

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

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

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ urges the Commission to dismiss the news distortion complaint filed by the Center for American Rights (CAR) against WCBS-TV concerning the editing of an interview with then-Vice President and then-Presidential candidate Kamala Harris on the news program “60 Minutes” last fall.² The FCC recently released a public notice seeking comment on the Complaint and shared the raw footage and transcript of the interview CBS provided to the Commission at the latter’s request.³ Given that the Complaint does not even allege a *prima facie* case for news distortion, let alone provide evidence that the editing in question was designed to deliberately mislead viewers about a significant event *and* done so at the direction of the licensee’s management, it must be

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

² *In re Complaint Against WCBS-TV* (Oct. 16, 2024) (Complaint or CAR Complaint). This Complaint was dismissed last January and then subsequently reinstated. See Letter from Peter Hyun, Acting Chief, Enforcement Bur. to Daniel Suhr, CAR, GN Docket No. 25-11, at 2 (Jan. 16, 2025) (dismissing Complaint as non-actionable); Order, GN Docket No. 25-11, DA 25-85 (EB Jan. 22, 2025) (reinstating Complaint).

³ Public Notice, *FCC Establishes MB Docket No. 25-73 and Comment Cycle for News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS, New York, NY*, MB Docket No. 25-73, DA 25-107 (Feb. 5, 2025) (Notice).

dismissed. Further, even assuming a successful claim could be made, Congress did not grant the FCC the authority to develop and enforce its news distortion policy and that policy also almost certainly violates the First Amendment.

NAB does not typically participate in FCC proceedings involving a single station or broadcaster. However, we do comment in such proceedings that raise issues implicating the interests of broadcast licensees more generally, as NAB did recently in urging the Commission to reject the frivolous petition to deny the license renewal of WTXF-TV, Fox Television's station in Philadelphia.⁴ Much like the Fox Television petition, this docket has significant implications for TV and radio stations across the country airing local and/or national news, news/talk programming, and interviews with public officials and candidates, from mayors to Presidents.

In this instance, the Commission should make quick work of the Complaint. Most glaringly, CAR fails to present a *prima facie* case for news distortion. To properly state a claim of news distortion, at the very least the complainant must allege that the distortion in question was done deliberately to mislead the public and that the intentional misleading was done at the behest of management. The Complaint, however, fails on both counts.

Even if the Complaint met the requirements for a *prima facie* news distortion claim, it also fails to present *any* evidence of a deliberate misrepresentation or that management had somehow been involved in perpetrating the claimed distortion. The Commission has strict standards for news distortion claims, requiring extrinsic evidence of deliberate distortion

⁴ See Comments of NAB and the Pennsylvania Ass'n of Broad., MB Docket No. 23-293, at 1-2 (Oct. 11, 2023) (explaining that the issues and arguments raised by the petition to deny there concerned all broadcast licensees, which depend on timely renewal of their licenses); see also Memorandum Opinion and Order, GN Docket No. 25-11, MB Docket No. 23-293, DA 25-57 (MB Jan. 16, 2025) (denying the petition to deny and granting WTXF's license renewal).

intended to mislead audiences that was directed by the licensee, its top management, or its news management.

Finally, even if CAR had made out a *prima facie* case and had provided the necessary evidence (or any evidence) to establish its claim, the Commission lacks the authority to enforce its news distortion policy, especially when read as broadly as CAR suggests. CAR effectively uses “news distortion” as a proxy for “balance,” which it is not, by urging the FCC to “assure” a “balanced presentation of information.” But “news distortion” is about falsifying or distorting facts. The Commission once had a balance requirement known as the “Fairness Doctrine.” It jettisoned that doctrine decades ago, however, because requiring so-called “balance” runs counter to the public interest and the First Amendment.⁵ While some have continued to implore the FCC to police content on broadcast stations in the name of “balance” – such as Free Press’s misguided 2020 petition requesting an investigation into broadcast coverage of the COVID-19 pandemic, including the editorial decisions to air President Trump’s press conferences and related commentary by certain radio personalities – the Commission has held firm against attempts “to resuscitate the long-dead Fairness Doctrine.”⁶

⁵ See *In re Syracuse Peace Council against Television Station WTVH Syracuse, NY*, 2 FCC Rcd 5043 (1987), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). Two remaining corollaries of the Fairness Doctrine (the political editorial and personal attack rules) were repealed in 2000 by court mandate. See *Radio-Television News Directors Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). The FCC subsequently deleted as obsolete the rule provisions referencing the “so-called ‘fairness doctrine.’” Order, 26 FCC Rcd 11422 (MB/OMD 2011).

⁶ *In re Free Press Emergency Petition for Inquiry Into Broadcast of False Information on COVID-19*, DA 20-385, at 4 (MB/OGC, Apr. 6, 2020).

Thus, the only live questions the Complaint implicates concern the legality and constitutionality of the news distortion policy in the first instance.⁷ The FCC lacks authority to regulate specific program content in the absence of an explicit statutory provision delegating such authority, especially given the prohibition on FCC interference in broadcasters' right of free speech under Section 326 of the Communications Act of 1934 (Act). Moreover, the news distortion policy and the Fairness Doctrine have been intertwined since their joint inception in the same 1949 FCC report, and unsurprisingly given their close connection, the news distortion policy contravenes the public interest and the First Amendment for the same reasons the Fairness Doctrine does.

As discussed below, the same grounds that led the Commission to repudiate the Fairness Doctrine would lead it to the identical conclusion here; namely, the news distortion policy is contrary to the public interest and the Constitution – especially as that policy is envisioned by CAR to include governmental second-guessing of broadcasters' selection and choice of material and even their editing processes. Nothing could be more intrusive than scrutinizing program content in this way, nor better designed to discourage broadcast coverage of controversial issues, which are the most likely to engender subjective feelings that a station's coverage was slanted, biased, distorted, or somehow otherwise faulty.

Even beyond similarities with the Fairness Doctrine, the news distortion policy is unconstitutionally vague. The Commission has never clearly defined what “distortion” – or

⁷ For the reasons set forth herein, the news distortion policy should be identified, pursuant to the President's recent Executive Order, as among those rules that are “unconstitutional” or “rais[ing] serious constitutional difficulties,” and that implicate significant political, social, or economic matters but are “not authorized by clear statutory authority.” *Ensuring Lawful Governance and Implementing the President's “Department of Government Efficiency” Deregulatory Initiative*, Executive Order (Feb. 19, 2025) (directing heads of agencies to identify within 60 days regulations within their jurisdiction for consistency with the law).

“rigging,” “slanting,” “deception,” “misrepresentation,” “bias,” “suppression,” “falsification,” and whatever additional terms have been used in complaints and FCC decisions – actually mean and how those terms differ from one another.⁸ To NAB’s knowledge, moreover, the FCC has never even offered a clear definition of what programming it considers to be “news” under the policy. The vice of vagueness thus infects the news distortion policy, contrary to Supreme Court precedent insisting on rigorous adherence to the requirement of clarity in regulations involving speech.

The FCC accordingly must dismiss the Complaint forthwith, while again recognizing that “the Commission is not the national arbiter of the truth” and, under the First Amendment, cannot “authenticate the news” or “try to do so.”⁹

II. THE FCC MUST DISMISS THE INVALID COMPLAINT

The Commission must dismiss CAR’s Complaint about editing. For many reasons, it does not present a valid news distortion claim.

The FCC rightfully places a high bar on news distortion claims. It will only intervene when claims include “extrinsic evidence” (*i.e.*, evidence outside the content of the allegedly distorted program) showing (1) that the broadcast news report was “deliberately intended to mislead viewers or listeners” about a “significant event,”¹⁰ *and* (2) that the deliberate distortion of the news was directed by the licensee, station management, or news

⁸ As discussed below, “staging” appears to be the only type of news distortion that the FCC has tried to define. NAB expresses no opinion here as to the legality or constitutionality of the news distortion policy as it applies to news staging or outright fabrication (*i.e.*, deliberately and intentionally airing a news report about an event or incident that did not occur).

⁹ *In re Application of American Broadcasting Companies, Inc., For Renewal of License of Station KGO-TV San Francisco, Cal.*, 86 FCC 2d 3, 11 (1981).

¹⁰ FCC, Consumer Guide, *Broadcast News Distortion* (July 18, 2024), <https://www.fcc.gov/broadcast-news-distortion>

management or resulted from an abdication of responsibility by one or more of those entities.¹¹ The Complaint does not even allege a *prima facie* case for news distortion, let alone demonstrate the programs' deliberate intent to distort at management's direction.

CAR's allegations and the available "evidence" (*i.e.*, the transcript of the interview with then-Vice President Harris) merely establish that CBS edited the interview, especially for length, when shown on "60 Minutes," and that one limited portion of the interview that concerned the Middle East was edited differently for airing on the program "Face the Nation."¹² Despite the Complaint's focus (at 2-3) on how the former Vice President's answer to a *single* question was edited, nothing here indicates, let alone demonstrates, deliberate falsification or a deliberate intent to mislead, given the lack of "extrinsic evidence or documents that *on their face reflect deliberate distortion.*"¹³ At best, the Complaint can be

¹¹ See, e.g., *Station KGO-TV*, 86 FCC 2d at 10; *In re Complaints Covering CBS Program "Hunger in America,"* 20 FCC 2d 143, 150 (1969); *In re Lynn J. Farris, Farris Broadcasting, Inc., KNEL(AM), Brady, TX*, 22 FCC Rcd 11193, 1194-95 (MB 2007). Extrinsic evidence includes written or oral testimony from "insiders" or persons with "direct personal knowledge of an intentional falsification of the news," especially evidence revealing "orders to falsify the news by a licensee, its top management or its news management." *In re Application of Pacifica Foundation*, 95 FCC 2d 750, 755-56 (1983). See also *Hunger in America*, 20 FCC 2d at 150-51 (also identifying evidence of bribery or other evidence such as outtakes or written memoranda).

¹² The "Face the Nation" episode primarily focused on the Middle East and consequently included only a very limited excerpt from the Harris interview. That clip of the Harris interview also served as a promotion for the much longer interview to be shown later on "60 Minutes," which covered a range of topics, such as the economy, immigration, border security, and the war in Ukraine.

¹³ *Pacifica Foundation*, 95 FCC 2d at 756 (emphasis in original) (also stating that the FCC "will not infer an intent to distort"). The differences in editing here do not on their face show deliberate, intentional distortion. The *three* questions about the Middle East that aired on both "60 Minutes" and "Face the Nation" were broadcast in the same sequential order without any falsification (*i.e.*, inserting an answer that the interviewee did not in fact say) or splicing (*i.e.*, rearranging answers to certain questions so they appear as answers to entirely different questions). In addition, the Commission decision CAR relies upon does not support its claim. Complaint at 3, citing *In re Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 FCC 2d 150 (1971). In that case, the FCC said it could conceive of

read to state that viewers may have been confused from the different edits. And even if the Complaint could somehow be regarded as asserting there was a deliberate intent to mislead, it never alleges, let alone proves, that the licensee, its top management, or its news management directed the (unshown) deliberate distortion.

The Commission, moreover, has correctly and consistently rejected news distortion claims based on complaints about editing and refused to involve itself in the journalistic functions of broadcasters. Consistent with Supreme Court precedent CAR references in its filing,¹⁴ the FCC properly has concluded that reviewing broadcasters' "editing process would be to enter an impenetrable thicket," where "[o]n every single question of judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion."¹⁵ The Commission "possesses neither the expertise nor the desire to look over the shoulder of broadcast journalists and inquire why a particular piece of information was reported or not reported."¹⁶

situations where the documentary evidence would be sufficiently strong to require an inquiry (e.g., "where a 'yes' answer to one question was used to replace a 'no' answer to an entirely different question"), but that situation was not presented there – and nor is it presented here. *Id.* at 153.

¹⁴ Complaint at 5, citing *Columbia Broadcasting System, Inc. (CBS) v. Democratic Nat'l Comm. (DNC)*, 412 U.S. 94 (1973), discussed in Section III.B.2., *infra*.

¹⁵ *Selling of the Pentagon*, 30 FCC 2d at 152-53.

¹⁶ *In re TVT License, Inc., For Renewal of License of Station WTVT(TV) Tampa, Florida*, 22 FCC Rcd 13591, 13596 (MB 2007) (citation omitted). At the risk of intruding into CAR's editing process, NAB notes that the Complaint's appendices fail to accurately reflect the three questions that appeared on both "60 Minutes" and "Face the Nation." While Appendix A (transcribing the "Face the Nation" clip) includes the three questions and answers aired on that program, Appendix B (purporting to reflect the material aired on "60 Minutes") leaves out the third question and answer entirely, thereby making the differences between the clips appear greater than reality.

For all these reasons, CAR has failed to present a valid news distortion claim, and the Commission must dismiss it. Further FCC action here would be contrary to decades of precedent, as well as intruding into First Amendment protections afforded to broadcasters.

III. THE ONLY COLORABLE QUESTIONS RAISED BY THE COMPLAINT CONCERN THE LEGALITY AND CONSTITUTIONALITY OF THE FCC'S NEWS DISTORTION POLICY

Even if the Complaint did present a remotely sufficient claim, the FCC's news distortion policy does not pass legal and constitutional muster today. At least to the extent that the policy purports to cover "slant," "bias," or related concerns, or regards "distortion," "rigging," or "suppression" to encompass slant or bias, then the news distortion policy inappropriately stretches the FCC's statutory authority; contravenes the FCC's previous determinations about the Fairness Doctrine; invites undue governmental intrusion into news program content and editorial functions; chills speech; is impermissibly vague; and infringes upon the First Amendment.¹⁷

A. The FCC's Authority to Regulate Specific Program Content in the Absence of an Explicit Statutory Enactment Is Questionable at Best

"Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content."¹⁸ The news distortion policy significantly implicates content by directly involving the Commission in judging whether particular programming is, as alleged in complaints, distorted, rigged, suppressed, or slanted

¹⁷ NAB expresses no opinion here as to the legality or constitutionality of the news distortion policy as it applies to outright fabrication or falsification of news stories (*i.e.*, deliberately and intentionally airing a news report about an event or incident that did not happen) or news "staging." The FCC has narrowly described "deliberate staging" of "news events" as a "purportedly significant 'event' which did not in fact occur but rather is 'acted out' at the behest of news personnel." *In re Network Coverage of the Democratic Nat'l Convention*, 16 FCC 2d 650, 657 (1969). Staging and fabrication are not at issue here.

¹⁸ *Motion Picture Ass'n of Am (MPAA) v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (citing, *e.g.*, 18 U.S.C. § 1464 (obscenity and indecency), 47 U.S.C. § 315 (airtime to political candidates)).

– or even edited inappropriately – despite Congress never granting the FCC specific authority to do so.

While the Commission has authority to hold a licensee “accountable for the *totality* of its performance of public interest obligations,”¹⁹ that does not mean the FCC has the requisite specific authority to regulate and make judgments about the content and presentation of specific programs, as claimed under the news distortion policy. Given the First Amendment issues “invariably raise[d]” when the government attempts to regulate program content,²⁰ the FCC’s general authority to determine whether a licensee has served the public interest “is and must be limited to determining whether the licensee’s *overall* programming has served its service area, and not whether any particular program is ‘appropriate.’”²¹ The “no censorship” provision of the Act reinforces this conclusion, as Section 326 prohibits the Commission from promulgating or fixing any regulation or condition that interferes with broadcasters’ right of free speech.²² Merely because a regulation, restriction, or condition is – or may be claimed to be – in the “public interest” does not mean the Commission has authority to promulgate it without clear delegated authority from Congress.²³

¹⁹ *CBS v. DNC*, 412 U.S. at 121 (emphasis added).

²⁰ *MPAA*, 309 F.3d at 805.

²¹ *In re Application of WGBH Educ. Found.*, 69 FCC 2d 1250, 1251 (1978) (emphasis in original).

²² 47 U.S.C. § 326. A policy that invites FCC scrutiny and potential imposition of adverse consequences stemming from broadcasters’ news programming (including their selection and editing of material) necessarily interferes with their speech.

²³ See, e.g., *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (stating that “no matter how important” the issue, an “agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress”); *MPAA*, 309 F.3d at 806 (stating that the “FCC cannot act in the ‘public interest’” if it “does not otherwise have the authority to promulgate the regulations at issue”).

B. The News Distortion Policy Is Rooted in the Discredited Fairness Doctrine, and the FCC Should Find it Contrary to the Public Interest and the Constitution for the Same Reasons

In claiming that WCBS violated the public interest standard under Section 309(a) of the Act,²⁴ the Complaint (at 4-5) calls for the FCC to assure a “balanced presentation of information” on important public issues. But the news distortion policy at its essence concerns falsifying or distorting facts, not “balance” or “fairness,” as conceived in the long-repealed Fairness Doctrine.²⁵ The Commission must acknowledge that its little-used news distortion policy is fundamentally rooted in and intertwined with the repudiated Fairness Doctrine. Thus, the news distortion policy – at least insofar as it applies to slant or bias or its treatment of distortion, rigging, or suppression as encompassing slant – contravenes the public interest and violates the Constitution for the same reasons the Commission reached that conclusion about the Fairness Doctrine during the Reagan Administration.

1. The News Distortion Policy Has Been Intertwined with the Fairness Doctrine Since Their Joint Inception

History shows that the news distortion policy has been closely intertwined with the Fairness Doctrine from its very beginnings. Beyond first framing the set of obligations referred to as the Fairness Doctrine, the FCC’s 1949 Report²⁶ also inaugurated the news distortion

²⁴ 47 U.S.C. § 309(a) (providing that the FCC shall grant applications for station licenses, modifications, and renewals upon a finding that a grant would serve the public interest, convenience, and necessity).

²⁵ See Complaint at 5, citing, *inter alia*, *CBS v. DNC*, 412 U.S. at 125. See also *id.* at 112 (stating that “*under the Fairness Doctrine* broadcasters are responsible for providing the listening and viewing public with access to a *balanced presentation of information* on issues of public importance”) (emphases added).

²⁶ *Editorializing by Broadcast Licensees*, Report, 13 FCC 1246, 1254 (1949) (1949 Report) (reporting on FCC’s belief that licensees have a responsibility to present a “fair,” “equal,” or “balanced” presentation of controversial public issues). This 1949 Report “served as the basis for all subsequent fairness rulings” and “also framed for the first time that set of obligations which collectively are referred to as the fairness doctrine.” *Inquiry Into the General*

policy by opining that licensees would be “abusing” their position if they “*withhold from expression over [their] facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news.*”²⁷ This portion of the 1949 Report is recognized as the beginning of the news distortion policy, which was later developed via individual FCC decisions.²⁸

Thus from its inception, the news distortion policy was connected to the Fairness Doctrine, and this tie remained throughout the life of the doctrine.²⁹ Over the years, moreover, numerous complaints brought to the Commission encompassed both Fairness Doctrine and news distortion claims, thereby showing their interrelatedness – if not interchangeableness – in the minds of many parties and, apparently at times, the Commission.³⁰

Fairness Doctrine Obligations of Broadcast Licensees, Notice of Inquiry, 49 Fed. Reg. 20317, 20321 (May 14, 1984).

²⁷ 1949 Report, 13 FCC at 1254-55 (emphases added). Again mixing Fairness Doctrine principles with news distortion, the 1949 Report further stated that licensees should not exercise their authority over selection of program material to “distort or suppress” information upon which a “fair and free discussion of public issues” depends. *Id.* at 1254.

²⁸ Detailed analyses of the news distortion policy (including the law review article cited in the Complaint, at 4) identify the passage quoted above from the 1949 Report on Fairness Doctrine principles as inaugurating that policy. Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 Wash. U. L. Q. 1005, 1015 (2000); accord, e.g., Chad Raphael, *The FCC’s broadcast news distortion rules: Regulation by drooping eyelid*, 6 Comm. L. & Pol’y 485, 494 (2001); *New World Communs. of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1233 (Fla. App. 2003) (discussing roots of news distortion policy). The FCC in news distortion cases decades later cited that same relevant paragraph from the 1949 Report. See, e.g., *Democratic Nat’l Convention*, 16 FCC 2d at 657.

²⁹ For example, the FCC included within its major 1974 report on the Fairness Doctrine a subsection about fairness and accuracy in news that addressed the news distortion policy. See *Fairness Report*, 48 FCC 2d 1, 21 (1974) (1974 Fairness Report) (quoting the 1949 Report’s passage about distortion and slant that inaugurated the policy, setting forth the “substantial extrinsic evidence” requirement for news distortion claims, and citing relevant news distortion precedent).

³⁰ Beyond including news distortion within its 1974 Fairness Report, other decisions blur the line between the Fairness Doctrine and news distortion. For example, in addressing one complaint concerning news coverage, the FCC stated that a broadcaster is “barred from

2. The News Distortion Policy Contravenes the Public Interest and the Constitution for the Same Reasons as the Fairness Doctrine

Especially in light of the intertwined history and close relationship between the news distortion policy and the Fairness Doctrine, the news distortion policy “violates the First Amendment and contravenes the public interest” for the same reasons the Commission found that the Fairness Doctrine does.³¹ To summarize, the FCC found that the Fairness Doctrine: (1) chilled speech and pervasively and significantly impeded the broadcasting of controversial issues of public importance; (2) inhibited the expression of unpopular opinion; (3) placed the government into the intrusive and constitutionally disfavored role of scrutinizing program content; (4) created the opportunity for abuse for partisan political purposes; (5) imposed unnecessary costs on broadcasters and the Commission; and (6) was unnecessary because the public had access to a multitude of viewpoints without regulatory intervention, due to explosive growth in the number and types of information sources available in the marketplace.³² These same grounds justify concluding that the news distortion policy is

keeping off his facilities viewpoints with which he does not agree,” which sounds very like “suppression” under the news distortion policy. But in the very next sentence, the FCC cites broadcaster Fairness Doctrine obligations to present differing viewpoints on controversial issues. *In Re Complaint by Mrs. J.R. Paul, Houston, Tex.*, 26 FCC 2d 591 (1969). Other FCC news distortion decisions reveal apparent confusion over the relationship between the news distortion policy and the Fairness Doctrine, simultaneously differentiating between that doctrine and the news distortion policy, *Hunger in America*, 20 FCC 2d at 147, while at the same time stating that the Fairness Doctrine “overlay[s] this entire area.” *Id.* at 151 n.7 (after addressing news distortion in detail, observing that the Fairness Doctrine “in particular situations such as here treated, may call for the presentation of contrasting viewpoints”). Many FCC decisions address claims involving both the Fairness Doctrine and the news distortion policy. See, e.g., *Application of Pacifica Found.*, 95 FCC 2d 750; *In Re Complaint by Citizens for Abraham D. Beame, New York, NY*, 41 FCC 2d 155 (BB 1973); *Democratic Nat’l Convention*, 16 FCC 2d 650.

³¹ *Syracuse Peace Council*, 2 FCC Rcd at 5043.

³² *Id.*, summarizing and reaffirming the conclusions of the FCC’s exhaustive 1985 Fairness Report, *Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143 (1985).

contrary to the public interest and the First Amendment. Ironically, the law review article about the news distortion policy quoted in the Complaint (at 4) calls for the policy's elimination, concluding that it "presents a greater threat to a free press than did the fairness doctrine."³³

First, the news distortion policy (especially as envisioned by CAR) and complaints pursuant to it will chill speech and discourage coverage of important public issues. Indeed, controversial issues – which the FCC has always wanted or even required broadcasters to cover – are those most likely to draw complaints claiming that broadcasters' coverage was slanted, biased, distorted, or otherwise faulty. The Commission need look no further than the complaint filed by a Baltimore prosecutor in 2021 against a TV station working diligently to examine and report on the actions of local public officials.³⁴ Breathing life into the news distortion policy will only serve to incentivize stations to avoid controversial and partisan issues and present only "bland, inoffensive" material, contrary to the public interest.³⁵

More specifically, the Commission entertaining meritless complaints will encourage additional frivolous filings finding fault with broadcasters' coverage and presentation of all types of informational programming. Merely the threat of complaints and the burdens of responding to them – along with the inevitable specter of FCC involvement in examining

³³ Levi, *Reporting the Official Truth* at 1009, 1013.

³⁴ See Letter to Jessica Rosenworcel, FCC Chairwoman, from Marilyn J. Mosby, Maryland State's Attorney (May 5, 2021).

³⁵ *CBS v. DNC*, 412 U.S. at 112.

editorial decisions – is sufficient to chill speech.³⁶ Indeed, chilling otherwise protected speech may be a primary purpose of the Complaint.³⁷

The FCC’s action here thus has significant implications for thousands of radio and TV stations providing local and/or national news and public affairs programming and that conduct interviews of public officials and candidates. Under the Constitution and rational FCC policy, broadcasters should not be looking over their shoulders and guessing how anyone might try to find fault in their presentation of tens of thousands of newscasts and their editing of innumerable stories and interviews. As the Commission recognized with the Fairness Doctrine, the news distortion policy is ripe for “abuse for partisan political purposes” across ideological lines and impacting both radio and television.³⁸ And make no mistake, the threat of Fairness Doctrine complaints chilled broadcast speech, including specifically news/talk programming on radio, and the news distortion policy – particularly if broadened – can be used to the same end.³⁹

Second, the news distortion policy places the Commission into the intrusive and constitutionally suspect role of scrutinizing program content and, as urged by the Complaint,

³⁶ “No rational firm – particularly one holding a government-issued license – welcomes a government audit.” *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998).

³⁷ The FCC has not codified its news distortion policy; thus, under the Act, any violation of that policy is only relevant to the extent it indicates that grant of an application would not be in the public interest. *In re Application for Renewal of License, WXYZ-TV, Detroit, MI*, 22 FCC Rcd 12744, 12746 (MB 2007). But WCBS’ license is not due for renewal until 2031.

³⁸ *Syracuse Peace Council*, 2 FCC Rcd at 5043.

³⁹ Studies have documented that the demise of the Fairness Doctrine in 1987 “led to significant increases in informational programming” on radio. T. Hazlett and D. Sosa, “*Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*,” 4 Mich Telecomm. & Tech. L. Rev. 35, 62-63 (1998). Just between 1987-1995, for example, the share of informational formats on AM radio rose nearly 21 percentage points, driven by large increases in news/talk formats. *Id.* at 60.

the specific editing choices of broadcasters. Even while the Fairness Doctrine was still in force, the Supreme Court recognized the “risk of an enlargement of Government control over the content of broadcast discussion of public issues,” and rejected complaints by the Democratic National Committee and others about many radio and television broadcasters’ general policy of refusing editorial advertisements.⁴⁰ The Court came down firmly on the side of “journalistic tradition and experience” under which, “[f]or better or worse, editing is what editors are for; and editing is selection and choice of material.”⁴¹ Similarly, the Commission should not maintain – let alone apply more broadly, as the Complaint calls for – a news distortion policy that invites governmental second-guessing of the editorial choices of stations and their selection and choice of material. As it said when rejecting Free Press’ outlandish request to investigate broadcast coverage of the COVID-19 pandemic, the Commission should not expand construction of its rules “to enable government-led flyspecking of broadcasters’ editorial judgments.”⁴²

Third, the news distortion policy is not needed to ensure that the public receives a range of views on controversial issues. Nearly 40 years ago, the FCC found the Fairness Doctrine unnecessary, given increases in the number and types of information sources available – and that was prior to satellite TV and radio, audio and video streaming services, podcasting, social media, “nearly universal” internet access, and the “nearly total” triumph of

⁴⁰ *CBS v. DNC*, 412 U.S. at 126.

⁴¹ *CBS v. DNC*, 412 U.S. at 124. While recognizing that newspaper or broadcast editors may abuse this power, the Court thought that was no reason to deny broadcasters the discretion Congress afforded them, concluding that “Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.” *Id.* at 110, 124.

⁴² *Free Press Emergency Petition for Inquiry Into Broadcast of False Information on COVID-19*, at 3.

smart devices⁴³ enabling audiences to easily access content, information, and ideas as “diverse as human thought.”⁴⁴ Given that the Fairness Doctrine’s imposition of burdensome regulation only on radio and TV stations was deemed unnecessary in the media marketplace of 1987, it is certainly unnecessary today – at least with regard to “slant,” “bias,” “suppression,” or other flavors of “distortion” closely related to “balance” – where consumers possess nearly unlimited access to a vast array of views and opinions about every issue under the proverbial sun. While purported “scarcity” of spectrum or stations was relied upon to justify certain regulatory policies in the past – as well as affording broadcasters lesser First Amendment protection than other media – that theory has been well and truly debunked.⁴⁵

C. The News Distortion Policy Raises Additional Serious First Amendment Questions

In the First Amendment hierarchy, “speech on public issues occupies the highest rung” and “is entitled to special protection.”⁴⁶ The news distortion policy – which has been applied to news programs, investigative news reports, documentaries, and coverage of political candidates and conventions – therefore “trenches upon an area in which the importance of

⁴³ Edison Research, *The Infinite Dial 2023*, at 3 (Mar. 2, 2023); Edison Research, *The Infinite Dial 2024*, at 7-8 (Mar. 28, 2024).

⁴⁴ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

⁴⁵ The FCC found in 1987 that “there is no longer a scarcity in the number of broadcast outlets” available to the public. *Syracuse Peace Council*, 2 FCC Rcd at 5054. But more significantly, the FCC, following a lengthy analysis, concluded that the “concept of scarcity – be it spectrum or numerical – is irrelevant” to determining the appropriate First Amendment standard to be applied to broadcasting and that the scarcity rationale developed in the *Red Lion* decision and successive cases “no longer justifies a different standard of First Amendment review for the electronic press.” *Id.* at 5052, 5055. Nearly 30 years ago, Congress similarly found that the “scarcity rationale for government regulation [of broadcasting] no longer applies.” H.R. Rep. No. 104-204, at 54 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 18.

⁴⁶ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation omitted). “[C]ontent-based regulations that target *political* speech are especially suspect.” *Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019) (emphasis in original).

First Amendment protections is at its zenith.”⁴⁷ A policy under which the government decides whether the content of particular news programming is distorted, rigged, slanted, or biased is clearly a content-based restriction under the First Amendment.⁴⁸ As such, to pass strict scrutiny, it must “further[] a compelling interest” and be “narrowly tailored,”⁴⁹ *i.e.*, the policy must employ the “least restrictive means” to achieve that compelling interest.⁵⁰

But regardless of the level of scrutiny applied, the news distortion policy appears contrary to the First Amendment for reasons in addition to those discussed in Section III.B.2.⁵¹ Beyond chilling speech and inviting disfavored governmental scrutiny of program content and stations’ editorial functions as did the Fairness Doctrine, the news distortion policy’s vagueness raises serious constitutional questions. Notably, it remains unclear what

⁴⁷ *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

⁴⁸ A regulation may be an unconstitutional *content*-based speech restriction even if it does *not* discriminate among *viewpoints*. *Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015). But complaints of bias in news programming are likely to slide into claims that the programming was slanted for failing to provide differing viewpoints or ignoring a specific viewpoint.

⁴⁹ *Reed*, 576 U.S. at 171 (citation omitted).

⁵⁰ *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452 (2015). While in certain proceedings, such as the recent rulemaking notice on artificial intelligence-generated content in political advertisements, the FCC assumed that intermediate scrutiny would apply to broadcast regulations because, under precedent dating back over half a century, broadcasters receive lesser First Amendment protections due to alleged spectrum scarcity. Notice of Proposed Rulemaking, MB Docket No. 24-211, FCC No. 24-74, at ¶ 29 & n.99 (rel. July 25, 2024). For the reasons set forth in Section III.B.2, NAB questions the continuing validity of those cases premised on spectrum scarcity, especially given the FCC’s and congressional disavowal of purported scarcity decades ago in a far less abundant media marketplace. Courts, moreover, have subjected certain content-based FCC restrictions to strict scrutiny even when imposed on broadcasters. See *Action for Children’s Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) (applying “strict scrutiny to [content-based] regulations . . . regardless of the medium affected by them”).

⁵¹ Even intermediate scrutiny requires that a regulation further an important governmental interest unrelated to the suppression of free expression and not burden substantially more speech than necessary to further those interests. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

“rigging,” “distortion,” “slant,” or “suppression” (as well as other related terms used in news distortion claims and decisions) mean or how they differ from one another. As one court observed, the FCC has never published the news distortion policy’s “definitive elements and defenses.”⁵²

To NAB’s knowledge, moreover, the news distortion policy, and the decisions applying it, offer no clear definition of what programming constitutes “news.” The few – and seemingly inconsistent – decisions addressing this question range from a bald statement that a talk show interview and editorials were “non-news programming,”⁵³ to responding to a claim that news distortion should apply to a football game by stating “whether or to what extent” news distortion policies should apply to sports events was “under study.”⁵⁴ The decision in that latter case did not respond in the negative – or at all – to petitioners’ characterization of news as “anything that is of interest to a large segment of the population.”⁵⁵ In short, broadcasters cannot even be sure what programming could be regulated under the “news” distortion policy or how broadly it might be interpreted.⁵⁶

⁵² *New World Communs.*, 866 So. 2d at 1233 (finding that the policy does not qualify as a “law, rule, or regulation” under Florida’s private sector whistle-blower’s statute, which requires a putative whistleblower to show that a law, rule, or regulation was violated before an actionable claim can be stated).

⁵³ *In re Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd 1503, 1507 (1992).

⁵⁴ *In the Matter of Complaints Against Screen Gems Stations, Inc., Station WVUE(TV), New Orleans, LA. and American Broadcasting Companies, Inc.*, 46 FCC 2d 252, 255 (1974) (addressing petition claiming that news distortion policy should be applied to broadcast of the Sugar Bowl, and stating that a pending notice of inquiry on broadcaster practices in connection with sports events was considering that issue).

⁵⁵ *Screen Gems Stations*, 46 FCC 2d at 255.

⁵⁶ The order concluding the FCC’s inquiry into broadcasts of sports referenced in the *Screen Gems* decision appeared to conflate newscasts with sportscasts, saying it made “no difference whether broadcasts of sports events are considered as news or entertainment” because in either case the licensee must refrain from deliberately falsifying, distorting or

The “vice of vagueness” – not to mention potential overbreadth – thus infects the news distortion policy.⁵⁷ The Supreme Court has made clear that vagueness can be fatal under the First Amendment, repeatedly stressing the necessity for clarity in speech-related regulations and frequently opining about the problem of vagueness in this area.⁵⁸ “When speech is involved, rigorous adherence to th[e] requirement[]” of clarity in regulation “is necessary,”⁵⁹ a standard that the news distortion policy does not meet.

Assuming that the Commission and broadcasters somehow “know” news distortion – or rigging, slanting, deception, misrepresentation, bias, suppression, falsification, and whatever additional (undefined) terms have been used – “when they see it” is not constitutionally sufficient, especially in today’s partisan environment where even “facts” and “truth” are often in the eye of the beholder. The FCC has correctly and frequently stated that it is not the “national arbiter of the truth,” nor can it, under the First Amendment, “authenticate the news.”⁶⁰ Accordingly, the Commission should decline the Complaint’s invitation to expand the news distortion policy into an unconstitutional Fairness Doctrine-like requirement for supposed “balance.” Indeed, a bipartisan majority of the Supreme Court recently concluded

suppressing facts. *Practices of Licensees and Networks in Connection with Broadcasts of Sports*, Report and Order, 48 FCC 2d 235, 237 (1974). Under this logic, the scope of the so-called “news” distortion policy could reach to at least some types of non-news programming as well, thereby raising First Amendment overbreadth questions. A “news” distortion policy potentially applicable to *non*-news content fails narrowly tailoring.

⁵⁷ *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683-84 (1968) (recognizing that the “vice of vagueness” produces a chilling effect on distributors and creators of media products).

⁵⁸ See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (providing that if a “law interferes with the right of free speech . . . , a more stringent vagueness test should apply”); *FCC v. Fox Television Stations, Inc.*, 557 U.S. 239, 254-55 (2012) (*Fox II*) (stating that “vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect”) (citation omitted).

⁵⁹ *Fox II*, 557 U.S. at 253-54.

⁶⁰ E.g., *Station KGO-TV*, 86 FCC 2d at 11; *Hunger in America*, 20 FCC 2d at 151.

that achieving “a better speech balance” is not a valid governmental interest under the First Amendment.⁶¹

IV. CONCLUSION

For all the reasons set forth above, the Commission must summarily dismiss the invalid Complaint.

Respectfully submitted,

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⁶¹ *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407 (2024) (stating that the government “may not interfere with private actors’ speech to advance its own vision of ideological balance”).