I Can't Afford the Time: How the FCC Could Conduct Rulemaking in a Post-Loper Bright Era to Strengthen the Equal Time Rule and Democracy in General

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TABLE OF CONTENTS

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I. INTRODUCTION

On Saturday November 2, 2024, Presidential candidate Kamala Harris appeared on Saturday Night Live for one minute and thirty seconds.[1] The skit, conducted during the cold open of the show, showed the presidential hopeful speaking to her doppelganger, played by Maya Rudolph, in a comedic exchange through a faux mirror.[2] Just after the airing and announcement of Harris's cameo on the late-night program then FCC Commissioner Brendan Carr, now Chairman, posted on X, the social media platform, saying, "this is a clear and blatant effort to evade the FCC's Equal Time rule."[3] Later an FCC representative noted to the media that there had not been a formal complaint filed by the Donald Trump campaign.[4] In response to the pressure from Commissioner Carr, National Broadcasting Company ("NBC"), the network behind Saturday Night Live, filed notice with the FCC that they gave President Donald Trump equal time on their broadcasting station.[5] NBC gave Trump two different free broadcasts, one a ninety second spot at the tail-end of a NASCAR broadcast and the other a sixty second spot during NBC Sunday Night football.[6]

This is only a blip in the history of political candidates and their appearances on Saturday Night Live and other broadcast television shows. In

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1. Saturday Night Live, *2024 Pre-Election Cold Open*, YOUTUBE at 6:05–8:28 (Nov. 3, 2024), https://www.youtube.com/watch?v=e6Funs6yyEw [https://perma.cc/HKM8-QLN3].

2. *See id.*

3. Brendan Carr (@BrendanCarrFCC), X (Nov. 2, 2024, 9:35 PM), https://x.com/brendancarrfcc/status/1852887210330341693?s=46 [https://perma.cc/FVW5-3WBP]; Tara Suter, *FCC commissioner claims Harris on 'SNL' violates 'equal time' rule*, THE HILL (Nov. 3, 2024), https://thehill.com/homenews/4968217-fcc-commissioner-claims-harris-on-snl-violates-equal-time-rule/ [https://perma.cc/6AGM-5237].

4. Lester Fabian Brathwaite, *FCC responds to claim Saturday Night Live tried to 'evade' Equal Time rule with Kamala Harris Appearance*, ENT. WKLY. (Nov. 3, 2024), https://ew.com/fcc-responds-to-commissioner-claim-regarding-kamala-harris-snl-appearance-8738897 [https://perma.cc/9TJ3-SKJ2].

5. Emily DeLetter, *NBC files FCC 'equal time' notice after Kamala Harris appears on 'SNL'*, USA TODAY (Nov. 3, 2024), https://www.usatoday.com/story/news/politics/elections/2024/11/03/nbc-fcc-equal-time-harris-snl/76039040007/ [https://perma.cc/ZRJ3-QTVP].

6. Ryan Gaydos, *NBC gives Trump free election ad and airtime during NASCAR, NFL broadcasts after Harris 'SNL' furor*, N.Y. POST (Nov. 4, 2024), https://nypost.com/2024/11/04/sports/trump-election-ad-airs-during-nbcs-nascar-nfl-coverage-amid-harris-snl-uproar/ [https://perma.cc/6GR6-EY98]. The viewership on the SNL program which Harris appeared is dwarfed by the combination of the viewership of Sunday Night Football and NASCAR. Rebecca Bunch, *Saturday TV Ratings 11/2/24: Saturday Night Live Soars to Season High, Our Holiday Shop Strong on Hallmark [+Analysis]*, THE TV RATINGS GUIDE, http://www.thetvratingsguide.com/2024/11/saturday-tv-ratings-11224-saturday.html [https://perma.cc/462S-U9LW]; Jesus Mesa, *Donald Trump's NFL Ad and Kamala Harris' SNL Sketch Compete for Ratings*, NEWSWEEK (Nov. 4, 2024), https://www.newsweek.com/donald-trump-kamala-harris-ratings-snl-sunday-night-football-1980095 [https://perma.cc/48VN-NQEA]; Cian Brittle, *Nascar's Phoenix finale gets 2.9m viewers as 2024 season averages 2.87m on NBC*, BLACKBOOK (Nov. 13, 2024), https://www.blackbookmotorsport.com/news/nascar-phoenix-viewership-season-nbc-november-2024/ [https://perma.cc/GZ5V-WNXF].

2016, both Donald Trump and Hillary Clinton made appearances on Saturday Night Live during their respective primaries.[7] Clinton's appearance only resulted in one candidate, a relative non-entity, Larry Lessig, to request equal time.[8] In lieu of Trump's 2016 SNL hosting appearance candidates John Kasich, Mike Huckabee, James Gilmore, and Lindsey Graham reached an agreement with NBC to have 12 minutes of free air time in certain affiliate stations along with time during other Saturday Night Live broadcasts.[9] The FCC even considered "Bedtime for Bonzo," a movie where Ronald Reagan stars alongside a monkey, a "use" under the rule and granted his opponent "equal opportunities."[10] When Dr. Mehmet Oz ran for U.S. Senate in Pennsylvania, Fox Television stations stopped their broadcasting of his TV show "Dr. Oz" in anticipation of a potential equal time rule activations.[11]

While people have been switching to streaming more and more, the broadcast television political advertising market is as strong as ever.[12] In 2024, political ad spending was projected to reach almost 16 billion dollars, with it projected to only grow more as the years go on.[13] Television ad spending still comprises a major share of some campaigns' advertising budgets, with some political ad agencies designating 65% of their client's

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7. Ted Johnson, *NBC Reaches Agreement on Equal Time After Trump's 'SNL' Gig*, VARIETY (Nov. 23, 2015), https://variety.com/2015/tv/news/nbc-equal-time-agreement-donald-trump-snl-1201647112/ [https://perma.cc/9PC3-2SD8]; *What did Hillary Clinton do in her first 2016 "SNL" appearance?*, CBS NEWS (Oct. 4, 2015), https://www.cbsnews.com/news/what-did-hillary-clinton-do-on-her-first-2016-snl-appearance/ [https://perma.cc/9XSK-EVRE].

8. Ted Johnson, *Presidential Candidate Larry Lessig Seeks Equal Time After Hillary Clinton's 'Saturday Night Live' Cameo*, VARIETY (Oct. 18, 2015), https://variety.com/2015/biz/news/hillary-clinton-saturday-night-live-larry-lessig-equal-time-1201620964/ [https://perma.cc/LSC3-U9GH] ("An attorney for Lessig's campaign, Adam Bonin, sent a letter on Oct. 10 to 47 affiliates asking them for comparable time to that given to Clinton — three minutes and 12 seconds.").

9. Johnson, *supra* note 7.

10. *See* Womble Bond Dickinson LLP, *Political Broadcast Manual*, CA. BROADCASTERS ASSOCIATION , https://www.womblebonddickinson.com/sites/default/files/2019-11/PoliticalLawManual_2018_CA.PDF [https://perma.cc/J47V-WLJP] (accessed Nov. 16, 2024).

11. Ronald Reagan and Arnold Schwarzenegger also had their entertainment programming pulled during their respective campaigns. Stephen Battaglio, *Here's what happens to Dr. Oz's talk show now that he's running for Senate*, L.A. TIMES (Nov. 30, 2021), https://www.latimes.com/entertainment-arts/business/story/2021-11-30/dr-oz-show-senate-announcement-pennsylvania-fcc-rules [https://perma.cc/64QK-DH8D].

12. *Compare* Julia Stoll, *Share of consumers who have cut the cord on cable or satellite TV and moved to streaming-only services in the United States from 2022 to 2024*, STATISTA (Sept. 23, 2024), https://www.statista.com/statistics/1484079/cord-cutting-move-streaming-services-us/#:~:text=According%20to%20a%20survey%2C%20the,percent%20of%20respondents%20in%202024 [https://perma.cc/3BKW-2PL9] *with* Sara Fischer, *U.S. political ad market projected to reach record $16 billion in 2024*, AXIOS (Dec. 8, 2023), https://www.axios.com/2023/12/08/us-political-ad-market-2024-spending.

13. Fischer, *supra* note 12.

advertising budgets towards traditional TV spots.[14] While the flashy races such as the ones described above are the ones in which headlines and eyes largely focus on, the equal time rule also extends to down ballot races.[15] These down ballot races are rarely thought about, as the average voter can struggle to name their local candidates.[16] The lack of knowledge about down ballot races and working-class candidates is due in large part to the massive political advertising budgets that are required to get one's name and likeness out there.[17] Due to the financial hurdles, working class candidates can find it too difficult to run for office in their respective communities.[18]

The main problem with the equal time rule is that it does not actually lead to equal opportunities as required within the text. Its current state does not secure equal time since campaigns are regularly unable to utilize the rule.[19] This Note advocates for the FCC to conduct rulemaking on the equal time rule to adopt an affirmative duty for broadcasters to notify opposing candidates of their ability to utilize their equal time. Section II focuses on the history of the equal time rule, the current state and enforcement of the rule, the current legal challenges to rule making in a post-*Loper Bright* world, and the equity problems with the rule. Section III proposes rulemaking which would require broadcasters to have a heightened responsibility to inform opposing candidates when a use is imminent. Section III also provides a legal justification, in anticipation of legal challenges to the proposed rulemaking, which will focus the broad power granted to the FCC to conduct rule making. Section III also analyzes how the FCC has been given broad power to rule

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14. Marty Swant, *Political ad spending piles up in key states less than a month until Election Day*, DIGIDAY (Oct. 14, 2024), https://digiday.com/media-buying/political-ad-spending-piles-up-in-key-states-less-than-a-month-until-election-day/ [https://perma.cc/ETP5-TQMH] ("Doug Thornell, CEO of SKDK" stated that through his agency 65% of spending on political advertising "still goes to linear TV.").

15. *Political Broadcasting Advisory*, PILLSBURY WINTHROP SHAW PITTMAN LLP, Mar. 2010, at 3, 5 , https://www.pillsburylaw.com/a/web/3016/3016.pdf [https://perma.cc/73G7-FH3X].

16. Maria Caspani, *What's in a name? One-third of U.S. voters don't know candidates*, REUTERS (Oct. 3, 2018), https://www.reuters.com/article/us-usa-election-name/whats-in-a-name-one-third-of-u-s-voters-dont-know-candidates-reuters-ipsos-poll-idUSKCN1MD1QC/ [https://perma.cc/35YH-HEJ7] ("34 percent of Republican registered voters and 32.5 percent of Democratic registered voters said they did not know the names of their party's congressional candidates in their districts"); Jill Rosen, *Americans don't know much about state government, survey finds*, JOHNS HOPKINS UNIV. (Dec. 14, 2018), https://hub.jhu.edu/2018/12/14/americans-dont-understand-state-government/ [https://perma.cc/RS3Q-A48S] ("a third of respondents didn't know which state officials they voted for beyond governor, lieutenant governor, and members of the legislature").

17. NICHOLAS CARNES, THE CASH CEILING: WHY ONLY THE RICH RUN FOR OFFICE – AND WHAT WE CAN DO ABOUT IT 126 at 6 (2018); *see* Truel & Hanson, *infra* note 77.

18. Ross Barkan, *It's way too hard for working-class people to run for office*, WASH. POST (Jan. 16, 2019), https://www.washingtonpost.com/outlook/2019/01/16/its-way-too-hard-working-class-people-run-office/ [https://perma.cc/KV9C-AGFR]; Maresa Strano, *Where Have All the Local Candidates Gone?*, NEW AM. (Nov. 6 2023), https://www.newamerica.org/political-reform/blog/where-have-all-the-local-candidates-gone/ [https://perma.cc/W3NV-JKP2].

19. Anne Ricchiuto, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 280-81 (2005).

make; how the public interest standard supports an equitable political market; and argues that the word "afford" in the equal time rule supports affirmative notification duties placed on broadcasters. Section III ends by analyzing possible counter arguments to the adoption of the new rule.

II. BACKGROUND

A. History of the Equal Time Rule

The equal time rule was implemented through the passage of the Communications Act of 1934.[20] The relevant section of the Act which contains the equal time rule is 315(a).[21] Congress passed the Communications Act of 1934 in response to the fear of the growing influence of broadcasting on the American populace.[22] The relevant regulation for the equal time rule is 47 CFR § 73.1941 and outlines the "timing of request," "burden of proof," and several other measures currently apart of the rule.[23] After the FCC ruled that newscast appearances by candidates qualify as a use under the equal time rule, Congress, in 1959, amended the rule adding exceptions to what would be considered "uses."[24] The act's relevant section reads as follows:

> If 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: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.[25]

The FCC requires candidates to request access to broadcast time or have broadcast companies themselves put up notice with the FCC that there is an

20. Jonathan D. Janow, *Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?*, 76 GEO. WASH. L. REV. 1073, 1073-74 (2008) (citing Communications Act of 1934, 47 U.S.C. § 151 (1934)).

21. *See id.* at 1073.

22. *Id.* at 1074 (citing Farmers Edu. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 529 (1959)).

23. 47 C.F.R. § 73.1941 (1994).

24. *See* Janow, *supra* note 20, at 1076.

25. 47 U.S.C. § 315(a) (2021) (first emphasis added) (second emphasis in original).

opportunity for broadcast time, although there is evidence to suggest that some stations fail to post these records.[26]

The Supreme Court has upheld that political broadcasting laws are in-line with free speech protection.[27] The Communications Act requires the FCC to ensure that broadcasting licensees operate in the public interest.[28] This has become known as a public interest standard and derives from several different sections of the Communications Act of 1934.[29] The public interest standard "is a broad one."[30] Along with the public interest standard stemming from Section 309, Section 315(a) also mentions the existence of the "obligation imposed upon [broadcasters] under this act to operate in the public interest."[31]

Previously, there existed a close cousin of the equal time rule known as the fairness doctrine.[32] In 1949, the FCC justified the fairness doctrine on the idea that the public interest standard given in the Communications Act was justified since broadcasting is "medium of free speech and freedom of expression."[33] The fairness doctrine required that a broadcasting licensee give equal airtime to both sides on issues which were deemed controversial.[34] The Supreme Court upheld the constitutionality of the fairness doctrine by adopting the reasoning that since broadcast companies control the scarcity of the broadcast, that therefore political speech and its dissemination is inherently important to public interest.[35] However, even with the holding of the Supreme Court, the FCC cited first amendment concerns when the commission repealed the fairness doctrine in 1987.[36] There were two rules which survived the repeal of the fairness doctrine, the editorial and personal attack rules, which required notice be given to certain candidates in the event of a personal attack on the candidate or an endorsement against a candidate

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26. The FCC, however, does give rulings on whether certain broadcasts are exempt from the equal time rule. *See generally In re* Petitions of the Aspen Inst. on Commc'n and CBS, INC., 55 F.C.C.2d 719 (1975) (clarifying several exemptions in the equal time rule); *see generally* Pillsbury, *supra* note 15; Christopher Terry, *Candidates Appearances, Equal Time, and the FCC's Online Public File Database: Empirical Data on TV Station Compliance During the 2016 Presidential Primary*, 25 CATH. UNIV. J. L. & TECH. 341, 351-52 (2017).

27. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388-91 (1969).

28. *See* 47 U.S.C. §§ 307(e)(1), 309(a); *see also Red Lion*, 395 U.S. at 380-81.

29. *See Red Lion*, 395 U.S. at 380-81.

30. *See id.*

31. 47 U.S.C.S. § 315(a) (LexisNexis 2025).

32. *See* Syracuse Peace Council, *Memorandum Opinion and Order*, 2 FCC Rcd 5043, ¶ 17 (1987) [hereinafter *Syracuse*] (repealing the fairness doctrine).

33. Editorializing by Broadcast Licensees, *Report*, Dkt. No. 8516, 1248 (1949), https://docs.fcc.gov/public/attachments/DOC-295673A1.pdf [https://perma.cc/7E93-BHMZ] (creating/clarifying the fairness doctrine).

34. Matt Stefon, *fairness doctrine*, BRITANNICA, https://www.britannica.com/topic/Fairness-Doctrine (Last updated Feb. 24, 2025) [https://perma.cc/E37S-FEYU].

35. *Red Lion*, 395 U.S at 390. The fairness doctrine could be considered a violation of the free speech rights of the broadcasters specifically because they intrude on their freedom of press and the broadcasting companies' freedom of speech in choosing what they want to air. *See id.* at 394.

36. *Syracuse*, *supra* note 32; Jerome Barron, *What Does the Fairness Doctrine Controversy Really Mean*, 12 U.C. L. COMMUN. & ENT. J. 205, 216 (1989).

by a broadcasting licensee.[37] Both of these rules were suspended in 2000 in response to a pending case in the D.C. Circuit, but no court has ever ruled that either of these rules were unlawful.[38]

B. Implementation of the Equal Time Rule

The statute requires that there be equal opportunities afforded to all candidates.[39] This has largely been construed that a broadcaster "make available periods of approximately equal audience potential to competing candidates to the extent that this is possible."[40] The FCC outlines that equal opportunities "generally means providing comparable time and place to opposing candidates."[41] The broadcast station can fulfill this requirement by allotting time on any of their other programming, however, they are not required to allot the time on identical programming.[42] In *the Matter of Summar Corp.*, the FCC was brought an issue regarding advertising spots in a congressional race where a broadcaster had delayed affording equal opportunities to an opposing candidate after several requests by a committee in support of said candidate.[43] The FCC held that giving more spots comparatively to an opposing candidate in an "isolated time frame" is not affording equal opportunity.[44]

The statute requires that someone be a legally qualified candidate, for any public office, to enjoy the usage of the rule.[45] Someone becomes a legally qualified candidate when they, "1) [have] publicly announced [their] candidacy, 2) meets the qualifications prescribed by applicable law to hold office, and 3) have qualified for a place on the ballot."[46] Under certain circumstances, some write-in candidates who do not satisfy all three requirements can also be considered legally qualified.[47] The burden is on the candidate requesting equal time to prove that they are legally qualified to in

37. Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. UNIV. L. REV. 97, 154 n.364 (2011).

38. *See id.* (citing Redio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000); Repeal or Modification of the Personal Attack and Political Editorial Rules, 65 Fed. Reg. 66643, 66644 (effective Nov. 7, 2000)).

39. 47 U.S.C.S. § 315(a) (LexisNexis 2025).

40. *See* Becker v. FCC, 95 F.3d 75, 84 (D.C. Cir. 1996).

41. *Fact Sheet: FCC Political Programming Rules,* FCC (Aug. 18, 2022), https://www.fcc.gov/sites/default/files/political_programming_fact_sheet.pdf [https://perma.cc/25Q8-K5VG].

42. *See id.*

43. *See* Liability of Summa Corp., Licensee of Station KLAS-TV, Las Vegas, Nev. For Forfeiture, *Memorandum Opinion and Order*, 49 F.C.C. 2d 443, 443 (1974) [hereinafter *Summa Corp.*] (regarding a congressional campaign buying advertising spots).

44. *See id.* at 449.

45. 47 U.S.C.S. § 315(a) (2025).

46. Flory v. FCC, 528 F.2d 124, 130 (7th Cir. 1975) (citing 47 C.F.R. §§ 73.120(a), 73.657(a)).

47. *See id.*

order to enjoy use of the equal time rule.[48] This has led to some instances of candidates being denied equal time, even when they are in fact a legally qualified candidate.[49]

The statute also requires that there be an initial use before other candidates can utilize the equal time rule.[50] The current regulation defines a use as "a candidate appearance (including by voice or picture) that is not exempt."[51] Previously, the regulation also qualified that an "appearance" be "controlled, approved or sponsored by the candidate or the candidate's authorized Committee," but this provision has been removed.[52] The FCC does not consider a candidate only appearing briefly in a broadcast, i.e. "an incidental inclusion," to cause the entire programming to be considered the use, unless the candidate is "integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of candidate."[53] In *Paulsen v. FCC*, the Broadcast Bureau of the FCC held that Pat Paulsen's performance on a Disney produced show constituted a use under the law.[54] The Ninth Circuit, in *Paulsen*, upheld that even non-political appearances qualify as uses under the rule.[55]

The FCC has issued rules pursuant to the statute outlining the process of how a candidate and broadcasting agency approaches implementation of the equal time rule.[56] The regulations require that a request for equal time "must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred[.]"[57] While a station is required to keep a public record of all political advertising and broadcasting time use, the burden is on the opposing candidates to both find out that there has been a use along with requesting for equal time.[58] If a candidate is denied their equal opportunity by a broadcast station, they then could file a formal complaint with the FCC or file a lawsuit in court.[59] It would be at this time that the FCC could step in, either through giving a declaratory

48. 47 C.F.R. § 73.1941 (2022).

49. *See Flory*, 528 F.2d at 131 (while the write in candidate was a legally qualified candidate his filings were not brought quickly enough to allow them to enjoy remedy from a previous adverse ruling).

50. *See Summa Corp.*, *supra* note 43, at 449.

51. 47 C.F.R. § 73.1941(b).

52. *Compare* Equal Opportunities, 57 Fed. Reg. 208 § 73.1941(b) (1992) *with* 47 C.F.R. § 73.1941(b).

53. *See* Complaint of D.J. Leary, *Memorandum Opinion and Order*, 37 F.C.C. 2d 576, 578 (1972) (regarding a brief airing of a political candidate).

54. *See* Paulsen v. FCC, 491 F.2d 887, 887 (9th Cir. 1974).

55. *See id.* at 891-92.

56. 47 C.F.R. § 73.1941 (1994).

57. 47 C.F.R. § 73.1941(c) ("Timing of request").

58. 47 U.S.C.S. § 315(e) (LexisNexis 2025) (requiring that a broadcast licensee keep a publicly available record of all requests for broadcast time done by a legally qualified candidate); Christopher Terry, *Candidate Appearances, Equal Time, and the FCC's Online Public File Database: Empirical Data on TV Station Compliance During the 2016 Presidential Primary*, 25 CATH. UNIV. J. L. & TECH. 341, 342-44 (2017).

59. *See generally* Pillsbury, *supra* note 15.

ruling or pursuing sanctions against the station.[60] Broadcast stations are not required to give notice to other candidates nor the FCC that there is an equal opportunity broadcast available, with the law only requiring that a candidate determine that they are entitled to relief before relief can be granted.[61]

The rule also operates differently depending on the medium or the nature of the candidate appearance. The question of whether the equal time rule applies to cable television seems to be up in the air. Recently, the current FCC Chairman, Brendan Carr, stated in a tweet that cable television is not required to follow the equal time rule, however the Supreme Court has upheld that cable television providers are still required to follow some content neutral regulations on broadcasters.[62] The equal time rule currently does not apply to streaming services since the FCC has declined to expand their jurisdiction to streaming services, although political advertising through streaming has become a widely used way for campaigns to advertise.[63] Separate from the equal time rule, all broadcasting stations are required to allow federal candidates to advertise, but there are no federal requirement for state and local candidates.[64] However, if a station does allow a state or local candidate to advertise on their broadcast then the equal time rule can be used to give other candidates in the same race access to broadcast time.[65]

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60. PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15; Relief can be denied. *See* Preserving the First Amendment, *Memorandum and Order*, 40 FCC Rcd 433, ¶10-14 (2025) [hereinafter *Preserving First Amendment*] (Denying a request for relief on an alleged violation of the equal time rule regarding a Tim Kaine appearance on SNL).

61. PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 4.

62. Brendan Carr (@BrendanCarrFCC), X (Nov. 5, 2024, 8:52 AM), https://x.com/BrendanCarrFCC/status/1853797430896062591 [https://perma.cc/H8U7-YELB] ("Sure. The FCC Equal Time rule does not apply to cable shows, whether they are on Fox News or MSNBC." in response to a since-deleted tweet); *but see* Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180 (1997); ERIC HOLMES, CONG. RSCH. SERV., LSB11239, THE EQUAL TIME RULE FOR POLITICAL CANDIDATES: CONSTITUTIONAL CONTEXT 2 (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11239 [https://perma.cc/7AUB-9J5Y].

63. John Eggerton, *FCC Chair: Regulatory Authority Over Streaming Must Come From Congress*, MULTICHANNEL NEWS (Dec. 1, 2023), https://www.nexttv.com/news/fcc-chair-regulatory-authority-over-streaming-must-come-from-congress [https://perma.cc/M8D8-P4YR]; Mark MacCarthy, *An 'Equal Time' Rule for Social Media*, FORBES (Jan. 21, 2020, 9:31 AM), https://www.forbes.com/sites/washingtonbytes/2020/01/21/an-equal-time-rule-for-social-media/ [https://perma.cc/4VEF-YML7]; Max Greenwood, *Video Ad Spending to Set Record for a Midterm Cycle in 2026*, CAMPAIGNS & ELECTIONS (Nov. 11, 2025).

64. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 5. The equal time rule does not require that candidates be given advertising opportunities or uses outside of the prescribed provision of their being an initial candidate use. There do exist some statutes, such as the reasonable access requirement for federal races, in which broadcasting stations are required to give 'access' to a candidate, however the reasonable access requirement does not apply to state or local candidates where the equal time rule does. *See* 47 C.F.R. § 73.941 (1992) (explaining that a station licensee is required to give reasonable access to any legally qualified candidate); The Communications Act of 1934, 47 U.S.C. 312(a)(7).

65. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 3, 5.

C. FCC and the Rulemaking Process

Regardless of administration, the FCC has adopted an agenda focused on market forces instead of active regulation, although the new Chairman, Brendan Carr, has voiced some interest becoming more involved with the actors in the communications market.[66] When the FCC or any agency goes into rulemaking, they must ensure that whatever rulemaking they establish will not be denied by the courts. For the last several decades *Chevron* has been the law of the land, allowing for agencies to enjoy deference in the APA rule making process when dealing with ambiguity.[67] However, the Supreme Court struck down the Chevron Doctrine modifying the analysis required under the APA.[68]

The Supreme Court in *Loper Bright* placed the emphasis on the courts and their respective judges to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[69] While there is some confusion as to which tools courts should use, the Sixth Circuit has tackled an arbitrary and capricious claim against FCC net neutrality rulemaking post-*Loper Bright*.[70] The Sixth Circuit, in *Ohio Telecom. Association v. FCC*, relied principally on the plain meaning of the statute both through definitions and context within the act at issue.[71] Relying on the plain meaning of the statute has also been the starting point of other Circuit courts in rectifying the *Loper Bright* ruling in the given issues brought before them.[72]

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66. *See* Kathleen Q. Abernathy, Comm'r, Fed. Commc'ns Comm'n, Address to Indiana University: My View from the Doorstep of FCC Change 2-7 (Mar. 4, 2002), https://transition.fcc.gov/ftp/Speeches/Abernathy/2002/spkqa206.pdf [https://perma.cc/56A3-ZTP3]; *Compare with* Ari Cohn, *Commissioner, regulate thyself: The incoming FCC chair is threatening to censor views he doesn't like*, FOUND. FOR INDIVIDUAL RTS. AND EXPRESSION (Nov. 20, 2024), https://www.thefire.org/news/commissioner-regulate-thyself-incoming-fcc-chair-threatening-censor-views-he-doesnt [https://perma.cc/3W46-TM3H].

67. Jeff Turrentine, *The Supreme Court Ends Chevron Deference-What Now?*, NRDC (June 28, 2024), https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference.

68. *See generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

69. *See id.* at 412.

70. Leonardo Cuello, *Loper Bright Decision Will Collapse on Itself, Policy Evidence is More Important than Ever Before in Driving Progress*, GEORGETOWN UNIV. MCCOURT SCH. OF PUB.POL'Y (July 31, 2024), https://ccf.georgetown.edu/2024/07/31/loper-bright-decision-will-collapse-on-itself-policy-evidence-is-more-important-than-ever-before-in-driving-progress/ [https://perma.cc/X3GH-AKMC]; *see also* Ohio Telecom Ass'n v. FCC, 124 F.4th 993, 997, 1001 (6th Cir. 2025).

71. *See Ohio Telecom Ass'n*, 124 F.4th at 1007-08. The case was brought in response to Biden era regulations which placed FCC regulatory power over broadband internet to impose net neutrality regulations. The question was whether the phrase "information service" included within its definition broadband internet. The Court relied largely on the plain meaning of information service being that of actual information rather than the connection of transmission offered by broadband striking down the Biden-era regulations.

72. *See* Van Loon v. United States Dep't of the Treasury, 122 F.4th 549, 564 (5th Cir. 2024). The Fifth Circuit, when confronted with an interpretation of what 'property' meant, relied principally on the plain meaning definition of property as the lynch pin of their reasoning.

Pre-*Chevron* decisions regarding FCC rulemaking may also shed a valuable light on how the courts may attempt to interpret FCC rulemaking in a post-*Loper Brig*ht world. In *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court focused on the statutory authority granted to the FCC under the Communications Act.[73] The Supreme Court specifically focused on Section 303 which provides that the commission may conduct regulatory rule making if based on a public interest.[74] The Supreme Court in this analysis in effect did not look to the plain meaning of the text to determine the question at hand rather using a public-interest standard as the benchmark of their reasoning to show that the FCC was acting within its regulatory power.[75] The FCC enjoyed broad regulatory authority in rulemaking in broadcasting even without *Chevron* deference.

D. Modern Issues in the Political Landscape

Working class people make up 52% of the population but "hold just 10% of city council seats, 3% of state legislative seats, and 2% of congressional seats."[76] En masse a given reason for this deficit is the lack of fundraising ability available to working class candidates, as opposed to their white-collar counterparts.[77] Recruiting on the local level which disproportionately biases towards white collar candidates adds into the institutional reasons for this impact, but fundraising prowess can translate into more successful candidacies.[78] Fundraising allows for more successful campaigns since it allows for a candidate to buy more advertising, hire trained staff, and buy their way into institutional support.[79]

In the broadcasting space, the ability to get a political advertisement disseminated requires knowledge and resources.[80] Filming a commercial,

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73. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 793 (1978).

74. *See id.*

75. The issue during this case has to do with licensing practices through the FCC which while not entirely topical to the equal time rule, the fact that FCC's prior arguments focused on their broad regulatory power has been able to be successful can be dispositive to how FCC can operate in a post-*Loper Bright* era. *See id.*

76. Sarah Truel & Eric Hanson, *Primary Barriers to Working Class Representation*, 76 POL. RSCH. Q. 1516, at 1519 (2023), https://journals.sagepub.com/doi/epub/10.1177/10659129231154914; *see also* Rachel Porter & Sarah Truel, *Inexperience and Success in Congressional Primaries*, 69 AMERICAN J. OF POL. SCI. 284, 288 (2024), https://ajps.org/2024/04/22/evaluating-inexperience-in-congressional-elections/.

77. *See* Truel & Hansen, *supra* note 76*,* at 1521-29.

78. *See id.* At 1525.

79. Ximena Bustillo, *It takes lots of money to win elections. Here's what you need to know,* NPR (Nov. 1, 2023, 5:01 AM), https://www.npr.org/2023/11/01/1205728664/campaign-finance-donations-election-fec-fundraising-ad-spending [https://perma.cc/FY5S-VEUX].

80. Kathleen Mackay, *Key Factors to Consider When Hiring a Political Advertising* Agency, HEARST BAY AREA (Sept. 2, 2020), https://marketing.sfgate.com/blog/when-should-you-hire-a-political-advertising-agency [https://perma.cc/86GB-89PH].

navigating red tape, and reaching out to broadcasting stations, can be complicated endeavors.[81] Even those candidates with a plethora of resources rely on experienced communications consultants to navigate the broadcasting market space.[82]

The rule in its current form disadvantages working class candidates. Divulging resources to scouring broadcasts and public records to find opportunities to request equal time is simply not feasible for a low resource campaign, which the equal time rule requires for its use.[83] The rule in its current format requires that candidates use their own resources to determine if there was a prior use, request the station to gain their equal opportunity, prove to the station that they are a legally qualified candidate, negotiate their equal opportunity advertising spot, and then pay for the spot.[84] This is not to mention that if they are denied for whatever reason through the process then have to take legal action through an FCC complaint or lawsuit, where candidates are required to divulge even more resources.[85] Furthermore, campaigns are inherently short enterprises, by their very nature everything is on a timetable. Therefore, dealing with an FCC claim or gathering the resources required for a prolonged legal challenge to a broadcast station's decision, is not only untimely to the campaign cycle process but leads to legal decisions occurring well past election days.[86] While there are campaigns that do have the resources to bring claims and recover some form of damages or sanctions against a noncompliant broadcast licensee, many challenger campaigns after election day have their campaign funds drained and the opportunity cost of legal fees and time don't make sense.[87]

81. Bridget Bowman & Ben Kamisar, *Eyes on 2024: How Presidential candidates are spending their money*, NBC NEWS (July 18, 2023, 10:30 AM), https://www.nbcnews.com/meet-the-press/meetthepressblog/eyes-2024-presidential-candidates-are-spending-money-rcna94825 [https://perma.cc/9Z4V-JB66]; Audrey Rawnie Rico, *How to Get a Commercial on TV for Your Business*, FIT SMALL BUS. (Mar. 10, 2023), https://fitsmallbusiness.com/how-to-get-commercial-tv/ [https://perma.cc/G6N9-CHUP].

82. Donald Shaw, *The Democratic Consultants Getting Rich off the Harris Campaign*, SLUDGE (Nov. 13, 2024), https://readsludge.com/2024/11/13/the-democratic-consultants-getting-rich-off-the-harris-campaign-2/ [https://perma.cc/WP6Y-7V74].

83. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 3–4.

84. *See id.* at 3–5; *see infra* discussion in Section II Sub Section B, the Implementation of the Equal Time Rule.

85. This process is explained above.

86. A myriad of cases and commission orders occur after election day has passed. *See e.g.*, *Preserving First Amendment*, *supra* note 60, at ¶ 14; *see also* Gary C. Jacobsen, *Party Organization and Distribution of Campaign Resources: Republicans and Democrats in 1982,* 100 POL. SCI. Q. 603, 615-16 (1986), https://www.jstor.org/stable/2151543.

87. *See* Jacobsen, *supra* note 86.

III. HOW TO FIX THE PROBLEMS WITH THE EQUAL TIME RULE

A. *Requiring Equal Time Notification by Broadcasters Fixes Inequities*

The FCC should require that broadcasting stations give notice to all qualified candidates at any point in which another legally qualified candidate use is imminent along with broadcasting spot offerings and their price points. The adoption of a rule which places an affirmative duty of broadcasting stations to give out equal time, allows for working class and grassroots campaigns to be able to properly use the rule. While the issue of low resources is not resolved on this matter, this does allow candidates to enjoy low accessible spot prices for broadcasts, adding another tool to their arsenal. Grassroots candidates around the country have shown that smart campaigning tactics which utilize the tools available to them can win races in instances where they are out-spent.[88] Making the rule affirmative gets rid of roadblocks for the usage of the rule while also empowering campaigns with more options for how to use their limited resources. Further, it could cut out the middlemen, instead of navigating the broadcasting and communication marketplace to put up an advertisement the offering of an equal opportunity can act as an efficient way for a candidate to expend minimal resources toward traditional media voter contact.

The FCC should use rulemaking to pass a regulation that fits in line with creating a notification regime under the equal time rule. Currently regulations set out the parameters for a candidate to request their equal time, but this can be changed by instead having them be notified by the broadcast licensee when a use is imminent. This will assuredly have several critics, broadcasting stations will be upset by the increased burden place on them, incumbent politicians will be upset with the possibility of access increasing to their opponents, and legal scholars may take issue with the similarity of the new rule to the fairness doctrine.

B. *Legal Justification for Notification Regime*

Conducting rulemaking to make the equal time rule impose an affirmative duty on broadcasters would be uniquely able to survive in the changing state of administrative law. Post-*Loper Bright* there is a different

88. Grace Segers, *How Alexandria Ocasio-Cortez won the race that shocked the country*, CITY & STATE N.Y. (June 27, 2018), https://www.cityandstateny.com/politics/2018/06/how-alexandria-ocasio-cortez-won-the-race-that-shocked-the-country/178323/ [https://perma.cc/RD4E-8M7T]; Conor Lynch, *Alexandria Ocasio-Cortes proves that money doesn't win elections: Are Democrats listening?,* SALON (July 6, 2018), https://www.salon.com/2018/07/06/alexandria-ocasio-cortez-proves-that-money-doesnt-win-elections-are-democrats-listening/.

framework for the rulemaking process which doesn't allow agencies the deference they enjoyed during the *Chevron* regime.[89] The FCC has three major arguments to justify the rulemaking change. First, there is an express grant of authority given to the FCC under the Communications Act. Second, the public interest standard supports an equitable political market. Third, the plain language of the statute supports an affirmative duty on broadcasters to notify opposing candidates. With these arguments together the FCC has ample legal standing to defend its rulemaking to support a notification regime.

1. The FCC Has a Grant of Authority to Create a Notification Regime.

The Supreme Court in *Loper Bright* placed emphasis on the importance of an agency having an express grant of authority to perform rule making, being a major reason why they overruled *Chevron*.[90] The Supreme Court in *Loper Bright* emphasized that "when a particular statute delegates authority . . . courts must respect the delegation."[91] Congress has expressly granted the FCC latitude in conducting rulemaking in a way that bolsters the use and viability of the equal time rule.[92]

The equal time rule regulatory authority is not only based generally by Section 303 of the Communications Act of 1934, but also a specific grant of authority is reiterated in Section 315(e) of the equal time rule section.[93] This reiterated provision given to the FCC regarding the equal time rule is broader than the normal grant of authority given to agencies and should be more than sufficient to support this rulemaking.[94] The D.C. Circuit Court in *Chisholm v. FCC* reasoned that this added grant of authority is highly indicative of an intent for broader power for the FCC to promulgate further regulations in relation to the equal time rule.[95] Just as would be the case here, in *Chisholm,*

89. Prior to Loper Bright, courts would utilize a two-step analysis with the first step asking whether there is an ambiguity in a statute and the second step requiring the utilization of statutory interpretation. Importantly, the second step of analysis would give great deference to an agency's interpretation. Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine*, LEGAL PLANET (Oct. 23, 2017), https://legal-planet.org/2017/10/23/everything-you-always-wanted-to-know-about-the-chevron-doctrine [https://perma.cc/2KVZ-RWDS].

90. Step zero refers to the first requirement of the *Chevron* doctrine in which a court is to determine whether "Congress meant to delegate to the agency authority to interpret the law in a given field" and courts around the country inability to use this first step was a key argument for *Chevron*'s repeal. *See Loper Bright*, 603 U.S. at 436 (*citing* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

91. *See id.* at 413.

92. *See* 47 U.S.C. §§ 303, 307(a), 309(h).

93. *See generally* 47 U.S.C. §§ 303, 315(e).

94. The D.C. Circuit noted in *Chisholm v. FCC* that the grant of authority in the Communications Act "is something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." *See* Chisholm v. FCC, 538 F.2d 349, 357 (D.C. Cir. 1976).

95. *See id.*

the grant of authority given to the FCC allowed it to change its longstanding interpretation of "bona fide news events" in the equal time rule.[96] In the case of rulemaking on the equal time rule the FCC has been delegated the authority required to interpret Section 315(a) to require notification by broadcast licensees.

2. The Public Interest Standard Supports an Equitable Political Market

The FCC can use the authority granted to them through the public interest standard to support rulemaking, which creates a more equitable political marketplace. Courts have implied that the intention of the Communications Act of 1934 was to ensure that there be proper political discourse, and inequities in the political market impede that goal.[97] The rule as it currently stands leads to inequities due to its enforcement structure, therefore violating the intention of the rule.[98] When looking at the legislative history of the statute, the FCC determined that the "purpose of [Section 315(a)] was to 'prevent discrimination between competing candidates by broadcasting stations.'"[99] The FCC further elaborated that "Congress probably hoped [the equal time rule] would contribute to an informed electorate."[100] The Communications Act of 1934, in Sections 307(a) and 309(a), imposes an independent obligation to broadcasting licensees to "operate in the public interest."[101] The Commission has previously used the public interest standard to justify the argument that the intent of the equal time rule is to disseminate equality in the political market.[102]

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96. *See id.* at 364.

97. While the Supreme Court has not affirmatively stated that the intention of the rule falls in line with this explanation it has used the public interest standard and its subsequent legislative affirmation of that principle to allow for the FCC to rule make based around the fairness doctrine. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381-82 (1969) (reasoning that since Congress has refused to stop the FCC in their rule making authority through the public interest standard the intention of congress is strong in supporting rule making on the fairness doctrine). In effect, ensuring that the equal opportunities rule maximizes actual equal opportunities can be argued to serve the public interest.

98. This is discussed at length above, In Section II Subsection D, in effect the rule in its current forms has barriers to entry causing for the enjoyment of the rule to become self-limiting.

99. Request of Carter/Mondale Reelection Committee, Inc., *Memorandum Opinion and Order*, 81 F.C.C.2d 409, ¶ 16 (1980) [hereinafter *Carter/Mondale*] (citing Primer of Political Broadcasting & Cablecasting, 69 F.C.C. 2d 2209, 2216 (1978)). The commission relied upon the 1959 Senate Committee Report for the 1959 amendments to 315(a) which states that the equal time rule was done to ensure that a candidate does not acquire "unfair advantage . . . through favoritism of a station." *See id.* at 416 (quoting S. Rep. No. 562, at 8-9 (1959)).

100. *See id.* at 416.

101. *See Red Lion*, 395 U.S. at 379 (citing 47 U.S.C. §§ 307(a), 309(a)).

102. *See* 47 U.S.C. §315(a); The Commission in their footnote applies this justification to the fairness doctrine, however this analysis applies to the equal time rule. *See Carter/Mondale*, *supra* note 99, at n.12.

The public interest standard has been used to impose affirmative duties on broadcasting licensees previously. The political editorial and personal attack rule both required stations to give affirmative notice of an certain impending uses along with spot times.[103] The Supreme Court in *Red Lion* even noted that these two rules "are indistinguishable from the equal-time provision."[104] These previous "complements" to the equal time rule used the public interest standard to place an affirmative burden on broadcasters.[105] The addition of a notification regime to the equal time rule could do the same.[106] Therefore, the equal time rule can impose an affirmative duty on broadcasters under the public interest standard. It was Congress's intent to ensure a proper equitable political marketplace where opportunity was accessible and the statute in its current state fails to properly follow with the public interest.

3. The Plain Meaning Supports Placing Affirmative Duties on Broadcasters

The plain meaning of the word "afford," where licensees are required to "afford" opposing candidates their equal opportunity under the law, supports creating an affirmative duty to broadcasters.[107] The word afford is something that is used quite regularly in the law, however its precise meaning is rarely litigated.[108] Interestingly, the word "afford" is not defined in Black's Law Dictionary.[109] The relevant definition of afford given by Merriam Webster's dictionary is, "to make available, give forth, or provide naturally or inevitably."[110] The Britannica Dictionary gives a simpler definition being, "to supply or provide to . . . someone."[111] Both of these definitions show an action of giving something, an affirmative action. The fact that the word afford implies an affirmative act by broadcasting licensees can be no better exemplified by the listed synonyms to which Merriam-Webster dictionary gives, "give, present, donate, bestow, [and] confer," all of which undoubtedly means an affirmative action, not a conditional one.[112]

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103. Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?* 61 CATHOLIC U. L. REV. 97 n. 364.

104. *Red Lion*, 395 U.S. at 391.

105. *See id.*

106. *See id.*

107. *See* 47 U.S.C. § 315(a).

108. When looking up the term "meaning of afford" on LexisNexis only one case comes up which is *State v. Hahn*, which uses the plain meaning of afford to mean "to make available; provide." *See* State v. Hahn, 586 N.W.2d 5, 11 (Wis. Ct. App. 1998).

109. *See generally* BLACK'S LAW DICTIONARY (9th ed. 2009).

110. The two other definitions are "to manage to bear without serious detriment" or "to be able to bear the cost of" which on their face do not seem to apply in this context as they are verbs which speak to the state of something not an action which is assuredly what is more at issue here. *See Afford,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/afford [https://perma.cc/VKY4-TD3C].

111. *Afford*, BRITTANICA DICTIONARY, https://www.britannica.com/dictionary/afford [https://perma.cc/8RKZ-6P8S].

112. MERRIAM-WEBSTER, *supra* note 110.

The current rule requires that a candidate request a station to then be given their equal time, even though the statute makes no mention of requests or conditionality in its plain language.[113] The statute reads that "*if* any licensee shall permit any [candidate] to use a broadcasting station," then "he shall afford [equal time]," showing a direct if-then relationship not one which is conditional on request.[114] Therefore, the use of the word "afford" within the statute imputes in plain meaning that the broadcasting stations must affirmatively 'afford' the equal opportunity. This should be done through affirmative notification to eligible candidates.

C. Addressing Legal and Normative Counterarguments

Broadcasters may argue that this would cause an increased undue burden on them. However, this argument is not persuasive because broadcasters would be able to easily carry the burden, and the burden could be minimal. Broadcasters are already required to keep public records of all uses under the equal time rule, and adding a notification regime would just be a targeted reflection of the public records they are already required to keep. Also, the burden would only be based on how licensees choose to follow this notification regime. Requiring that candidates give information on their opposing candidates would reduce administrative costs for notification. Notification could also be as simple as a publicly available webpage which lists spot prices for opposing candidates.[115]

A question which critics may ask is, why has neither Congress nor the FCC added the notification requirement. On the political front, generally, office holders do not have incentive to pass policy or change the status quo regarding political rules.[116] On the regulatory front, the FCC has been regulation hesitant in general.[117] Also, the FCC may argue that the equal time rule has been in its current form for decades and its interpretation is entrenched. But a law which was incorrect in the first place does not become

113. *See* 47 U.S.C. § 315(a).

114. *See id.* (emphasis added).

115. This is different from the status quo as currently the prescribed way of finding out about a candidate use of a broadcast spot requires requesting the public records at issue or investigating on one's own if a use occurred. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 5.

116. This is also like the issues which surround why campaign finance reform, if ever, is passed through Congress, it is not in the interests of the lawmakers who decide the law. Jonathan S. Krasno, *The Incumbents' Case for (Some) Campaign Finance Reform*, BRENNAN CTR. FOR JUST. (May 25, 1998), https://www.brennancenter.org/our-work/research-reports/incumbents-case-some-campaign-finance-reform [https://perma.cc/8U2G-JZKN].

117. *See* Abernathy, *supra* note 66.

correct due to its prolonged existence.[118] Further, the FCC has changed its longstanding interpretation of "bona fide newscast" previously showing that this would not necessarily be new ground for the FCC.[119]

IV. CONCLUSION

The adoption of a notification requirement for broadcasters when a use is imminent under the equal time rule will lead to more equitable outcomes for candidates. Doing so will allow candidates to be more able to properly use the rule to their advantage in any given political race. It gives candidates more time to request their broadcasting spot and allows for any information gaps to be filled between entrenched candidates and grassroots ones. This Note contends that Congress, when implementing the Communications Act, envisioned a more hands-on rule which causes its use to be more prevalent in political races. While Congress does not say to the letter a notification system is required under the statute, it is clear from the usage of the term afford and the broad authority granted to the FCC in rulemaking that Congress intended for the FCC to ensure the rule's effectiveness. The recent action by the Supreme Court in *Loper Bright* has complicated the ability for agencies to defend legal challenges to their rule making, but the fact that the rule in its plain meaning imputes an affirmative burden on broadcast licensees will fit in-line with how Circuit Courts have interpreted rulemaking post-*Loper Bright*. While it is not likely that newly minted Commissioner Brendan Carr will cite to my arguments and change the rule, nonetheless, the usage of the word "afford" and the background to which it is used may help to dissuade the FCC from its current illness against rulemaking. As is demonstrated above, campaign reform is hard to come by, so sometimes it is best to look to the past to find little ways to help make our democracy better.

118. This is in effect the same argument that have been used by critics of stare decisis and adopted by the current Supreme Court. *See* Kent Barnett & Christopher Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475 (2024); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1845-46 (citing Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113 (1973); Devin Dwyer, *After Roe Ruling, is 'stare decisis' dead? How the Supreme Court's view of the precedent is evolving,* ABC NEWS (June 24, 2022, 12:20 PM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047 [https://perma.cc/Q77F-68VQ]. Further, legal scholars for years have argued against the usage of stare decisis to uphold problematic legal doctrine which started on fuzzy legal ground. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

119. However, the change in interpretation of one of the rule's exceptions is less comprehensive than changing the actual implementation of the rule. *See* Chisholm v. FCC, 538 F.2d 349, 358 (D.C. Cir. 1976).