# Reasonable Access, Made More Reasonable: An Argument for Extending the Reasonable Access Rule to Cable Programming

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* J.D., May 2020, The George Washington University Law School; B.A., English, May 2016, Tulane University. Senior Articles Editor, Federal Communications Law Journal, Vol. 72. This Note is dedicated to my parents, Ann Stevens and Tom Gutierrez, for giving me the opportunity to attend law school, and to my sister, Lacey Gutierrez, for making sure that I survived it. Without them, none of this would have been possible. Thank you to Professor Michael Beder, Notes Editor Ali Kingston, and the staff of the Federal Communications Law Journal for all of their guidance and hard work throughout this process, and to Bobby Baker for introducing me to this topic. Finally, I would like to thank everyone who has helped me get to where I am today: my family, my friends, my professors and teachers, my coaches, my colleagues and supervisors, and, most importantly, my loved ones who, although no longer with us, surely would have been proud to see my words in print—Julie, Grandma, Pop Pop, and Uncle John.

## I. INTRODUCTION

For many Americans, the first Friday of February can be a particularly long one. The nine-to-five nation anxiously watches the clock as it ticks, seemingly slower than ever, towards quitting time, knowing that what awaits them that weekend is the most glorious day of the American sporting year: Super Bowl Sunday.

Super Bowl XLVI, the culmination of the 2011-2012 National Football League season, gave football fans a much-anticipated rematch between the New England Patriots and the New York Giants.[1] Yet on that first Friday of February 2012, while millions of Americans wondered whether quarterback Tom Brady and the Patriots would get back at the Giants for denying the Patriots a perfect season in Super Bowl XLII,[2] whether quarterback Eli Manning and the Giants would finally put the nail in the coffin of the Patriots' Dynasty,[3] or whether they had ordered enough chicken wings to feed all the guests coming to watch the game, Randall Terry had something very different on his mind.

In early 2011, Terry announced his intention to challenge President Obama in the Democratic primaries before the 2012 presidential election.[4] A prominent figure within the pro-life movement, Terry was well aware that he stood no chance of unseating Obama.[5] In reality, the goal of Terry's candidacy, at least in part, was to gain the right to air graphic anti-abortion advertisements during Super Bowl XLVI.[6] In the days leading up to the Super Bowl, Terry submitted a request to Chicago's WMAQ-TV to purchase ad time for his campaign during the game.[7] Fortunately, WMAQ-TV rejected Terry's request, and, on that Friday before the big game, the FCC denied the complaint Terry filed against the station, saving millions of unsuspecting

1. *See* Mark Maske, *Super Bowl 2012: Giants, Patriots Prepare for Rematch of Memorable Championship Game*, WASH. POST (Jan. 23, 2012), https://www.washingtonpost.com/sports/redskins/super-bowl-2012-giants-patriots-prepare-for-rematch-of-memorable-championship-game/2012/01/23/gIQA7i8FMQ_story.html?utm_term=.e9f1de63efc2 [https://perma.cc/C84X-HRY9].

2. *See* Judy Battista, *Giants Stun Patriots in Super Bowl XLII*, N.Y. TIMES (Feb. 4, 2008), https://www.nytimes.com/2008/02/04/sports/football/04game.html [https://perma.cc/W9Y4-RW72].

3. As we now know, neither of these outcomes came to fruition.

4. *See* Devin Dwyer, *Activist Vows Graphic Anti-Abortion Ads During Super Bowl*, ABC NEWS (Jan. 18, 2011), https://abcnews.go.com/Politics/anti-abortion-activist-randall-terry-eyes-presidency-graphic/story?id=12639702 [https://perma.cc/AWF8-E36E].

5. *See id.*

6. *See id.*

7. *See* Complaint of Randall Terry Against WMAQ-TV, Chicago, Illinois, *Memorandum Opinion and Order*, 27 FCC Rcd 598, para. 1 (2012).

viewers from being subjected to unsettling material during the ad breaks normally reserved for the likes of the Budweiser Clydesdales.[8]

Naturally, all of this begs the question of how running a 30-second spot during the most coveted advertisement opportunity of the year would even be in the realm of possibilities for someone like Randall Terry. The answer is something called the reasonable access rule. In essence, Section 312(a)(7) of the Communications Act of 1934[9] ("Communications Act") requires commercial broadcast stations to grant legally qualified candidates for federal office "reasonable access" to their station—meaning that, upon request, commercial broadcasters must make reasonable amounts of air time available for purchase to these candidates.[10]

In reality, Congress did not intend to give the Randall Terrys of the world a platform to push their agenda in such a manner, and by no means is a situation like this the norm. Rather, it was the interests of the American voting public that were the driving force behind the reasonable access rule, as the provision sprang from Congress's desire to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[11] In theory, the reasonable access rule is a good thing, as it aims to further the democratic process we as Americans hold so dear. However, in practice and in execution, the reasonable access rule would seem to have its flaws.

As the law currently stands, the reasonable access rule applies to broadcast television, as well as direct broadcast satellite (DBS) television.[12] Yet, when it comes to cable programming, the rule's presence is nowhere to be found. In fact, FCC regulations specifically provide that cable operators are under no obligation to permit legally qualified candidates to use their facilities.[13] Thus, while the eyes of the nation look ahead to the 2020 presidential election this November, and to all of the political advertising that will come with it, the reasonable access rule finds itself residing all too comfortably in the past.

What can be done to address this discrepancy and bring the reasonable access rule at least a little bit closer to the present? Well, the solution that this

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8. *See id.* (finding WMAQ-TV reasonably concluded that Terry "did not make a substantial showing that he is a legally qualified candidate entitled to reasonable access to broadcast stations in Illinois[,]" and "even if Terry were a legally qualified candidate, . . . WMAQ's refusal to sell time to him specifically during the Super Bowl broadcast [was not] unreasonable.").

9. 47 U.S.C. § 151 *et seq.* (2018).

10. *See* 47 U.S.C. § 312(a)(7); *see also* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.03(2) (2018). To avoid confusion, it should be noted here, as it also will be later in this Note, that Section 312(a)(7) was not part of the original 1934 Communications Act, but rather was enacted in 1972.

11. CBS v. FCC, 453 U.S. 367, 379 (1981) (quoting S. Rep. No. 92-96, at 20 (1971)) (emphasis omitted).

12. *See* 47 C.F.R. § 25.701 (2019) (directing DBS providers to also comply with 47 U.S.C. § 312(a)(7)).

13. *See* 47 C.F.R. § 76.205 (2019). Cable operators are free to sell advertising time to candidates if they so choose, but they also must "afford equal opportunities to all other candidates for that office to use such facilities." 47 C.F.R. § 76.205(a) (2019).

Note puts forth is a simple one: Congress could, within the bounds of its constitutional authority, amend the Communications Act to establish a cable equivalent to the reasonable access rule, and provide the FCC with a statutory directive to create a regulatory scheme that mirrors the one currently in place for broadcasters. It should be noted that the resolution that this Note lays out is statutory, as opposed to purely administrative, in large part because this exertion of regulatory force over cable operators would appear to exceed the FCC's current rulemaking authority under the Communications Act.

Whether Congress should or should not actually amend the Communications Act in this regard is not for this Note to say. Rather, this Note merely intends to demonstrate that if individuals were to advocate for such a change, they would have a valid argument in support of doing so. Specifically, given the current make-up of the television landscape, the failure to amend the Act could arguably amount to an abandonment of the goals Congress sought to achieve with the reasonable access rule in the first place. On top of that, because it would advance the government's compelling interest in contributing to the freedom of expression that the First Amendment guarantees, and because it would be narrowly tailored to achieve this goal by creating an even more limited access right than the one that already exists in the broadcast scheme, Section 312(a)(7)'s cable twin would likely survive the strict scrutiny that a reviewing court would be inclined to apply. Ultimately, in an era in which the differences between broadcast and cable television—at least in the eyes of the average viewer—are virtually invisible, there is certainly a viable argument that requiring broadcasters, but not cable operators, to comply with Section 312(a)(7) not only makes little to no sense at all, but also goes against basic notions of fairness.

Although the reasonable access rule extends to candidate requests for all types, lengths, and classes of programming time,[14] this Note will focus on the rule specifically within the context of political advertising in the form of traditional, short-form commercials, as opposed to program-length commercials, like infomercials.[15] Section I will provide a brief look at the dynamics of today's television landscape, in order to demonstrate how one might argue that the current regulatory regime makes little sense, while Section II will provide an introduction to the political programming scheme as a whole and explain the statutory and regulatory provisions relevant to how the reasonable access rule functions with regards to broadcast. Next, Section III will address *CBS v. FCC*,[16] the case in which the Supreme Court upheld the constitutionality of the broadcast reasonable access rule, and will examine the logic the Court applied in coming to its decision. From there, Section IV will discuss what level of scrutiny a reviewing court might apply to a potential statute expanding reasonable access requirements to cable operators, looking at standards that have been applied in similar cases and concluding that such

14. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.03(2) (2018).

15. Program-length commercials are defined as "any commercial or other advertisement fifteen (15) minutes in length or longer or intended to fill a television or radio broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer." 16 C.F.R. § 308.2(f) (2019).

16. 453 U.S. 367 (1981).

a court would likely apply strict scrutiny. Finally, Section V will perform a strict scrutiny analysis on the would-be cable reasonable access rule, concluding that the bases that the *CBS* Court relied on could similarly serve as the compelling government interest and sufficiently narrow tailoring necessary for such a statute to be upheld.

## II. THE TELEVISION LANDSCAPE TODAY

It seems that the biggest television-related buzz phrase of the last few years has been "cord cutting," which makes sense considering how much easier the Internet has made it to view your favorite television content when you want it, where you want it, and how you want it.[17] So of course, more and more viewers are, in fact, cutting the cord, electing to rely on over-the-top video providers like Netflix and Hulu, as well as virtual multichannel video providers (vMVPDs) like Sling or YouTube TV.[18] While there are arguments to be made for applying the reasonable access rule to these platforms as well, such a stance is beyond the scope of this Note, especially considering the relative nascence of the streaming industry as compared to cable.

Despite the rise of cord cutting, there is no reason to believe that the sun has set on cable quite yet, as a whopping 72.9% of American households still have traditional cable service.[19] Compare this to the mere 13.3% of homes that are using over-the-air TV antennas,[20] the traditional form of receiving broadcast television signals, and the discrepancy in the application of the reasonable access rule starts to become a head scratcher. Although local broadcast channels[21] are generally included as part of a cable subscription, there are still scores of for-pay channels that potential voters devote their time to whose commercial breaks are currently unavailable to legally qualified federal candidates by way of the reasonable access rule.[22]

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17. *See* Gregory Go, *7 Ways to Get the Most Out of Cutting the Cord*, U.S. NEWS WORLD REP. (Aug. 16, 2017), https://money.usnews.com/money/personal-finance/spending/articles/2017-08-16/7-ways-to-get-the-most-out-of-cutting-the-cord [https://perma.cc/X3WP-6REV].

18. *See* Mike Snider, *Television is Still the Most Dominant Media, but More Young Adults are Connecting Via Internet*, USA TODAY (Dec. 12, 2018, 12:01 AM), https://www.usatoday.com/story/money/media/2018/12/12/cutting-cord-2018-tv-dominates-but-younger-users-connect-via-web/2276207002/ [https://perma.cc/4NC8-CVL5] (citing Nielsen's Q2 2018 Total Audience Report) (stating that "[t]wo thirds of U.S. homes (66 percent) have subscription video services" and that "[b]roadband-delivered live TV services . . . are in 3.4 percent of homes . . . .").

19. *See Nielsen Total Audience Report Q1*, NIELSEN (2019), https://www.rbr.com/wp-content/uploads/Q1-2019-Nielsen-Total-Audience-Report-FINAL.pdf [https://perma.cc/5TAF-STLR].

20. *See id.*

21. The major broadcast networks are NBC, CBS, ABC, FOX, and, in some markets, CW. *See Broadcast, cable... What's the difference?*, NCTA (Nov. 12, 2008), https://www.ncta.com/whats-new/broadcast-cable-whats-the-difference [https://perma.cc/LL6M-2GRG].

22. For reference, examples of subscription cable channels include Animal Planet, Comedy Central, Turner Classic Movies, etc. *See id.*

In addition to cable's sizeable share of the television market, it is also important to note that broadcast and cable television are no longer so distinguishable as to justify an unequal regulation like the reasonable access rule. For instance, seeing as 72.9% of television-viewing households receive their cable and broadcasting content in the same way, it seems likely that the average consumer would tend to lump all of the content that they watch together under the general umbrella of "TV," rather than correctly perceiving it as coming from two distinct sources.

Further, the dynamics of the broadcast and cable industries mirror one another in certain key ways. Broadly speaking, just as the broadcast networks do with their local station affiliates, cable networks grant local cable operators permission, one way or another, to transmit the networks' content. Similarly, cable networks make a certain amount of time per hour of programming available for cable operators to sell to advertisers themselves,[23] and the same is true for broadcast networks and their local station affiliates.[24] When we combine this amorphous relationship between broadcast and cable television with cable's prevalence, the decision to apply Section 312(a)(7) to broadcast without also applying it to cable seems to not make all that much sense—adding fuel to the fire for a demand that Congress extend the reasonable access rule to cable.

## III. INTRODUCTION TO THE REASONABLE ACCESS REGIME IN THE BROADCASTING CONTEXT

In essence, the Communications Act and the regulations that it instructed the FCC to adopt require broadcasters transmitting political programming to satisfy a series of obligations, while also granting certain rights to political candidates that wish to reach the broadcasters' audience.[25] Before proceeding any further, it will be necessary to explain to whom the Communications Act grants these rights, and to introduce the right that is the focus of this Note: the right of reasonable access.

### *A. Legally Qualified Candidates*

Generally speaking, the rights granted by the FCC's political programming rules may only be enjoyed by "legally qualified" candidates.[26] These regulations establish a three-pronged test that provides that, in order to be legally qualified, a candidate must: (i) "publicly announce[] his or her intention to run for nomination or office;" (ii) be "qualified under the

23. *See* Hiawatha Bray, *With New Tech, TV Election Ads Get Personal*, BOS. GLOBE (Nov. 5, 2018), https://www.bostonglobe.com/business/2018/11/05/with-new-tech-election-ads-get-personal/NuPUy32veySgi4PC3ZN0pI/story.html [https://perma.cc/9EPQ-34AC].

24. *See* Janet Stilson, *Fox, NBC Affils Wary of Nets' Ad Reduction Plans*, TVNEWSCHECK (Jul. 25, 2018, 8:58 AM), https://tvnewscheck.com/article/219485/fox-abc-affiliates-wary-nets-reduced-ad-plan/ [https://perma.cc/S6CF-FLUX].

25. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.01 (2018).

26. *See id.* at § 2.02.

applicable local, State or Federal law to hold the office for which he or she is a candidate;" and (iii) be a "bona fide candidate for nomination or office."[27]

A candidate can publicly announce his or her candidacy by making a public statement of their intention to run, or by simply "filing the necessary papers to qualify for a place on the ballot."[28] This requirement extends to incumbent candidates as well, as his or her intention to run is not assumed.[29] To satisfy the second prong of the test, a candidate must satisfy "the age, residency, and other requirements" imposed by the law applicable to the office sought, as well as any "eligibility requirements imposed by the political party."[30] Finally, in order to be a bona fide candidate, "[t]he candidate must make a substantial showing that his or her candidacy is genuine."[31] This can be accomplished by qualifying for a spot on the ballot,[32] or by showing that he or she is otherwise qualified for the office in question and "[h]as publicly committed . . . to seeking election" as a write-in candidate,[33] which usually necessitates "engag[ing] to a substantial degree in activities commonly associated with political campaigning."[34]

### *B. Reasonable Access*

One of the most significant rights that the Communications Act grants to legally qualified candidates for federal office is the right to reasonable access to broadcast facilities. Enacted in 1972 as part of the Federal Election Campaign Act of 1971,[35] Section 312(a)(7) amended the Communications Act to provide that all legally qualified candidates for federal office are to be granted "reasonable access" to commercial broadcast facilities.[36] In essence, the reasonable access rule grants legally qualified federal candidates the "statutory right to purchase a 'reasonable' amount of time on broadcast stations, regardless of whether the station has previously provided such time to another candidate."[37] In terms of sanctions for broadcasters that do not comply with Section 312(a)(7)'s directive, the Act allows the FCC to revoke a station's license for the "willful or repeated failure to allow reasonable

27. *See* 47 C.F.R. § 73.1940(a)(1)-(2), (b)(2) (2019).
28. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.02 (2018).
29. *See id.*
30. *Id.*
31. *Id.*
32. *See* 47 C.F.R. § 73.1940(b)(1) (2019).
33. *See* 47 C.F.R. § 73.1940(b)(2) (2019).
34. *See* 47 C.F.R. § 73.1940(f) (2019).
35. 2 U.S.C. § 431 *et seq*. (2018).
36. *See* 47 U.S.C. § 312(a)(7).
37. Kerry L. Monroe, *Unreasonable Access: Disguised Issue Advocacy and the First Amendment Status of Broadcasters*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 117, 136 (2014).

access or to permit purchase of reasonable amounts of time for the use[38] of a broadcasting station" by such a legally qualified federal candidate.[39]

Broadcasters must provide candidates reasonable access to their stations "at least during the 45 days before a primary and the 60 days before a general or special election."[40] Within these windows, "a broadcaster faces a steep burden to justify refusing an access request."[41] Otherwise, the FCC "rel[ies] upon the reasonable, good faith judgements of licensees[,]" and will determine whether a candidate's request for access was reasonable on a case-by-case basis, looking at the "circumstances surrounding a particular candidate's request for time and the station's response to that request."[42]

In deciding whether to grant a candidate's request, broadcasters may consider "their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that will be caused by" the candidate's use, and "the amount of time already sold to a candidate in a particular race."[43] However, while broadcasters are kept on a fairly long leash, the FCC does impose some important limitations on their ability to decline candidate requests to purchase time. For instance, broadcasters may neither consider the candidate's chance of winning,[44] nor the content of the candidate's use[45] in making their decision. Additionally, broadcasters are prohibited from establishing policies "that flatly ban[] federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers."[46] Finally, broadcasters may not impose restrictions on the exercise of a candidate's reasonable access right if that restriction would require the candidate to forfeit some other legal right.[47]

For an example of these standards in action, we need look no further than the previously-mentioned Randall Terry case. There, the FCC concluded

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38. While not as relevant for purposes of the reasonable access rule as it is for other parts of the political programming regulatory scheme, for clarity's sake it should still be noted that, generally speaking, "any broadcast . . . of a [legally qualified] candidate's voice or picture" constitutes a "use" for purposes of the FCC's political programming rules, provided that the candidate's appearance is identifiable and non-fleeting. *See* Political Primer 1984, 100 F.C.C. 2d 1476, 1489-92 (1984).

39. 47 U.S.C. § 312(a)(7).

40. Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 681 para. 9(b) (1991).

41. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.03(2) (2018).

42. Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 681 para. 8 (1991).

43. *Id.* at 682 para. 9(i).

44. *See* Political Primer 1984, 100 F.C.C. 2d 1476, 1486 (1984).

45. *See* Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 681 para. 9(g) (1991).

46. *Id.* at para. 9(h).

47. *See* American Family Life Assur. Co. v. FCC, 129 F.3d 625, 627 (D.C. Cir. 1997) (citing to Complaint of Dole Kemp '96 Campaign Against Aflac Broadcast Partners, Licensee of Station KWWL (TV), Waterloo, Iowa, and Station WAFB (TV), Baton Rouge, Louisiana, *Memorandum Opinion and Order*, 11 FCC Rcd 13036, para. 6 (1996)) (noting the FCC found unreasonable a broadcaster's refusal to sell time to a candidate unless the candidate agreed to a forum selection clause making the FCC the sole and exclusive forum for resolving disputes over charges for advertising time).

that the broadcast station's refusal to sell Terry his desired advertising time during the Super Bowl was reasonable for two primary reasons.[48] First, because Terry requested time on what is "typically the highest rated program of the year," the station likely would have had a limited amount of advertising time left to sell.[49] As such, it could have been impossible for the station "to provide reasonable access to all eligible federal candidates who request[ed] time during that broadcast."[50] Second, because there are really no other broadcasts equivalent to the Super Bowl, the station reasonably concluded "that it would be impossible to provide equal opportunities after the fact to opponents of candidates whose spots aired during the program."[51]

## IV. THE BASES FOR UPHOLDING THE CONSTITUTIONALITY OF THE REASONABLE ACCESS RULE ON BROADCAST

Considering that the reasonable access rule not only requires broadcasters to do business with candidates who they may have never chosen to do business with otherwise, but also compels the broadcasting of ads from candidates with whom broadcasters may disagree on a political level, it should be of little surprise that the constitutionality of the rule has been challenged. The first such challenge to the rule, and the only one to reach the Supreme Court, came in 1981 in *CBS v. FCC*.[52]

Roughly a year before the 1980 presidential election, the Carter-Mondale Presidential Committee ("Committee") requested that NBC, CBS, and ABC each make a 30-minute prime time program available for the Committee's purchase.[53] Each of the networks declined the Committee's request, claiming either that granting such access would lead to a disruption of regular programming, or that they were not yet prepared to sell programming time to candidates this early in the election season.[54] After the FCC resolved the Committee's complaint against the networks in favor of the

48. *See generally* In re Complaint of Randall Terry Against WMAQ-TV, Chicago, Illinois, *Memorandum Opinion and Order*, 27 FCC Rcd 598, para. 9 (2012).

49. *Id.* at 602.

50. *Id.*

51. *Id.* Another piece of the political programming regulatory scheme, the Communications Act further provides that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ." 47 U.S.C. § 315(a) (2018). Essentially, this equal opportunity requirement "means that a licensee must treat all legally qualified candidates for the same office alike." 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.07(1) (2018). In practice, a station will be able to satisfy this requirement if it offers time that is "reasonably comparable in terms of audience reach and demographics." *Id.* However, few broadcast events, if any, are truly comparable to the Super Bowl in this regard.

52. 453 U.S. 367 (1981).

53. *See id.* at 371. The Committee's intention was to present a documentary that outlined the record of President Carter's administration, along with the formal announcement of his candidacy. *See id.* at 371-72.

54. *See id.* at 372-73.

Committee,[55] the broadcasters decided to take their case to federal court to challenge the constitutionality of Section 312(a)(7). However, the Supreme Court ultimately held that the reasonable access rule passed constitutional muster, as it "properly balance[d] the First Amendment rights of federal candidates, the public, and broadcasters."[56]

Although it never explicitly articulated what degree of scrutiny was applied to Section 312(a)(7), the Court, in coming to its conclusion, rested on two key bases. First, the Court emphasized that the reasonable access rule implicates the First Amendment interests of candidates and voters as well, not just those of the broadcasters.[57] Noting that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues"[58] before making a decision, the Court concluded that the reasonable access rule "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[59] Second, the Court asserted that its holding was not an approval of a "*general* right of access to the media" and was impliedly thus allowing a permissible intrusion into the broadcasters' First Amendment rights because of the limited nature of the reasonable access right.[60] In the Court's words:

> Section 312(a)(7) creates a *limited* right to 'reasonable access' that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced. The Commission has stated that, in enforcing the statute, it will 'provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgements. . . .' If broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions.[61]

However, underlying these two bases was another element that factored into the Court's decision: the nature of the broadcast medium. The Court noted that licensed broadcasters are "granted the free and exclusive use of a

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55. The FCC found that the networks' explanations for their conduct were "deficient when subjected to [the Commission's] test of reasonableness[,]" largely because the networks had failed to consider President Carter's individual needs as a candidate. Complaint of Carter-Mondale Presidential Committee, Inc. Against the ABC, CBS, and NBC Television Networks, *Memorandum Opinion and Order*, 74 F.C.C. 2d 631, para. 45 (1979).

56. *CBS, Inc.*, 453 U.S. at 397.

57. *See id*. at 396-97.

58. *Id.* at 396 (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).

59. *Id.*

60. *Id.*

61. *Id.* (quoting Complaint of Carter-Mondale Presidential Committee, Inc. Against the ABC, CBS & NBC Television Networks, *Memorandum Opinion and Order*, 74 F.C.C.2d 657, para. 44 (1979)) (emphasis in original).

limited and valuable part of the public domain"[62]—the electromagnetic spectrum. However, in exchange for this benefit, broadcasters are "burdened by [certain] enforceable public obligations."[63] This is, in essence, an articulation of what is often referred to as the scarcity theory, a "cornerstone of broadcast regulation."[64] It was this theory that guided the Court's decision in the seminal *Red Lion Broadcasting Co. v. FCC* to uphold an earlier version of the political programming regulatory regime, concluding that "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . ."[65] Subsequently, the *Red Lion* decision has come to stand for the principle that the government has "greater freedom to place restraints on broadcast speech" than it does with regards to other mediums,[66] and that precedent surely played a role in the Court's decision.

## V. WHAT LEVEL OF SCRUTINY SHOULD APPLY TO A CABLE REASONABLE ACCESS RULE?

Like Section 312(a)(7) before it, a cable reasonable access rule would likely be met with staunch opposition, as cable operators would surely attempt to challenge the constitutionality of the rule under the First Amendment. As is the case with any First Amendment inquiry, the first question that must be asked is what degree of scrutiny a reviewing court should apply to a potential statute expanding the reasonable access requirement to cable, especially considering that "not every interference with speech triggers the same degree of scrutiny under the First Amendment . . . ."[67] Although the proper First Amendment treatment of cable speech has been debated as cable has grown into what it is today, "[t]he Supreme Court has never fully articulated the extent of First Amendment protections applicable to cable operators."[68] On one end of the spectrum, there is *Red Lion*'s model for broadcast, allowing for more extensive federal regulation, relatively speaking.[69] On the other is

62. *Id.* at 395 (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966)).

63. *Id.* (quoting *Office of Communication of the United Church of Christ*, 359 F.2d at 1003). As a technical matter, "broadcasters cannot, in the same location, share a single frequency." 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 1.04(2)(O.a) (2018).

64. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 1.04(2)(O.a) (2018).

65. 395 U.S. 367, 389. The regulation in question was something called the "fairness doctrine," which "imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." *Id.* at 369.

66. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 7.15(16)(b) (2018); *see also* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 13.11(1) (2018).

67. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637 (1994).

68. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 5.07(2) (2018).

69. *See id.* at § 13.11(1) (2018).

the Court's approach to print media, largely embodied in the Court's decision in *Miami Herald Publishing Co. v. Tornillo*,[70] which ensures that publishers "are unburdened by any governmentally imposed access or content requirements."[71]

Cable, it would seem, falls somewhere in the middle. While some courts and the FCC applied the broadcast model to cable in its early days, several decisions in the 1980s expressed dissatisfaction with this approach.[72] After all, cable does not use the airwaves to the same extent that broadcast does, rendering "the rationale of physical interference in the broadcast spectrum requiring an 'umpiring role' for government . . . absent, or at least substantially lessened."[73] However, the Supreme Court has not exactly embraced the print model either. In *Turner Broadcasting System, Inc. v. FCC*, for example, the Court concluded that analogizing cable operators to newspapers is inappropriate because "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[74] Therefore, due to the nature of the technology, "a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude" and, "unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[75]

One potential approach a reviewing court could take would be the approach adopted by the Court in *Turner I*. At issue there was one of the amendments that the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[76] made to the Communications Act.[77] Congress stated that its intention with the 1992 Cable Act was to, among other things, "ensure cable operators continue to expand their capacity and program offerings, to ensure cable operators do not have undue market power, and to ensure consumer interests are protected in the receipt of cable service."[78] The provision in question required cable operators to carry "the signals of local commercial television stations and qualified low power stations[,]"[79] thus allowing broadcast stations to "require a cable operator that serves the same

70. 418 U.S. 241 (1974).

71. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 5.07(2) (2018).

72. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 13.11(1) (2018) (citing to Century Communications Corp. v. FCC, 835 F.2d 292, 294-95 (D.C. Cir. 1987) and Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985) among others).

73. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 8.03 (2018).

74. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994) (*Turner I*).

75. *Id.*

76. 47 U.S.C. § 521 *et seq.* (2018).

77. *See Turner I*, 512 U.S. at 630.

78. *Cable Television*, FCC (Dec. 15, 2015), https://www.fcc.gov/media/engineering/cable-television [https://perma.cc/3AUF-G769].

79. 47 U.S.C. § 534(a) (2018).

market . . . to carry its signal."[80] This program carriage regime is commonly referred to as "must-carry."[81]

Soon after the 1992 Cable Act went into effect, Turner Broadcasting System—a cable operator, despite the name—along with a series of other cable programmers and operators, filed suit to challenge the constitutionality of the provisions.[82] Ultimately, the Court held that the must-carry provisions were content-neutral restrictions subject to intermediate First Amendment scrutiny,[83] which required the provisions to be narrowly tailored to further important governmental interests.[84] Subsequently, the Court proceeded to remand for further fact finding.[85]

When the case ultimately made its way back up, the Court, in applying intermediate scrutiny, concluded that the record supported "Congress' predictive judgment that the must-carry provisions further important governmental interests"[86] in "preserving the benefits of free, over-the-air local broadcast television," as well as "promoting the widespread dissemination of information from a multiplicity of sources" and "fair competition in the market for television programming."[87] Additionally, the Court found that "the provisions do not burden substantially more speech than necessary to further those interests."[88] As such, the Court concluded that the provisions were "consistent with the First Amendment."[89] Vital to the decision were the interests of non-cable viewers, as the Court emphasized that the purpose of the provisions was "to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households."[90]

The First Amendment concerns posed by the must-carry provisions and the reasonable access rule are one and the same species, as they both constrain the editorial discretion of cable operators and broadcasters, respectively. However, the reasonable access rule cannot truthfully be called a content-neutral restriction in the same way that the must-carry provisions are. While a cable reasonable access rule would be neutral with respect to its treatment of various political standpoints, in that cable operators would generally have to grant access requests to legally qualified federal candidates regardless of their platform, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that

80. *See Cable Carriage of Broadcast Stations*, FCC (Dec. 9, 2015), https://www.fcc.gov/media/cable-carriage-broadcast-stations [https://perma.cc/Y7M4-VNXK].
81. *See id.*
82. *See Turner I*, 512 U.S. at 634.
83. *See id.* at 662.
84. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (*Turner II*) (citing to *Turner I*).
85. *See Turner I*, 512 U.S. at 668.
86. *Turner II*, 520 U.S. at 185.
87. *Id.* at 189.
88. *Id.* at 185.
89. *Id.*
90. *Id.* at 193.

subject matter."[91] As such, a court reviewing the constitutionality of a cable reasonable access rule would likely apply strict scrutiny in doing so, which would require "the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[92]

## VI. APPLYING STRICT SCRUTINY TO A CABLE REASONABLE ACCESS RULE

Although the *CBS* Court never expressly articulated what degree of scrutiny it was applying, we can assume that, although Section 312(a)(7) is plainly a content-based speech regulation, the more lenient *Red Lion* approach to regulations of broadcast speech would have led the Court to apply something less than traditional strict scrutiny. At the same time, we also know that the degree of scrutiny that Section 312(a)(7) satisfied must have been stricter than the intermediate scrutiny that the Court applied to the content-neutral must-carry provisions at issue in *Turner II*. Therefore, at the very least, it must have been the case that the broadcast reasonable access rule's contribution to freedom of expression constituted an important government interest, and the limited nature of the right the rule conferred made it such that the rule was narrowly tailored to achieve that important interest. However, a statute that satisfies intermediate scrutiny very well may have the potential to satisfy strict scrutiny as well, and that could be the case with a cable reasonable access rule.

### *A. Compelling Government Interest—Contribution to Freedom of Expression*

If allowing more candidates to disseminate their messages to more broadcast viewers is an important government interest, then perhaps allowing candidates to reach even more viewers on cable, who might not have been reachable otherwise, is an even more important government interest—perhaps so important as to verge into compelling territory. For the *CBS* Court, the degree to which the reasonable access rule furthered the First Amendment rights of audience members nationwide carried the day when it came to concluding that the government's interest in the rule was constitutionally sufficient.[93] This logic should doubly support the application of the reasonable access rule to cable, as cable television provides candidates and the public with even more opportunities to present and receive, respectively, that

91. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015). Appropriate for the context of this Note, the example the Court gave to illustrate this principle was "a law banning the use of sound trucks for political speech – and only political speech . . . even if it imposed no limits on the political viewpoints that could be expressed." *Id.*

92. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotations omitted).

93. *See* CBS v. FCC, 453 U.S. 367, 395-96 (1981) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)) ("It is the right of the viewers and listeners . . . which is paramount.").

"information necessary for the effective operation of the democratic process."[94]

At the outset, it should be noted that there is an argument to be made that, because some cable operators already elect to make advertising time available to candidates on their own terms, the government's interest in expanding the reasonable access rule to cable is somewhat less than compelling. However, at least up to this point, simply relying on cable operators voluntarily selling time slots to candidates in order to effectuate the goals Congress set out to achieve with the reasonable access rule in the first place has been insufficient. For instance, in the lead up to the 2018 midterm elections, candidates collectively spent over two-and-a-half times as much money on local broadcast advertising as they did on local cable advertising, with totals reaching $3.1 billion and $1.2 billion, respectively.[95] As this data indicates, there certainly appears to be a barrier to access to cable advertising in place, and a cable reasonable access rule could be the government's best shot at overcoming it. Whereas the current regime only allows candidates to assert their reasonable access right to have their advertisements played on a few channels, expanding the right to cable would grant candidates access to hundreds of new channels, and with them new viewers that may have otherwise been unreachable by virtue of the reasonable access rule.

Admittedly, it seems at times as if, like Mark Twain, the reports of broadcast's death are greatly exaggerated.[96] In fact, of the top five most-watched networks of 2019, by total viewers, only one was a cable network—Fox News, which came in at number five.[97] On the other hand, the big four broadcast networks—CBS, NBC, ABC, and Fox—finished first through fourth, in that order.[98] In this sense, it could certainly be argued that the reasonable access rule, as it currently stands, already sufficiently contributes to freedom of expression, and any further increase of the already-large audience available to legally qualified federal candidates would not be enough to justify the burdens that such an expansion would impose on cable operators. If candidates can seemingly get the job done as it is, then is subjecting cable operators to the same obligations as broadcasters really necessary?

On a base level, the answer to that question is: yes. Congress would never have enacted the reasonable access rule in the first place had its purpose not been deemed necessary. There is no reason that that purpose should lose

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94. *Id.* at 396.

95. *See* Jason Lynch, *Advertisers Spent $5.25 Billion on the Midterm Election, 17% More Than in 2016*, ADWEEK (Nov. 15, 2018), https://www.adweek.com/tv-video/advertisers-spent-5-25-billion-on-the-midterm-election-17-more-than-in-2016/ [https://perma.cc/7KB8-K9F3].

96. Contrary to popular belief and common misquoting, this is, in fact, how Mark Twain phrased his famous line. *See* DICTIONARY.COM, *The reports of my death are greatly exaggerated*, https://www.dictionary.com/browse/the-reports-of-my-death-are-greatly-exaggerated [https://perma.cc/34ZS-NMK3] (last visited Jan. 27, 2019).

97. Michael Schneider, *Most-Watched Television Networks: Ranking 2019's Winners and Losers*, VARIETY (Dec. 26, 2019, 7:45 AM PST), https://variety.com/2019/tv/news/network-ratings-top-channels-fox-news-espn-cnn-cbs-nbc-abc-1203440870/ [https://perma.cc/KHN7-T2BR] (citing Nielsen's 2019 viewership report).

98. *Id.*

any importance simply because of the medium in question. Further, although the broadcast networks' spots atop the viewership rankings are by no means an aberration,[99] their numbers may still be somewhat inflated. Nine of the year's top ten most-watched television events came from one of the big four broadcast networks, which surely helped boost them in the rankings.[100] The fact remains that there are still millions of viewers, spread out over more than 100 different cable channels, who are inaccessible by means of the reasonable access rule while watching those channels. Working off the 2019 network viewership rankings, expanding the reasonable access rule to cable would almost double the number of viewers that candidates can already reach on the big four broadcast networks.[101] Surely this would be an even more significant contribution to freedom of expression.

Audience size aside, extending the reasonable access rule to cable would allow candidates to do something that they simply cannot do as effectively with broadcast programming alone: target their advertisements with hyper-specificity. Part of cable's appeal is the presence of so many channels that cater to so many different niche interests. There is the Food Network for the gourmands, the Travel Channel for the wanderlust crowd, and even the Tennis Network for the Serena Williams devotees—and the list goes on.

We are living in the era of Big Data, where various organizations have "the ability to make sense of [the] huge amounts of data" we leave behind as part of our consumer footprint,[102] and have been for quite some time.[103] Unsurprisingly, politicians use this wealth of information to their benefit as part of a practice referred to as "addressable advertising," which dates back to President Obama's 2012 campaign.[104] Based off of information like voting

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99. For instance, the top five most-watched networks in 2018 were, similarly, NBC, CBS, ABC, Fox, and Fox News. *See* Michael Schneider, *Most-Watched Television Networks: Ranking 2018's Winners and Losers*, INDIE WIRE (Dec. 27, 2018, 3:30 PM), https://www.indiewire.com/2018/12/network-ratings-top-channels-espn-cnn-fox-news-cbs-nbc-abc-1202030597/ [https://perma.cc/9YRA-3DZD] (citing Nielsen's 2018 viewership report).

100. The 2019 College Football Playoff Championship game was the lone cable event to break the top ten. *See* Michael Schneider, *Top Rated Shows of 2019: Super Bowl LIII, 'The Big Bang Theory,''Game of Thrones' Dominate*, VARIETY (Dec. 27, 2019, 12:00 PM PST), https://variety.com/2019/tv/news/top-rated-shows-2019-game-of-thrones-big-bang-theory-oscars-super-bowl-1203451363/ [https://perma.cc/3LUM-QZC4] (citing Nielsen's 2019 viewership report).

101. Michael Schneider, *Most-Watched Television Networks: Ranking 2019's Winners and Losers*, VARIETY (Dec. 26, 2019, 7:45 AM PST), https://variety.com/2019/tv/news/network-ratings-top-channels-fox-news-espn-cnn-cbs-nbc-abc-1203440870/ [https://perma.cc/KHN7-T2BR] (citing Nielsen's 2019 viewership report).

102. Marrian Zhou, *Midterm Elections: How Politicians Know Exactly How You're Going to Vote*, CNET (Nov. 5, 2018, 7:49 AM PST), https://www.cnet.com/news/how-your-personal-data-is-used-to-create-a-perfect-midterm-election-ad/ [https://perma.cc/Y72F-TDL8].

103. *See generally* Steve Lohr, *The Age of Big Data*, N.Y. TIMES (Feb. 11, 2012), https://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html [https://perma.cc/98A4-PQQN].

104. *See* Alex Byers and Emily Schultheis, *Political Ads' New Target: Individuals*, POLITICO (Feb. 12, 2014, 01:01 PM), https://www.politico.com/story/2014/02/political-ads-latest-target-individuals-103443?o=0 [https://perma.cc/YHZ6-EDX9].

records, home ownership, job history, and cable box addresses, these advertisements are custom-tailored for, and sent directly to, the households where the candidate believes the advertisement "will do the most good" for his or her campaign.[105]

While addressable advertisements can serve multiple purposes,[106] few are as beneficial to the candidate as targeting persuadable voters.[107] By analyzing all of the available data, a candidate's campaign staff could conclude that a significant portion of the 35 to 54-year-old female demographic in a particular town may be undecided and could be persuaded into casting their vote in the candidate's favor, and thus campaign funds should be used to buy advertising time on channels like HGTV or TLC from the local cable operator.[108] However, what is the candidate to do if the cable operator decides not to do business?

With no legal obligation to grant reasonable access to the candidate, there is nothing to stop a cable operator from simply declining to do business with a candidate because the cable operator takes issue with the candidate's political party or stances on certain issues. Thus, for example, a candidate who has been outspoken about a cable operator's business practices in the candidate's district could be prevented from reaching the voters that could be the difference between victory and defeat. Although it is worth noting that this cable operator would not be allowed to sell advertising time to this candidate's opponent without also selling time to the disfavored candidate,[109] all that the current regulatory regime would be doing in this situation is dissuading the cable operator from selling any advertising time to candidates running for that particular office. As such, and just as importantly, those voters could be deprived a means of receiving the disfavored candidate's message, or potentially the message of any other candidate for that office, thus hindering their ability to effectively participate in the democratic process. While no one can really say what the likelihood of all of this transpiring is, by extending the reasonable access rule to cable, such a situation could be entirely avoided, and one would be hard pressed to deem such an end result anything less than a contribution to freedom of expression.

Ultimately, the *CBS* Court made clear that "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns

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105. *See* Hiawatha Bray, *With New Tech, TV Election Ads Get Personal*, BOS. GLOBE (Nov. 5, 2018), https://www.bostonglobe.com/business/2018/11/05/with-new-tech-election-ads-get-personal/NuPUy32veySgi4PC3ZN0pI/story.html [https://perma.cc/4N88-P7CH].

106. For example, a candidate could use an addressable advertisement to target supporters in order to motivate them to actually go to the polls. *See id.*

107. *See* Alex Byers & Emily Schultheis, *Political Ads' New Target: Individuals*, POLITICO (Feb. 12, 2014, 01:01 PM), https://www.politico.com/story/2014/02/political-ads-latest-target-individuals-103443?o=0 [https://perma.cc/WC2W-ALTF].

108. According to marketing profiles compiled for HGTV and TLC, viewers in this demographic account for a considerable portion of each of these channels' viewership. *See* NAT'L MEDIA SPOTS (last visited Jan. 31, 2020), http://www.nationalmediaspots.com/network-demographics/HGTV.pdf [https://perma.cc/F9WE-2RJY] *and* NAT'L MEDIA SPOTS (last visited Jan. 31, 2020), http://www.nationalmediaspots.com/network-demographics/TLC.pdf [https://perma.cc/JR86-LBGK].

109. *See* 47 C.F.R. § 76.205(a) (2019).

for political office[,]"[110] and the fact that a different medium is now in question should not make this sentiment any less true. Extending Section 312(a)(7) and its requirements to cable operators would allow candidates to present their platforms to even more potential viewers than under the current regulatory regime. This further contribution to the freedom of expression that the First Amendment guarantees should constitute a government interest that is sufficiently compelling to satisfy the first prong of the strict scrutiny analysis. Now, the only question remaining is whether a cable reasonable access rule would be narrowly tailored to achieve this compelling interest.

### *B. Narrow Tailoring—The Limited Nature of the Reasonable Access Right*

In order to satisfy strict scrutiny, a cable reasonable access rule would also have to be narrowly tailored to achieve the compelling government interest in question. In order for a content-based statute to be deemed narrowly tailored, it must be no more restrictive than necessary to achieve the interest it was intended for, as, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[111] Although the *CBS* Court did not use specific scrutiny language when performing its analysis, its emphasis on the limited nature of the broadcast reasonable access right as one of its bases for upholding Section 312(a)(7)'s constitutionality would appear to answer the narrow tailoring question in the affirmative.

Applying the reasonable access rule to cable by no means requires that the operations or interpretations of the rule itself be altered. Thus, if Section 312(a)(7)'s requirements were to be applied to cable operators in the same manner that they are applied to broadcasters, there is no reason to believe that the resulting right of reasonable access would be any less limited than the one that already exists. This is to say that Section 312(a)(7)'s cable equivalent also would not be unnecessarily restrictive. For instance, reasonable access requests would still be reserved solely for campaigns promoting legally qualified federal candidates. Further, in evaluating a cable operator's decision to decline a request for reasonable access, the FCC would still apply the same reasonableness standard that it applies in the broadcast context, with the cable operator receiving the same degree of deference as the broadcaster. Ultimately, "Section 312(a)(7) does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming[,]"[112] and neither would its cable twin.

In fact, a cable reasonable access right would arguably be even more limited than the right candidates currently enjoy with regard to broadcast, thus making the new statute even less restrictive than its broadcast predecessor and

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110. CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)) (internal quotations omitted).

111. U.S. v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 847 (1997)).

112. *CBS, Inc.*, 453 U.S. at 397.

sufficiently narrowly tailored for purposes of a strict scrutiny analysis. Generally speaking, the Communications Act directs the FCC to regulate broadcast television in the "public interest, convenience and necessity."[113] This public interest standard, as it is more commonly known, places a good deal of weight upon broadcasters' shoulders. Perhaps most importantly, the receipt[114] and renewal[115] of a license to operate a broadcast station is conditioned upon the degree to which the FCC believes the owner of the station would broadcast or has been broadcasting, respectively, in service of the public interest.

While not dealing with a purported violation of Section 312(a)(7) specifically, the Supreme Court spoke to the role that the public interest standard plays within the political programming context in *Arkansas Educational Television Commission v. Forbes*.[116] Ralph Forbes, an independent Congressional candidate with little support, claimed that the denial of his request to be included in a debate held by a public television station violated his First Amendment rights.[117] In rejecting Forbes' claim, the court implied that, because broadcasters, by virtue of their "duty to schedule programming that serves the 'public interest, convenience, and necessity[,]'"[118] are already obligated "to exercise substantial editorial discretion in the selection and presentation of their programming[,]"[119] access claims like the one made by this candidate could be what pushes interference with the broadcaster's free speech rights into impermissible territory.[120]

Cable operators, on the other hand, do not bear the same burden that the public interest standard imposes and, as such, are not required to exercise the same degree of editorial discretion that the *Forbes* Court notes. For instance, while a broadcaster runs the risk of having its license revoked for broadcasting indecent content, as doing so runs counter to the public interest,[121] cable operators generally need not be so concerned, as they, by virtue of operating a subscription service, are not subject to these same requirements.[122] Yet, as

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113. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 1.04(5)(a) (2018) (quoting 47 U.S.C. §§ 302(a), 307(d), 309(a) and 316(a) (2018)). Other formulations of this public interest standard are scattered throughout the Communications Act, but the substance of the standard remains the same across the various statutes. *See id.* at n.43.

114. *See* 47 U.S.C. § 309(a) (2018).

115. *See* 47 U.S.C. § 309(k)(1)(A) (2018).

116. *See* 523 U.S. 666, 674 (1996).

117. *See id.* at 669-71.

118. *Id.* at 674 (quoting 47 U.S.C. § 309(a)).

119. *Id.*

120. *See id.* at 673-74 ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.").

121. *See, e.g.*, Citizens Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York, *Declaratory Order*, 56 F.C.C. 2d 94, 99 (1975) (basing statutory authority to grant citizen complaint and deem broadcasted language "indecent" on 18 U.S.C. § 1464 and 47 U.S.C. § 303(g)'s mandate to "encourage the larger and more effective use of the radio in the public interest . . . ."). This Order was upheld in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

122. *See Obscene, Indecent and Profane Broadcasts*, FCC (last visited Jan. 27, 2019), https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts [https://perma.cc/EU75-7SDC].

we saw in *CBS*, the broadcast reasonable access right is so limited that, even with the public interest standard and the editorial discretion that it requires broadcasters to exercise in play, it does not add so much to broadcasters' plates as to impermissibly intrude upon their First Amendment rights.[123] Therefore, because cable operators are not already burdened by the public interest standard, the risk of the reasonable access rule impermissibly interfering with their First Amendment rights is even lower than it is with broadcasters, thus preventing cable reasonable access from being impermissibly restrictive. Consequently, it is somewhat of a stretch to say that extending Section 312(a)(7)'s requirements to cable operators would be any more problematic than it was when the same was done to broadcasters.

However, with all this being said, if the determination of whether a statute is narrowly tailored depends on a lack of less restrictive alternatives, it would be a half-hearted effort to complete this analysis without looking at any such alternatives. In *United States v. Playboy Entertainment Group*, the Court made clear that "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."[124] Undoubtedly, a challenger to the cable reasonable access rule would likely have some less restrictive alternatives in mind as well.

At issue in the *Playboy* case was a statute that required cable operators "who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission" to the late evening and early morning, "when children are unlikely to be viewing . . . ."[125] Essentially, the purpose of the statute was to prevent children from inadvertently being exposed to such material.[126] However, its end result was that "for two-thirds of the day no household in [these] service areas could receive [this] programming, whether or not the household or the viewer wanted to do so."[127] Unsurprisingly, the plaintiff, an adult entertainment company whose programming consisted almost entirely of sexually explicit material, challenged the statute on First Amendment grounds.[128]

Because the statute in question was a content-based speech restriction, the Court applied strict scrutiny[129] and ultimately found that, because the government failed to show that the statute was "the least restrictive means for addressing" this issue, it was "violative of the First Amendment."[130] Upholding the decision made below, the Court concluded that if an alternative statute "requir[ing] cable operators to block undesired channels at individual

123. *See CBS, Inc.*, 453 U.S.

124. 529 U.S. 803, 816 (2000).

125. *Id.* at 806 (quoting 47 U.S.C. § 561(a) (1994)).

126. *See id.* As the Court explained, although "signal scrambling was already in use" before the statute was enacted, as a means to ensure "that only paying customers had access to certain programs[,]" the practice was imprecise and could at times still allow the material from the scrambled channels to be seen or heard, "a phenomenon known as 'signal bleed.'" *Id.*

127. *Id.* at 807.

128. *See id.*

129. *See id.* at 815.

130. *Id.* at 827.

households upon request" were to be "publicized in an adequate manner," said statute would be an effective, less restrictive means of achieving the government's goal,[131] and the government failed to explain why this approach would be "insufficient to secure its objective . . . ."[132]

It does not appear that a cable reasonable access rule would encounter the same difficulties as the statute from *Playboy*. There is not really another similar yet less restrictive statute in play that could be easily adapted and be just as effective as the reasonable access rule in achieving the government's interest in contributing to freedom of expression. If the goal is to truly maximize the degree to which candidates can disseminate their messages, and maximize the degree to which potential voters are able to become fully informed before exercising their right to vote, then it would seem that the reasonable access rule would really be the least restrictive means of achieving that goal.

With this being said, perhaps there are ways that the cable reasonable access rule could be altered so as to further minimize its restrictiveness. For instance, maybe the new statute could direct the FCC to establish an even more deferential standard to be applied when determining whether a cable operator's decision to reject a candidate's access request was reasonable, particularly outside of the pre-election window. Further, maybe an additional requirement of the cable reasonable access rule could be that, as part of his or her access request, the candidate must also submit a statement of purpose of sorts, detailing why the candidate believes that advertising on a certain channel in a certain area will contribute to freedom of expression. Specifically, this could include an explanation as to why the candidate believes that the voters he or she intends to reach would be otherwise unable to receive the candidate's message as effectively. The contents of this statement could then become part of the record to be reviewed by the FCC in determining the reasonableness of the candidate's request.

As appealing as these alternatives sound, the government would still have a strong argument against them. A regime that provided cable operators with a higher degree of deference than broadcasters, who enjoy a fairly substantial degree of deference as it is, would not really be as effective as applying the reasonable access rule to cable just as it is to broadcast. Additionally, imposing a burden on candidates to explain why they feel the need to advertise on certain channels or in certain locations would really only make the reasonable access rule more restrictive, as making candidates' lives more difficult would likely do nothing to make cable operators' lives easier.[133]

Ultimately, applying Section 312(a)(7)'s requirements to cable just as they are applied to broadcast would be the least restrictive means of achieving

131. *Id.* at 816. The statute that the Court was referring to was 47 U.S.C. § 560 (1994).

132. *Id.* at 826.

133. There is an argument to be made that imposing such a burden on candidates would diminish the number of candidates who seek to take advantage of the rule, thus reducing the burden the rule would place on cable operators. However, it seems unlikely that enough candidates would be dissuaded from invoking their reasonable access rights to make this a reality. Further, even if this were to be the result, all that it would mean is that this alternative version of the rule is less effective than the original.

the government's compelling interest in furthering freedom of expression by virtue of allowing more candidates to reach more voters with their messages. As such, it would appear that, were Congress to amend the Communications Act and enact a statute creating a cable reasonable access rule, that statute would survive strict scrutiny and be upheld as constitutional under the First Amendment.

## VII. CONCLUSION

Generally speaking, the law struggles to keep pace in sectors and industries where change happens quickly. Such is the nature of the legislative process. Thus, it is understandable that the Communications Act does not fully reflect the realities of today's television landscape. However, not all of the changes that the television viewing experience has seen from 1972, when Congress enacted Section 312(a)(7), to now are exactly recent. Specifically, the differences between cable and broadcast media are now virtually indistinguishable to the average viewer, and cable is no longer the nascent younger sibling to broadcast that it once was—and it has been this way for quite some time. What this Note hopefully succeeded in demonstrating is that Congress could, within the bounds of its constitutional authority, bring the law in line with these realities by amending the Communications Act to create a cable equivalent to the reasonable access rule.

By allowing candidates to maximize the audience they can reach with their platform, and allowing viewers to become knowledgeable voters, the reasonable access rule strives to make the fundamental interest that we have in voting feel more tangible. After all, what good would a right to vote be if we could only exercise it with blinders on? Yet, because the reasonable access rule remains inapplicable to cable programming, same as the day it was born, one could very well say that Congress is not only failing to effectuate the very goals it set out to achieve in enacting Section 312(a)(7) in the first place, but is also imposing regulatory burdens on broadcasters that they alone should not have to bear.

As this Note detailed, the degree to which a cable reasonable access rule would contribute to the freedom of expression that the First Amendment guarantees could constitute a compelling government interest. Additionally, the limited nature of the right it would create could make it such that the statute would be narrowly tailored to achieve that interest. As such, although the court reviewing such an amendment to the Communications Act would likely subject it to strict scrutiny, Section 312(a)(7)'s cable equivalent would stand a significant chance of being upheld.

Of course, with the 2020 presidential election fast approaching, the chances that Congress would make such a change in time to make a difference are non-existent. And even if Congress did, there is admittedly a question of whether it would really make all that much of a difference. Given the rate at which the television landscape is evolving, it is unclear how people will be consuming their video content in the next few years. These concerns are both understandable and valid. However, they should not take away from anything

that this Note has put forth. Where there is room for change there are always those willing to push for it. And as this Note illustrates, if and when the time comes for a push to establish a cable reasonable access rule, the advocates for such a change will have a strong argument in favor of their cause. That is something that academics, regulators, and legislators alike must keep in mind.