). https://docs.fcc.gov/public/attachments/DA-26-517A1.pdf.

[21] Order, *In the Matter of Walt Disney Co.*, Order, DA 26-416 (MB Apr. 28, 2026), https://docs.fcc.gov/public/attachments/DA-26-416A1.pdf ("*Early Renewal Order*").

stations is to probe "possible violations of the Communications Act of 1934 and the FCC's rules, including the agency's prohibition on unlawful discrimination." *Early Renewal Order*, at ¶ 1. This opaque, one-sentence justification was foreshadowed by a March 27, 2025, letter from Chairman Carr to Disney CEO Robert Iger informing him that the Chairman had directed the Commission's Enforcement Bureau to investigate whether Disney and ABC had violated "FCC equal employment opportunity regulations by promoting invidious forms of DEI [diversity, equity, and inclusion] discrimination."[22] The letter purports to rely on "the FCC's longstanding equal employment opportunity or EEO rules [which] set forth specific requirements," but also makes reference to "invidious forms of DEI," as if those concepts were the same. *Investigation into Disney/ABC's DEI Programs* at 1. In particular, it raised questions about Disney making DEI a "key priority" through such practices as requiring that "50 percent of regular and recurring characters" on ABC programs be drawn from "underrepresented groups." *Id. at* 2.

Other than unadorned references to the FCC's EEO rules and the FCC general statutory mandate, Chairman Carr's letter did not specify how Disney and ABC's practices might have violated any FCC rule, let alone provide a basis for non-renewal (or early renewal) of licenses. Instead, it drew on President Trump's January 20 Executive Order pledging to "end the radical and wasteful DEI programs that have

[22] *Letter from Brendan Carr to Robert A. Iger RE: Investigation into Disney/ABC's DEI Programs*, (Mar. 27, 2025) https://www.fcc.gov/sites/default/files/Carr-Letter-to-Disney-DEI-03272025.pdf ("*Investigation into Disney/ABC's DEI Programs*").

spread across the federal government." *Id.* at 3.[23] Chairman Carr wrote that the FCC, at his direction, "has already taken action to end its own promotion of DEI." *Id.* He added that he was "pleased to see that some regulated companies are already taking steps toward rooting out discriminatory DEI policies." *Id.* The unstated premise of the FCC's investigation draws on the Executive Orders' assumption that DEI programs, however they might be configured, necessarily conflict with federal civil rights statutes, as well as the FCC's rules. *E.g.*, 47 C.F.R. § 73.2080(a).

The Commission opened this proceeding and called for interested parties to file comments or petitions to deny the ABC licenses.[24] While the FCC has received over 150,000 submissions in this docket, several petitions to deny target ABC's programming choices and not just the network's hiring practices. The Media Research Center ("MRC") and the Center for American Rights ("CAR") focus primarily on programming issues, alleging that ABC is a "partisan political operation" that "routinely broadcasts misinformation, disinformation, and other fake news,"[25] and is

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[23] The letter did not specifically cite the Executive Order but apparently was making reference to Exec. Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, 90 Fed. Reg. 8339 (Jan. 29, 2025). President Trump also issued Exec. Order No. 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 31, 2025). Neither of the Executive Orders offered a definition of DEI, or diversity, equity, and inclusion, but seemed to assume that DEI—whatever it may be—is a *per se* violation of existing civil rights laws.

[24] *FCC's Media Bureau Establishes Pleading Cyle and Ex Parte Procedures for the Early Renewal Applications of the Walt Disney Company's ABC Licenses,* Public Notice, DA 26-541 (MB May 29, 2026).

[25] Petition to Deny of the Media Research Center ("MRC Pet.") at 6-24.

"on an ideological mission to advance a Race & Culture agenda contrary to the public interest."[26] Other submissions focused more on DEI issues, with a group called the Article III Project alleging ABC's DEI initiatives necessarily violate anti-discrimination laws,[27] and the American Alliance for Equal Rights ("AAER") expressing concern about potential violation of antidiscrimination laws.[28] FIRE's comments will focus on the DEI and programming questions. None of the issues raised warrant designating the licenses for hearing, much less provide any basis for nonrenewal of ABC's owned and operated station licenses.

Argument

I. The FCC's Asserted Concerns Over DEI Practices Provide No Legitimate Basis for This Review of ABC's Licenses

Coming as it does after years of demands by Donald Trump to revoke network "licenses," and in the wake of eighteen months of jawboning by the President and Chairman Carr targeting ABC programming and personalities, this unprecedented proceeding calling for early review of ABC's television station licenses reeks of political pretext. And even if this proceeding were not already tainted by the transparent misuse of regulatory power to punish perceived Administration critics,

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[26] Petition to Deny of the Center for American Rights ("CAR Pet.") at 32-35.

[27] The Petition to Deny of the Article III Project is a conclusory page and a half submission that merely asserts Disney's employment practices are "a clear, glaring violation of federal law."

[28] *See* Comments of the American Alliance for Equal Rights ("AAER Comments") at 2-3. AAER does not call for nonrenewal of the ABC licenses, but instead urges the FCC to engage in "close oversight" of ABC's employment practices. *Id.* at 6.

the Commission's justification is far from sufficient to justify early review, not to mention conducting hearings or imposing nonrenewal of ABC's licenses.

A. The Commission's Pretextual Use of its EEO Rules Exceeds the Limits of its Jurisdiction

Chairman Carr's repeated talismanic references to the "public interest" cannot justify this proceeding. It is well-settled "the FCC's public-interest authority must be interpreted in light of the 'targets' of the Communications Act of 1934." *Nat'l Religious Broads. v. FCC*, 138 F.4th 282, 292 (5th Cir. 2025)). *See also Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002). The use of the words "public interest" in a regulatory statute "is not a broad license to promote the general public welfare" because those words "take meaning from the purposes of the regulatory legislation." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) (use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to eliminate discrimination). The FCC's general mandate to "make available" communications services to all Americans "without discrimination on the basis of race, color, religion, national origin, or sex", 47 U.S.C. § 151, applies to the "provision of communications services to Americans," and is not a directive empowering the Commission to "eradicate *employment* discrimination," *Nat'l Religious Broads.*, 138 F.4th at 293.

In this regard, it has long been understood the FCC is not charged in considering license renewals "with an undifferentiated mandate to enforce the antidiscrimination laws: the FCC is not the Equal Employment Opportunity Commission (EEOC), and a license renewal proceeding is not a Title VII suit."

Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). *See also Nat'l Org. for Women v. FCC*, 555 F.2d 1002, 1017–18 (D.C. Cir. 1977) (rejecting petitions to deny, explaining that the FCC is "not charged … with the enforcement of Title VII under its 'public interest' mandate" and that even a finding of probable cause by the EEOC "does not necessarily mean that the same finding raises an issue under the Communications Act."). The D.C. Circuit has explained that "the FCC can probably only regulate discrimination that affects 'communication service'—here, that means programming." *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). This presents the Commission with a dilemma where both horns constrain its authority. On one, its EEO enforcement authority is limited to addressing specific communications-related matters, and on the other, the Commission cannot enforce its policies in ways that threaten constitutional injury, including First Amendment injury.

Because of the particular focus of its authority, the FCC's limited jurisdiction to enforce EEO mandates has long been a matter of contention, and the Commission's view of the public interest in this regard has shifted significantly over time. The requirements date to 1969, when Commission required broadcast licenses not only to refrain from discriminatory hiring practices but also to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice."[29] The rules required stations to actively seek out minority and female applicants, track referral sources of minority applicants, and to record the race and sex of each applicant and each person hired. If the data showed a station employed a lower percentage of minorities and women than were employed in the local workforce, the Commission "would take that into account in determining whether to renew the station's license." *MD/DC/DE Broads. Ass'n. v. FCC*, 236 F.3d 13, 16 (D.C. Cir. 2001).[30]

As noted, the Commission's authority to use its EEO policies in licensing proceedings is cabined both by the FCC's jurisdictional limits of its public interest authority and by constitutional constraints. The D.C. Circuit held the affirmative action requirements of the FCC's EEO rules could not be justified by the asserted interest in promoting "diverse programming" and that the government mandates violated the Equal Protection Clause. *Lutheran Church-Missouri Synod*, 141 F.3d at 356 ("[O]ur opinion has undermined the proposition that there is any link between broad employment regulation and the Commission's avowed interest in broadcast diversity."); *MD/DC/DE Broads. Ass'n.*, 236 F.3d at 21 ("[I]t is far from clear that future employment in the broadcast industry is a public benefit for which the Government is constitutionally responsible."). And the courts have made quite clear

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[29] 47 C.F.R. § 73.2080(b). *See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240 (1969).

[30] Congress ratified these requirements, and in 1992 prohibited the FCC from "revis[ing] … the regulations concerning equal employment opportunity … as such regulations apply to television broadcast station licensees." 47 U.S.C. § 334(a)(1).

the constitutional limits apply not just to the formal exercise of FCC authority but also to informal, "raised eyebrow" intimidation techniques. *MD/DC/DE Broads. Ass'n.*, 236 F.3d at 19 ("investigatory hearing before the FCC 'is considered by both key staff people and most commissioners almost as drastic as taking a license away'") (quoting BARRY COLE AND MAL OETTINGER, RELUCTANT REGULATORS 213 (1978)).

The irony here is that the Commission is threatening ABC's licenses for its allegedly engaging in the type of recruitment and hiring practices it formerly believed the public interest *required*. The FCC used to review licenses if they recruited and hired too few minority group members, and here it is threatening ABC's licenses because Chairman Carr is claiming it is hiring too many. It does not matter whether the FCC is asserting authority to do this under its anti-discrimination rules of 47 C.F.R. § 73.2080(a) or its former affirmative action requirements of 47 C.F.R. §§ 73.2080(b) and (c). Just as the Commission cannot exercise its EEO authority to ensure programming is sufficiently "diverse," it cannot manipulate its rules to combat programming decisions the Chairman thinks are too "woke."[31]

The question in this proceeding is not whether ABC's hiring or editorial policies are "good," or whether they are politically acceptable to the current Administration (or, for that matter, to the previous one). It is that the government has no legitimate

[31] Its attempt to do so through this proceeding prompted filings from political groups asking the FCC to fight their culture war battles. For example, a section of the CAR comments demands that the Commission deny renewal of ABC station licenses to end what it calls the networks "ideological mission" to create "DEI TV." CAR Comments at 32–35. Of course, the irony of this (or hypocrisy, if you prefer) is that the FCC has no authority to promote CAR's "ideological mission," either.

business exercising its authority either to require "wokeness," *see Reges v. Cauce*, 175 F.4th 1014, 1023, 1036 (9th Cir. 2025), or to restrict it, *Pernell v. Fla. Bd. of Governors of the State University*, ___ F.4th ____, 2026 WL 1955783, at **1, 15 (11th Cir. 2026).

This would be true even if this proceeding had been launched in isolation, and not in the context of the President's repeated calls to revoke network "licenses," his thin-skinned reactions to jokes by talk show hosts, his calls to punish journalists for critical coverage, and his installation of an obsequious FCC Chair all too willing to do his bidding.[32] As former Commissioner Carr used to say back in the days when he was honoring his oath to uphold the law and the Constitution, "[i]t is obvious to everyone what is going on—or should be."[33]

In the present context, the Commission's good faith administration of the law cannot be presumed. Numerous judges have recently pointed out that "courts have seen instance after instance of departures from this tradition" of assuming that executive or administrative authority is in service of a good faith application of law. *Fed. Educ. Ass'n. v. Trump*, 795 F. Supp. 3d 74, 88–92 (D.D.C. 2025) (collecting numerous cases), *stay pending appeal denied*, 2025 WL 2738626, at *1 (D.C. Cir. Sept. 25, 2025); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*,

[32] This is unlike previous FCC Commissioners and former Chairmen of both political parties. *See*, *e.g.*, Andrew C. Barrett, *et al.*, *Petition for Special Relief in the Matter of Repeal of the News Distortion Policy* at 10 (Nov. 13, 2025), https://protectdemocracy.org/wp-content/uploads/2025/11/News-Distortion-Petition-for-Special-Relief.pdf; *In re Radio Television Digital News Ass'n,* No. 26-1099 (D.C. Cir. May 20, 2026).

[33] *Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies,* 39 FCC Rcd. at 1844 (dissenting statement of Commissioner Brendan Carr).

774 F. Supp. 3d 86, 88 (D.D.C. 2025) ("The retaliatory nature of the Executive Order at issue … is clear from its face"). In a case like this, regularity cannot be presumed. *See Media Matters for Am. v. Bailey*, 2024 WL 3924573, at *18 (D.D.C. Aug. 23, 2024). Presuming regularity of the Commission's actions in these circumstances would be naive and foolish.

A. Contrary to the FCC's Assumption, DEI Does Not Equate to Illegal Discrimination

Chairman Carr launched the investigation of ABC's employment practices shortly after President Trump's Executive Orders pledging to stamp out DEI initiatives, making explicit references to them. *See Investigation into Disney/ABC's DEI Programs* at 3. And the investigation's premise appeared to be that anything DEI-related (whatever that means) necessarily is a violation of federal law. However, that assumption is unwarranted. The same fallacy underlies a range of actions that purport to implement the Administration's Executive Orders on this issue, many of which have been enjoined for various reasons that are relevant here.

Some courts have rejected the Administration's assumption that DEI initiatives necessarily violate antidiscrimination laws.[34] Others have found that the

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[34] *See*, *e.g.*, Jenner & Block LLP v. DOJ, 784 F. Supp. 3d 76, 107 (D.D.C. 2025), *appeal docketed*, No. 25-5265 (D.C. Cir. July 22, 2025) ("The defendants point to no case holding such diversity initiatives illegal. Instead, they expand the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* beyond its own bounds. In fact, they recognize as much, saying that they 'raise legitimate legal issues of just how far DEI policies and programs can go and whether such policies cross the line into illegal discrimination.'"); Perkins Coie LLP v. DOJ, 783 F. Supp. 3d 105, 176 n.38 (D.D.C. 2025), *appeal docketed*, No. 25-5241 (D.C. Cir. July 2, 2025) ("[T]he government broadly asserts that 'diversity initiatives have always been legally suspect and are especially so since the Supreme

government's references to "DEI" are undefined and unconstitutionally vague.[35] In some cases, courts enjoined decisions as being arbitrary and capricious.[36] Perhaps

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Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*")—which seems to be an expansive view of the actual holding in that case, which considered challenges to the college 'admissions systems used by Harvard College and the University of North Carolina.'"; Nat'l Council of Nonprofits v. McMahon, ___ F. Supp. 3d ___, 2026 WL 1876366, at *32 (D. Mass. June 30, 2026) ("[T]he Administration's belief that all diversity, equity, and inclusion practices are illegal" is "not settled law, and many diversity, equity, and inclusion practices remain legal across the country."); N*at'l* E*duc.* A*ss'n* v. Dep't of Educ., 779 F. Supp. 3d 149, 187 (D.N.H. 2025) ("The Letter does not make clear … what the Department believes constitutes a DEI program, or the circumstances in which the Department believes DEI programs run afoul of Title VI."); Am. Fed'n of Teachers v. Dep't of Educ., 796 F. Supp. 3d 66, 110–11 (D. Md. 2025), *appeal dismissed*, No. 25-2228 (4th Cir. Jan. 22, 2026) ("[T]here is no basis in Title VI or *SFFA* for concluding that discussion of race—in the two ways highlighted in the Letter or otherwise—is ever, or especially always, discrimination. The government cannot proclaim entire categories of classroom content discriminatory to side-step the bounds of its statutory authority.").

[35] *See*, *e.g.*, *Council for Opportunity in Educ. v. Dep't of Educ.*, 2026 WL 120984, at *14 (D.D.C. Jan. 16, 2026) ("[T]he court is left to guess how the excerpted sentences conflict with the Administration's policies, priorities, or violate civil rights law."); *Urb. Sustainability Dirs. Network v. USDA*, 2025 WL 2374528, at *35 (D.D.C. Aug. 14, 2025), *modified*, 2026 WL 1877821 (D.D.C. June 30, 2026), *appeal docketed*, No. 25-5370 (D.C. Cir. Oct. 17, 2025) ("The letters even leave vague what the agency means by 'DEI' or 'initiatives that discriminate on the basis of protected characteristics.'"); Perkins Coie LLP, 783 F. Supp. 3d at 175 ("[T]he government avoids trying to define the terms 'diversity, equity and inclusion' altogether and contends that the Order's reference 'to categories prohibited by civil rights laws' provides a sufficient 'intelligible benchmark' to save the Order from plaintiff's vagueness challenge."); *NAACP v. Dep't of Educ.*, 779 F. Supp. 3d 53, 66 (D.D.C. 2025) ("Although the challenged documents place a particular emphasis on 'certain DEI practices,' they fail to provide an actionable definition of what constitutes 'DEI' or a 'DEI' practice, or delineate between a lawful DEI practice and an unlawful one."); *Freedom Network USA v. Trump*, 825 F. Supp. 3d 638, 659 (N.D. Ill. 2026), *modified*, 2026 WL 1899186 (N.D. Ill. June 29, 2026) (""[H]ow to comply with the requirement that a grantee 'not operate any programs promoting DEI that violate any applicable Federal antidiscrimination laws' is left entirely to the grantee's imagination.").

[36] *See*, *e.g.*, *Robert F. Kennedy Ctr. for Just. and Hum. Rts. v. McMahon*, ___ F. Supp. 3d ___, 2026 WL 1893511 (D.D.C. June 30, 2026); *Council for Opportunity in*

most pertinent to this proceeding are those cases finding that the Administration's use of its anti-DEI Executive Orders was a pretextual ploy to target and punish perceived "enemies" for their protected speech.[37] Here, given the President's well-documented antagonism toward ABC, echoed by Chairman Carr's servile response, it is difficult to avoid the conclusion that the "true motivation lurking behind the façade of discrimination allegations [is] the administration's disapproval of plaintiff's speech." *Perkins Coie LLP*, 783 F.Supp.3d at 154-55.

Educ. v. Dep't of Educ., 2026 WL 120984, at *14 (D.D.C. Jan. 16, 2026) ("[T]he court is left to guess *how* the excerpted sentences conflict with the Administration's policies, priorities, or violate civil rights law."); *Urb. Sustainability Dirs. Network*, 2025 WL 2374528, at *35 ("The two grant terminations premised on anti-DEI priorities … were also lacking in sufficient reasoning tied to an individualized assessment of the grants and thus likely arbitrary and capricious."); *Nat'l Council of Nonprofits*, ___ F. Supp. 3d. ___, 2026 WL 1876366, at *15 ("[T]he Administration has threatened legal action against generally lawful activity with which it disagrees.").

[37] *See*, *e.g.*, *Susman Godfrey LLP v. Exec. Off. of the President*, 789 F. Supp. 3d 15, 43 (D.D.C. 2025), *appeal docketed*, No. 25-5310 (D.C. Cir. Aug. 26, 2025) ("In the absence of any plausible allegations of unlawful discrimination, Susman's statements on its website are speech plainly protected by the First Amendment."); *Jenner & Block LLP*, 784 F. Supp. 3d at 110 ("What is remarkable is the shared characteristic of the firms now threatened with EEOC investigations: speech the President dislikes."); *Perkins Coie LLP*, 783 F. Supp. 3d at 154-55 ("A fair reading of the record, and taking the government at its word, requires finding that the justification for EO 14230 stemming from plaintiff's purported 'racial discrimination' was motivated only by plaintiff's First Amendment protected speech in support of diversity."); *Am. Fed'n of Teachers*, 796 F. Supp. 3d 66, 111 ("The letter is textbook viewpoint discrimination") (cleaned up).

B. The FCC's Stated Rationale for this Proceeding and the Petitions to Deny Submitted in it Highlight the First Amendment Tensions the Inquiry Raises

It has been evident since the first announcement of this investigation that Chairman Carr is seeking to use it as a hook to regulate ABC's programming, even if the inquiry was superficially framed as being about the FCC's employment rules. He specifically cited ABC's stated commitment to hire "underrepresented groups" for "regular and recurring characters" as well as for "writers, directors, crew, and vendors." *See Investigation into Disney/ABC's DEI Programs* at 2. And he cited the work of political activists who have criticized the Disney Corporation for "wokeness," suggesting this inquiry is part of general culture war grievances and not actually related to FCC EEO policies.[38] But as Carr once said in his previous role as Commissioner, "[i]t is quite obvious that the FCC's stated rationales are nothing more than pretext."[39]

To whatever extent the Commission has been less than forthcoming about its motivations, the petitions submitted in this proceeding by the usual political suspects

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[38] *See Investigation into Disney/ABC's DEI Programs* at 2 n.4 (citing Christopher Rufo, *The Wokest Place on Earth*, CITY JOURNAL (May 7, 2021), https://www.city-journal.org/article/the-wokest-place-on-earth (criticizing Disney policies in general and for putting content advisories on some of its classic films). Punditry aside, it is hard to tell what bearing Disney's policies at its theme parks or its placing advisories on films have to do with the employment records at ABC's eight owned and operated television stations. This is all just culture war fluff. *See Cathy Young, Ron DeSantis, Chris Rufo, and the College Anti-Woke Makeover*, CATO INSTITUTE COMMENTARY (Jan. 16, 2023), https://www.cato.org/commentary/ron-desantis-chris-rufo-college-anti-woke-makeover.

[39] *Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies,* 39 FCC Rcd. at 1844 (dissenting statement of Commissioner Brendan Carr).

have been quite upfront about their goals. CAR, for example, is calling for an "[o]verhaul [of] ABC's network programming," CAR Petition at 63, including that ABC "eliminate" a current program dedicated to producing race- and culture-themed content, *id.*, "commit to hiring several prominent, Trump-aligned actual Republicans as on-air talent," *id.*, and "to an even(ish) mix of Republican and Democrat candidates and elected officials as guests on its interview programs," *id.*, among other things.[40] In short, CAR is advocating both the return of a more aggressive form of the fairness doctrine bolstered with ideologically defined hiring quotas.[41]

But broadcasters' decisions about what stories to tell, what their editorial positions will be, and who they should hire to convey those messages are all protected by the First Amendment. *See*, *e.g.*, *Democratic Nat'l Comm.,* 412 U.S. at 124–25 ("[E]diting is what editors are for; and editing is selection and choice of material"). "To the extent the publisher's choice of writers affects the expressive content of its

[40] CAR's proposed "reforms" go far beyond imposing a political litmus test for on-air talent. It advocates prohibiting all "on-air talent and off-camera producers and executives" whose shows discuss politics from "donat[ing] to, host[ing] fundraisers for, or campaign[ing] for political candidates, parties, PACs, or causes. CAR Petition at 64. Of course, such proposals are obviously unconstitutional. *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 357 (1976) ("political belief and association constitute the core of those activities protected by the First Amendment"); *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam)) ("The First Amendment safeguards an individual's right to participate in the public debate through political expression and political association.").

[41] The MRC Petition is equally focused on political litmus tests, but do not try to mask this as an inquiry into ABC's employment practices. Instead, MRC embraces the FCC's role as the nation's speech police, as will be discussed in the next Section II, *infra*.

newspaper, the First Amendment protects that choice," *McDermott v. Ampersand Publ'g LLC*, 593 F.3d 950, 962 (9th Cir. 2010), and the same is no less true of broadcasters, including their choices of editors and writers, as well as their selection of on-air talent and guests.

Even if the FCC's actions come disguised as "anti-discrimination" measures, the First Amendment bars regulating a licensee's hiring practices in order to foster the government's notion of political balance. In our constitutional scheme the government has no legitimate role to decide "what counts as the right balance of private expression—to 'un-bias' what it thinks [is] biased." *Moody*, 603 U.S. at 719. The Supreme Court has long made clear that antidiscrimination laws, when applied to speech and publishers cannot trump the First Amendment, and that such laws are not "immune from the demand of the Constitution." *303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023). *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) ("[T]he First Amendment prohibits the State from imposing [an inclusion] requirement through … its public accommodations law.").

"The Speech Clause has no more certain antithesis" than to allow government to intrude on editorial decisions through enforcement of antidiscrimination statutes where "the ultimate point of forbidding … discrimination toward certain classes is to produce a society free of the corresponding biases." *Hurley*, 515 U.S. at 578–79. In *Hurley*, the Court held unanimously that the First Amendment barred Massachusetts from applying its public accommodation law to require the private organizers of Boston's St. Patrick's Day parade to include a gay contingent. In reaching this conclusion, the Court drew on precedent upholding the rights of newspaper publishers, citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). *Hurley*, 515 U.S. at 570, 579. *Tornillo*, another unanimous ruling of the Court, made clear that:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258. The First Amendment protects these choices "regardless of whether the government considers [the] speech sensible and well intentioned or deeply 'misguided.'" *303 Creative LLC*, 600 U.S. at 586 (quoting *Hurley*, 515 U.S. at 574). *Contra Investigation into Disney/ABC's DEI Programs* at 1 ("Disney started out a century ago as an iconic American company . . . But then something changed.").

The FCC's evident purpose to combat DEI and what it perceives as "wokeness" clearly conflicts with this constitutional imperative. But even if Chairman Carr could be taken at his word and the FCC's inquiry is focused just on hiring choices involving performers, writers, and directors, the First Amendment problem is the same. Applying these constitutional principles, the court in *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 993–96 (M.D. Tenn. 2012), dismissed with prejudice a civil rights claim under 42 U.S.C. § 1981 alleging that casting decisions for the ABC television programs *The Bachelor* and *The Bachelorette* were motivated by racial discrimination.

Even assuming the truth of the allegations, the court held the claims were barred as a matter of law because, under *Hurley*, "anti-discrimination statutes of general applicability must yield to the First Amendment." *Id*. at 996. The court compared casting decisions by television producers with editorial and creative choices by newspaper editors, playwrights, or parade sponsors (as in *Hurley*) and held them to be constitutionally protected. *Id*. at 1000. It noted:

> [T]he First Amendment protects the defendants' ability to control the content of their own programs unilaterally. Thus, whether applying § 1981 here would actually enhance the Shows' expressive content, contradict that content, or not affect it all is essentially beside the point, because the defendants—not the plaintiffs—are entitled to control the casting of their own programs in the manner in which they see fit.

Id. at 997 n.13. This general principle means "the First Amendment can trump the application of antidiscrimination laws to protected speech." *Id*. at 993.[42]

The Eighth Circuit reached the same conclusion in *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019), holding the First Amendment barred the Minnesota Human Rights Act from requiring a videographer to record same-sex marriages. The court observed that "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment." *Id*. at 755 (citing *Hurley*, 515 U.S. at 579).

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[42] AAER takes issue with this conclusion and refers to the motion to dismiss ABC filed in *Claybrooks*. But it fails to cite the court's holding in *Claybrooks* dismissing the discrimination claim because First Amendment protects a broadcaster's casting choices. AAER Comments at 4 n.8. Nor does AAER cite any of the Supreme Court decisions on which the *Claybrooks* holding is based.

The Supreme Court has applied a similar analysis under the First Amendment's religion clauses. It has held, for example, that they bar application of employment discrimination statutes to a religious institution's selection of ministers, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), and reaffirmed and expanded on this in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020), with respect to religious schools' selection of teachers. As the Court explained, religious institutions may be subject to secular laws, but not for "internal management decisions that are essential to [their] central mission." *Morrissey-Berru*, 591 U.S. at 746. Under the First Amendment, laws, even those of general application, can no more regulate editorial choices of how broadcasters make casting and writing decisions than it can tell churches what ministers to hire. *Claybrooks*, 898 F. Supp. 2d at 996; *Tornillo*, 418 U.S. at 258.

Such considerations explain why courts have already limited the FCC's EEO rules as violations of the Equal Protection Clause. *Lutheran Church-Missouri Synod*, 141 F.3d at 356 ("The regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny."); *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 21. And what is true for the former affirmative action requirements of the EEO policy is equally true of the nondiscrimination mandate and the First Amendment where the Commission seeks to regulate a licensee's casting and editorial choices. The FCC's current inquiry into the ABC license renewals is irreconcilable with the First Amendment.

C. References to the FCC's Character Policy are Ironically Misplaced

Some petitioners make reference to other Commission policies in an effort to bolster their arguments for putting the ABC television station licenses into renewal hearings. For example, CAR devotes a section of its submission to arguing the FCC should deny the renewals on character grounds because of the allegations of employment discrimination. CAR Petition at 35–42. But this misunderstands both the Commission's character policy and the EEO rules.[43] While the Communications Act requires licensees to meet character qualifications (which include, among other things, following FCC rules), the FCC's Character Policy Statement does not single out adherence to EEO policies as a separate component of compliance. In fact, the FCC's orders setting forth its character requirements do not mention the EEO rules *at all*.[44] Accordingly, CAR's attempt to create multiple issues fails.[45]

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[43] This failure to understand FCC policies or to cite them in context is part of a disturbing pattern with CAR. *See*, *e.g*., Robert Corn-Revere, *Fact Checking Without Facts,* Broadband Breakfast (Apr. 13, 2026), https://broadbandbreakfast.com/robert-corn-revere-fact-checking-without-facts/ ("Unfortunately, neither Suhr nor his organization has any discernable experience in broadcast law, and it shows.").

[44] *See generally In the Matter of Pol'y Regarding Character Qualifications in Broad. Licensing*, 102 F.C.C.2d 1179 (1986); *Pol'y Regarding Character Qualifications in Broad. Licensing, Policy Statement and Order,* 5 FCC Rcd. 3252 (1990), modified, *Memorandum Op. and Ord.*, 6 FCC Rcd. 3448 (1991), further modified, *Memorandum Op. and Ord.*, 7 FCC Rcd. 6564 (1992).

[45] CAR's principal source for its attempt to create a character issue is a joint statement of former Chairman William Kennard and Commissioner Gloria Tristani in a proceeding entitled *In the Matter of Rev. of the Comm'n's Broad. and Cable Equal Emp. Opportunity Rules,* 13 FCC Rcd. 23004, 23050 (1998). CAR Pet. at 35. CAR fails to mention, however, that the FCC rulemaking from which those separate statements come was *reversed* by *Lutheran Church-Missouri Synod*, 141 F.3d at 353, where the

Ironically, CAR relies heavily on the FCC's initial EEO Notice of Proposed Rulemaking from 1968, *In the Matter of Petition for Rulemaking to Require Broad. Licensees to Show Nondiscrimination in Their Emp.t Pracs.*, 13 F.C.C.2d 766 (1968) ("*1968 EEO NPRM*"), which led to the adoption of EEO rules. But it ignores the context of that Notice entirely, which the Commission adopted during the civil rights struggles of the 1960s. *See* CAR Pet. at 36. As the Commission explained at the time, the connection between the public interest standard and the EEO rules was the need to ensure that broadcasters did not overlook minority needs in the community:

> A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programing to serve the area's needs and interests.

1968 EEO NPRM, 13 F.C.C.2d at 770. But the Commission went even further:

> News organizations must employ enough Negroes in positions of significant responsibility to establish an effective link to Negro actions and ideas and to meet legitimate employment expectations. Tokenism — the hiring of one Negro reporter, or even two or three — is no longer enough. Negro reporters are essential, but so are Negro editors, writers, and commentators.

Id. at 774. In this regard, the Commission said the public interest required licensees to engage in outreach to minority applicants:

> It is not enough, though, as many editors have pointed out to the Commission to search for Negro journalists. … It must become a commitment to seek out young Negro men and women, inspire them to become — and then train them as — journalists. Training programs should be started at high schools and intensified at colleges. Summer

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D.C. Circuit held that the Commission's affirmative action rules were unconstitutional. *See supra* at 17.

> vacation and part-time editorial jobs, coupled with offers of permanent employment, can awaken career plans.

Id. at 774. And the Commission was not concerned just with news:

> Television should develop programing which integrates Negroes into all aspects of televised presentations. … For example, Negro reporters and performers should appear more frequently — and at prime time — in news broadcasts, on weather shows, in documentaries, and in advertisements. … In addition to news-related programing, we think that Negroes should appear more frequently in dramatic and comedy series.

Id. at 775.[46]

Given the origin of the FCC's EEO policy, and the concerns to which it was directed, it is impossible to fathom how CAR imagines there is a character issue that could impede renewal of the ABC station licenses. CAR devotes several pages to describing various Disney programs established to provide employment opportunities for minorities, including programs for writers, directors, and other talent. CAR Pet. at 37–42.[47] This asserted concern dovetails with Chairman Carr's complaint about ABC's stated commitment to hiring "underrepresented groups" to play "regular and

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[46] As historical context, it is worth noting that the Commission's NPRM was issued in July 1968, less than two months before the first network series with a black woman in the lead role premiered on television. *See Julia* (1968 TV series), Wikipedia, https://en.wikipedia.org/wiki/Julia_(1968_TV_series).

[47] Weirdly, this list includes criticisms of Disney's charitable giving, CAR Pet. at 40–41, which bears no conceivable connection to any review of the ABC television licenses or their hiring practices. It also mentions Disney's support for historically Black colleges and universities and cites an Office of Legal Counsel report suggesting that governmental support for such institutions might violate the Equal Protection Clause. CAR Pet. at 37–38. This reference is even more perplexing, since Disney is not the government, so the Equal Protection question is irrelevant. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019).

recurring characters" and to serve as "writers, directors, crew, and vendors." *See Investigation into Disney/ABC's DEI Programs* at 2. It appears the Chairman and CAR now question the renewal of the ABC licenses for conducting the kinds of activities for which the EEO policy was created. That is, they seem concerned that Disney and ABC are engaging with *too many* Negros and other minorities.

And there is a further irony here. Even in 1968, when the Commission's public interest authority was at its zenith, and before courts limited the agency's EEO mandate and upheld greater First Amendment protections for broadcasters, the FCC knew it could go only so far. It acknowledged:

> The judgment as to whether to use one performer or another or a particular script approach in a particular program is wisely one beyond the jurisdiction of this Commission. Rather, all we do is again raise the question in context of the conscience of the broadcaster at this juncture of our national affairs.

1968 EEO NPRM, 13 F.C.C.2d at 775. Since then, the Supreme Court has upheld greater First Amendment protections for broadcast licensees and the FCC's EEO policies have been substantially narrowed due to constitutional concerns. The idea that renewal of ABC's licenses should be questioned for the practices CAR and the Chairman have cited is simply bizarre and stands the purpose of the FCC's rules on its head.

II. Concerns About ABC Programming Provide No Basis for Nonrenewal and Conflict With the Communications Act and the First Amendment

The common theme of the various petitions to deny license renewal for ABC's owned and operated televisions stations is that they are "biased" and the FCC is empowered to impose an administrative "death penalty" as a result. But this is not the law and never was. Both the Communications Act and the First Amendment flatly prohibit empowering the FCC to act as the nation's speech police.

A. The Early Renewal Designation Touched off a Political Feeding Frenzy

The Petitions to Deny mainly just present a bundle of grievances complaining about network bias, failure to cover preferred topics, and misinformation. One petitioner, Media Research Center was founded in 1987 to "expose and neutralize the propaganda arm of the Left: the national news media."[48] Today, MRC describes itself as "the unrelenting counterforce to leftist bias in America's newsrooms, broadcast networks, and Big Tech platforms."[49] Given its avowedly political mission, the MRC petition does not bother to make legal arguments to support its petition to deny. Instead, the petition is nothing but a litany of MRC allegations about ABC's alleged partisanship, its failure to cover "many of the most critical issues of the day," supposedly condoning political violence, and routinely broadcasting "misinformation, disinformation, and other fake news."[50]

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[48] *See* Robert Corn-Revere, *The Mind of the Censor and the Eye of the Beholder: The First Amendment and the Censor's Dilemma* 197 (2021). MRC is one of a number of conservative advocacy groups founded by L. Brent Bozell, III, including the now-defunct Parents Television Council, which was known for manufacturing complaint campaigns to the FCC and its questionable use of statistical analyses. *Id.* at 214–18. *See also* Rob Eshman, *Howard Stern and the Parent's Television Council Fallacy*, Jewish Journal (May 15, 2012), https://jewishjournal.com/opinion/rob_eshman/104052/ (Any reporter who quotes PTC as a significant source in the debate over indecency "is committing journalistic malpractice.").

[49] *See* Media Research Center, https://mrc.org/about.

[50] MRC Petition at 12, 20.

CAR's Petition, as noted, raises many of the same complaints, except its argument also contains make-weight references to the public interest standard. Although CAR purports to rely on a number of sources of authority for its complaints, including the FCC's EEO rules and its character policy, the thrust of its argument is to complain about programming on the ABC stations (*e.g.*, biased moderation of debates, sympathetic coverage of Kilmar Abrego Garcia, anti-Trump stories on the news, partisan statements and jokes, public criticism of Trump and/or Stephen Miller, and publication of a "false poll" during the 2020 election). CAR Pet. at 9–29. It concludes that "missing the views and voices of half the country in a national newsroom is not in the public interest." *Id.* at 31.[51] CAR also complains that ABC is "on an ideological mission to advance a Race & Culture agenda contrary to the public interest" and that Disney allegedly has a "cozy relationship with the Chinese Communist Party." *Id*. at 32, 45.[52] Its proposed "reforms" include a laundry list of speech-restrictive measures, including eliminating a program dedicated to producing race- and culture-themed content, hiring "Trump-aligned … on-air talent," balancing the political make-up of guests on interview programs, and prohibiting on-air talent and producers from political activities. *Id*. at 62-64.

[51] CAR provides no analysis of the performance of individual station operations—despite that being the point of any license renewal proceeding.

[52] Again, CAR provides no analysis of how this allegation bears on ABC station operations.

B. None of the Issues Petitioners Raise Provide Any Valid Basis for Designating Hearings or Non-Renewal of ABC's Licenses

Contrary to Petitioners' arguments, the government has no legitimate role to decide "what counts as the right balance of private expression—to 'un-bias' what it thinks [is] biased[.]" *Moody*, 603 U.S. at 719. "However imperfect the private marketplace of ideas, here [is] 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." *Id.* at 733. This fundamental constitutional rule is not affected by Petitioners' boilerplate (and dated) references to the Communications Act's public interest standard or cases like *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). Whether *Red Lion* is still valid is addressed later, *see infra* at 47-56, but even if it is, Petitioners' arguments overstate FCC authority under that precedent and provide no valid basis for nonrenewal of ABC's television station licenses.

The FCC's licensing authority has never empowered the government to impose the editorial oversight that the Petitioners demand. The public interest standard is not—and never was—a blank check empowering bureaucrats to second-guess the independent editorial judgment of broadcasters. Given the principle established at our nation's founding that "Congress shall make no law … abridging the freedom of speech or of the press," U.S. Const. Amend. I (emphasis added), government regulation of broadcast content, including the equal opportunity rules, has been a constant source of tension. This tension was acknowledged in the Communications Act itself, which 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.*

The Act's mandates "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites reference to First Amendment principles." *Democratic Nat'l Comm.,* 412 U.S. at 122. 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." *League of Women Voters of Cal.*, 468 U.S. at 378. Recognizing this inherent tension, 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; *see also Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968) ("[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little.").

Accordingly, from the beginnings of broadcast regulation, Congress and the FCC (and the FCC's 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.[53] The FRC from the outset sought to "chart a course between the need of arriving at a workable concept of the

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[53] 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).

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*, 25 Fed. Reg. 7291, 7294–95 (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 7292. 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 and 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 7293 (citation modified).

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.*

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.* 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 broadcasts in the public interest." *Id.* at 7295. The FCC has emphasized that it did "not intend to guide the licensee along the path of programming." *Id.* at 7296. On the contrary, "the licensee must find his own path with the guidance of those whom his signal is to serve." *Id.*

As the Supreme Court has observed, the Communications Act was designed "to maintain — no matter how difficult the task — essentially private broadcast journalism." *Democratic Nat'l Comm.*, 412 U.S. 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 modified).

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."[54]

The Supreme Court has emphasized "the minimal extent" that the government may influence the programming provided by broadcast stations. *Turner I*, 512 U.S. at 652. It has 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." *Id.* at 650. Similarly, the D.C. Circuit has expressly avoided approving "a

[54] *Banzhaf*, 405 F.2d at 1096. *See also Pub. Int. Rsch. Grp. v. FCC*, 522 F.2d 1060, 1067 (1st Cir.1975), *cert. denied*, 424 U.S. 965 (1976) ("[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) ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress … limited the Commission's power in this area").

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, Inc. v. FCC*, 521 F.2d 288, 296–97 (D.C. Cir. 1975); *see also Cmty-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978) (*en banc*).

The FCC has frequently emphasized that the Communications Act does not empower it to become the arbiter of truth, *see Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C.2d 143, 151 (1969), and it has strictly avoided the type of review Petitioners seek 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). Yet that is precisely the role Petitioners demand in this proceeding. The Commission is constrained, however, both by Section 326 of the Act and the constitutional command that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette v. West Virginia State Bd. of Educ.*, 319 U.S. 624, 642 (1943).

Petitioners no doubt have been emboldened by the perception that they will have a receptive audience at the FCC and that the agency's current Chairman will do anything to accede to the President's whims, no matter how outlandish or inconsistent with his oath to uphold the law and the Constitution. They have good reason to believe this is true. But so long as the United States is governed by the rule of law, any temporary political gains they may hope to achieve from the Commission in this proceeding will be short-lived and will end with the harsh judgment of history.

III. Through This Proceeding, the FCC Demonstrates its Own Illegitimacy

By wearing a Donald Trump lapel pin in the halls of the FCC, and through his actions over the past eighteen months, Chairman Carr signaled his allegiance lies not with the law or the Constitution, but with the man he sees as his boss.[55] This institutional shift has vast constitutional implications for this proceeding. As the Supreme Court recognized in *League of Women Voters of California*, if it were to be shown that FCC administration of its rules "'[has] the net effect of reducing, rather than enhancing,'" speech, the Court would be "forced to reconsider the constitutional basis of [its] decision" in *Red Lion*. 468 U.S. at 378 n.12 (quoting *Red Lion*, 395 U.S. at 393). In decades past, the Court indicated it was not yet ready to reconsider the authority entrusted to the FCC "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id*. at 376 n.11. But now that signal has been given—right there on the Chairman's lapel.[56]

The Commission itself has concluded, "[i]f any substantial possibility exists that [our] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone." *See Notice of Proposed Rulemaking In re Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48

[55] *See* Robert Corn-Revere, *Brendon Carr's Bizarro World FCC*, The Dispatch, (Apr. 30, 2025), https://thedispatch.com/article/brendan-carrs-bizarro-world-fcc/.

[56] *See, e.g.,* Vanessa Friedman, *A Trump Lapel Pin Makes a Point*, N.Y. Times (Apr. 22, 2025), https://www.nytimes.com/2025/04/22/style/trump-lapel-pins-gold-card.html.

Fed. Reg. 28295, 28298 (1983). Following this logic, 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 v. FCC*, 867 F.2d 654, 660 (D.C. Cir. 1989). For the same reason, it later abandoned two remaining vestiges of the fairness doctrine—the personal attack and political editorial rules. *Radio-Television News Directors' Ass'n. v. FCC,* 229 F.3d 269, 272 (D.C. Cir. 2000). This analysis fully applies to this proceeding, where Petitioners claim the FCC should deny renewal of the ABC licenses because of their editorial policies.

A. The FCC Has Declared Itself to be the President's Political Instrument

If this licensing proceeding demonstrates nothing else, it starkly illustrates that the Commission is not an agency that understands it must "walk a 'tightrope' to preserve the First Amendment values written into … the Communications Act." *Democratic Nat'l Comm.*, 412 U.S. at 117. The Commission no longer comports itself as the independent regulatory agency Congress designed it to be, but merely as an instrument to implement presidential policy.[57] As Chairman Carr put it at a December 2025 Senate Commerce Committee oversight hearing, "The FCC isn't an independent agency, formally speaking."[58] And since that hearing, the Supreme

[57] *See* Patience Haggin, *FCC Isn't an Independent Agency, Chair Brendan Carr Says*, The Wall Street Journal (Dec. 17, 2025), https://www.wsj.com/politics/policy/fcc-isnt-an-independent-agency-chair-brendan-carr-says-74e81fff.

[58] *Id.* Chairman Carr's statement came in response to an embarrassing question from Congressman Ben Ray Lujan, who pointed out that the FCC's website referred

Court confirmed that formerly independent federal agencies, like the FCC, are under the President's direct political control. *Trump v. Slaughter*, 609 U.S. ___, 2026 WL 1855612, at *17 (2026).[59] As a consequence, "the President will direct policy at agencies like the FCC that have traditionally been treated as independent."[60]

According to the Court, the benefit of recognizing administrative agencies' subordination to Executive authority is that "[w]hen power is exercised well, the people know whom to thank; [and] when power is exercised poorly, they know whom to blame—and whom to fire." *Id.* at *16. But while a political reckoning may come sometime in the future, there is another implication of this shift in power that directly involves the FCC. It means the Commission is no longer capable of fulfilling the delicate task of balancing the vital constitutional interests Congress entrusted to it.

Both the technological assumptions underlying the FCC's public interest authority and the structural constraints built into the FCC's design no longer exist. This means that none of the precedents on which the Commission may rely in this proceeding to justify an adverse licensing action—including *Red Lion*—can support such action. The technical world on which those cases are based, and the independent

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to the agency as independent. That reference, reflecting an understanding that dates to 1927, was removed from the website by the time the hearing ended.

[59] President Trump also issued an Executive Order that provides that his or the Attorney General's legal interpretations are binding on all agencies. *Ensuring Accountability for All Agencies*, Exec. Order No. 14215, 90 Fed. Reg. 10447, 10448–49 (Feb. 18, 2025).

[60] Stuart Minor Benjamin, *Making Broadcast Content Regulation Aggressive Again*, 6 J. Free Speech L. 1047, 1058 (2026).

agency at the center of them, are gone. And when it comes to regulating the freedoms of speech and press, the Constitution will not tolerate such unbridled executive power. That was the lesson of the Sedition Act of 1798.

B. The Communications Act Provided Safeguards Designed to Preserve the Constitutional Balance

Whatever one may think of independent regulatory agencies within the framework of the three branches of government, Congress never intended to give the President direct control over regulated industries, and most especially over the communications industry. The debates over the Radio Act of 1927 devoted much attention to what form the agency should take and settled on the independent administrative agency model: "The arguments for an independent commission focused primarily on the adjudicatory tasks involved in licensing stations, and the importance of impartiality, particularly given the sensitivity of government decisions affecting free speech."[61] As the Senate Committee on Interstate Commerce concluded at the time, "[t]his regulatory power should be as free from political influence or arbitrary control as possible."[62]

Because Congress recognized the inherent dangers of empowering the government to regulate broadcasting, it sought to minimize the potential for political abuse by designing the Commission as a politically bipartisan institution, as

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[61] Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose* in A Legislative History of the Communications Act of 1934 20 (Max Paglin, Ed. 1989).

[62] *Id*. (quoting S. Rep. No. 69-772, at 2) (1926).

evidenced by its structure—a multimember commission appointed by the President with Senate confirmation, subject to a partisan balance requirement and fixed terms.[63] Congress also adopted specific safeguards, such as the "no censorship" provision of Section 326, and it sought to infuse the Act with First Amendment values. *See League of Women Voters of Cal.*, 468 U.S. at 377. Specifically, Section 326 provides that nothing in the Act "shall be understood or construed to give the Commission the power of censorship," and "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

This was the structure that enabled courts in years past to conclude the FCC could be entrusted with administering a public interest standard that was in tension with the First Amendment. However, such reliance is no longer possible in the wake of *Slaughter*. Additionally, the Supreme Court has confirmed that the courts owe no deference to agencies' statutory interpretations, which makes the law's unambiguous prohibitions, like Section 326, all the more binding on the Commission. *See Loper Bright Enters. v. Raimondo*, 603 US 369, 392–93 (2024). As the Court has now clarified the law, the unambiguous command of Congress that the FCC has no power

[63] 47 U.S.C. § 154(a), (b)(5), (c); 47 U.S.C. § 401(c). Multimember structures with specified tenure, partisan balance requirements, and full or partial independent litigation authority are characteristic of independent agencies. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 789–804 (2013) (examining the functional differences between independent and executive agencies).

of censorship must take precedence over any exercise of discretionary "public interest" authority by the agency.

As a consequence, "Carr's efforts to reinvigorate public interest regulation, by underscoring the potential for abuse inherent in the government's capacious authority over broadcast content, reinforce the arguments for overruling *Red Lion* and *Pacifica* or repealing the public interest standard." *See* Benjamin, *supra*, at 1100.

C. Both Technological and Legal Changes Undermine the Assumptions Underlying FCC Authority

Chairman Carr has argued he is only enforcing the public interest standard as it has long been understood, and if Congress wants to make a change it is free to do so.[64] Putting aside the disingenuousness of that statement,[65] there is another alternative: judicial supervision. Up until now, Chairman Carr has been careful to avoid taking any final action that might be subject to judicial review and a legal reckoning. But any adverse licensing action against the ABC television station

[64] As Chairman Carr observed at a Senate oversight hearing, "Congress passed a law charging the FCC with enforcing the public interest standard. If they want something different then they need to change the law." *See Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 119th Cong. 61 (2025) (statement of Brendan Carr, Chairman, Fed. Commc'ns Comm'n).

[65] A bipartisan group that includes seven former FCC Commissioners (five Republicans and two Democrats), four of whom had served as Chairman, as well as senior staff members petitioned the agency about Carr's actions in office observing Commission's processes have been "weaponized" to serve "partisan purposes." *See* Barrett, et. al, *supra*, at 10. No former FCC Chairman or Commissioner has expressed support for Chairman Carr's actions.

licenses would be subject to judicial review.[66] If that were to happen the Chairman would have a lot of "splainin" to do,[67] and his assumed role of speech cop would come to an abrupt end.

1. The Technological Assumptions Underlying FCC Authority are Obsolete

As has long been known, the FCC's assertion of authority based on spectrum scarcity has been obsolete for decades, and both the Commission and reviewing courts have indicated they are willing to reconsider it. They have acknowledged that *Red Lion* was based on "'the present state of commercially acceptable technology' as of 1969,"[68] that its rationale "is not immutable,"[69] and that with the passage of time and the advance of technology, "some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets."[70]

By the mid-1980s the Commission "found that the 'scarcity rationale,' which has historically justified content regulation of broadcasting . . . is no longer valid."[71]

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[66] 47 U.S.C. § 402(b).

[67] *See "You've Got Some 'splainin' to Do!"–Updated for Today's World*, Quote/Counterquote, (Aug. 18, 2013), https://www.quotecounterquote.com/2011/05/lucy-you-got-some-splainin-to-do.html (describing origins of cultural catchphrase derived from the *I Love Lucy* TV show).

[68] *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388).

[69] *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987).

[70] *Banzhaf*, 405 F.2d at 1100.

[71] *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

In 1985, the FCC conducted In 1985, the FCC conducted a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine and reported, "[o]n the basis of the voluminous factual record compiled in [the] proceeding, [the FCC's] experience in administering the doctrine and [its] general expertise in broadcast regulation" the fairness doctrine, as a matter of policy, no longer "serves the public interest."[72] The Commission found the fairness doctrine was incompatible with the First Amendment.[73]

A decade and a half later, in complying with the congressional mandate to conduct a biennial review of broadcast regulations, the FCC again found that the media landscape has been transformed.[74] It concluded that "the modern media marketplace is far different than just a decade ago," finding that traditional media sources "have greatly evolved" and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history."[75]

Doctrine Report")); *see also Syracuse Peace Council*, 867 F.2d at 660–66 (discussing *1985 Fairness Doctrine Report* and upholding FCC's decision to repeal the fairness doctrine).

[72] *1985 Fairness Doctrine Report* at 147.

[73] *Id.* at 151 (*citing Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

[74] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13623 (2003) ("*Biennial Regulatory Review*").

[75] *Id.* at 13647–48.

Two decades ago, an FCC staff report concluded that the spectrum scarcity rationale "no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting."[76] It criticized the logic of the scarcity rationale for content regulation and added that "[p]erhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices."[77] Content regulation "based on the scarcity of channels[] has been severely undermined by plentiful channels."[78]

It is particularly unfortunate (and telling) that the Commission's recent Public Notice on broadcasters' public interest obligations omits *entirely* this history of FCC findings on scarcity.[79] But failure to mention its prior findings cannot make them disappear, nor can the Commission stuff the technological genie back into the bottle.

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[76] John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FCC Media Bureau 8 (Mar. 1, 2005), https://www.fcc.gov/reports-research/working-papers/scarcity-rationale-regulating-traditional-broadcasting-idea-whose. FCC staff research papers are unofficial studies and do not necessarily reflect the position of the Media Bureau or the Commission.

[77] *Id.* at 11.

[78] The report also concludes that alternative rationales for broadcast content regulations are similarly flawed. *Id.* at 18–28.

[79] Public Notice, *FCC's Media Bureau Seeks Comment on Petition by Disney's ABC Asking the FCC to Declare That The View Qualifies as a* Bona Fide *News Interview Program and Thus Is Exempt from the Statutory Equal Opportunities Requirements,* DA 26-517 (MB May 22, 2026) ("*Public Notice*"). The Public Notice was issued in response to a Petition for Declaratory Ruling submitted by KTRK Television, Inc. and American Broadcasting Companies, Inc., *available at* https://www.fcc.gov/ecfs/document/10522087167981/1.

The conditions once used to justify differential First Amendment treatment of broadcasters simply do not exist.

Of course, as Chairman Carr has observed, Congress could reexamine the public interest standard, but if it chose to do so it would have to address previous congressional findings that "[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism,"[80] and that "the scarcity rationale for government regulation no longer applies."[81]

These legislative conclusions from three decades ago are even more true today in a world of myriad programming choices, including streaming media. From the 1950's through the 1970's, the three major broadcast networks captured over 90% of U.S. audiences.[82] As of May 2026, broadcast network viewership represented just 20.1% of television viewership, compared to cable viewership at 24.1% and streaming services at 44.8%.[83]

In the interim, courts have been unwilling to grant the FCC greater authority to regulate broadcast content. In *MPAA v. FCC*, the D.C. Circuit vacated the

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[80] Telecommunications Competition and Deregulation Act of 1995, S. Rep. 104-23, at 2–3 (1995).

[81] Communications Act of 1995, H. Rep. 104-204, at 54 (July 24, 1995).

[82] John Markert, *Decline of the Big Three Networks*, EBSCO (2023), https://www.ebsco.com/research-starters/history/decline-big-three-networks.

[83] Meg James, *TV milestone: Streaming is now bigger than cable and broadcast combined*, L.A. Times (June 17, 2025), https://www.latimes.com/entertainment-arts/business/story/2025-06-17/nielsen-report-streaming-surpasses-television-in-viewership.

Commission's video description rules. *Motion Picture Ass'n of Am, Inc.*, 309 F.3d 796, 807 (D.C. Cir. 2002). Although the court analyzed only the question of whether the FCC had been given statutory authority to adopt the rules, it explained that it interpreted the Commission's powers narrowly because any regulation of programming content "invariably raise[s] First Amendment issues." *Id.* at 805. The thrust of the holding was that the FCC's general public interest authority over programming is far less expansive than previously assumed.

The same conclusion follows from the D.C. Circuit's decision in *RTNDA v. FCC*, where the court ordered the Commission to repeal the personal attack and political editorial rules. *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (per curiam). There, the court held that 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 ("[It is] incumbent upon the Commission to 'explain why the public interest would benefit from rules that raise these policy and constitutional doubts'") (citation omitted). Although the court did not decide whether such rules are constitutional or would serve the public interest, it was unwilling to allow the FCC to continue to enforce the content restrictions (which had already been subject to protracted review) while the Commission assessed their validity. Reviewing courts would not defer to any FCC decision to aggressively interpret and enforce the public interest standard. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817–18 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when

First Amendment rights are at stake.") (citation modified); *see also Loper Bright Enters.*, 603 US at 392–93.

Any adverse licensing action in this proceeding would certainly draw close judicial scrutiny and likely give courts a long-awaited opportunity to end the scarcity rationale underlying the FCC's public interest standard. In that connection, Justice Thomas has written that *Red Lion*'s "doctrinal incoherence" has "been apparent for some time" and that "dramatic technological advances have eviscerated the factual assumptions underlying those decisions." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532–33 (2009) (Thomas, J., concurring). He observed that "[t]he extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today," and indicated his openness to reconsidering both "*Red Lion* and *Pacifica* in the proper case." *Id.* at 534–35. This could be that case.

2. The Legal Assumptions Underlying FCC Authority are Obsolete

As noted, the FCC is no longer the independent agency that Congress designed, and that fact affects the constitutionality of any adverse action the Commission might take in this proceeding. Chairman Carr "has explicitly rejected the Commission's longstanding self-restraint with respect to the public interest standard, stating that licenses have 'a unique obligation to operate in the public interest.'" *See* Benjamin, *supra*, at 1050–51. The problem is, the Chairman has interpreted the "public interest" as meaning broadcasting that favors President Trump while broadcasts that displease or question the President violate the "public interest." *Id*. at 1050–55 (citing numerous examples). And it represents a complete reversal of Carr's views on the meaning of the public interest before he became Chairman. *Id*. at 1056 & n.30 (citing numerous examples, including "[p]olitical satire is one of the oldest and most important forms of free speech" and "censorship is the authoritarian's dream."). What a difference a presidential appointment can make.

Again, in the words of *Commissioner* Carr, "it is obvious to everyone what is going on."

Most importantly, it is obvious to alert judges. Justice Gorsuch raised the question of whether the FCC should be getting involved with regulating late-night comedy bits and cited one of Carr's more notorious examples on jawboning: "Last year, taking objection to a network host's on-air remarks, the Chairman of the FCC suggested there would be 'additional work … ahead' for the agency if broadcasting companies did not 'find ways to … take action.'" *Slaughter*, 609 U.S. ___, 2026 WL 1855612 at *25 (Gorsuch, J., concurring). And he warned of the constitutional implications of such an institutional realignment.

Justice Gorsuch explained the problem of the President's "waxing authority":

> A business out of favor with the party in control of the White House might be able to stave off an FCC investigation. But can it survive a subsequent FTC rule declaring unlawful one of its longstanding trade practices? What about an in-house adjudication by OSHA? Or a prosecution for a new crime the SEC announces? Not to mention what these now-coordinated powers could do to disfavored individuals who lack the resources needed to fend off such attacks.

Id. at *27. And while Justice Gorsuch joined the majority in voting to limit the administrative state as a "fourth branch" of government, he warned that "the fourth branch's powers still exist; they have just been reassigned to the President." *Id*. This development, he wrote, "risks inviting exactly what those who framed our Constitution feared: the 'accumulation of all powers … in the same hands, whether of one, a few or many, and whether hereditary, self appointed, *or elective*.'" *Id.*, quoting THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed. 1961) (J. Madison) (emphasis added).

Justice Gorsuch agreed with the *Slaughter* majority that it is important to know whom to fire, but he added "while electoral accountability is a good thing, it cannot be the only thing." *Id.* He observed that perhaps "any real response . . . will have to come from this Court," because—echoing Chairman Carr's line about Jimmy Kimmel—"[i]f the task of fixing a problem belongs to those who made it, this Court has some work to do." *Id.* at *28. This boils down to two choices: "Let Presidents exercise all those powers or begin subjecting them to the Constitution's constraints." *Id.* at *29. And Justice Gorsuch concluded "[i]t is time to return, all the way, to the Constitution." *Id.*

Another decision from the Supreme Court's last term, *Nat'l Republican Senatorial Comm. v. FEC*, 609 U.S. ___, 2026 WL 1868932 (2026), also points the way for what the Court should do regarding governmental restrictions on speech that were previously upheld based on conditions that no longer apply: Overrule them. That is most necessary where, as with the broadcast precedents on which the Commission and Petitioners now rely, the "hollowed-out precedents [are] 'so undermined' by subsequent developments that they are 'no longer good law' and 'retai[n] no vitality.'" *Id.* at *13 (quoting *Agostini v. Felton*, 521 U.S. 203, 217–18 (1997)) ("*NRSC*").

The Court in *NRSC* overruled *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"), in which the Court previously had upheld political party coordinated campaign spending limits. *See NRSC*, at *13–15. Relevant to the older broadcast precedents, the Court rejected "watered-down scrutiny that allowed 'unskillful tailoring' in the First Amendment campaign-finance context." *Id.* at *14. And it explained that the assumptions about political parties upon which *Colorado II*'s holding was based were no longer true, and that "since 2001, political parties' relative power has substantially diminished in comparison to outside groups." *Id.*

As Justice Kavanaugh's opinion for the Court reaffirmed, *stare decisis* "is at its weakest when we interpret the Constitution," *id.* at *13 (quoting *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020)), particularly where subsequent rulings and factual developments reveal the flaws or misplaced assumptions of earlier precedents. *Id.* at *14. These considerations apply in full here: "[M]ore recent decisions," (*id.* at *16), than *Red Lion* have held broadcasters enjoy far greater protections than were recognized in 1969, and that the dangers of government regulation of speech are more pronounced.[84] And the factual predicates that supported the constitutional rule in *Red Lion* have long since ceased to be true.[85] Additionally, the Supreme Court recently affirmed that reviewing courts do not owe the FCC the deference that

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[84] *See, e.g., Turner I*, 512 U.S. at 650–52; *League of Women Voters of Cal.*, 468 U.S. at 378; *Democratic Nat'l Comm.*, 412 U.S. at 117.

[85] *See, e.g., Fox Television Stations, Inc.*, 556 U.S. at 532–33 (Thomas, J., concurring); *see supra*, 46-52.

Chairman Carr seems to assume he deserves. *Loper Bright Enters.*, 603 US at 392–93. The need to rethink precedent is particularly important where, as here, "the Commission itself has already largely undermined the legitimacy of its own rule." *Meredith Corp.*, 809 F.2d at 873.

It is unlikely that any of this will make much of a difference to Chairman Carr or the current Commission majority. But in our system, fortunately, they will not have the final say. And the FCC is obligated to address the constitutional and statutory points raised in this proceeding even if some on the Commission may find them "politically awkward." *Meredith Corp.*, 809 F.2d at 874. This is an adjudicatory proceeding, and the Commission is not free to overlook constitutional challenges to its authority. *Id.* at 873. *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).

Conclusion

This proceeding is a shameful chapter in the history of the FCC. It will long be remembered as a low point in the annals of government in which the President's functionaries and some outside political operatives attempted to manipulate administrative law to undo the lessons learned from the Sedition Act of 1798. The only question now is whether current Commission leadership can summon sufficient courage to do the right thing or will be forced to do so by the courts.

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FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION

/s/ Robert Corn-Revere

Robert Corn-Revere, Chief Counsel
Ronnie London, General Counsel
700 Pennsylvania Ave., SE, Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@fire.org
ronnie.london@fire.org

William Creeley, Legal Director
510 Walnut Street, Suite 900
Philadelphia, PA 19106
(215) 717-3473
will@fire.org