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

In the Matter of	)	
	)	
Complaints Involving the Political Files of WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC, *et al*.	)	MB Docket No. 19-363 Files Nos. 140502A-H, J-L
	)	
Complaints Involving the Political Files of Scripps Broadcasting Holdings, LLC, licensee of Station WCPO-TV, Cincinnati, OH	)	File No. 160926a
	)	
Online Political Files of Meredith Corporation, Licensee of Station WPCH-TV, Atlanta, GA and Georgia Television, LLC, Licensee of Station WSB-TV, Atlanta, GA	)	Files Nos. 082117a-b

REPLY OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)[1] hereby replies to the opposition of the Campaign Legal Center (CLC) and other advocacy groups[2] to NAB, *et al*.'s petitions for reconsideration of three FCC political file orders.[3] The Opposition offers no persuasive reasons for the FCC to decline to grant the Petitions.

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] Opposition of CLC, Sunlight Found., Common Cause, Benton Inst. for Broadband and Soc'y and Issue One (CLC, *et al*.), MB Docket No. 19-363 (Dec. 30, 2019) (Opposition).

[3] Petition of NAB, Fox Corporation, Graham Media Group, Heart Television, Inc., Nexstar Broadcasting, Inc., Tegna, Inc. and The E.W. Scripps Company, MB Docket No. 19-363 (Nov. 15, 2019) (NAB, *et al*. Petition) (requesting reconsideration and clarification of *Complaints Involving the Political Files of WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC, et al*., Memorandum Opinion and Order, FCC 19-100 (Oct. 16, 2019) (Political File Order or Order) and *Complaints Involving the Political Files of Scripps Broadcasting Holdings, LLC, licensee of Station WCPO-TV, Cincinnati, OH*, Order, FCC 19-101 (Oct. 16, 2019) (Acronym Order)); Petition of NAB and Meredith Corporation, File Nos. 082117a-b (Dec. 18, 2019) (NAB/Meredith Petition) (requesting reconsideration of one aspect of *Online Political Files of Meredith Corporation, Licensee of Station WPCH-TV, Atlanta, GA and Georgia Television,*

I. THE OPPOSITION FAILS TO REFUTE PETITIONERS' SUBSTANTIVE ARGUMENTS ABOUT THE APPROPRIATE INTERPRETATION OF SECTION 315(e)

As an initial matter, the Opposition (at 15) dismisses as "bizarre" NAB *et al*.'s request that the FCC clarify that the disclosure obligations attaching to third-party ads under § 315(e)(1)(B) do not attach to candidate-run ads under § 315(e)(1)(A). In fact, it is CLC, *et al*.'s opposite position that is not supported by § 315(e) or the FCC. In the statute, Congress established two different sets of disclosure obligations (one applying to candidate-run ads and the second applying to ads run by all others). As explained in the NAB, *et al*. Petition (at 21),[4] eschewing the distinction would effectively make § 315(e)(1)(A) a nullity.[5] The Political File Order (at note 24) specifically noted the statutory distinction, and the notice in this proceeding stated – as NAB, *et al*. had requested – that the Order's disclosure obligations apply to "requests for the purchase of time for *non*-candidate advertisements that communicate a message about 'any political matters of national importance,' *i.e*., issue ads" under § 315(e)(1)(B).[6] CLC, *et al*.'s position thus has already been rejected.

The Opposition (at 12) also prefers the FCC's interpretation of the term "political matter of national importance," erroneously contending that NAB, *et al*.'s definition would contravene statutory intent and language. To the contrary, NAB *et al*.'s approach better reflects (1) the Bipartisan Campaign Reform Act's (BCRA) intent to address the "use of soft

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LLC, Licensee of Station WSB-TV, Atlanta, GA, Order, DA 19-1232 (Med. Bur. Dec. 3, 2019) ("Bureau Order")) (collectively, the Petitions).

[4] *See also* Comments of Joint Broadcasters, MB Docket No. 19-363, at 3-5 (Dec. 30, 2019); Joint Comments of ABC TV Affiliates Ass'n, CBS TV Network Affiliates Ass'n, FBC TV Affiliates Ass'n and NBC TV Affiliates, MB Docket No. 19-363, at 6 (Dec. 30, 2019); Comments of NCTA – The Internet & Television Ass'n, MB Docket No. 19-363, at 2 n. 4 (Dec. 30, 2019) (supporting the NAB, *et al*. Petition).

[5] "[O]ne of the most basic interpretive canons" is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. U.S*., 556 U.S. 303, 314 (2009) (citations omitted).

[6] FCC, Media Bureau, *Public Notice*, DA 19-1224 at 1 (Nov. 29, 2019) (emphasis added).

money and issue advertising to influence *federal* elections";[7] and (2) the language of § 315(e)(1)(B) focusing on nationally important political matters, including federal elections and national legislative issues. Congress did not use the terms "state" or "local" in § 315(e)(1)(B), thereby supporting NAB, *et al*.'s position that this section should not apply to ads about thousands of state and local elections merely because they may mention issues discussed at the national, as well as state or local, level.[8] Not only is the FCC's interpretation of § 315(e)(1)(B) overbroad in light of congressional intent and the statutory language, but it also will be virtually impossible to administer consistently. Even the Opposition (at 13) recognizes it would be "impracticable" for stations to draw "fine distinctions between federal and state issues," which is precisely what the Political File Order requires.[9]

Finally, the FCC should reject the Opposition's specious claim (at 13) that NAB, *et al*.'s rational narrowing of the term "political matter of national importance" would have "the effect of eliminating virtually all disclosure requirements." In reality, NAB, *et al.*'s Petition (at 9-10) supports treating only third-party ads about state and local elections/candidates as falling outside the purview of § 315(e)(1)(B); those ads with messages directed to or about national political actors/candidates in a position to make or take national political decisions or actions would still be subject to the disclosure requirements. Third-party ads referring to state and local political issues (including ballot issues and referendums) also would still be

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[7] *McConnell v. FEC*, 540 U.S. 93, 132 (2003), overruled in part, *Citizens United v. FEC*, 558 U.S. 310 (2010) (emphasis added).

[8] As commenters observe, there is no evidence Congress wanted or expected such ads directed at local/state races to be reported under § 315(e)(1)(B), and the Political File Order cited no evidence justifying a finding that third-party ads about local/state elections have any impact on federal elections, making the FCC's interpretation arbitrary and capricious. *See* Joint Affiliate Comments at 5-6.

[9] Several parties point out the difficulties of determining whether an issue is only state or local or whether it is also a national legislative issue of public importance or a political matter of national importance, a broader term encompassing more issues. *See* NAB, *et al*. Petition at 9, 15-16; Joint Broad. Comments at 5-6; Joint Affiliate Comments at 3.

subject, as they are now, to the sponsorship ID and political file obligations of § 73.1212.[10] And, NAB, *et al.*'s position does not affect any of the disclosures required for candidate ads under § 315(e)(1)(A) and the FCC's rules. Even beyond all the FCC reporting and recordkeeping obligations imposed on broadcasters, federal law and the Federal Election Commission impose extensive disclosure requirements on political candidates and contributors, and non-governmental sources of information about political campaigns and ads abound online, thus giving lie to any implication that increasing local stations' burdens is the only way interested parties may obtain information about elections and candidates.

In short, the Opposition offers no persuasive reasons why the FCC should not reconsider its overbroad definition of "political matters of national importance." As discussed in further detail below, adopting NAB, *et al.*'s rationally tailored approach will ease needless burdens on broadcasters, while still ensuring the disclosure of relevant information about political ads in a manner more consistent with the First Amendment.[11]

II. THE OPPOSITION ERRONEOUSLY DISMISSES THE VERY REAL BURDENS IMPOSED BY THE FCC'S ORDERS

[10] *See* 47 C.F.R. § 73.1212(d)-(e) (applying disclosure and recordkeeping requirements to any broadcast matter involving "a controversial issue of public importance").

[11] The FCC cannot expand the scope of the rules set forth in the Political File Order, as the Opposition (at 14) supports. CLC, *et al*. did not file a timely petition requesting reconsideration of the Order; thus, their belated requests in the Opposition must be dismissed on that basis. In any event, further increasing the burdens on stations without demonstrating any evidentiary basis or substantial governmental interest in doing so would only increase the vulnerability of the rules to administrative law and constitutional challenges. In particular, the Opposition's argument (at 14) that the term "legally qualified candidate" in § 315(e)(1)(B)(i) should include state and local candidates lacks merit. As the FCC correctly determined, Congress's use of the term "national importance" in § 315(e)(1)(B) implies a limit to federal candidates. Political File Order at ¶¶ 31-32. Moreover, the term "legally qualified candidate" is "grouped in a list" with other terms pertaining only to federal elections and national legislative issues and "should be given related meaning." *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989) (stating that the "interpretation" of a provision in a federal statute "is governed by the familiar principles that 'words grouped in a list should be given related meaning'") (citations omitted).

In dismissing broadcasters' concerns about the burden imposed by the FCC's recent orders, the Opposition (at 17) at the outset observes that stations are not required to air issue ads or those for state and local candidates and, thus, broadcasters can avoid the burden by declining to air most political ads. While NAB doubts it was CLC, *et al*.'s intent, the logic of their argument helps make the case that the revised political file requirements are unconstitutional. If the burdens of complying with the FCC's new interpretation of § 315(e) are likely to incent some stations to deny or decrease access for state and local candidates wanting to reach voters and third parties wanting to express their political opinions, that supports finding the revised rules contrary to the First Amendment.[12] As the Fourth Circuit concluded last month, disclosure obligations that impose "legal liabilities and compliance burdens" that "deter" an advertising/media platform from "hosting political speech" create constitutional infirmities.[13] Touting the ability of broadcasters to "opt out" by not hosting political speech is tantamount to saying "stop speaking," which – particularly in the political context – is fundamentally at odds with the First Amendment.[14]

The Opposition (at 17) also asserts that NAB, *et al*. greatly exaggerated the burdens of the revised rules. The FCC should reject this claim. For example, the Opposition's argument (at 19) that reviewing political ads is not substantially different than reviewing all other advertising for compliance with legal requirements, such as sponsorship identification, is nonsensical and demonstrates CLC, *et al.*'s continued ignorance of broadcast station operations. Ordinary commercial ads do not even require review for inclusion of special

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[12] The Supreme Court has found regulations foreclosing or burdening channels for political speech to be unconstitutional. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 167-68 (2002).

[13] *The Washington Post v. McManus*, No. 19-1132, at 16-17 (4th Cir. Dec. 6, 2019) (finding unconstitutional a state law requiring online platforms to publish on their websites, and retain for state inspection, certain information about the political ads they carry).

[14] *McManus* at 19-20.

sponsorship ID language.[15] Such is not the case with issue ads, which necessitate the review of additional sponsorship ID language, the disclosure of the identity of the sponsor,[16] and now – if they address "political matters of national importance" – extensive further review and disclosures about all referenced federal elections, candidates and issues. Various parties refute with real-world examples the Opposition's notion (at 21) that the new § 315(e)(1)(B) requirements impose minimal, "if any," additional burdens.[17] Given that CLC, *et al*. have no experience complying with the political file rules, the FCC should be skeptical of their non-fact-based claims about the burdens of those rules.

A significant part of the regulatory burdens imposed on stations includes the risk of complaints and enforcement actions, especially given the rules' essentially strict liability standards. Not only do the new requirements increase the chances of inadvertent noncompliance (*e.g.*, by missing one issue in an ad among thousands that includes multiple issues and candidates), but stations also appear subject to liability for such errors or omissions despite their reasonable good faith efforts to comply.[18] Contrary to the

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[15] Under 47 C.F.R. § 73.1212(f), the mention of the sponsor's corporate/trade name or its product/service (which are invariably included in any commercial ad) is sufficient sponsorship ID.

[16] *See id*. at §§ 73.1212(d) & (e) (imposing disclosure and political file obligations for broadcast matters involving "a controversial issue of public importance").

[17] Commenters report that a Louisiana TV station spent an extra two hours per day using a new political form complying with the FCC's revised rules in the two weeks prior to the 2019 Louisiana governor's election, which prevented the station from working with its nonpolitical advertisers to reschedule their ads. Joint Broad. Comments, at 11-13 (concluding that NAB *et al.*'s estimate of time burden "may be on the low side" and also reporting that stations in Iowa spent an extra 30-45 minutes per day complying with the new rules in December, with the expectation that would increase to an extra 2-3 hours per day in January). *See also* Comments of the Law Offices of Jack N. Goodman, MB Docket No. 19-363, at 2-4 (Dec. 30, 2019) (describing significant compliance burdens, including trying to obtain information from reluctant advertisers and agencies).

[18] The Opposition (at 22) disputes NAB, *et al*.'s characterization of the FCC's regulatory approach as "strict liability," but other parties agree that a standard imposing liability

Opposition's position, the FCC should recognize the substantial burdens and other potential harms of its new rules, including confusing and unnecessary over-disclosure by stations and even reduced political speech, and instead require stations to make reasonable good faith efforts to disclose the topics that are the focus of political ads.[19]

III. THE OPPOSITION IGNORES THE FIRST AMENDMENT ISSUES RAISED BY THE FCC'S EXPANSION OF THE SECTION 315(e) REQUIREMENTS

In claiming that the FCC's new interpretation of § 315(e)(1)(B) raises no constitutional concerns, the Opposition (at 23-24) ignores NAB, *et al*.'s arguments, as well as highly relevant portions of *McConnell v. FEC*. While *McConnell* narrowly upheld § 315(e) against a facial First Amendment challenge, the Opposition fails to acknowledge that the majority, *id*., 540 U.S. at 242, essentially directed the FCC to "write regulations" that "limit, and make more specific," § 315(e)(1)(B)'s reach, and noted that parties remained free to challenge the provision as interpreted or applied. As the NAB, *et al*. Petition explained (at 11-12), the Political File Order's interpretation of that provision was not limited or specific and only increased regulatory burdens, making it vulnerable to an as-applied challenge. This is especially the case due to the new rules' lack of both narrow tailoring[20] or a substantial, let alone compelling, government interest in requiring the disclosure of myriad potential issues that could be mentioned in third-party ads (including those about local/state elections).[21]

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regardless of broadcasters' "good faith efforts to follow the Rules" is essentially strict liability. Joint Affiliate Comments at 2-3.

[19] *See* NAB, *et al.* Petition at 12-20; Joint Broad. Comments at 8-13; Joint Affiliate Comments at 3, 6-8; Goodman Comments at 8, 11; NCTA Comments at 5-6.

[20] The approach of the Political File Order is the antithesis of narrowly tailored; it has no limiting factor, as even topics raised before local school boards could be regarded as political matter of national importance. *See* Joint Broad. Comments at 5 (observing that a school board election could raise arguably national issues, such as changing names of schools honoring figures from the Confederacy).

[21] Indeed, the three-judge panel that initially reviewed BCRA found all of § 315(e) unconstitutional, including the provisions relating to candidate ads, due to the absence of evidence that they served substantial governmental interests. *McConnell v. FEC*, 251 F.

The Opposition's general statements that the Supreme Court has upheld political disclosure requirements in other cases do not, moreover, address the constitutional concerns with the Political File Order. The Opposition (at 23-24) relies on inapposite cases, in which the approved disclosure obligations were applicable to purchasers of political ads or to financial contributors to campaigns. Neither the Opposition nor the FCC should assume that the same rationales supporting disclosure rules applicable to those direct participants in the political process are sufficient to uphold burdens placed on advertising/media outlets. "Disclosure obligations applied to neutral-third party platforms," as discussed above, "deter hosting political speech," which makes them, "from a First Amendment perspective, different in kind from conventional campaign finance [disclosure] regulations."[22]

Supp. 2d 176, 718, 811-13 (D.D.C.), aff'd in part and rev'd in part, 540 U.S. 93 (2003); *see also id*., 251 F. Supp. 2d at 377-79. In finding that the disclosure requirements pertaining to political matters of national importance survived a facial challenge, the Supreme Court's slim majority puzzlingly opined that those requirements "seem[ed] likely to help the FCC to determine whether broadcasters are carrying out their obligations" under the fairness doctrine. *McConnell*, 540 U.S. at 240 (quoting fairness doctrine and citing § 73.1910, the rule section referencing the doctrine). The majority's reliance on the fairness doctrine was questionable at the time, given that the FCC had in 1987 decided to no longer enforce it because it violated the First Amendment and did not serve the public interest, *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), affirmed, 867 F.2d 654 (D.C. Cir. 1989), and that the D.C. Circuit had in 2000 ordered repeal of two corollaries of the fairness doctrine (the political attack and the political editorial rules). *RTNDA and NAB v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). Certainly no aspect of the "so-called 'fairness doctrine'" should be relied upon today to justify political file disclosures, as the FCC finally deleted as "obsolete" the rule provisions referencing that "defunct" doctrine in 2011. Order, DA 11-1432 (Aug. 24, 2011). And the *McConnell* majority's other asserted rationale – that the third-party issue disclosure requirements may help the FCC determine "whether broadcasters are too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs" – has little, if anything, to do with political advertising specifically and is therefore inapposite. *Id*., 540 U.S. at 240-41. In any event, there are no requirements that stations must air some defined amounts of non-entertainment or public affairs programming, and other FCC rules (*e.g*., the issues/programs lists) directly pertain to stations' obligations to air community-responsive programming. The governmental interest served by onerous disclosure and recordkeeping requirements for third-party ads thus remains obscure, to say the least.

[22] *McManus* at 16-17 (stating that ordinary campaign finance disclosure requirements do not run the risk of reducing the quantity of expression). The Supreme Court has previously invalidated campaign finance rules, such as limits on expenditures, that "reduce[] the quantity of expression by restricting the number of issues discussed" or the "size of the

For all these reasons, the FCC should revise its interpretation of § 315(e)(1)(B), as urged in the NAB, *et al*. Petition (at 6-20). Doing so is necessary to comport with the basic tenet – "which has for so long been applied by th[e] [Supreme] Court that it is beyond debate" – that statutes should be construed to avoid constitutional questions.[23]

IV. THE OPPOSITION OFFERS NO RELEVANT ARGUMENTS ABOUT THE BUREAU ORDER

The Opposition (at 16-17) responds to the NAB/Meredith Petition with only a few inapposite sentences, asserting that acronyms such as "GA CD-6" are unlikely to be understood by the general public and that it is not burdensome for stations to spell out acronyms in their political files. These brief general statements, however, are not responsive to NAB/Meredith's arguments and do not reflect the Media Bureau's actual order.

While the Opposition, citing the FCC's Acronym Order,[24] assumes that the Media Bureau's problem lay in WPCH-TV's failure to spell out the "acronym" GA CD-6, the Bureau did not say that was the basis for its decision. The Bureau Order did not use the term "acronym"; did not refer to the earlier Acronym Order; and indicated (at ¶ 12) that part of its problem may have been the placement of disclosure paperwork relating to the special election in Georgia's 6th Congressional District in a subfolder only generally identified as "U.S. House Race," with a "handwritten note" referring to GA CD-6 on associated NAB PB-18 forms. The Bureau Order (at ¶ 12) in fact failed to clearly state – or even generally indicate –

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audience reached," which could easily result from overly burdensome requirements placed on advertising/media outlets. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

[23] *Jones v. U.S.*, 526 U.S. 227, 239-40 (1999). *See also Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1379 (D.C. Cir. 1999) (faulting FCC's interpretation of a statutory provision as raising "constitutional concerns," citing the "canon of constitutional doubt" which states ambiguous statutes should not be read to raise constitutional questions when a reasonable and constitutional alternative is available).

[24] In its Acronym Order (at ¶¶ 8-9), the FCC admonished an Ohio station for use of an acronym to describe the sponsor of political ads, finding that nothing in the record indicated that the acronym in question was "commonly recognized" or in "widespread usage" such that the general public would likely understand what organization the acronym represented.

what would have constituted "clear and meaningful disclosure" in the case before it and neglected to provide guidance for broadcasters going forward as to the level and/or type(s) of identification and description of elections sufficient under the FCC's rules. Due to this lack of clarity, the NAB/Meredith Petition (at 5-7) explained that the Bureau's approach is unfair and contrary to judicial precedent, administrative law and constitutional norms, particularly the "fair notice" required by due process. Given its unwarranted assumption that the Bureau faulted WPCH-TV for use of an acronym, the Opposition unsurprisingly ignores these substantive arguments and offers no valid reason why NAB/Meredith's Petition should not be granted. NAB and Meredith therefore urge reconsideration of the Bureau Order to establish that broadcasters' good faith efforts to identify and communicate the races and elections referenced in political advertisements satisfy their political file obligations.[25]

V. CONCLUSION

For the foregoing reasons and those stated in the Petitions, the FCC should grant NAB *et al*.'s requests for reconsideration and clarification.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Rick Kaplan
Jerianne Timmerman

January 28, 2020

[25] The FCC also should grant NAB, *et al*.'s request for reconsideration of the Acronym Order to rely in the first instance on broadcasters' good faith judgments as to their viewers' and listeners' understanding of acronyms, rather than forcing station personnel to predict whether FCC officials will find an acronym to be commonly recognized or widely used. The Opposition's simplistic statement (at 17) that it is not burdensome to require stations to spell out "obscure" (to whom?) acronyms is not a sufficient answer, especially for organizations that have an acronym as their legal name. *See* NAB, *et al*. Petition at 22-24.

CERTIFICATE OF SERVICE

I, Jerianne Timmerman, hereby certify that copies of this Reply have been served via U.S. Mail and electronic mail, this 28th day of January 2020, on the following persons at the addresses shown below.

- Margaret L. Tobey, Senior Vice President, Regulatory Affairs and Assistant Secretary, NBCUniversal, 300 New Jersey Ave., NW, Suite 700, Washington, DC 20001, Counsel for WTVJ(TV), margaret.tobey@nbcuni.com
- John W. Zucker, Deputy Chief Counsel, ABC, Inc., 77 W. 66th St., New York, NY 10023, Counsel for WTVD-TV, john.zucker@abc.com
- Keith Murphy, Senior Vice President, Government Relations & Regulatory Counsel, ViacomCBS, 1275 Pennsylvania Ave, NW, Suite 710, Washington, DC 20004, Counsel for WWJ-TV, keith.murphy@viacom.com
- Joseph M. Di Scipio, Senior Vice President, FCC Legal & Business Affairs and Assistant General Counsel, Fox Television Stations, LLC and New World Communications of Tampa, Inc., 400 N. Capitol St., NW, Suite 890, Washington, DC 20001, Counsel for KMSP-TV and WTVT-TV, joe.discipio@fox.com
- Kurt Wimmer, Covington & Burling, LLC, One CityCenter, 850 10th St., NW, Washington, DC 20001, Counsel for WCNC-TV, kwimmer@cov.com
- Kenneth C. Howard, Jr., Baker & Hostetler LLP, Washington Square, Suite 1100, 1050 Connecticut Ave., NW, Washington, DC 20036, Counsel for KMGH-TV, KNXV-TV and WCPO-TV, khoward@bakerlaw.com
- Gregory L. Masters, Esq., Wiley, 1776 K St., NW, Washington, DC 20006, Counsel for WFLA-TV, gmasters@wiley.law
- Mark J. Prak, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 1600 Wells Fargo Capitol Center, 150 Fayetteville St., Raleigh, NC 27601, Counsel for WMUR-TV, mprak@brookspierce.com
- Jennifer A. Johnson, Covington & Burling, LLC, One CityCenter, 850 10th St., NW, Washington, DC 20001, Counsel for WDIV-TV, jjohnson@cov.com
- Eric G. Null. Angela J. Campbell, Andrew Jay Schwartzman, Institute for Public Representation, Georgetown University Law Center, 600 New Jersey Avenue, NW, Suite 312, Washington, DC 20001, Counsel for Campaign Legal Center and the Sunlight Foundation, andyschwartzman@gmail.com; campbeaj@georgetown.edu
- Drew Simshaw, Andrew Jay Schwartzman, Institute for Public Representation, Georgetown University Law Center, 600 New Jersey Avenue, NW, Suite 312, Washington, DC 20001, Counsel for Campaign Legal Center, Sunlight Foundation, Benton Foundation and Common Cause, andyschwartzman@gmail.com
- Joshua N. Pila, General Counsel, Local Media and Video, Meredith Corp., 1716 Locust Street, Des Moines, IA 50309, Counsel for WPCH-TV, joshua.pila@meredith.com
- Michael D. Basile, Cooley LLP, 1299 Pennsylvania Avenue, NW, Suite 700, Washington, DC 20004, Counsel for WSB-TV, mdbasile@cooley.com
- Meredith McGehee and Tyler Cole, Issue One, 1401 K Street, NW, Suite 350, Washington, DC 20005, mmcgehee@issueone.org; tcole@issueone.org
- Brendan M. Fischer, Campaign Legal Center, 1101 14th Street, NW, Suite 400, Washington, DC 20005, bfischer@campaignlegalcenter.org

Jerianne Timmerman