No. 12-15935

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL STEPHEN LEVINSON,

Plaintiff-Appellant,

v.

KELLY McCULLOUGH, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

# BRIEF FOR INTERVENOR UNITED STATES


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## STATEMENT OF JURISDICTION

Plaintiff invoked the district court's federal question jurisdiction. *See* ER032 (Amended Compl. ¶ 1); 28 U.S.C. § 1331. On March 28, 2012, the district court dismissed his case for lack of jurisdiction for failure to exhaust administrative remedies under the Federal Communications Act. ER003. Plaintiff timely appealed that ruling to this Court within the 30-day period provided by Federal Rule of Appellate Procedure 4(a)(1)(A). ER001. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

Plaintiff, who seeks to become a write-in candidate for President of the United States, brought suit against several national news networks and two public television stations in Arizona, arguing that these television broadcasters improperly denied his requests for access to broadcast his campaign message. The district court dismissed the complaint for lack of jurisdiction, noting that plaintiff did not exhaust his claims before the Federal Communications Commission. The questions presented by this appeal are:

1. Whether plaintiff had a cause of action under the Federal Communications Act against the television stations that declined to grant him access.

2. Whether Congress's decision to exempt public broadcasters from the "reasonable access" requirement of 47 U.S.C § 312(a)(7) violated the First Amendment rights of political candidates.

## STATEMENT OF THE CASE

Michael Levinson seeks to become a write-in candidate for President of the United States. His name appeared on the ballot for the 2012 Arizona Republican primary election, which was held on February 28, 2012. Prior to that contest, he sent requests to several national television networks, as well as to two local public television stations affiliated with the Public Broadcasting Service ("PBS"),[1] asking that the networks and the public stations provide him with broadcast time to present "a substantive, issue laden two hour speech" in support of his Presidential campaign. ER032. The networks did not reply to his request. The public stations informed Levinson that they are exempted by statute from the "reasonable access" requirement of 47 U.S.C. § 312(a)(7).

Plaintiff filed this *pro se* action in district court, asking the court to declare the Communications Act unconstitutional to the extent that it exempts public broadcasters from the "reasonable access" requirements of Section 312(a)(7). He also requested that the district court order the public broadcast stations to show cause why they should not cease and desist all operations until they grant plaintiff's request for access, and to order

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[1] The FCC licenses television broadcast stations either as commercial stations or noncommercial educational stations. Noncommercial educational stations are often referred to as "public" stations. The Public Broadcasting Service is a private, non-profit corporation whose membership is made up of noncommercial educational television stations. PBS provides programming and network services to its members, but is not itself a licensee of any television stations. *See generally Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 291-93 (D.C. Cir. 1975).

the commercial networks to show cause why their broadcast licenses should not be revoked by the district court.

The district court dismissed plaintiff's complaint for failure to present his claims to the FCC. Levinson appealed to this Court, which *sua sponte* appointed pro bono counsel to represent Levinson and scheduled oral argument for October 15, 2012.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

The Federal Communications Act of 1934 provides a "unified and comprehensive regulatory system for the [broadcasting] industry." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940). The Act created the FCC and gave the agency broad powers to promulgate rules and regulations and to enforce the provisions of the Act. *See* 47 U.S.C. §§ 154(i), 315(d); *Belluso v. Turner Commc'n Corp.*, 633 F.2d 393, 396 (5th Cir. 1980) (describing agency's broad rulemaking and enforcement authority). "The focus of the Act is the general public, with the FCC, not the private litigant, as its champion." *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3d Cir. 1982).

#### A. The Reasonable Access Provision

In 1971, Congress amended the Act to require broadcasters for the first time to grant "reasonable access" to any "legally qualified candidate for Federal elective office." 47 U.S.C. § 312(a)(7). Prior to that time, "an individual candidate could claim no personal right of access unless his opponent used the station," *Columbia Broad. Sys., Inc. v. FCC*, 453 U.S. 367, 379 (1981), in which case the Act's equal opportunities provision

would require the broadcaster to "afford equal opportunities to all other such candidates for that office," 47 U.S.C. § 315(a).

In 2000, Congress amended the reasonable access provision to limit this requirement only to commercial broadcasters. In the provision plaintiff challenges in this case, Congress clarified that this requirement applies only to a broadcaster "other than a non-commercial educational broadcast station." *Id.* § 312(a)(7).

Pursuant to its delegated rulemaking authority, 47 U.S.C. §§ 154(i), 303(r), the Commission has promulgated rules defining the terms "legally qualified candidate" and "reasonable access." *See* 47 C.F.R. §§ 73.1940, 73.1944. To be a legally qualified candidate for President of the United States within the meaning of the reasonable access provision, it is not sufficient that a candidate satisfy the constitutional prerequisites for that office. In addition, he or she must either (1) appear on the ballot or (2) be an eligible write-in candidate that "makes a substantial showing that he or she is a bona fide candidate for nomination or office." *Id.* § 73.1940(b). That standard requires candidates to produce "evidence that [they have] engaged to a substantial degree in activities commonly associated with political campaigning," such as "making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters. . . ." *Id.* § 73.1940(f). To be a qualified candidate in a particular state, a candidate must either: (1) show he meets this standard based on his activities in that state; or (2) show that he meets that

standard in ten separate states, in which case he will be deemed a legally qualified candidate nationwide. *Id.* § 73.1940(c).

### B. The Equal Opportunities Provision

A separate statutory requirement, applicable to public television stations as well as commercial stations, mandates that that whenever a broadcaster permits any candidate for a federal, state or local public office to "use" broadcast facilities, the broadcaster must afford an equal opportunity to any legally qualified opponent. 47 U.S.C. § 315(a). This requirement has existed in various forms since the Act was first passed in 1934. *See* Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088 (June 19, 1934).

The Act specifically excludes coverage of certain bona fide news events from the definition of "use." *See* 47 U.S.C. § 315(a)(1)-(4). There is thus no equal opportunity requirement when a broadcaster features a candidate on a "bona fide newscast," "bona fide news interview," "bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary)," or during "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." *Id.* The FCC has long held that "debates between candidates" generally qualify under this last exception and thus are "exempt from the equal time requirements of Section 315 . . . as 'on-the-spot coverage of bona fide news events.'" *In the Matter of Petitions of the Aspen Inst. Program on Communications & Soc'y & CBS, Inc., for Revision or Clarification of Comm'n Rulings Under Section 315(a)(2) & 315(a)(4)*, 55 F.C.C.2d 697, 703 (1975).

### C. FCC Complaint Process and Judicial Review of FCC Orders

Congress has vested the Federal Communications Commission with authority to enforce the Communications Act, including the "reasonable access" and "equal opportunity" provisions. *See* 47 U.S.C. § 154(i). Section 312, which is entitled "Administrative Sanctions," authorizes the FCC to "revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . ." *Id.* § 312(a)(7).

A candidate who believes that a station has failed to provide the reasonable access or equal opportunity required by the statute may file an informal complaint against the broadcaster with the Commission. 47 C.F.R. § 1.41; *see The Law of Political Broadcasting and Cablecasting* ("*Political Primer*"), 100 F.C.C.2d 1476, 1478 (1984) (explaining how to file a political broadcasting complaint). Plaintiff has, in the past, followed this procedure. *See, e.g.*, *In Re Complaint of Michael Steven Levinson*, 9 F.C.C.R. 3018 (1994); *In re Complaint of Michael Stephen Levinson Against Television Station Licensees*, 87 F.C.C.2d 433 (1980).

Upon finding that a station has failed to comply with the reasonable access or equal opportunity requirements, the Commission can order various forms of relief including cease and desist orders, monetary forfeitures, revocation of a station's license, and denial of license renewal. *See, e.g.*, 47 U.S.C. §§ 307, 312(a), 312(b), 501, 502, 503; *Belluso*, 633 F.2d at 397 (describing agency's enforcement authority).

A person aggrieved by the Commission's order may seek review directly in the court of appeals under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 (the Hobbs Act). The statute provides that a litigant who seeks to rely "on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass," must first file a petition for reconsideration with the agency to give the FCC the opportunity to address the issue. 47 U.S.C. § 405(a). *See also id.* (A person "whose interests are adversely affected" by an order, but "was not a party to the proceedings resulting in such order," also must file a petition for reconsideration before seeking review of the order in a court of appeals).

These exclusive review provisions of the Communications Act displace causes of action that a party might otherwise use to bring suit in district court. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468-69 (1984) (Communications Act displaces Administrative Procedure Act review); *American Bird Conservancy v. FCC*, 545 F.3d 1190, 1193 (9th Cir. 2008) (Communications Act displaces Endangered Species Act review). [2]

## II. PRIOR PROCEEDINGS

**1.** For purposes of this appeal, the well-pled allegations of the complaint are assumed to be true. Plaintiff was a candidate on the Arizona Republican Presidential

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[2] A narrow exception to this scheme of exclusive appellate review exists for suits seeking to enforce or challenge FCC monetary forfeiture orders issued under Section 503 of the Act. By statute, such suits must be brought in district court for a *de novo* trial. *See* 47 U.S.C. § 504(a); *Dougan v. FCC*, 21 F.3d 1488, 1489-91 (9th Cir. 1994) (discussing forfeiture exception to direct appellate review under the Act).

primary ballot. ER096. That election was held on February 28, 2102. ER032 (Amended Compl. ¶ 2).

Prior to that election, plaintiff sent a letter to the presidents of the ABC, NBC, CBS, FOX, and CNN news networks, as well as to two public television stations in Arizona, "request[ing] time for broadcasting a substantive, issue laden two hour speech, on behalf of [his] candidacy for U.S. president." ER032 (Amended Compl. ¶ 3-a); ER076-078 (certified mail receipts for network executives in New York). Plaintiff wished to use this two-hour time slot to perform ""The Book ov [sic] Lev It A Kiss,"" which he describes as his "magnum opus Television Scripture, a prophetic work of art, hand lettered, designed in double columns, with every line a carefully crafted delicate sensible rhyme, rivalling [sic] both Dante, of Divine Comedic fame, and old Blind Homer." ER038 (Amended Compl. ¶ 15-c).[3] Plaintiff's proposed broadcast also "include[d] a test drive of Plaintiff's Vehicle for World Peace, this innovative conception of such magnitude and public interest" that its nationwide airing would create a "strong likelihood of winning the Arizona republican party primary," and "enable Plaintiff to make a huge showing in all presidential primaries that follow Arizona's." ER038-039 (Amended Compl. ¶ 15-d); *see also Pro Se* Brief of Michael

[3] Plaintiff refers to himself as "Lev" on his campaign website, which is entitled "Lev for World Peacemaker." See http://www.michaelslevinson.com/new/index.php?itemid=4%23more/ (last visited Sept. 13, 2012).

Levinson as Amicus Curiae ("*Pro Se* Amicus Br.") at 20-24 (describing proposed television broadcast).[4]

Plaintiff invoked both Sections 312 and 315 of the Act in making this request. He asserted that he was entitled to reasonable access under Section 312 because he was a legally qualified candidate for President. He also argued that he was entitled to equal opportunities under Section 315 because the broadcasters planned to air an upcoming Republican Presidential primary debate in which plaintiff was not invited to participate. *See* ER075 (letter from public broadcaster responding to access requests under both Sections 312 and 315); *see also* ER086 (Original Compl. ¶¶ 6-7) (arguing that plaintiff is entitled "to the same opportunity . . . to deliver a broadcast speech" as candidates who will be participating in the debate); ER034 (Amended Compl. ¶¶ 7-9) (same).

The national news networks did not respond to plaintiff's request. ER033 (Amended Compl. ¶ 6). The two public broadcast stations, KAET-TV in Phoenix and KAUT-TV in Tucson, responded by informing plaintiff that their public broadcast channels are exempt from Section 312(a)(7)'s reasonable access requirements. ER075, ER093. KUAT-TV further informed plaintiff that the coverage of a Presidential debate does not trigger the equal opportunities requirement. *See* ER075.

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[4] In light of this Court's order denying plaintiff's request to act as counsel on his own behalf in this appeal, this Brief refers to Mr. Levinson's *pro se* arguments as the arguments of the amicus, and the arguments of his pro bono appointed counsel as the arguments of plaintiff-appellant.

**2.** On February 2, 2012, plaintiff filed suit in district court against the managers of the two public broadcast stations, asserting a "First Amendment right to deliver a broadcast speech over U.S. non-commercial, tax payer funded network of PBS stations." ER086 (Original Compl. ¶ 7). Plaintiff asked the district court to order the public stations to "cease and desist all TV operations until such time as the defendant TV station managers in charge schedule Plaintiff's proposed speech as a candidate for president, before the Arizona primary is held." ER089 (Original Compl. ¶ 15).[5]

Plaintiff then filed an amended complaint on February 14, 2012 that added the ABC, NBC, CBS, FOX, CNN, and Public Broadcasting System networks as defendants. ER027. That amended complaint asked the district court to order the public stations to show cause why they should not schedule plaintiff's speech or be ordered to cease and desist all operations, and also asked the court to order the national networks to show cause why their broadcasting licenses should not be revoked by the district court. ER029.

In addition to challenging the constitutionality of Section 312(a)(7), the amended complaint raises both "reasonable access" claims under Section 312, and "equal

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[5] Although the complaint stated on its cover that it concerned a "constitutional issue," ER084 (emphasis removed), and expressly challenged the constitutionality of a federal statute, ER086, ER089-091 (Original Compl. ¶¶ 7, 17-18, 22), plaintiff failed to serve a copy of the complaint upon the Attorney General, as required by Federal Rule of Civil Procedure 5.1(a). Likewise, neither the district court nor this Court certified this constitutional challenge to the Attorney General as required by 28 U.S.C. § 2403(a), Federal Rule of Civil Procedure 5.1(b), and Federal Rule of Appellate Procedure 44(a).

opportunities" claims under Section 315, against both the public and commercial broadcasters. *See* Pro Bono Counsel Br. at 3, 7, 28 (discussing plaintiff's statutory claims under Sections 312 and 315); *Pro Se* Amicus Br. at 3-4, 10, 29 (same). Plaintiff has not named the United States or the Federal Communications Commission as defendants in this lawsuit, however.

On March 28, 2012, the district court *sua sponte* dismissed the case for lack of subject matter jurisdiction. ER004-005. The court held that because "the FCC has exclusive jurisdiction over complaints that a broadcaster has violated 47 U.S.C. § 315," plaintiff must exhaust his complaint with the agency rather than filing suit in district court. ER004 (citing *Maher v. Sun Pubs., Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978)). The court declined to consider plaintiff's constitutional challenge to Section 312(a)(7) before plaintiff presented his claims to the agency, noting that if the FCC were to grant him relief on his equal access claim under Section 315—which applies to public and commercial broadcasters alike—"his constitutional argument is moot." ER004.

Plaintiff appealed to this Court, which *sua sponte* appointed pro bono counsel to argue on plaintiff's behalf.

**3.** Plaintiff filed similar lawsuits in the District of New Hampshire and the Middle District of Florida. In New Hampshire, plaintiff sued public broadcasters, commercial broadcasters, and the Federal Communications Commission itself (although he did not properly serve the complaint on the FCC). The court dismissed his case for failure to allege a cognizable First Amendment claim. *See Levinson v. New*

*Hampshire Public Television et al.*, No. 11-589 (D.N.H.), Dkt. Nos. 9 (Report and Recommendation of Magistrate Judge), 13 (Order adopting Report and Recommendation). Plaintiff appealed to the First Circuit, which submitted the case to a panel without argument. *See Levinson v. NHPT et al.*, No. 12-1511 (1st Cir.).

In the Middle District of Florida, plaintiff again sued the FCC (without proper service) as well as public and commercial broadcasters. That court dismissed his complaint as frivolous, noting that the Communications Act does not create a cause of action to sue broadcasters, the First Amendment does not compel public broadcasters to allow third parties access to their programming, and the factual allegations against the FCC are time barred because they concern the administrative complaint he filed with the agency in 1980. *See Levinson v. WEDU-TV et al.*, No. 11-2839 (M.D. Fla.), Dkt. Nos. 23 (Report and Recommendation of Magistrate Judge), 32 (Order adopting Report and Recommendation). Plaintiff appealed to the Eleventh Circuit, which dismissed his appeal for want of prosecution, and later denied his motion for leave to reinstate the appeal. *See Levinson v. WEDU-TV et al.*, No. 12-12278 (11th Cir.).

## SUMMARY OF ARGUMENT

**I.** Plaintiff asks this Court to order several commercial broadcast networks and two public broadcast stations to provide him with "reasonable access" within the meaning of 47 U.S.C. § 312(a)(7), and to give him an "equal opportunit[y]" to broadcast his campaign message under 47 U.S.C. § 315(a). Neither plaintiff nor his amicus come to grips with structure of the statute, which vests sole authority to enforce these

provisions in the FCC and provides for judicial review of the FCC's determinations only on direct review in the court of appeals. Plaintiff argues that he can nevertheless demand that the district court grant him access to air time on two public broadcast stations because Congress has excluded public stations from the reasonable access provision altogether. But the district court had no authority to grant plaintiff the relief he seeks against the defendant public broadcast stations and could not provide a constitutional ruling untethered to an actual case or controversy. In any event, even under general exhaustion principles, courts will not excuse failing to comply with a statutory exhaustion scheme on the ground that it would be futile to present a claim to an agency in the first instance.

**II.** If the Court were nevertheless to consider the merits of plaintiff's First Amendment contentions, they should be rejected as wholly insubstantial. The Constitution does not confer a right on political candidates to compel television and radio stations to provide them with access. In providing a statutory right, Congress was not obliged to make its provisions applicable to all broadcasters. Plaintiff's challenge would have substance only if Congress could not rationally distinguish between educational television stations and commercial stations. Plaintiff has not made such an argument and none would be plausible.

## STANDARD OF REVIEW

This Court reviews de novo the district court's order dismissing plaintiff's claims for lack of subject matter jurisdiction. *Orsay v. U.S. Dep't of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002).

## ARGUMENT

### I. PLAINTIFF'S STATUTORY AND CONSTITUTIONAL CLAIMS WERE PROPERLY DISMISSED BECAUSE THE REASONABLE ACCESS AND EQUAL OPPORTUNITIES PROVISIONS ARE ENFORCEABLE ONLY BY THE FCC AND JUDICIAL AUTHORITY IS LIMITED TO REVIEW OF THE COMMISSION'S DETERMINATIONS.

**A.** Plaintiff asks this Court to order several commercial networks as well as two public broadcast stations to provide him with "reasonable access" and "equal opportunities" within the meaning of 47 U.S.C. §§ 312(a)(7) and 315(a). He does not explain why, as a statutory matter, he is a qualified candidate for President or why "reasonable access" would encompass his demand for time to present "a substantive, issue laden two hour speech[.]" ER032.

This Court has neither the means nor the authority to determine in the first instance whether plaintiff meets the prerequisites of the statute. Congress has vested the FCC with authority to enforce the "reasonable access" and "equal opportunities" provisions, and a candidate seeking to compel access must file a complaint with the Commission. *See* 47 C.F.R. § 1.41; *Political Primer*, 100 F.C.C.2d at 1478. Decisions issued by the FCC in response to such complaints are reviewable *only* in the Court of Appeals under the exclusive judicial review provisions of 47 U.S.C. § 402(a) and the

Hobbs Act, 28 U.S.C. § 2342. To ensure that courts of appeals will not be called upon to review factual and legal disputes that had not been presented to the agency, the Act requires any person who "was not a party to the proceedings resulting in such order, decision, report, or action," or who "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass," to first file a petition for administrative reconsideration before petitioning for appellate court review. 47 U.S.C. § 405(a).

Courts have uniformly held that the sole means of challenging an FCC order is to seek review under the Hobbs Act in the court of appeals. In *ITT World Communications*, 466 U.S. at 468, for example, the Supreme Court held that telecommunications companies could not bring suit in district court under the Administrative Procedure Act seeking to enjoin an allegedly *ultra vires* action of the Commission, because the "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals." Indeed, the Court observed that the doctrine of primary jurisdiction would require any party that wishes to challenge an FCC policy or practice to first seek a declaratory ruling from the Commission under 47 C.F.R. § 1.2. *See id.* at 468 n.5. And in *American Bird Conservancy*, 545 F.3d at 1193, this Court likewise held that the Act's direct appellate review scheme prevents a party from filing suit in district court to enjoin agency action under the Endangered Species Act.

By the same token, the courts of appeals have uniformly held that no private right of action to obtain judicial may be implied under the Act. *See, e.g.*, *Schneller v.*

*WCAU Channel 10*, 413 F. App'x 424, 426 (3d Cir.), *cert. denied*, 132 S. Ct. 246 (2011) ("The District Court did not err in concluding that it lacked jurisdiction to consider this claim, for there is no private cause of action under that statutory provision. . . . The proper course for raising a claim under section 315 is to file a complaint with the FCC." (citations omitted)); *Forbes v. Arkansas Educ. Television Commc'n Network Found.*, 22 F.3d 1423, 1427 (8th Cir. 1994) (*en banc*) (no private right of action under § 315); *Lechtner v. Brownyard*, 679 F.2d 322, 326 (3d Cir. 1982) (no private right of action under FCC's "personal attack rule"); *Belluso*, 633 F.2d at 394-97 (no private right of action under § 315); *Schnapper v. Foley*, 667 F.2d 102, 116 (D.C. Cir. 1981) (no private right of action under Public Broadcasting and Communications Acts); *Daly v. CBS, Inc.*, 309 F.2d 83, 86 (7th Cir. 1962) (no private right of action under § 315); *see also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942) ("The Communications Act of 1934 did not create new private rights.").

Plaintiff's past invocations of the reasonable access provision illustrate the workings and good sense of the statutory exhaustion scheme. In 1980, for example, the Commission found that Mr. Levinson had not established a sufficient campaign presence throughout the state of New York to be considered a bona fide write-in Presidential candidate in that state for the upcoming election. *See In Re Complaint of Michael Stephen Levinson Against Television Station Licensees*, 87 F.C.C.2d 433 (1980). Because he is once again a write-in candidate for the upcoming Presidential election, Mr. Levinson must make "a substantial showing that he . . . is a bona fide candidate for

nomination or office," 47 C.F.R. § 73.1940(b)(2), by producing "evidence that [he] has engaged to a substantial degree in activities commonly associated with political campaigning," such as "making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters," *id.* § 73.1940(f).[6]

Similarly, in the 1992 Presidential primary contests in New Hampshire, the Commission concluded that "reasonable access" did not encompass Mr. Levinson's "request[ing] a three-hour block of prime time programming" to present his campaign message. *Michael Steven Levinson*, 7 F.C.C.R. 1457 (1992) (letter from Chief of FCC's Fairness/Political Programming Branch), *aff'd In Re Complaint of Michael Steven Levinson*, 9 F.C.C.R. 3018 (1994); *see also, e.g.*, *In re Complaint of Randall Terry*, 27 F.C.C.R. 598, 601-02 (2012) (candidate's request to run political advertising during the Super Bowl was unreasonable under Commission's longstanding interpretation of § 312(a)(7)). The Commission might likewise have concluded here that plaintiff's request for two hours of air time to read from "'The Book ov [sic] Lev It A Kiss,' a magnum opus Television Scripture" and to take "a test drive of Plaintiff's Vehicle for World Peace," ER038 (Amended Compl. ¶¶ 15-c, 15-d), is unreasonable. *See, e.g.*, *In re Complaint of Michael Steven Levinson*, 9 F.C.C.R. at 3019 ("Stations were not unreasonable in concluding that

[6] Plaintiff does not dispute that his request for access based upon his primary candidacy has become moot. *See* Pro Bono Counsel Br. at 10 (arguing controversy persists based upon his write-in candidacy for the general election).

the request for a three-hour block of time on a specific date [to read from the Book ov Lev] would unduly disrupt their programming, particularly given the likelihood of equal opportunities requests for equivalent blocks in prime time.").

Plaintiff is quite wrong to insist that he need not present his demand for access on public broadcast stations to the Commission because the Commission does not have authority to order access on public stations under the terms of § 312(a)(7). The Commission also has no authority to order commercial stations to offer time to a candidate who is not qualified, or to compel a station to provide access that is not reasonable.

Moreover, this Court has previously held that "[b]ecause the Telecommunications Act does require exhaustion, we cannot rely on a judicially created futility exception to evade the statutory exhaustion requirement." *See Fones4All Corp. v. FCC*, 550 F.3d 811, 818 (9th Cir. 2008). And in other statutory contexts, this Court has repeatedly recognized that "the doctrine of exhaustion of administrative remedies is not prevented from being applied solely by the fact the party applying for judicial relief urges a violation of rights secured by the federal constitution," and that, "[w]here relief may be granted on other nonconstitutional grounds, exhaustion is required." *Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975); *see also Murillo v. Mathews*, 588 F.2d 759, 762 (9th Cir. 1978) (same); *Owner-Operators Independent Drivers Association of America, Inc. v. Skinner*, 931 F.2d 582, 588-89 (9th Cir. 1991) (requiring exhaustion of constitutional challenge to agency regulations reviewable

under the Hobbs Act); *Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc.*, 609 F.2d 355, 362-66 (9th Cir. 1979) (requiring exhaustion of First Amendment challenge to the FCC's adoption of a "family viewing" policy). As the district court noted, plaintiff raised both constitutional and statutory claims against the public broadcasters, and "if relief is granted [on the statutory claim], his constitutional argument is moot." ER004.

In this case, the problem with plaintiff's case is even more fundamental than a failure to exhaust administrative remedies. As discussed, the courts have no independent authority to order a public station or any other station to provide access to a candidate. Courts are empowered only to review decisions of the FCC. Plaintiff cannot obtain redress of his claimed injury in a suit against public stations, and a court cannot properly resolve his constitutional constitutions in a suit that cannot redress his grievance.

## II. PLAINTIFF'S FIRST AMENDMENT CLAIM IS MERITLESS.

If the Court were to consider the merits of plaintiff's constitutional claim, it is apparent plaintiff does not, as he claims, have a "First Amendment right to deliver a broadcast speech over the U.S. non-commercial, tax payer funded network of PBS stations." ER034 (Amended Compl. ¶ 9). The Supreme Court has explained that "the First Amendment of its own force *does not* compel public broadcasters to allow third parties access to their programming." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998) (emphasis added); *see also CBS, Inc. v. Democratic Nat'l Comm.*, 412

U.S. 94, 113 (1973) (noting that the FCC "on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities"); *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980) (no "candidate has a constitutional right of broadcast access to air his views"). Indeed, the Supreme Court has observed that because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

Whatever right plaintiff has to demand reasonable access to a broadcast station is a creation of statute. Prior to the 1971 amendments to the Communication Act that created the "reasonable access" requirement of Section 312(a)(7), "an individual candidate could claim no personal right of access unless his opponent used the station" (in which case the equal time requirement of Section 315(a) would require that the candidate receive broadcast time). *Columbia Broad. Sys, Inc.*, 453 U.S. at 379. Section 312(a)(7) thus "enlarged the political broadcasting responsibilities of licensees." *Id.*

Because the reasonable access provision is not compelled by the Constitution, it is not, as plaintiff contends, subject to the same level of scrutiny that applies in challenges brought by broadcasters alleging violations of their First Amendment rights. *See* Br. 21-22 (citing *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), and *United States v. O'Brien*, 391 U.S. 367 (1968)). The contours of the statutory right are subject only to rational basis review, which is a "paradigm of judicial restraint." *FCC v.*

*Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). Those "attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id.* at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Public broadcasting serves a fundamentally different purpose from commercial broadcasting and operates on a different economic model that relies on voluntary viewer contributions and, in most cases, contributions from the Corporation for Public Broadcasting. *See* 47 C.F.R. § 73.621 (noncommercial broadcasting licenses are issued "only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service"); *see also League of Women Voters*, 468 U.S. at 367 (discussing history of noncommercial, educational broadcasting in the United States).

## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH**
**FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,311 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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## CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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*/s/ Michael P. Abate*
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