

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF FREE PRESS

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EXECUTIVE SUMMARY

The Commission can and should step in when a broadcaster intentionally falsifies the news. But that is not what is before the Commission today. The Complaint at issue involves the basic journalistic practice of shortening an interview response. The Commission has denied requests alleging much worse, and it should do the same here.

In this Comment, Free Press first dissects the edit that “60 Minutes” made to then-Vice President Harris’s interview response and explains why it was a standard editing practice. At this step, we also flag that the logical implication of the Complaint’s news distortion claim is either that broadcasters cannot edit interviews involving political candidates and officials, or that the Commission should weigh in on a political candidate’s demeanor. Neither is tenable.

Second, Free Press argues that the Complaint should be dismissed for mootness. The relief requested by the Complaint has been granted. That should be the end of the inquiry, as Chairman Carr and Commissioner Simington have recognized. Complainant is free to file a new complaint requesting different relief, but it has not done so. And it is not proper for the Commission to read into the Complaint anything that is not actually there. By opening a docket on a request that is now moot, this Commission invites suspicion that it is impermissibly acting on political motivations. Closing the docket would end that speculation.

Third, Free Press walks through the Commission’s two-step analysis for news distortion claims. The Complaint cannot satisfy either step: it fails to raise a *prima facie* case and it does not raise a substantial and material question of fact. The Complaint’s allegations are not substantial because: (1) the Complaint fails to offer any evidence supporting the notion that the broadcaster intended to distort the news by shortening Harris’s interview response; and (2) the alleged distortion did not involve a significant aspect of the news report. And the allegations are not material because the Complaint cannot point to any reason why WCBS, its principals, or management dictated the edit, instead of “60 Minutes” employees acting within their professional discretion to cut raw footage into the shorter segment that aired.

Fourth, we argue that agency intervention here risks running afoul of the First Amendment. The Constitution affords the Commission some latitude to regulate broadcasters, but there are clear limits. Those limits are reached when regulation treads on broadcasters’ journalistic discretion and harms the public’s ability to receive information by creating a chilling effect on the press.

Fifth, Free Press contextualizes the creation of this docket within a larger portfolio of speech-restrictive actions that Chairman Carr has taken recently.

Finally, we address Complainant’s reservation of right to request the recusal of any commissioner who has prejudged the matter. It is hornbook law that any such recusal is not required. To require recusal would also be an administrative mess—all but one FCC commissioner has made public evaluative statements about the issues involved in this matter.

In light of all of these reasons, the Commission should dismiss the Complaint and close the docket.

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I. INTRODUCTION

On October 16, 2024, the Center for American Rights (Complainant) filed a consumer complaint (Complaint) before the Federal Communications Commission (FCC or Commission) against WCBS, a licensed television broadcast station in New York City.¹ The Complaint takes issue with licensee WCBS’s broadcast of an interview with then-Vice President Kamala Harris on CBS’s “60 Minutes” program. Specifically, the Complaint alleges that CBS engaged in news distortion by manipulating one of Harris’s answers on the war in Gaza. Complainant comes to this conclusion because the licensee’s broadcast of CBS news show “Face the Nation” played a clip of the same interview the day before, featuring a different portion of Harris’s answer to the question.

The Complaint was denied on January 16, 2025.² The Commission’s Enforcement Bureau noted that the Complaint “runs contrary to” principles of journalistic discretion, and stated that its allegations were “insufficient to rise to the level of an actionable enforcement matter.”³ In a

¹ The Complaint is also incorporated by reference into Complainant’s petition to the Commission to condition approval of the Skydance-Paramount merger on the undertaking of certain commitments. *See* Center for American Rights, *Skydance Media and Paramount Global*, Petition to Condition Grant, MB Docket No. 24-275 at 8 (filed Dec. 16, 2024).

² *See Preserving the First Amendment*, Letter Order, GN Docket No. 25-11 (rel. Jan. 16, 2025).

³ *Id.* at 2.

complete departure from that decision after President Trump’s inauguration, the Commission restored the Complaint by setting aside the January 16, 2025 order, and opened this docket to “permit broader public participation and thereby serve the public interest.”⁴

Free Press will first describe the CBS clips at issue and map them onto the allegations made in the Complaint. Then, the Comment explains why the Complaint does not raise a claim warranting agency action, for two reasons each independently sufficient to warrant dismissal: first, the Complaint is moot; and second, the Complaint fails to satisfy the Commission’s news distortion inquiry. Next, Free Press will explain why the Complaint’s allegations cannot be squared with the First Amendment, even if the First Amendment gives the Commission some latitude to regulate broadcasters based on content. The Comment then frames this agency action within the larger context of the Commission’s recent turn against free speech principles under Chairman Carr’s leadership. Finally, the Comment addresses Complainant’s supposed reservation of right to request the recusal of FCC commissioners in this matter.

Dockets for public comment are valuable mechanisms for public participation and civic engagement, through which interested stakeholders can voice their opinions, experiences, and expertise on important agency actions. But this docket is pure spectacle. It not only entertains a frivolous, unsubstantiated, and moot complaint, but it also gives the pleading attention it simply does not warrant. For this reason, and the many discussed below, Free Press urges the Commission

⁴ *News Distortion Complaint Involving CBS Broadcasting Inc., licensee of WCBS, New York, NY (Facility ID No. 9610); Preserving the First Amendment*, Order, GN Docket No. 25-11, DA 25-85 (rel. Jan. 22, 2025) [hereinafter *Restoration of Complaint*]; *FCC Establishes MB Docket No. 25-73 and Comment Cycle for News Distortion Complaint Involving CBS Broadcasting Inc., licensee of WCBS, New York, NY*, Public Notice, MB Docket No. 25-73, DA 25-107 (rel. Feb. 5, 2025) [hereinafter *Public Notice*].

to close the docket and dismiss the Complaint. To do anything less would create a gross chilling effect on the press.

II. THE COMPLAINT’S ALLEGED “DISTORTION” IS A STANDARD EDITING PRACTICE.

The Complaint alleges that CBS “transform[ed]” Harris’s answer into “a fundamentally different answer.”⁵ By doing so, Complainant alleges, CBS crossed the line from the “normal” exercise of news judgment into “an act of significant and substantial news alteration.”⁶ Specifically, Complainant takes issue with an apparent discrepancy between two clips from the same interview, the first featured as part of WCBS’s airing of CBS’s “Face the Nation” news show on Sunday, October 6, 2024, and the second as part of its “60 Minutes” program the day after. Complainant remarks that both programs featured footage from the same interview with Harris, yet two different answers were given to the identical question from interviewer Bill Whitaker.⁷

A. CBS’s Unedited Transcript and Footage Show that the Harris Responses with Which Complainant Takes Issue Were All Part of the Same Answer to Whitaker’s Question.

The transcript for the “Face the Nation” excerpt is as follows:

Whitaker: We supply Israel with billions of dollars in military aid, and yet Prime Minister Netanyahu seems to be charting his own course. The Biden-Harris administration has pressed him to agree to a cease-fire, he’s resisted. You urged him not to go into Lebanon. He went in anyway. He has promised to make Iran pay for the missile attack, and that has the potential of expanding the war. Does the U.S. have no sway over Prime Minister Netanyahu?

Harris: The aid that we have given Israel allowed Israel to defend itself against 200 ballistic missiles that were just meant to attack the Israelis and the people of Israel. And when we think about the threat that Hamas, Hezbollah, presents, Iran, I think that it is without any question our imperative to do what we can to allow Israel to defend itself against those kinds of attacks. Now the work that we do diplomatically with the leadership of Israel is an ongoing pursuit around making

⁵ Center for American Rights, Complaint at 3 (filed Oct. 16, 2024) [hereinafter Compl.].

⁶ *Id.* at 2–3.

⁷ *See id.* at 2 (“Same interview, same question, two completely different answers.”).

clear our principles, which include the need for humanitarian aid, the need for this war to end, the need for a deal to be done which would release the hostages and create a cease-fire. And we're not gonna stop in terms of putting that pressure on Israel and in the region including Arab leaders.

Whitaker: But it seems that Prime Minister Netanyahu is not listening.

Harris: Well, Bill, the work that we have done has resulted in a number of movements in that region by Israel that were very much prompted by, or a result of, many things including our advocacy for what needs to happen in the region.

Whitaker: Do we have a real close ally in Prime Minister Netanyahu?

Harris: I think, with all due respect, the better question is, "Do we have an important alliance between the American people and the Israeli people?" And the answer to that question is, "Yes."⁸

While "Face the Nation" only aired the clip of Harris's interview transcribed above, the show flagged that "60 Minutes" would air the extended interview the following night.⁹ Here is the transcript of the relevant portion of the "60 Minutes" episode, with edits and additions shown in redline text:

Whitaker: We supply Israel with billions of dollars in military aid, and yet Prime Minister Netanyahu seems to be charting his own course. The Biden-Harris administration has pressed him to agree to a cease-fire, he's resisted. You urged him not to go into Lebanon. He went in anyway. ~~He has promised to make Iran pay for the missile attack, and that has the potential of expanding the war.~~ Does the U.S. have no sway over Prime Minister Netanyahu?

Harris: ~~The aid that we have given Israel allowed Israel to defend itself against 200 ballistic missiles that were just meant to attack the Israelis and the people of Israel. And when we think about the threat that Hamas, Hezbollah, presents, Iran, I think that it is without any question our imperative to do what we can to allow Israel to defend itself against those kinds of attacks. Now [T]he work that we do diplomatically with the leadership of Israel is an ongoing pursuit around making clear our principles, which include the need for humanitarian aid, the need for this war to end, the need for a deal to be done which would release the hostages and~~

⁸ *Id.*, App. A; see also Face the Nation, "Face the Nation" Full Broadcast | Oct. 6, 2024, YouTube (Oct. 7, 2024), <https://www.youtube.com/watch?v=3N-yaqClBqg> (airing relevant portion of Harris's interview from timestamps 3:02–5:25).

⁹ See Face the Nation, *supra* note 8.

~~create a cease fire. And we're not gonna stop in terms of putting that pressure on Israel and in the region including Arab leaders.~~

Whitaker: But it seems that Prime Minister Netanyahu is not listening.

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

~~**Whitaker:** Do we have a real close ally in Prime Minister Netanyahu?~~

~~**Harris:** “I think, with all due respect, the better question is, “Do we have an important alliance between the American people and the Israeli people?” And the answer to that question is, “Yes.”¹⁰~~

The Complaint focuses on the changed portion of Harris’s response to Whitaker’s second prompt.¹¹ CBS’s unedited transcript shows that Harris actually gave a three-sentence response to Whitaker’s comment. The answer in the “Face the Nation” clip is the first sentence verbatim;¹² the second sentence is omitted from both;¹³ and the “60 Minutes” clip takes the last sentence verbatim.¹⁴

¹⁰ Compare Compl., App. B, with *id.*, App. A.

¹¹ See *id.* at 2.

¹² Unedited Transcript of “60 Minutes” Interview Footage of Kamala Harris, Fed. Comm’n’s Comm’n, at 8, ll. 5–10, <https://www.fcc.gov/sites/default/files/Transcript-Transcribed-Unedited-Interview-Footage-6-of-14.pdf> (last visited Mar. 1, 2025) [hereinafter Unedited Transcript] (“Well, Bill, the work that we have done has resulted in a number of movements in that were very much prompted by, or a result of, many things including our advocacy for what needs to happen in the region.”).

¹³ *Id.* at 8, ll. 10–11 (“And we’re not going to stop doing that.”).

¹⁴ *Id.* at 8, ll. 11–14 (“We are not going to stop pursuing what is necessary for the United States to be clear about where we stand on the need for this war to end.”).

In addition to those changes, the transcript and unedited footage expose other edits the Complaint does not discuss.¹⁵ The “Face the Nation” clip generally features more footage from this portion of the interview than the “60 Minutes” clip does. For instance, the “60 Minutes” version cuts a sentence from Whitaker’s first question,¹⁶ as well as all but the first clause of the fifth sentence in the unedited transcript of Harris’s response to it.¹⁷ It also does not include Whitaker’s third question or Harris’s response.¹⁸ The “Face the Nation” clip also cuts the last sentence of Harris’s response to Whitaker’s third question.¹⁹ Both versions also cut the back half of Whitaker’s second prompt.²⁰ Neither version includes Harris’s third sentence to Whitaker’s first question, a confirmation of what she says in the sentence immediately before it.²¹ Additionally, both interview clips cut extraneous clarifying and stage-setting speech from both Whitaker and Harris.²²

¹⁵ This dissection is tedious. But Free Press engages in this exercise precisely to demonstrate the type of analysis that the Commission would be resigned to conducting as a predictable outcome of legitimizing complaints like this one. By creating an entire docket for this Complaint, the Commission could be inundated with similar requests. Suddenly, minor and routine editing choices would be scrutinized. Any dividing line between news distortion and legitimate editing would be obliterated. And these requests would presumably come from all sides of the political spectrum, including those seeking unedited interview transcripts and footage of President Trump.

¹⁶ Compare Unedited Transcript at 6, ll. 21–23, with Compl., App. B.

¹⁷ Compare Unedited Transcript at 7, ll. 1–23, with Compl., App. B.

¹⁸ Compare Unedited Transcript at 8, ll. 15–25, with Compl., App. B.

¹⁹ Compare Unedited Transcript at 8, ll. 18–25, with Compl., App. A.

²⁰ Compare Unedited Transcript at 7, ll. 24–25, 8, ll. 1–4, with Compl., App. A, and *id.*, App. B.

²¹ Compare Unedited Transcript at 7, ll. 2–8, with Compl., App. A, and *id.*, App. B.

²² Compare Face the Nation, *supra* note 8, at 3:02–5:25, and 60 Minutes, *Kamala Harris: The 2024 60 Minutes Interview*, YouTube (Oct. 7, 2024), <https://www.youtube.com/watch?v=TJys7OVH24E>, at 1:30–2:20, with Unedited Transcript at 6, l. 15 (cutting Harris’s “mm-hmm” affirming Whitaker’s statement), *id.* at 6, l. 18 (cutting Whitaker’s “The Biden Administration” for redundancy), *id.* at 7, ll. 1–2 (cutting Harris’s introduction “Well, let’s start with this. On this subject”), and *id.* at 8, ll. 15–16 (cutting Whitaker’s transition statement, “Just one last thing.”).

B. Shortening Footage for Length Concerns, While Still Retaining the Sentiment of the Response, Is a Common Practice that Does Not “Distort” Anything.

Complainant did not take issue with any of the other changes identified above, but claimed that airing different answers in response to Whitaker’s second prompt (“But it seems that Prime Minister Netanyahu is not listening”) constituted news distortion.²³ The Complaint argues that CBS “editing its news program to such a great extent” means that “the general public cannot know what answer the Vice President actually gave to a question of great importance.”²⁴ Complainant intimates that the consequence of this distortion is that the public cannot ascertain Harris’s position on U.S. foreign policy in the Middle East, and possibly her suitability as a presidential candidate.²⁵

It is commonplace for journalists to edit and use smaller parts of a longer answer for brevity.²⁶ Where an entire clip needs to be shortened for broadcasting, such editing might even be necessary to create a finished product. This type of editorial choice is a non-issue, especially when it presents a shorter restatement of an extended response (given in the same answer).

At a common-sense level, the differences cited by Complainant boil down to that type of standard editing practice. And where a program like “60 Minutes” gets a set time slot, and the raw footage runs longer than the duration for a segment, cutting certain portions when others can stand

²³ Compl. at 2.

²⁴ *Id.* at 6.

²⁵ *See id.* at 4 (“Here, the question is incredibly consequential—U.S. foreign policy toward the Middle East in the middle of a war—and the timing is also significant: weeks before a presidential election, and with a candidate who has sat for very few news interviews.”).

²⁶ *See Journalism Ethics Guidelines*, Scripps 1, <https://scripps.com/wp-content/uploads/2024/03/SCRIPPS-JOURNALISM-ETHICS-GUIDELINES-2024.pdf> (last visited Mar. 1, 2025) (“We use quotes or sound bites to best tell the story — but never to change the intent or meaning of what the source said. Partial quotes are acceptable when using only a portion of a quote does not change the meaning or context.”); 60 Minutes, *60 Minutes publishes transcript, video requested by FCC*, CBS News (Feb. 5, 2025), <https://www.cbsnews.com/news/60-minutes-publishes-transcripts-video-requested-by-fcc> (“In reporting the news, journalists regularly edit interviews – for time, space or clarity.”).

on their own is inevitable. Here, the “60 Minutes” version of the interview condensed the fifty-three-minute-and-thirty-three-second unedited version to fifteen minutes and nineteen seconds, covering topics including the war in Gaza, unemployment in America, the economy, immigration, the war in Ukraine, and gun ownership.²⁷ The cuts in Harris’s responses, taken separately in each respective clip and together in the unedited transcript, all reflect her views on the efficacy of the United States’ record of intervention and advocacy in Israel. The “Face the Nation” excerpt includes Harris’s backward-looking explanation of what she viewed the United States to have done already, and the “60 Minutes” excerpt featured a forward-looking statement of her position on what the United States should do in the future. Taking different parts of her longer response, where the context of one part does not depend on the other, is an acceptable and core journalistic practice. To find this type of splicing impermissible under the Commission’s news distortion doctrine would have disastrous chilling effects on journalists covering political matters, because it would essentially suggest that reporters cannot edit political candidates’ answers for brevity or clarity. At the very least, doing so would foster fear that such standard editing practices will draw administrative scrutiny.

In considering the Complaint’s allegations, it is also worth taking a step back to pin down precisely what message the Complaint claims has been distorted. To the extent that Complainant suggests CBS elided Harris’s “actual” response to the question,²⁸ our analysis above shows that this claim is unfounded. The unedited transcript reveals that both the “Face the Nation” and “60 Minutes” answers were direct responses to the same question posed and that they were just different excerpts of the same answer. If this is the “distortion” that Complainant raises, then at

²⁷ 60 Minutes, *supra* note 22.

²⁸ *See* Compl. at 6.

this stage, we are now able to verify that there was no “transform[ation of] an interviewee’s answer” into “a fundamentally different answer” and the Complaint should be dismissed once again.²⁹

If instead the implicit accusation here is that by editing her interview, CBS made Harris seem like a more suitable candidate than she actually was,³⁰ such a claim would require the Commission to first take a position on the fitness of a political candidate. It would be untenable for a nonpartisan, independent agency to weigh in on such a matter, and an offensive proposition under the First Amendment for the government to supplant a newsroom’s views with its own on the topic.³¹ Taking such a position publicly would also be unworkable because there is no

²⁹ *Id.* at 3.

³⁰ Reading this subtext into the Complaint is not unfounded. President Trump’s lawsuit against CBS over the same broadcast makes the implicit explicit, and other Trump administration officials have also made this claim. *See* Complaint at 17, *Trump v. CBS Broad., Inc.*, No. 2:24-cv-00236-Z (N.D. Tex. Oct. 31, 2024) (“The edited broadcast created confusion because that was CBS’s intent: to do whatever it took to portray Kamala as intelligent, well-informed, and confident when, in fact, she is none of the above.”); Will Sharf, *CBS News, Release the Full Kamala Harris Interview Transcript Now*, *Federalist* (Oct. 21, 2024), <https://thefederalist.com/2024/10/21/cbs-news-release-the-full-kamala-harris-interview-transcript-now> (“CBS News now stands accused of deliberately distorting its news coverage for nakedly political purposes, to prop up Kamala Harris’ flailing presidential campaign by attempting to hide her inability to answer even simple questions about her policy positions and how she would act if elected president.”).

³¹ *Cf. Complaints Covering CBS Program “Hunger in America”*, Memorandum Opinion, 20 F.C.C.2d 143, 147 (1969) [hereinafter, *Hunger in America*] (“In these circumstances, it is, we believe, inappropriate to hold an evidentiary hearing and upon that basis (i.e., credibility or demeanor judgments), make findings as to the truth of the situation. The truth would always remain a matter open to some question, and unlike a tort or contract case, where a judgment must be made one way or another, that is not the case here. The issue presented here by the complaints is not one under the fairness doctrine, concerned with presentation of contrasting viewpoints (a different matter upon which we do not pass), but rather, whether to find the licensee has sought deliberately to slant the news. . . . [I]ntervention by the Government should be limited to cases where there is extrinsic evidence involving the licensee or management or in the unusual case where the matter can be readily and definitely resolved. That is not this case.”); *Editorializing by Broadcast Licensees*, Report, 13 F.C.C. 1246, 1255 (1949) (“[F]ears have been expressed that any effort on the part of the Commission to enforce a reasonable standard of fairness and impartiality would inevitably require the Commission to take a stand on the merits of the particular issues considered in the programs broadcast by the several licensees, as well as exposing the licensees to risk of loss

objective “truth” for this matter—while Complainant may argue that the “60 Minutes” version made Harris look better because the shorter clip conveyed concision, one could just as easily argue that the longer answer featured on “Face the Nation” made her look better because her answer was more substantive. If CBS’s depiction of Harris’s fitness as a presidential candidate is the impetus driving the Complaint, the Commission must promptly discontinue its involvement in the matter.

III. THE COMPLAINT IS MOOT AND SHOULD BE DISMISSED ACCORDINGLY.

Before wading into the elements of news distortion,³² Free Press raises a threshold issue: This docket should not have been created in the first place because the Complaint is moot. As relief for the allegations outlined above, Complainant requested only that the Commission direct CBS to “release the complete transcript of the Vice President’s interview with ‘Sixty Minutes.’”³³ CBS has since provided the unedited transcript and video of the “60 Minutes” interview in question to the Commission’s Enforcement Bureau, and the Commission made those materials public.³⁴ Previously, Chairman Carr publicly stated that releasing the transcript “would inoculate, entirely, CBS from that FCC complaint.”³⁵ Commissioner Simington has also said essentially the same,

of license because of ‘honest mistakes’ which they may make in the exercise of judgment with respect to the broadcasts of programs of a controversial nature. We believe that these fears are wholly without justification, and are based on either an assumption of abuse of power by the Commission or a lack of proper understanding of the role of the Commission.”).

³² See *infra* Section IV.

³³ Compl. at 5.

³⁴ See *Public Notice* at 1; see 60 Minutes, *supra* note 26 (also providing the unedited materials).

³⁵ Kristen Altus, *FCC commissioner urges CBS to release the transcript from Harris’ ‘60 Minutes’ interview*, Fox Business (Oct. 22, 2024), <https://www.foxbusiness.com/media/fcc-commissioner-cbs-release-transcript-harris-60-minutes-interview> (then-Commissioner Carr stating in an interview, “I don’t think this needs to be a federal case because I think CBS should release it . . . then that would inoculate, entirely, CBS from that FCC complaint”); Glenn Beck (@glennbeck), Twitter (Oct. 21, 2024, 3:18 PM), <https://x.com/glennbeck/status/1848443828459504097> (then-Commissioner Carr stating in another interview, “[i]n my view, that’s the best way forward here: release the transcript and there’s no reason to have this before the FCC”).

posting that releasing the transcript would remove this Complaint from administrative review.³⁶

This mootness issue alone is sufficient justification to close this docket.³⁷

The Complaint's procedural posture also muddies the analytical waters. The Commission more commonly reviews news distortion allegations when they are made in petitions to deny renewal of a broadcaster's license, based on a licensee's duty to serve the public interest under 47 U.S.C. § 309.³⁸ There, a two-step inquiry requires that petitioner: (1) make a prima facie case; and (2) raise a substantial and material question of fact that merits a hearing.³⁹ But here, where all Complainant requested was the complete "60 Minutes" interview transcript, Complainant and its defenders might try to chalk up the Complaint's evidentiary deficiencies to its procedural posture.

³⁶ See Nathan Simington (@SimingtonFCC), Twitter (Oct. 21, 2024, 1:00 PM), <https://x.com/SimingtonFCC/status/184840898888797549> ("Broadcast news distortion is an extraordinarily narrow complaint category. CBS could easily remove the predicate for any further discussion by releasing the transcript.").

³⁷ And even if the Commission *can* open dockets on moot items, that does not mean it *should*, particularly in the fraught space of FCC oversight of broadcasters' editorial discretion.

³⁸ See *Application for Renewal of License WXYZ-TV, Detroit, Michigan File No. BRCT-20050601AIB Facility ID No. 10267*, Letter, 22 FCC Rcd 12744, 12746 (2007) [hereinafter *WXYZ-TV*] ("The Commission has not codified its news distortion policy and, therefore, for purposes of section 309(k)(1) of the Act, any violation is only relevant to the extent it indicates that grant of the application would not be in the public interest."); see also *New World Commc'ns of Tampa, Inc. v. Akre*, 866 So.2d 1231, 1233 (2003) ("The FCC has never published its news distortion policy as a regulation with definitive elements and defenses. Instead, the FCC has developed the policy through the adjudicatory process in decisions resolving challenges to broadcasters' licenses.").

³⁹ See *Applications for Renewal of Licenses of Television Stations at Denver, Colorado KCNC-TV (BRCT-971126KH) KMGH-TV (BRCT-971125KK) KUSA-TV (BRCT-971123KP) KWGN-TV (BRCT-971201LS)*, Letter, 12 Com. Reg. (P&F) 79 (MMB 1998) (citing *Astroline Commc'ns Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)) ("In assessing the merits of a petition to deny, a two-step process is required under Section 309(d)(1) and (2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), (2). The first test is whether the petition demonstrates by specific allegations of fact that grant of the application would be prima facie inconsistent with the public interest, convenience and necessity. If such a prima facie case is alleged, the second test is whether -- on the basis of the application, the pleadings, or other matters of which the Commission may take official notice -- a substantial and material question of fact is presented to warrant further inquiry in a hearing.").

That is to say, the procedural posture of this Complaint may allow it to evade meaningful comparison to previous FCC administrative decisions and case law decided at a different stage. In further analyzing the Complaint, any such excuse-making for the Complaint’s defects is a product of the poor fit created by establishing a docket over a moot complaint—one which requested a transcript that has since been released.

Additionally, the fact that the Complaint is moot raises questions about what the Commission seeks to accomplish through this docket.⁴⁰ The value of “broader public

⁴⁰ Given the coinciding timing of the creation of this docket with President Trump’s \$20 billion lawsuit against CBS based on the same events, and with the review of an \$8 billion proposed merger between CBS parent company Paramount and Skydance Media, this docket’s establishment around a moot complaint gives the appearance that FCC leadership is exerting pressure on CBS to settle the lawsuit in an appeal to quash this inquiry and facilitate the merger. Others have already drawn this conclusion. *See* WSJ Ed. Bd., *Trump, CBS, and ‘News Distortion’*, Wall St. J. (Feb. 9, 2025), <https://www.wsj.com/opinion/trump-cbs-and-news-distortion-broadcast-license-kamala-harris-interview-6591835d> (“Mr. Trump clearly wants to intimidate the press, and it’s no credit to the FCC to see it reinforcing that with an inquiry. The bad Biden FCC precedent against Fox is no justification for the Trump FCC to do the same against the liberal press.”); *id.* (“What raises eyebrows, however, is that Mr. Trump is also suing the network, demanding damages of—Mike Myers’s Dr. Evil voice here—\$20 billion.”); Robert Corn-Revere, *A plea for institutional modesty*, FIRE (Feb. 7, 2025), <https://www.thefire.org/news/plea-institutional-modesty> (former FCC chief counsel to Chairman Quello cautioning, “The practice of making threats (veiled or otherwise), demanding answers or documents from licensees, or otherwise exerting informal pressure has been sufficiently common that the courts have given it a name: regulation by raised eyebrow. It is also generally called ‘jawboning.’ Some officials believe they can avoid judicial scrutiny if they only act informally, confining their actions to bullying through unofficial actions. But they are wrong. The DC Circuit is keenly aware that the FCC can abuse its authority in this way and has limited ‘raised eyebrow’ tactics in past cases. And the Supreme Court again last term reaffirmed that government officials violate the First Amendment if they use coercive threats to restrict speech. . . . The court observed that public officials may denounce disfavored speech all they like, but they cannot flex their regulatory muscles in order to silence the speaker.”); Am. Newsroom, *Trump FCC chair pick stresses need to ‘restore’ First Amendment rights*, Fox News (Nov. 19, 2024), <https://www.foxnews.com/video/6364907502112> (Carr stating in an interview that “There’s also a, a news distortion complaint at the FCC still, um, having to do with CBS, and CBS has a transaction before the FCC, and I’m pretty confident that that news distortion complaint over the ‘60 Minutes’ transcript is something that is likely to arise, uh, in the context of the FCC review of that transaction.”). The potential appearance of coercion alone is yet another reason for the Commission not to proceed further with this docket.

participation” over this moot request pales in comparison to the chilling effect this inquiry will impose on journalists over standard and innocuous editing practices.⁴¹ Rather than risking government scrutiny over similar frivolous claims, journalists may choose not to report on certain issues at all.

The Complaint is moot, and never should have been reinstated. For the purposes of the next section of this Comment, however, Free Press will assess the Complaint’s failed attempt to make a full-throated, viable news distortion claim as if it has a cognizable request for relief.⁴²

IV. THE BARE ALLEGATIONS OF THE COMPLAINT FALL FLAT IN LIGHT OF THE COMMISSION’S NEWS DISTORTION ADJUDICATIVE HISTORY AND PRINCIPLES.

The Commission engages in a two-step analysis to evaluate news distortion claims under the public interest standard. In this section, Free Press will test the Complaint under this framework. It does not fare well.

A. The Complaint Flunks the Commission’s News Distortion Criteria at Every Step.

According to previous Commission and court decisions on news distortion, “the appropriate questions for the Commission to ask at the threshold stage are first, whether the petitioner’s allegations make out a prima facie case, and second, whether they raise a substantial and material question of fact regarding the licensee’s ability to serve the public interest.”⁴³ Failure

⁴¹ See *Public Notice*, *supra* note 4. The level of attention the Commission has given the matter, including the display of a banner on the FCC website inviting submission of brief comments, is inconsonant with the Complaint’s mootness. See *Consumer Inquiries and Complaints Center*, Fed. Comm’ns Comm’n, <https://consumercomplaints.fcc.gov/hc/en-us> [<https://archive.ph/TUcsP>] (last visited Mar. 1, 2025).

⁴² Cf. *Am. Legal Found. v. FCC*, 808 F.2d 84, 87 (D.C. Cir. 1987) (procedural history included CIA complaint requesting investigative hearing and consideration of alleged abuses in ruling on applications by ABC stations for license renewal).

⁴³ *Serafyn v. FCC*, 149 F.3d 1213, 1220 (D.C. Cir. 1998).

at either step ends the inquiry.⁴⁴ For the reasons described below, the Complaint cannot pass either step.

1. Complainant fails to raise a prima facie case of news distortion.

At the first step of the inquiry, the task of evaluating whether the Complaint makes out a prima facie case “is much like that performed by a trial judge considering a motion for directed verdict: if all the supporting facts alleged in the [petition] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”⁴⁵ The burden rests with Complainant to establish the prima facie case, “including the existence of an appropriate issue.”⁴⁶

For the purposes of this step, the factfinder assumes all the supporting facts alleged in the Complaint are true: that WCBS did in fact air two different answers to the same question across two different programs; that the general public no longer has confidence in what Harris actually said; that CBS refused to provide Complainant with the transcript of the show in contravention of past practice; and that the question was consequential because of its subject matter and timing.⁴⁷ Even assuming the alleged facts as true, the Complaint does not raise an appropriate issue for the Commission’s involvement. The unedited “60 Minutes” transcript reveals that each answer was

⁴⁴ See *Mobile Commc’ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1410 (D.C. Cir. 1996) (finding that Commission not need not take § 309(d) two-step inquiry in order because a negative resolution at either stage is sufficient); *TVT License, Inc.*, 22 FCC Rcd. 13591, 13596 n.36 (2007) [hereinafter *TVT*] (citing *Mobile Communications Corp. of America* for the same proposition). If both steps are satisfied, the Commission must hold a hearing on the matter. See *Serafyn*, 149 F.3d at 1216 (“As the Commission interprets it, § 309 erects a two-step barrier to a hearing . . .”).

⁴⁵ *WXYZ-TV*, 22 FCC Rcd at 12746 (alteration in original) (quoting *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)).

⁴⁶ *Galloway v. FCC*, 778 F.2d 16, 19 (D.C. Cir. 1985) (citing *Healey v. FCC*, 460 F.2d 917, 921 (D.C. Cir. 1972)).

⁴⁷ See Compl. at 2–4.

indeed a response Harris gave directly to the question.⁴⁸ Because the transcript now clearly shows both of Harris's answers were responses to the same question asked by Whitaker, it nullifies the Complaint's allegation that "the general public no longer has any confidence as to what the Vice President actually said in response to the query."⁴⁹ The public now knows her full response.

The sole allegation of the Complaint having been resolved, Complainant fails to make a prima facie case because there is no longer any existence of an appropriate issue. The Complaint does not allege that using different portions of a larger response to a question is news distortion.⁵⁰ Nor is it the proper role of the Commission to read into the bare-boned Complaint such an allegation where it does not already exist.⁵¹ Without any remaining viable allegations of a news

⁴⁸ See WSJ Ed. Bd., *supra* note 40 ("A preview of the interview that ran on 'Face the Nation' aired the initial half of Ms. Harris's answer, where she argued that Mr. Biden's pressure hadn't been for naught, while '60 Minutes' itself used the other half, where the VP pledged to keep it up. *Both pieces are responsive to the question.* The first is more of a classic Kamala word salad, which is news, but the second might be more suggestive of how a President Harris might behave in office, which is also news. In other words, this looks like editorial judgment, not an instance of splicing footage to create a misleading response that never happened.") (emphasis added); see also 60 Minutes, *supra* note 26 ("Each excerpt reflects the substance of the vice president's answer. As the full transcript shows, we edited the interview to ensure that as much of the vice president's answers to 60 Minutes' many questions were included in our original broadcast while fairly representing those answers. 60 Minutes' hard-hitting questions of the vice president speak for themselves.").

⁴⁹ Compl. at 3.

⁵⁰ Nor could Complainant possibly raise this because it did not have access to the transcript at the time of filing. Again, it is the Commission that has manufactured this awkward fit by creating a docket at this juncture.

⁵¹ Cf. *Galloway*, 778 F.2d at 19 ("If [Complainant] wanted to cure the insufficiency of his pleadings, he should have sought a rehearing before the Commission on an amended complaint, rather than appealing to this court. He did not do so."). Chairman Carr seems all too willing to bypass this defect and fill in allegations that the Complaint does not make. See Cynthia Littleton, *FCC Chief Brendan Carr Says Trump 'Has Been Right' on Media Bias Claims Amid CBS Probe; Anna Gomez Decries 'Chilling Effect' and 'Weaponization' of Agency*, Variety (Feb. 7, 2025), <https://variety.com/2025/tv/news/fcc-60-minutes-weaponization-brendan-carr-anna-gomez-1236301172> (noting that in Fox News interview, Chairman Carr "flatly asserted that Trump 'has been right on these media bias issues'" and that the 60 Minutes interview "looks like it has been pretty chopped up").

distortion issue, the factual allegations raised in the Complaint (assumed true at this stage) do not amount to a prima facie case. The Commission could stop its inquiry there and dismiss the Complaint.

2. *The Complaint also does not raise a substantial and material question of fact.*

The second step creates independent grounds for dismissal. “An allegation of news distortion is ‘substantial’ if it meets two conditions: it is deliberately intended to slant or mislead; and it involves a significant event and not merely a minor or incidental aspect of the news report.”⁵² The materiality prong is satisfied “only if the licensee itself is said to have participated in, directed, or at least acquiesced in a pattern of news distortion.”⁵³ Free Press discusses each prong in turn, including their sub-elements. As discussed below, the Complaint does not meet a single requirement.

i. The allegation is not substantial.

A complaint’s news distortion allegation is substantial if it satisfies two conditions:

[F]irst, . . . the distortion . . . [must] be deliberately intended to slant or mislead. It is not enough to dispute the accuracy of a news report . . . or to question the legitimate editorial decisions of the broadcaster The allegation of deliberate distortion must be supported by “extrinsic evidence,” that is, evidence other than the broadcast itself, such as written or oral instructions from station management, outtakes, or evidence of bribery.

Second, the distortion must involve a significant event and not merely a minor or incidental aspect of the news report. . . . [T]he Commission tolerates . . . practices [such as staging and distortion] unless they “affect [] the basic accuracy of the events reported.”⁵⁴

⁵² *TVT*, 22 FCC Rcd at 13595.

⁵³ *Id.*

⁵⁴ *Serafyn*, 149 F.3d at 1217 (alteration in original) (quoting *Galloway*, 778 F.2d at 20).

As part of the second condition, the Commission “has refused to investigate inaccurate embellishments concerning peripheral aspects of news reports or attempts at window dressing which concerned the manner of presenting the news” where the facts of the story are accurately broadcast.⁵⁵

- a. The Complaint fails to offer any evidence supporting an inference that WCBS deliberately intended to slant or mislead viewers.

To adequately allege deliberate distortion, “[i]t is not enough to dispute the accuracy of a news report . . . or to question the legitimate editorial decisions of the broadcaster.”⁵⁶ Rather, a complaint “must be supported by ‘extrinsic evidence.’”⁵⁷

The Commission has historically considered the extrinsic evidence requirement as the most important, central element of the entire inquiry.⁵⁸ The rationale for the special consideration for this element involves existential questions about the appropriate role of this Commission as weighed against constitutional concerns. The Commission has reasoned that, without extrinsic evidence,

the matter would again come down to a judgment as to what was presented, as against what should have been presented — a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency.⁵⁹

⁵⁵ *Galloway*, 778 F.2d at 20 (cleaned up).

⁵⁶ *Id.* (citations omitted).

⁵⁷ *Id.* (citing *Hunger in America*, 20 F.C.C.2d at 151).

⁵⁸ *See, e.g., Complaints Concerning Network Coverage of the Democratic Nat’l Convention*, 16 F.C.C.2d 650, 657–58 (1969) [hereinafter *DNC*] (“We stress that in this area of staging or distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events.”); *Hunger in America*, 20 F.C.C.2d at 150 (same).

⁵⁹ *DNC*, 16 F.C.C.2d at 657–58.

Indeed, the Commission risks running up against the First Amendment when making this inquiry absent extrinsic evidence.⁶⁰ Without such extrinsic evidence about intent or motive, it is essentially impossible to differentiate standard journalism practices from distortion.⁶¹ Extrinsic evidence is “evidence outside the broadcast itself” and “includes written or oral instructions from station management, outtakes, or evidence of bribery,”⁶² as well as “testimony, in writing or otherwise, from ‘insiders’ or persons who have direct personal knowledge of an attempt to falsify the news.”⁶³

The Complaint clearly does not offer any extrinsic evidence and accordingly should be dismissed. Indeed, the entire point of the Complaint was to obtain the unedited transcript as extrinsic evidence, *because Complainant had none*. And now that the transcript has been released, there is still no extrinsic evidence even gesturing at an intent to distort, because the transcript contributes nothing to the question of motive. As the Commission recognized in January, the Complaint merely made allegations “in conclusory fashion” and failed to submit any extrinsic evidence on this point.⁶⁴

At most, the transcript and two video clips show that Harris’s answers in each are shorter portions of her complete answer. But it is insufficient for a news distortion claim to merely dispute

⁶⁰ See *Complaints Against Screen Gems Stations, Inc., Station WVUE(TV), New Orleans, La. & Am. Broad. Companies, Inc.*, 46 F.C.C.2d 252, 257 (1974) (“Because of First Amendment considerations, we believe it is inappropriate for us to make inquiry into this sensitive area in the absence of extrinsic evidence Our role in this area is, therefore, very limited and the licensee’s discretion is commensurately broad.”).

⁶¹ *Id.* (“Any time a producer, news director or editor decides not to print or broadcast a news story, he is, in a sense, ‘suppressing’ news.”).

⁶² *Serafyn*, 149 F.3d at 1223 (citations omitted).

⁶³ *Complaint of Denny Mulloy Against WBNS-TV Columbus, Ohio*, Order, FCC 86-360, 1986 WL 290825, Attach. A, at *5 (OHMSV Aug. 13, 1986) [hereinafter *WBNS-TV*].

⁶⁴ *Preserving the First Amendment*, *supra* note 2, at 2.

accuracy.⁶⁵ There is simply nothing in the Complaint beyond that—no evidence that CBS intended to distort Harris’s statement, and certainly no evidence even hinting at the possibility that management or the broadcaster ordered anyone working for either “Face the Nation” or “60 Minutes” to shorten her answer in order to distort the broadcast.

In claiming that it has “clear external evidence of outtakes necessary for this Commission to act,” Complainant points to the “Face the Nation” and “60 Minutes” clips.⁶⁶ But where an outtake is generally understood to be a part of a film recording not included in the final version,⁶⁷ and where extrinsic evidence is held to be “outside the broadcast itself,”⁶⁸ the cited clips are not extrinsic evidence because they were broadcasted. Moreover, they do not go to intent but rather to accuracy.

The lack of evidence in this Complaint stands in stark contrast with previous news distortion claims before the Commission. For example, in *Serafyn v. Federal Communications Commission*, the petitioner claimed that CBS had engaged in news distortion by suggesting in a “60 Minutes” segment that most Ukrainians are anti-Semitic. In particular, the petitioner alleged that there was misleading sound editing, incorrect language translation, and soundbites of interviews taken out of context. But there, the petitioner’s claims were submitted alongside the broadcast itself, outtakes of interviews, a letter from an interviewee stating that his words were taken out of context, a statement from another interviewee that the producer of the show misled

⁶⁵ See *Galloway*, 778 F.2d at 20 (“It is not enough to dispute the accuracy of a news report . . . or to question the legitimate editorial decisions of the broadcaster”) (citations omitted). *But cf.* Compl. at 3 (arguing about the accuracy of the interview, namely that “CBS has taken a single question and transformed Harris’ answer”).

⁶⁶ Compl. at 2.

⁶⁷ See, e.g., *Outtake*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/outtake> (last visited Mar. 1, 2025).

⁶⁸ *Serafyn*, 149 F.3d at 1223.

him, viewer letters, a dictionary supporting petitioner’s claim that a word in the broadcast was mistranslated, historical information about the subject matter covered, information that CBS had rebuffed the offer of a history professor to help it understand the subject, and “seven other items of evidence.”⁶⁹ The instant Complaint points to no such support.

Nor is the Complaint comparable to the petition to deny in *TVT*, where petitioners argued that a Fox Television subsidiary distorted the news by failing to air their original report on synthetic bovine growth hormone use by Florida dairy farmers and instead broadcasting a version that was more favorable to Monsanto, the company that produces the hormone.⁷⁰ Petitioners supported their claims with evidence including statements made by station management during the editorial process, information from petitioners’ report that petitioners would have kept in absent pressure from management, and an affidavit from a reporter from another station.⁷¹ That is substantially more evidence compared to the Complaint in this docket, which offers none. Yet even considering the extrinsic evidence in *TVT*, the Commission found that the “totality of the evidence in the record indicate[d] that the case involve[d] an editorial dispute rather than a deliberate effort to distort the news.”⁷²

The Complaint is instead most analogous to the one at issue in *Complaint Concerning the CBS Program “Selling of the Pentagon.”*⁷³ The *Selling of the Pentagon* complainant was concerned with an allegation that “60 Minutes” “had so edited and rearranged as to misrepresent”

⁶⁹ *Id.* at 1217–18.

⁷⁰ 22 FCC Rcd at 13597.

⁷¹ *See id.* at 13592–93.

⁷² *Id.* at 13596.

⁷³ 30 F.C.C.2d 150 (1971) [hereinafter *Selling of the Pentagon*].

the content of an interview—including by cutting portions of the interviewee’s answers.⁷⁴ There, the Commission held:

[I]acking extrinsic evidence or documents that on their face reflect deliberate distortion, we believe that this government licensing agency cannot properly intervene. It would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy — dependent always on journalistic judgment — across which broadcasters must not stray.⁷⁵

An epitomical display of the free speech concerns at play in news distortion disputes, *Selling of the Pentagon* underscores the core justification for the extrinsic evidence requirement in the first place. The Commission reasoned that the journalistic function of broadcasters

necessarily involves selection and editorial judgment. And, in the absence of extrinsic evidence, documentary or otherwise, that a licensee has engaged in deliberate distortion, for the Commission to review this editing process would be to enter an impenetrable thicket. On every single question of judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion.⁷⁶

The Complaint at the center of this docket raises these precise concerns and leads the Commission headlong into this same thicket.⁷⁷

⁷⁴ *Id.* at 150–51.

⁷⁵ *Id.* at 152.

⁷⁶ *Id.* at 152–53.

⁷⁷ Complainant has not yet, but may attempt to argue now that the mismatch between the clips and the transcript is sufficient evidence of such intent. See *Serafyn*, 149 F.3d at 1224 (“Our point is only that as an analytical matter a factual inaccuracy can, in some circumstances, raise an inference of such intent.”). But the issue for the D.C. Circuit in *Serafyn* was that the Commission “categorically eliminated factual inaccuracies from consideration as part of its determination of intent,” the “chief example” being a literal mistranslation of words, not an editorial choice to shorten an answer. *Id.* The question at this stage, which the D.C. Circuit faulted the Commission for getting wrong in *Serafyn*, is whether the totality of the evidence raises “sufficient doubt” over whether the licensee engaged in news distortion. *Id.* at 1216 (citing *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)). Absent any other evidence, as is the case here, the factual accuracy claim alone does not raise a sufficient question of intent, particularly where the edited transcript reveals that both responses were part of the same larger response. See *TVT*, 22 FCC Rcd at 13597 (“Taken together, therefore, none of the factual inaccuracies alleged by the Petitioners in the final BGH report are egregious or obvious enough to raise an inference of intent

b. The alleged distortion involved a merely incidental aspect of the broadcasted program.

In addition to requiring extrinsic evidence, a viable news distortion allegation also “must involve a significant event and not merely a minor or incidental aspect of the news report.”⁷⁸ The Commission will not investigate “‘inaccurate embellishments concerning peripheral aspects’ of news reports or ‘attempts at window dressing which concerned the *manner* of presenting the news’ as long as ‘the essential facts of the news stories to which these presentational devices related were broadcast in an accurate manner.’”⁷⁹

The Commission has generally found that matters of journalistic judgment, concerning the manner of how news is presented, are not significant for purposes of this step, so long as those changes do not affect the basic accuracy of the broadcast.⁸⁰ These permissible editing choices

to distort.”); *cf. Serafyn*, 149 F.3d at 1217–18 (factual inaccuracy only one of several pieces of evidence offered). Finally, Free Press maintains that it would strain belief to construe the Complaint’s vague cite to a tweet by Mollie Hemingway—who does not work for CBS, WCBS, or any of the programs in question—as evidence of intent to distort. *See* Compl. at 3 (citing Mollie Hemingway (@MZHemingway), Twitter (Oct. 12, 2024, 2:33 PM), <https://x.com/MZHemingway/status/1845170976616583339>). Nor has Complainant claimed it as such. In any case, the assertion is hearsay and a conclusory statement made by an individual with no personal knowledge of the matter. *See* Fed. R. Evid. 801; *cf. Fed. Commc’ns Comm’n, THE PUBLIC AND BROADCASTING 11* (2021) [hereinafter *THE PUBLIC AND BROADCASTING*], https://www.fcc.gov/sites/default/files/public_and_broadcasting_0.pdf (“The Commission will investigate a station for news distortion if it receives documented evidence of rigging or slanting, such as testimony or other documentation, from individuals with *direct personal knowledge* that a licensee or its management engaged in the intentional falsification of the news.”) (emphasis added). Neither the tweet nor any discrepancy between the two clips amounts to a sufficient showing for Complainant to raise a question of intent.

⁷⁸ *Galloway*, 778 F.2d at 20.

⁷⁹ *Id.* (emphasis in original) (quoting *Applications of WPIX, Inc. (WPIX), New York, New York for Renewal of License; Forum Communications, Inc., New York, New York for Construction Permit for New Television Broadcasting Station*, 68 F.C.C.2d 381, 385–386 (1978) [hereinafter *WPIX*]).

⁸⁰ *See DNC*, 16 F.C.C.2d at 656 (“Few would question the professional propriety of asking public officials to smile again or to repeat handshakes, while the cameras are focussed upon them. In short, while there can, of course, be difficult gray areas, there are also many areas of permissible licensee judgment in this field.”); *WPIX*, 68 F.C.C.2d at 386 (“The news events reported and

include: shooting multiple takes to capture different angles when using a single camera;⁸¹ filming multiple takes of the same question and only airing one response;⁸² using a shot of an interviewee responding to one question as if the interviewee is answering another, where the transcript reflects that the substitute doesn't change the general sentiment of the interviewee's unaired answer;⁸³ cutting part of an interviewee's response providing more nuance;⁸⁴ airing one of two different responses to the same question absent evidence that the licensee prompted the interviewee to change their answer;⁸⁵ and arranging the broadcast of current and accurate news stories along with 1–2 day-old silent film without indicating that the film accompanying the story was not shot on the same day.⁸⁶

discussed on WPIX's evening news show referred to actual occurrences or facts. None of the material used to embellish the news stories deceived the public about a matter of significance or affected the essentially accurate verbal accounts contained in the news items.”).

⁸¹ See *Galloway*, 778 F.2d at 20 (“The technological imperatives of TV news may also require a certain amount of stage managing, for example, shooting ‘reverses.’ These were not the kinds of practices that concerned the Commission.”).

⁸² See *id.* at 21 (“Since Ms. Johnson actually did participate in the fraud and did confess, even if not in precisely the manner portrayed, the ‘basic accuracy of the events reported,’ . . . has not been distorted. Whatever we may think of this playacting as a journalistic practice, it does not violate FCC rules as currently applied.”) (citation omitted).

⁸³ See *id.* at 21–22 (“While the substitution of an answer to another question may fairly be considered distortion *per se*, when it does not affect the ‘basic accuracy’ of the answer it is not “significant” enough to violate FCC rules.”).

⁸⁴ See *id.* at 22 (“The decision not to include Petty’s cautionary remarks is more ‘a matter of editorial discretion [] than an act of deliberate distortion.’”) (citing FCC Staff Ruling).

⁸⁵ See *id.* (“The outtakes show that Dan Rather twice asked insurance investigator Crawford to estimate how much money was involved in a typical fraudulent claim. In the first take (the one not broadcast) Crawford replied, ‘[A]bout eight thousand dollars.’ In the second take, the one ultimately included in the broadcast, Crawford increased his estimate to ‘[a]pproximately twelve thousand dollars.’ . . . The transcript unquestionably shows that Crawford revised his estimate, but despite Galloway’s contention that ‘there is no other explanation,’ it does not show that he did so at the urging of CBS.”).

⁸⁶ *WPIX*, 68 F.C.C.2d at 385–386 (“The judgmental errors by the staff in dressing up the stories were unnecessary, but they were clearly the type of journalistic or editorial mistake which can occur in the preparation of a daily news show under the pressure of deadlines, especially where

The Commission summarized these types of decisions best in *DNC*, where it noted that “[t]he judgment when to turn off the lights and send the cameras away is again not one subject to review by this Commission. We do not sit to decide: ‘Here the licensee exercised good journalistic judgment in staying’; or ‘Here it should have left.’”⁸⁷

The distortion alleged in the Complaint is most analogous to some of the criticism made against CBS’s editing choices in *Galloway*. To the extent there remains a live distortion claim after the transcript has been released, it must be that by excerpting different portions of Harris’s response, “60 Minutes” misled viewers by denying them the opportunity to evaluate her complete answer. In *Galloway*, CBS was accused of news distortion because it did not include interviewee Robert Petty’s full answer with cautionary remarks.⁸⁸ Instead, CBS aired a clip of Petty answering briefly in the affirmative without qualification.⁸⁹ The D.C. Circuit found that CBS did not violate the Commission’s news distortion policy in *Galloway*, and the grievance at issue there is on all fours with the alleged distortion before the Commission today.⁹⁰

As explained in Section II, the choice to air different pieces of Harris’s response to Whitaker’s question does not change the basic accuracy of the interview. The first part of her answer, featured on “Face the Nation,” is responsive to the challenge underlying Whitaker’s prompt that the Biden-Harris administration was ineffective in negotiating with Israeli Prime

stories of a continuing nature are concerned. However, these mistakes did not go to the substance of the news.”).

⁸⁷ 16 F.C.C.2d at 656.

⁸⁸ *Galloway*, 778 F.2d at 21–22.

⁸⁹ *Id.*

⁹⁰ Arguably the facts in *Galloway* are worse. Not only did CBS there cut some of Petty’s more nuanced answer, but it replaced his response to the question with a shot of him saying “Yes” to another question in the interview. *Id.* Here, Harris’s aired response was part of her full response to the question posed.

Minister Netanyahu; her first sentence rebuffs the implication by asserting that the administration’s advocacy prompted change. The second part, featured on “60 Minutes,” also reflects the truth of what she said, and responds to Whitaker’s prompt by stating that she intends to continue advocacy and work in the region. The choice to select the longer portion for “Face the Nation” and the shorter for “60 Minutes” was one of editorial discretion. The Commission should not wade into the journalistic morass of deciding what should survive the cutting room floor.⁹¹

Additionally, when evaluating whether an alleged distortion is a significant event, the Commission has factored in the proportion of time in the broadcast that was allotted to the content in question.⁹² Here, the dialogue in question was part of a much longer interview, taking up just three pages of the forty-five page transcript and approximately three minutes and thirty-six seconds of the fifty-three-minute-and-thirty-three-second video.⁹³ It is entirely possible that the “60 Minutes” producers cut some of Harris’s longer response to make sure there was time to expose viewers to her answers on a wider range of questions, as well as to air an interview with her running

⁹¹ See *DNC*, 16 F.C.C.2d at 656.

⁹² See *id.* at 651 (“ABC points out that of the total of 19 hours and 37 minutes of its overall coverage of the convention and surrounding events, approximately 13 minutes and 49 seconds, or 1.1 percent, were devoted to film or tape coverage of the disorders involving the police and demonstrators.”); *Black Producer’s Ass’n New York, New York Complaint of Deceptive News Pracs.*, 70 F.C.C.2d 1920, 1928 (1979) [hereinafter *Black Producer’s Ass’n*] (“Initially, we do not believe that either of these two scenes portrayed a ‘significant’ event. The rough-housing scene lasted a total of three (3) seconds and the attack scene lasted a total of approximately thirty-five (35) seconds. The ‘Youth Terror’ documentary consisted of forty-eight (48) minutes and thirty-eight (38) seconds of actual program time. Although these youths appear briefly at other times in the program, the bulk of the program focused on other individuals and other aspects of youth ‘terror.’ Thus, the vast majority of time in the documentary was not devoted or directly concerned with the activities of the youths appearing in these two scenes. When the documentary is looked at as a whole, these two scenes cannot be considered ‘significant’ to its overall import.”).

⁹³ Compare Unedited Transcript (containing forty-five pages of interview dialogue), *with id.* at 6–8. See also Fed. Comm’n Comm’n, *CBS 60 Minutes*, YouTube (Feb. 5, 2025), <https://www.youtube.com/watch?v=vEu8hSGDKJA>.

mate, Tim Walz, all within the program's timeslot.⁹⁴ Those types of editorial decisions are for "60 Minutes" to make, not the Commission.

ii. The allegation is not material.

In addition to needing to be a substantial question of fact, the news distortion allegation must also be material. When evaluating materiality, "[t]he Commission regards an allegation as material only if the licensee itself is said to have participated in, directed, or at least acquiesced in a pattern of news distortion."⁹⁵ The Commission has stated that the allegation must

involve[] the licensee, including its principals, top management, or news management. . . . [I]f the allegations of staging . . . simply involve news employees of the station, we will, in appropriate cases . . . inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status.⁹⁶

While the Complaint points the finger at CBS for the alleged distortion in a conclusory fashion, the editing with which it takes issue is typically left in the hands of "60 Minutes" editorial and production staff, who convert raw footage to the finished product. There are no allegations in the Complaint suggesting that licensee WCBS or network CBS dictated this change. For all the reasons above, this Complaint does not clear the high bar of the Commission's news distortion framework and should be dismissed twice over.

⁹⁴ See 60 Minutes, *supra* note 26 ("As the full transcript shows, we edited the interview to ensure that as much of the vice president's answers to 60 Minutes' many questions were included in our original broadcast while fairly representing those answers."). Compare Fed. Commc'ns Comm'n, *supra* note 93, with 60 Minutes, *supra* note 22 (reducing the fifty-three-minute-and-thirty-three-second version to fifteen minutes and nineteen seconds and covering a wide range of topics in addition to the one at issue here), and Face the Nation, *supra* note 8 (airing two-minute-and-twenty-three-second clip from the same interview, which was the only clip from the entire interview aired on the episode, which was forty-five minutes and thirty-three seconds long).

⁹⁵ *Serafyn*, 149 F.3d at 1216.

⁹⁶ *Id.* (quoting *Hunger in America*, 20 F.C.C.2d at 150–51); see also *WBNS-TV*, 1986 WL 290825, Attach. A, at *5 (FCC staff ruling noting that "evidence revealing orders from the broadcaster, its top management, or its news management to falsify the news" is "particularly relevant").

B. The Commission’s Broader News Distortion Policy and Public Interest Standard Principles Weigh in Favor of Nonintervention.

In addition to the particular elements of the news distortion test, the general principles animating the news distortion doctrine confirm that this inquiry should end. The Commission’s news distortion policy has “an extremely limited scope.”⁹⁷ The Commission has explained that it “generally will not intervene” in “complaints concerning broadcast journalism, such as allegations that stations have aired inaccurate or one-sided news reports or comments, covered stories inadequately, or overly dramatized the events that they cover.”⁹⁸ The exceedingly narrow application of this policy is why the Commission has noted that opening a news distortion action is “rare.”⁹⁹

This limited scope traces back to the agency’s “beginnings with the Radio Commission in 1927,” where the Commission was “loathe to take any action that might be, or even appear to be, an interference in the content of political speech, in the full and free exchange of views in the marketplace of ideas that serves a people dedicated to informed self-governing.”¹⁰⁰ Political speech, such as “speech involving the very process of selecting and electing candidates is perhaps the most sensitive in this regard.”¹⁰¹ This case is not so exceptional as to clear the high bar needed to find news distortion, especially considering that the Complaint involves this more sensitive type of speech.¹⁰² For the reasons discussed above, the Complaint fails at every step, in part because it

⁹⁷ *Galloway*, 778 F.2d at 21.

⁹⁸ THE PUBLIC AND BROADCASTING, *supra* note 77, at 11.

⁹⁹ *Preserving the First Amendment*, *supra* note 2, at 2.

¹⁰⁰ *DNC*, 16 F.C.C.2d at 650.

¹⁰¹ *Id.*

¹⁰² *See* Compl. at 4 (asserting that the import of its allegations stems in part from the fact that the speech involved was from a candidate “weeks before [the] presidential election”).

offers scant evidence¹⁰³—indeed, less evidence than other cases the Commission has evaluated, including those where the Commission still found there to be insufficient extrinsic evidence to support a claim.

The public interest standard more broadly also militates against government intervention because the standard not only permits but requires editorial discretion. Describing the bounds of editorialization by broadcast licensees, the Commission has reasoned that it had “come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest.”¹⁰⁴ Indeed, the Supreme Court has confirmed that notwithstanding a broadcaster’s responsibilities to serve the public interest under 47 U.S.C. § 309(a), television broadcasters still “enjoy the widest journalistic freedom.”¹⁰⁵ Consistent with this public interest responsibility, “[p]ublic and private broadcasters alike are not only permitted, *but indeed required*, to exercise substantial editorial discretion in the selection and presentation of their programming.”¹⁰⁶

Here, “60 Minutes” exercised its editorial discretion in a way that promoted the public interest by maximizing the breadth of the content in Harris’s interview, as enabled by a shorter response to the question at issue.¹⁰⁷ By doing so, “60 Minutes” ensured that viewers could see more responses from Harris over a broader range of questions. Viewed this way, not only were

¹⁰³ See *supra* Section IV.A.2.i.a.

¹⁰⁴ *Editorializing by Broadcast Licensees*, *supra* note 31, at 1252–53.

¹⁰⁵ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (internal quotes omitted).

¹⁰⁶ *Id.* (emphasis added); see also *Nat’l Broad. Co. v. FCC*, 516 F.2d 1101, 1113 (D.C. Cir. 1974) (citing *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 110–111 (1973)) (“Journalistic discretion, the Court emphasized, is the keynote to the legislative framework of the Communications Act.”).

¹⁰⁷ See *60 Minutes*, *supra* note 26.

the editing choices made by “60 Minutes” not news distortion, but they may well be precisely the type of editorial discretion the public interest standard affirmatively encourages.

V. THE FIRST AMENDMENT GIVES THE COMMISSION SOME LATITUDE TO REGULATE BROADCAST LICENSEES OVER THE CONTENT THEY AIR, BUT SUPPORTS CLOSING THIS DOCKET NEVERTHELESS.

In this section, Free Press discusses how First Amendment principles should impact the Commission’s decision-making with respect to the Complaint and docket.

A. The Supreme Court Has Affirmed the Commission’s Limited Authority to Regulate Some Content Aired by Broadcasters Without Violating the First Amendment.

Because broadcast licensees use spectrum, “a valuable and limited public resource, there is . . . present an unusual order of First Amendment values.”¹⁰⁸ *Red Lion Broadcasting Co. v. Federal Communications Commission* explains these contours.¹⁰⁹ Because “[n]o one has a First Amendment right to a license or to monopolize a radio frequency[,] to deny a station license because ‘the public interest’ requires it ‘is not a denial of free speech.’”¹¹⁰

Broadcasters do have First Amendment protections,¹¹¹ but “the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount.”¹¹² The Commission’s ability to regulate the speech of broadcasters is permissible only insofar as it does not encroach “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”¹¹³ Put differently, “[o]nly when the interests of the public are found to

¹⁰⁸ *Columbia Broad. Sys., Inc.*, 412 U.S. at 101.

¹⁰⁹ 395 U.S. 367 (1969).

¹¹⁰ *Id.* at 389.

¹¹¹ *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

¹¹² *Red Lion*, 395 U.S. at 390.

¹¹³ *Id.*

outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.”¹¹⁴ Otherwise, “it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.”¹¹⁵

B. First Amendment Principles Warrant Abstention from Intervention Here.

Though there is some latitude to regulate broadcaster speech, that power “has always been in tension with the First Amendment,” and the Commission is still “prohibited from engaging in ‘censorship’ or ‘interfering with the right of free speech’” by “statutory and constitutional command.”¹¹⁶ The D.C. Circuit has noted that the scarcity rationale is not “without bounds” and that “not all regulation can be justified in the name of scarcity.”¹¹⁷ For example, the D.C. Circuit observed that the Commission could run up against that boundary through “[o]verzealous invocation of rules such as the fairness doctrine,” which “could cause an ‘erosion of the journalistic discretion of broadcasters in the coverage of public issues.’”¹¹⁸ That is to say, when the Commission erodes broadcasters’ journalistic discretion in covering public issues, that encroachment can harm the public’s ability to receive information in contravention of the First Amendment.¹¹⁹ To avoid crossing into unconstitutional territory, this Commission must “eschew

¹¹⁴ *Columbia Broad. Sys., Inc.*, 412 U.S. at 110.

¹¹⁵ *Id.*

¹¹⁶ *Corn-Revere*, *supra* note 40.

¹¹⁷ *Nat’l Broad. Co.*, 516 F.2d at 1113.

¹¹⁸ *Id.* (quoting *Columbia Broad. Sys., Inc.*, 412 U.S. at 124).

¹¹⁹ *See TVT*, 22 FCC Rcd at 13595–96 (noting that “journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment’s Free Press guarantee”); *cf. Selling of the Pentagon*, 30 F.C.C.2d at 152 (“In view of all the facts at our disposal, we conclude that further action by this Commission would be inappropriate — and not because the issues involved are insubstantial. Precisely to the contrary, they are so substantial that they reach to the bedrock principles upon which our free and democratic society is founded.”).

the censor's role, including efforts to establish news distortion in situations where government intervention would constitute a worse danger”¹²⁰

Further action in this matter—where the Complaint essentially takes issue with CBS's basic editorial discretion to decide which part of an interview to air—would open the door for sweeping application of the Commission's news distortion policy. As a result, the Commission “would be required to oversee far more of the day-to-day operations of broadcasters' conduct.”¹²¹ Not only would the Commission's duties under the news distortion policy impermissibly bloat, but such government scrutiny would also occur at the behest of private individuals who could take issue with any political content from broadcasters.¹²²

The fear that further FCC involvement here will create a chilling effect on the freedom of the press is well-founded. In previous inquiries, broadcasters have noted that “the mere transmission to a broadcaster of a formal inquiry by the Commission with respect to such matters as the accuracy or alleged bias of broadcast coverage of controversial issues and public events is deleterious to the journalistic function of the broadcaster.”¹²³ With respect to regulating matters of editorial discretion, “few spectres can be more frightening to a person concerned with the vitality of a free press than the vision of a television camer[a]n turning his camera to one aspect of a public event rather than another because of concern that a governmental agency might want him

¹²⁰ *Selling of the Pentagon*, 30 F.C.C.2d at 153.

¹²¹ *Ark. Educ. Television Comm'n*, 523 U.S. at 674 (quoting *Columbia Broad. Sys., Inc.*, 412 U.S. at 127).

¹²² *See id.* at 674–75 (remarking that eroding journalistic discretion by increasing Commission oversight would “transfer[] ‘control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals’ who bring suit under our forum precedents.”) (quoting *Columbia Broad. Sys., Inc.*, 412 U.S. at 124).

¹²³ *DNC*, 16 F.C.C.2d at 654.

to do so, or fear of Government sanction if he did not.”¹²⁴ The Commission has also recognized the possible harmful effect of continuing a news distortion investigation absent meeting the requirements laid out above, noting that “[i]f we are to continue to encourage the presentation of innovative, informative, and provocative programming on the serious issues of the day, we must resist the urge for pervasive oversight lest we inhibit the broadcaster’s freedom and ability to perform this task.”¹²⁵ To continue this investigation here would trigger these concerns, and that is when the First Amendment constrains the Commission.

C. Section 326 of the Communications Act Also Cautions Against Further Commission Involvement.

Section 326 prohibits the Commission from censoring radio communications or interfering with the right of free speech.¹²⁶ The Commission has found that the provision “prohibits [it] from directing broadcasters in the selection and presentation of broadcast matter,” as “the particular topics and the manner in which they are presented is within the editorial discretion of the

¹²⁴ *Id.* (alterations in original). In *DNC*, the Commission decided to continue its investigation given the gravity of the charges involved. But in that case, the charges alleged the broadcast of events that did not occur but were instead acted out “at the behest of news personnel.” *Id.* at 657. There was also substantially more evidence proffered, such as multiple witness statements. *See id.* at 658–59 (listing witness statements from a Senator, the U.S. Attorney for the Northern District of Illinois, and Assistant U.S. Attorneys).

¹²⁵ *Black Producer’s Ass’n*, 70 F.C.C.2d at 1930.

¹²⁶ *See* 47 U.S.C. § 326.

licensee.”¹²⁷ As discussed above,¹²⁸ the conduct with which Complainant takes issue squarely falls under the editorial discretion of the broadcaster. Section 326 is therefore a clean fit here, and supplies an independent basis for stopping the Commission’s inquiry.

VI. THIS DOCKET’S ESTABLISHMENT IS PART OF THE COMMISSION’S RECENT AGENDA TO WEAPONIZE THE FIRST AMENDMENT.

The FCC Chairman has consistently professed to champion free speech.¹²⁹ He has emphasized that “[a] newsroom’s decision about what stories to cover and how to frame them should be beyond the reach of any government official, not targeted by them.”¹³⁰ That principle must apply here, though the Chairman seems to have conveniently forgotten it.

Then-Chairwoman Rosenworcel agreed with that principle when she denied this Complaint, alongside two others filed by Complainant against other licensees, as well as a petition to deny renewal of a Fox-owned station’s license. She wrote, “I have directed the FCC to take a stand on behalf of the First Amendment. We draw a bright line at a moment when clarity about

¹²⁷ *Complaint by Robert J. Bolan, Tempe, Ariz. Concerning Fairness Doctrine Re KTAR-TV & NBC Network*, 49 F.C.C.2d 1263, 1265 (1974); *see also Applications for Renewal of License Station WHAS-TV, Louisville, KY (File No. BRCT-20050401BGR; Facility ID No. 32327) Station WKPC-TV, Louisville, KY (File No. BRET-20050331ATP; Facility ID No. 21432)*, 22 FCC Rcd 12846, 12848 (Vid. Div. MB 2007) (“[T]he FCC is prohibited by section 326 of the Act from censoring programs or from interfering with freedom of expression in broadcasting. The choice of what is or is not covered in the presentation of broadcast news is a matter committed to the licensee’s good faith discretion.”).

¹²⁸ *See supra* Sections II, IV.A.2.i.b, and V.B.

¹²⁹ *See* Corn-Revere, *supra* note 40 (writing to Chairman Carr, “[y]ou have been called a ‘free speech warrior,’ and some of your past statements support that label. In 2021, when two Democratic members of the House Energy and Commerce Committee wrote to media outlets castigating them for spreading misinformation about the 2020 election and the COVID epidemic and demanding answers to a list of questions, you properly denounced it as ‘a chilling transgression of the free speech rights that every media outlet in this country enjoys’”).

¹³⁰ Office of Commissioner Brendan Carr, *FCC Commissioner Carr Responds to Democrats’ Efforts to Censor Newsrooms*, Fed. Comm’n Comm’n (Feb. 22, 2021), <https://docs.fcc.gov/public/attachments/DOC-370165A1.pdf>.

government interference with the free press is needed more than ever.”¹³¹ All four cases, she suggested, “seek to weaponize the licensing authority of the FCC in a way that is fundamentally at odds with the First Amendment.”¹³² These statements are consistent with those expressed by Chairman Carr in February of 2021.

Yet this Complaint, and Complainant’s others, have been restored because FCC leadership, newly installed since the inauguration, asserts that the denials “were issued prematurely based on an insufficient investigatory record.”¹³³ Free Press reminds the Commission that it is Complainant’s burden to establish allegations and furnish the record in support of them.¹³⁴ And as one former FCC Chairman’s chief counsel noted, “embarking on a federal ‘investigation’ into editorial decision-making only magnifies the incursion into the freedom of the press, as [Chairman Carr has] noted in the past.”¹³⁵ These idiosyncrasies, bordering on complete reversal of previous statements, have reasonably elicited skepticism about Chairman Carr’s motives and analysis.¹³⁶

The restoration of all of Complainant’s filings is just one act recently taken in contravention with Chairman Carr’s former free speech sentiments. Chairman Carr also wrote a letter (after the election but before he was appointed chair) to the CEOs of Alphabet, Apple, Meta, and Microsoft

¹³¹ Statement of Chairwoman Jessica Rosenworcel, *Preserving the First Amendment*, GN Docket No. 25-11 (Jan. 16, 2025), <https://docs.fcc.gov/public/attachments/DOC-408913A1.pdf>.

¹³² *Id.*

¹³³ See Restoration of Complaint, *supra* note 4.

¹³⁴ See *supra* Section IV.

¹³⁵ Corn-Revere, *supra* note 40.

¹³⁶ See, e.g., Office of Commissioner Anna M. Gomez, *Commissioner Gomez Statement on FCC Weaponization Against CBS*, FCC (Jan. 31, 2025), <https://docs.fcc.gov/public/attachments/DOC-409255A1.pdf> (“This is a retaliatory move by the government against broadcasters whose content or coverage is perceived to be unfavorable. It is designed to instill fear in broadcast stations and influence a network’s editorial decisions.”).

to inquire about their use of the nonpartisan fact-checking site NewsGuard on their sites.¹³⁷ In that letter, he accused the companies of silencing Americans’ First Amendment rights and acting as a “censorship cartel” by removing or deprioritizing content flagged by the fact-checking service.¹³⁸ He stated that the censorship cartel “must be completely dismantled” with a barely veiled threat to wield Section 230 of the Communications Act against them.¹³⁹ As Free Press and others have remarked, Chairman Carr’s recent rhetoric turns the First Amendment on its head.¹⁴⁰ He, in his capacity as a government official, has threatened to go after private companies because he does not like their speech, while also making claims that those private parties are somehow violating freedoms guaranteed against government interference by the Constitution. The docket here raises free speech concerns, but so does this larger trend.

¹³⁷ See Letter from Brendan Carr, Commissioner, Fed. Comm’ns Comm’n, to Sundar Pichai, Chief Executive Officer, Alphabet Inc., Satya Nadella, Chief Executive Officer, Microsoft Corp., Mark Zuckerberg, Chief Executive Officer, Meta Platforms, Inc., & Tim Cook, Chief Executive Officer, Apple Inc. (Nov. 13, 2024), <https://docs.fcc.gov/public/attachments/DOC-407732A1.pdf>.

¹³⁸ *Id.*

¹³⁹ *Id.*; cf. Corn-Revere, *supra* note 40 (defining “jawboning”).

¹⁴⁰ See, e.g., Jessica J. González, *Trump’s pick to lead the FCC poses a threat to free speech*, The Hill (Nov. 30, 2024), <https://thehill.com/opinion/campaign/5013011-trumps-pick-to-lead-the-fcc-poses-a-threat-to-free-speech>; Jessica J. González, *Trump’s FCC Chairman Doesn’t Know What Censorship Actually Is*, Free Press (Dec. 3, 2024), <https://www.freepress.net/blog/trumps-fcc-chairman-carr-threatens-free-speech>; Corn-Revere, *supra* note 40 (“Although your demands were framed as a kind of appeal to free speech, it is impossible to miss the irony that a high government official was demanding that private business make changes in their speech policies. And it is difficult to reconcile the demands you make in this letter with your previous statements opposing bureaucratic micromanagement of the internet.”); Mike Masnick, *Brendan Carr Makes It Clear That He’s Eager To Be America’s Top Censor*, techdirt (Nov. 27, 2024), <https://www.techdirt.com/2024/11/27/brendan-carr-makes-it-clear-that-hes-eager-to-be-americas-top-censor/> (“In reality, Brendan Carr may be the biggest threat to free speech in our government in a long while. And he’s not being shy about it. Carr is abusing the power of his position to pressure companies to censor speech he disagrees with, all while cloaking it in the language of ‘free speech.’”).

VII. SHOULD THE COMMISSION PROCEED WITH THIS MATTER, COMPLAINANT’S RESERVATION OF THE RIGHT TO REQUEST RECUSAL IS INAPPROPRIATE.

Complainant stated that it “reserves the right to request the recusal of any FCC commissioner who reviews this matter in the future who prejudged this issue without seeing any evidence or legal argument.”¹⁴¹ Putting aside the fact that each commissioner has presumably seen Complainant’s legal argument because it was laid out in the Complaint,¹⁴² the Commission should decline any such request.

It is hornbook law that recusal would not be required even were a commissioner to discuss issues raised in a complaint before adjudicating the matter.¹⁴³ Furthermore,

[p]rejudgment of adjudicative facts is not necessarily a ground for disqualification. The holdings are almost uniform that a judge who has announced his findings of fact is not disqualified to hear the case a second time after a remand, and these holdings are generally applied equally to the administrative adjudicator. Prejudgment of fact bearing on law or policy is no more a disqualification than prejudgment of philosophy about law or policy.¹⁴⁴

Finally, the request is impractical because every sitting commissioner, save Commissioner Starks, has commented on the matter in a way that could conceivably be characterized as

¹⁴¹ Compl. at 5 n.2.

¹⁴² See *id.* at 4 (walking through “WCBS’s violation of 47 U.S.C. § 309(a)”).

¹⁴³ See *Selling of the Pentagon*, 30 F.C.C.2d at 160 (Johnson, Comm’r, writing separately) (“The controlling cases have held, with only a few exceptions, that the combination with judging or prosecuting or investigating does not deny due process.” (citing Kenneth Culp Davis, *Administrative Law Treatise* 248, § 13.11 (1958))); see *id.* (“The Administrative Procedure Act and its legislative history lend support to the argument that Congress affirmatively intended to approve the combination of advocating and judging. Congress apparently endeavored to deal comprehensively with the whole question of separation of functions. Yet the Act not only says nothing of advocacy other than prosecuting, but the Act limits the separation-of-functions requirements strictly to ‘hearing adjudications,’ something far afield from what is involved in the ‘Selling’ complaint.”).

¹⁴⁴ *Id.* at 156–57 (quoting Davis, *supra* note 143, at 169, § 12.06).

“prejudg[ing] the issue.”¹⁴⁵ Chairman Carr, for example, stated that President Trump “has been right on these media bias issues,” explicitly mentioning the “60 Minutes” interview at issue here, which he noted “looks like it has been pretty chopped up.”¹⁴⁶ Commissioner Gomez has also commented on the Complaint.¹⁴⁷ And Commissioner Simington has also preliminarily opined on the matter, suggesting the Complaint is now moot.¹⁴⁸ In light of these complications, it is the wiser course to ignore any request to this effect.

VIII. CONCLUSION

Complainant cites the Commission’s statement more than half a century ago that “[r]igging or slanting the news is a most heinous act against the public interest — indeed there is no act more harmful to the public’s ability to handle its affairs. In all cases where we may appropriately do so, we shall act to protect the public interest in this important respect.”¹⁴⁹ Ironically, Complainant omits the qualifying statement that immediately follows that excerpt:

But in this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor’s role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself.¹⁵⁰

¹⁴⁵ *Id.* (“[E]ven if the Chairman’s proposed test of ‘appearance of bias’ were an established proposition of law in this area (which it manifestly is not), such a proposition would be far too confining — and it would render the Chairman himself guilty of the very transgression he charges to others.”).

¹⁴⁶ Littleton, *supra* note 51 (“Carr’s statement that Trump is ‘right’ while the commission is ostensibly investigating whether ‘60 Minutes’ engaged in an ill-defined act of ‘news distortion’ has been jaw-dropping.”).

¹⁴⁷ See Office of Commissioner Anna M. Gomez, *supra* note 136 (“This is a retaliatory move by the government against broadcasters whose content or coverage is perceived to be unfavorable. It is designed to instill fear in broadcast stations and influence a network’s editorial decisions.”).

¹⁴⁸ See Simington, *supra* note 36.

¹⁴⁹ Compl. at 1 (citing *Hunger in America*, 20 F.C.C.2d at 151).

¹⁵⁰ *Hunger in America*, 20 F.C.C.2d at 151.

The matter here falls under that category. If there was ever any question as to whether CBS distorted the news in its “60 Minutes” broadcast, that concern was put to bed when the interview transcript was released.¹⁵¹ That transcript reveals that the different answers were shorter excerpts of Harris’s longer answer to Whitaker’s question. Both answers are accurate depictions of Harris’s response, and neither excerpt provides essential context without which the meaning of the other cannot be understood. That is not news distortion, but rather the type of editorial choice the First Amendment and this Commission’s public interest standard are meant to protect. And even if the Commission were to believe otherwise, the Complaint falls far short of meeting the high standards of the Commission’s news distortion inquiry.

As former Chairwoman Rosenworcel noted when denying the Complaint the first time around, to act further on the filing “would set a dangerous precedent.”¹⁵² Basic journalistic practices should not be the center of FCC scrutiny. To make them so will chill journalists’ speech, as we believe creating this docket already has. Anything less than a full-throated disavowal of this caliber of pleading and type of claim will further harm press freedom. Free Press urges the Commission to dismiss the Complaint as moot—or in the alternative, as insufficient to meet its evidentiary burden. The Commission should also close this docket and step away from such censorial action.

¹⁵¹ See *supra* notes 35–36.

¹⁵² Rosenworcel, *supra* note 131.