No. 26A274

In the Supreme Court of the United States

NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE, APPLICANTS,

v.

SHERROD BROWN, JON OSSOFF, ROY COOPER, AND KRISTEN MCDONALD RIVET, RESPONDENTS

BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE; NATIONAL MEDIA RESEARCH, PLANNING & PLACEMENT; SMART MEDIA GROUP; AND FLEXPOINT MEDIA AS AMICI CURIAE IN SUPPORT OF APPLICANTS

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September 1, 2026

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INTEREST OF AMICI CURIAE[1]

The Republican National Committee (RNC) is the national committee of the Republican Party (Party). *See* 52 U.S.C. § 30101(14). The RNC manages Party business at the national level, including by developing and promoting the national platform; supporting candidates for public office at all levels of government nationwide; developing and implementing electoral strategies; educating, assisting, and mobilizing voters; and fundraising to support Party operations and candidates.

The RNC has a strong interest in the FCC's interpretation of lowest unit charge (LUC) for broadcast campaign advertisements. Its judicial rewrite of settled broadcast practice directly impacts amicus curiae's ability to communicate with voters, support candidates, and fulfill its role in the political process.

Amici National Media Research, Planning & Placement; Smart Media Group; and FlexPoint Media are media buyer organizations who purchase advertising space from broadcast affiliates on behalf of campaign committees. As media buyers, all three amici have ex-tensive and longstanding experience with navigating the FCC regulatory compliance landscape in the context of political media airtime purchasing, and can speak meaningfully to industry norms.

Amici write to address the profound legal and practical fallout of the holding below, drawing on their extensive experience purchasing and planning political media airtime within the FCC's regulatory framework.

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[1] No counsel for a party authored this brief in whole or in part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici or its counsel contributed money intended to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

Federal courts have only the power the Constitution and Congress give them—nothing more. They may not "usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). These jurisdictional limits on "the judicial process" protect "the political branches." *United States v. Texas*, 599 U.S. 670, 676 (2023) (quotation omitted). Case in point: the decision below "seize[d] imaginary jurisdiction" by disregarding fundamental principles of law. App. 90 (Wilkinson, J., dissenting).

The Candidate Respondents jumped the line. Disagreeing with the longstanding industry practice memorialized in Media Bureau Guidance (Guidance), they filed an application for review. Rather than wait for the Commission to act, they ran to federal court. But because the application for review remained pending, there was no final agency action. And the Candidate Respondents had not, as required by Congress, exhausted their administrative remedies. As a result, the federal court never had jurisdiction. Sensing the problem, the panel manufactured a fix—a novel equitable exception with no precedent in the FCC's nearly 100-year history.

In its rush to alter crucial election rules in the final weeks of the election cycle, the panel majority took a sledgehammer to bedrock principles of administrative law. It is hornbook law that two requirements must be satisfied before a federal court exercises jurisdiction: (1) the agency action must be final; and (2) the petitioner must have exhausted administrative remedies. It is equally well-settled that statutory exhaustion requirements do not suffer equitable exceptions. Yet the lower court jettisoned all three rules and opened the floodgates to duplicative federal litigation any time a litigant thinks an agency is taking too long.

These errors make agencies less accountable. In the delegated-authority context, Congress authorizes delegation but also ensures that the five presidentially nominated Commissioners review controversial delegated-authority action. The lower court gutted this accountability mechanism, allowing a litigant to bypass Commission review and head straight to federal court. And in so doing, the lower court opened up not one, not two, but *three* circuit splits.

The lower court's errors cannot be limited to the instant case. The decision below would bless simultaneous review by an agency and federal courts in the mine run of administrative law delegated-authority cases. Political accountability *and* judicial efficiency are on the chopping block.

The lower court also erred substantively in setting aside the Guidance. It misread the LUC framework in the Communications Act to emphasize who pays for an advertisement rather than who "uses" a broadcast station, tossing aside decades' worth of FCC precedent and industry practice affording LUC to both coordinated party expenditures and authorized committees like JFCs. The lower court's crabbed interpretation of the Communications Act subjects different modes of candidate speech to different rules running headlong into the First Amendment. Making matters worse, the lower court changed these rules during the last few months of an election. This has thrown protected political speech—including amici's own—into upheaval and created significant uncertainty about core First Amendment rights.

The Fourth Circuit found the possibility that the Guidance might go into effect before the Commission rules—even though it merely memorialized longstanding industry practice—"intolerable." App. 34 n.7. But even "an emergency may not call into life a power which has never lived." *Wilson v. New*, 243 U.S. 332, 348 (1917). Because the Fourth Circuit never had jurisdiction, and because it erred on the merits, its mandate should be stayed.

ARGUMENT

I. THERE IS MORE THAN A FAIR PROSPECT THIS COURT WILL REVERSE FOR LACK OF JURISDICTION.

The panel majority assumed jurisdiction on three theories: (1) the Guidance was final agency action (notwithstanding ongoing agency review); (2) exhaustion was satisfied by the mere filing of an application for review (notwithstanding that it remained unresolved); and (3) the Commission had "constructively denied" that application (notwithstanding that Congress mandated exhaustion). App. 33–38. None of these rationales bear scrutiny, establishing more than a fair prospect of reversal.

A. The Decision Below Turns the Finality Requirement Upside Down, Erroneously Exercising Jurisdiction and Splitting With Other Courts of Appeals.

1. The Guidance—Which Was Under Active Agency Review—Cannot Be a Final Order.

In a few spare sentences, the majority dispensed with the basic principle that agency action must be final to be reviewable. It held that "only when review is *completed*, not merely begun, does an order made under delegated authority become nonfinal." App. 33–34 (emphasis added). That gets finality exactly backwards.

Under longstanding precedent, agency action is final only when the challenged action "mark[s] the consummation of the agency's decisionmaking process" and is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). And the Hobbs Act authorizes aggrieved parties to file suit only upon "final orders of the Federal Communications Commission." 28 U.S.C. § 2342(1). As Judge Wilkinson explained: "[I]t is unclear how *the completion of Commission review* could be the thing that makes an order 'nonfinal.'" App. 68 (Wilkinson, J., dissenting).

The panel justified its departure from core finality principles under Section 155(c)(3). But that section merely says that an order made pursuant to delegated authority "shall have the same force and effect" as orders of the Commission "unless reviewed as provided in [47 U.S.C. § 155(c)(4)]." 47 U.S.C. § 155(c)(3). It does not say that such an order *remains final during the pendency* of such review. Rather, Section 155(c)(3)'s "unless reviewed" clause simply means the Commission might "overturn a staff decision, which would eliminate its 'force and effect.'" App. 68 (Wilkinson, J., dissenting). A staff decision that can be overturned is not final. It is under review.

Further, the panel majority's reading does violence to the Hobbs Act's statutory filing window. A party has sixty days after a final Commission order to file a "petition for review." 47 U.S.C. § 155(c)(7). As then-Judge Scalia explained, "[i]f the intent were to establish a filing deadline rather than a filing window, it would more naturally have been phrased 'no later than 60 days after … entry' rather than 'within 60 days after … entry.'" *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985) (declining to exercise jurisdiction over nonfinal FCC order). The Fourth Circuit's decision to reach the merits "before the Commission ha[s] disposed of the application for review pending before it impermissibly enlarges the filing window." App. 65 (Wilkinson, J., dissenting) (quoting 47 U.S.C. § 155(c)(7)) (cleaned up). Here, the Candidate Respondents filed an application for review that the FCC was "legally bound to consider." *Id.* at 68 (citing 47 U.S.C. § 155(c)(4)). Because it was under review, the Guidance was hardly "the FCC's last word on the matter" and was therefore not final. *Id.*

The panel majority's holding directly conflicts with at least four other circuits. The Second, Third, Eleventh, and D.C. circuits have all squarely held that a pending § 155(c)(7) application for review renders delegated FCC action nonfinal. *See, e.g., Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88–89 (2d Cir. 2000) ("Decisions of agency staff are not directly appealable final orders [under § 155(c)(7)]."); *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 287 (3d Cir. 2007) (petition filed before final FCC order is "incurably premature"); *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1047, 1051 (11th Cir. 2003) ("Georgia Power's first petition for review of the Cable Services Bureau's order is 'incurably premature.'"); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002) ("The petitioners must give the Commission an opportunity to issue a final decision; otherwise, the statutory prerequisite [Section 155(c)] would be rendered useless."); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (per curiam) ("[W]e expressly hold that a petition for review filed after a bureau decision but before resolution by the full Commission is subject to dismissal as incurably premature.").

The D.C. Circuit has repeatedly reached the same result under the Commission's related Section 405(a) framework, holding that, once a party seeks review, "the entire order is rendered nonfinal." *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489–90 (D.C. Cir. 1994). And for good reason: a party that seeks "reconsideration of an order cannot at the same time appear before a court to seek review of that same order, any more than the party could literally be in two places at the same time." *Id.*

Every court of appeals known to amici that has considered the question outside the delegated-authority context has reached the same conclusion. *See, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002) ("A request for administrative reconsideration renders an agency's otherwise final action non-final."); *West Penn Power Co. v. EPA*, 860 F.2d 581, 582–83 (3d Cir. 1988) ("[T]he pendency of the reconsideration petition deprives the agency decision of finality."); *Winter v. ICC*, 851 F.2d 1056, 1061-62 (8th Cir. 1988) (same); *Milice v. Consumer Prod. Safety Comm'n*, 2 F.4th 994, 1000–01 (D.C. Cir. 2021) (a request for reconsideration "renders [the] agency's otherwise final action non-final"); *accord CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 326 (1961) ("[A]n administrative order is not 'final,' for the purposes of judicial review, until outstanding petitions for reconsideration have been disposed of.").

If judicial review is unavailable while the *same agency body* reconsiders its decision, how much more so here, when staff-level guidance memorializing longstanding practice is being reviewed by the full agency *for the first time*? As the D.C. Circuit has put it, the reason that filing an application for reconsideration defeats finality is straightforward: "there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary." *Outland v. CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960). Put more bluntly, "it is a pointless waste of judicial energy for the court to process any petition for review before the agency has acted on the request for reconsideration." *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989). And good reasons aside, in the delegated-authority context, the Commission must be given "an opportunity to issue a final decision; otherwise, the statutory prerequisite [of an application for review] would be rendered useless." *Alabama Power*, 311 F.3d at 1366.

The panel majority criticized Congress for creating a "Catch-22 situation" where filing an application for review "strips the order of finality for purposes of judicial review" but allows it to continue in effect. App. 34 n.7. But even if the Guidance has interim legal force under § 155(c)(3), *but see* App. 9–10, that is hardly improper. It is par for the course in both agency and judicial review. A district court's merits judgment, for example, retains legal effect while on appeal, absent a stay. So too for many administrative orders. *See, e.g.,* 29 U.S.C. § 153(b) (delegated action remains effective while under review unless stayed by full NLRB). That does not, however, mean the underlying order is *final* during review. Finality requires both that an order have legal effect and that it "mark the consummation of the agency's decisionmaking process." App. 66 n.2 (Wilkinson, J., dissenting) (citing *Bennett*, 520 U.S. at 177–78).

Finally, as Judge Wilkinson observed, a challenger of delegated-authority guidance need not twist in the wind. *Id*. at 69–70. The Communications Act provides that every application for review "shall be passed upon by the Commission." 47 U.S.C. § 155(c)(4). And mandamus is available to prod a recalcitrant agency into action. *See Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (asking "whether the agency's delay is so egregious as to warrant mandamus"). If respondents were dissatisfied with the pace of Commission proceedings, they were free to seek mandamus compelling agency action. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–65 (2004). But a reviewing court may not conjure finality where none exists—least of all to evade a jurisdictional limit on its own authority.

2. The Decision Below Would Unravel the Delegation Structure of Multiple Multimember Agencies.

The lower court's approach to finality cannot be cabined to the FCC. It would open the floodgates to duplicative litigation under a variety of statutes in the worst possible circumstance: any time a litigant grows impatient or just wants a different forum, even where, as here, the full agency never got the opportunity to review staff-level guidance at all. Examples abound throughout the federal administrative state:

- The Federal Energy Regulatory Commission delegates first-instance orders to staff under 18 C.F.R. § 375.307, subject to mandatory Commission rehearing before judicial review under both the Federal Power Act, 16 U.S.C. § 825l(a), and the Natural Gas Act, 15 U.S.C. § 717r(a)-(b).

See Clifton Power Corp., 294 F.3d at 111 (dismissing as nonfinal a petition under the FPA); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981 (D.C. Cir. 1993) (a petition under the Natural Gas Act "must be dismissed" if filed prematurely).

- The Securities and Exchange Commission likewise delegates authority to divisions, ALJs, individual Commissioners, and staff under 15 U.S.C. § 78d-1(a), subject to full Commission review before judicial review. *See City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998) (dismissing petition filed under 15 U.S.C. § 79x(a) before the Commission had acted).
- The National Labor Relations Board, Federal Maritime Commission, and Federal Trade Commission share the same delegated architecture (though review is discretionary rather than mandatory under Section 155(c)(7)). 29 U.S.C. § 153(b) ("[NLRB] may review any action of a regional director delegated to him under this paragraph."); 46 U.S.C. § 46104 (authorizing FMC delegation) and 46 C.F.R. § 501.11(f) (FMC "shall retain a discretionary right to review an action taken under delegated authority by a subordinate delegatee" including by petition); 16 C.F.R. § 0.7(a) (FTC "may delegate" certain functions to a division, individual Commissioner, administrative law judge, or employee board; it "retains a discretionary right to review such delegated action").

The problem compounds for agencies whose organic statutes, unlike § 155(c)(7), lack an explicit tie between a final Commission order and the statute of limitations. Where the Hobbs Act deadline runs from disposition of a pending application, no separate finality-based tolling doctrine is needed. But judicial review of most agency action relies on exactly that doctrine; treating an order under review as nonfinal is what allows the deadline to toll under the APA. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 285 (1987) (construing APA § 704 to "render[] the orders under reconsideration nonfinal"). The panel majority's view that an order remains final *throughout the pendency of review* would eliminate that basis for tolling. Such a rule doesn't just "waste judicial energy"—it threatens to destroy the very review the majority was so anxious to protect.[2]

B. The Panel's Exhaustion Holding Is Wrong and Conflicts With the Precedent of the Court and that of Every Other Court of Appeals.

Even if final agency action existed (it does not), exhaustion would independently bar review. The Communications Act is plain: "[t]he filing of an application for review … shall be a condition precedent to judicial review." 47 U.S.C. § 155(c)(7). For decades, courts of appeals have uniformly held that a petitioner must obtain a ruling from the full Commission before seeking judicial review. *See, e.g.*, *Richman Bros. Recs. v. FCC*, 124 F.3d 1302, 1303 (D.C. Cir. 1997). Yet the majority below took up the merits without so much as *mentioning* the term exhaustion.

[2] The panel majority's alternative holding—that the Guidance is "necessarily final" because it operates as a legislative rule, App. 36–38—is equally flawed and no more modest. In the majority's view, substantive correctness determines whether an agency's reading of a statute "supplements" existing law or "effects a substantive change." *Id.* An agency decision is "final" whenever it ends up being right and provisional when it ends up being wrong. That merits-based determination cannot possibly be correct. *See id.* And regardless, as Judge Wilkinson observed, whether a rule is legislative or interpretive speaks to notice-and-comment procedure. *Id.* at 66 n.2. The substantive character of agency action does not somehow supply the "consummation of the agency's decisionmaking process" that *Bennett* requires. *Id.*

Instead, the panel majority appears to have concluded that the mere filing of an application satisfied exhaustion. That interpretation is, in Judge Wilkinson's words, "myopic" and could not be more wrong. App. 64 (Wilkinson, J., dissenting). For starters, the very concept of exhaustion means an agency gets to *decide*—not merely receive paperwork. That makes particular sense in the delegated-authority context. "Congress did not intend that [a] court review a staff decision that has not been adopted by the Commission itself." *Richman Bros. Recs.*, 124 F.3d at 1304. Were the rule otherwise, and the Commission not given an opportunity to review the delegated decision, "the statutory prerequisite would be rendered useless." *Alabama Power*, 311 F.3d at 1366. Filing, in other words, starts the exhaustion process. It does not complete it. Congress reinforced this elsewhere in the statute: the deadline to petition runs from the date the Commission "dispose[s] of" all applications for review—not from the date any application is filed. 47 U.S.C. § 155(c)(7). Under the panel's view, however, a court would have jurisdiction over a suit filed by a litigant mere minutes after filing an application for review.

Indeed, the Communications Act requires that the "full Commission must have an opportunity to 'pass[] upon' petitioners' application for review before [judicial review] begins." App. 66 (Wilkinson, J., dissenting) (quoting 47 U.S.C. § 155(c)(4)). Yet the decision below "creates two parallel tracks of redundant litigation and cuts the Commissioners out of the picture where Congress required their involvement." *Id.*; *see also Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993) (discussing the "danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency" reconsideration). To find exhaustion satisfied by the mere filing of paperwork "disrespects the value of agency finality, namely the benefit of having a complete, collective judgment of the most accountable agency officials before judicial review commences." *Id.*

It is thus unsurprising that the Fourth Circuit again stands alone. The other courts of appeals are unanimous that the mere filing of an application does not satisfy 47 U.S.C. § 155(c)(7). *See, e.g., Am. Tel. & Tel. Co. v. FCC,* No. 90–1415, 1991 WL 49925, at *1 (D.C. Cir. Mar. 21, 1991) (holding that the "[m]ere filing of an application for review with the Commission is not sufficient to satisfy the exhaustion requirement of 47 U.S.C. § 155(c)(7)."); *Richman Bros.*, 124 F.3d at 1303–04 (holding that § 155(c)(7) "precludes the court from exercising jurisdiction" until petitioner secures a ruling from the full Commission); *Alabama Power Co.*, 311 F.3d at 1366 (dismissing for failure to exhaust and holding that "[t]he mere act of filing an application alone does not satisfy the jurisdictional prerequisite" of § 155(c)(7)); *Georgia Power,* 346 F.3d at 1049-50 (rejecting argument that 47 U.S.C. § 155(c)(7) "demands only that [a petitioner] file an application for review of the [bureau's] order, not that it await a ruling from the full FCC"); *Schneller v. WCAU Channel 10*, 413 F. App'x 424, 427 (3d Cir. 2011) (citing *Alabama Power* and *Richman Bros.* with approval and dismissing for lack of jurisdiction where petitioner had neither sought or obtained Commission review); *Council Tree*, 503 F.3d at 287 (holding that where a petition "was still pending before the FCC," judicial review was "incurably premature"); *Cellular Phone Taskforce*, 205 F.3d at 88–89 ("Decisions of agency staff are not directly appealable final orders [under § 155(c)(7)].”). In short, filing paperwork with an agency has never satisfied exhaustion—until the decision below. A stay is warranted for that reason alone.

C. The Lower Court’s Constructive Denial Theory Cannot Create Jurisdiction Where—As Here—Congress Mandates Exhaustion, Creating Another Circuit Split.

The Fourth Circuit also found “final” agency action on the theory that “the Commission ha[d] constructively denied the Application for FCC Review.” App. 36. But constructive denial is a judicially created doctrine that cannot satisfy a congressionally mandated exhaustion requirement. “Mandatory exhaustion statutes … establish mandatory exhaustion regimes, foreclosing judicial discretion” to craft exceptions. *Ross v. Blake*, 578 U.S. 632, 639–40 (2016). Full stop. Here, Section 155(c)(7) makes the filing of an application for review an explicit “condition precedent to judicial review.” *See Georgia Power*, 346 F.3d at 1050–51 (rejecting equitable exception because “courts cannot waive [a Congressionally mandated] exhaustion requirement [like] § 155(c)(7)”). The lower court erred in fashioning a judge-made exception.

The Fourth Circuit pointed to a smattering of cases in favor of its “constructive denial” theory. None help. *Scoggins v. Lee’s Crossing Homeowners Ass’n*, 718 F.3d 262, 271–72 (4th Cir. 2013), was not even an agency case but a homeowners’ association dispute. And while *Hardin* and *Friedman* at least involve agencies, they are prudential ripeness cases; neither involves a statutory prerequisite to judicial review. *Env’t Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970); *Friedman v. FAA*, 841 F.3d 537, 542–43 (D.C. Cir. 2016).

Although exhaustion makes good sense in this context because it ensures that a politically accountable agency body reviews staff-level guidance, the question is not whether exhaustion is a good idea; it is whether Congress made it mandatory. It did. This Court should grant a stay and make clear that Congress meant what it said.

II. THE FOURTH CIRCUIT'S INTERVENTION DISRUPTED SETTLED ELECTION RULES BASED ON A MISREADING OF THE COMMUNICATIONS ACT.

The consequences of the Fourth Circuit's premature intervention extend far beyond administrative law. The court below changed the rules governing campaign advertising in the closing weeks of an election—precisely when judicial restraint matters most. Instead of allowing the Commission to finish its work, the court upended the longstanding industry practice memorialized by the Guidance. It ignored decades of settled practice recognizing that a candidate's "use" of a broadcast station—not who pays for it—is the operative trigger for LUC. Broadcasters, candidates, media buyers, and political parties have relied on that practice and have planned this election cycle around it. Nevertheless, the Fourth Circuit upended all of this a mere *10 days* before the LUC window opens and less than a month before early voting begins in many states. *See* 52 U.S.C. § 20302(a)(8)(A). That piles error upon error: the court below impermissibly interrupted an unfinished administrative process to unsettle campaign speech towards the end of an election.

That was exactly the danger addressed by *Purcell v. Gonzalez*. There, this Court barred federal courts from altering election rules as an election approaches. 549 U.S. 1, 4–5 (2006) (per curiam). As several lower courts have recognized, *Purcell* can apply in the campaign finance context. Campaign-finance rules affect "who can speak, how much they can speak, and what they can speak about"—and thus shape the information voters receive about candidates and issues. *OPAWL—Bldg. AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 774–75 (6th Cir. 2024). Thus, the danger of disrupting the delicate "equilibrium in the campaign contribution laws" on which election participants have relied exists in spades. *Lair v. Bullock*, 697 F.3d 1200, 1203–04, 1214–15 (9th Cir. 2012) (invoking *Purcell* and staying an injunction that altered longstanding campaign-contribution limits five weeks before an election).[3]

That same danger is present here. LUC governs the price of candidate-related broadcast speech during the critical weeks just before an election—when Congress was most concerned that inflated advertising costs might make it impossible for a candidate to speak. By altering longstanding industry practice and making political speech more expensive only days before the LUC statutory window opened, the Fourth Circuit did just what *Purcell* forbids. A stay would restore the longstanding industry practice memorialized in the Guidance pending this Court's review.

A. The Fourth Circuit Erred in Setting Aside the Guidance Because Coordinated Advertisements and Advertisements Purchased by JFCs Can Constitute Candidate "Uses."

The LUC is set out in the Communications Act, which provides that "[t]he charges *made for the use* of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for

[3] *But see Chancey v. Illinois State Board of Elections*, 635 F. Supp. 3d 627, 644–45 (N.D. Ill. 2022) (finding *Purcell* concerns inapplicable where the challenged restrictions were enacted months earlier, the plaintiffs demonstrated a substantial First Amendment injury, and the State failed to show that relief would cause confusion or prejudice any particular election participant). *Chancey* bears little resemblance to this case: here, election participants had planned around the existing rules; the ruling disrupted those plans only 10 days before the LUC window opened; and no substantial constitutional injury justified that disruption.

nomination for election" shall not exceed the "lowest unit charge" in a window of time before primary and general elections. 47 U.S.C. § 315 (b)(1)(A) (emphasis added). The statutory touchstone is thus the candidate's "use" of the station—not the identity of the entity that pays for that use.

By the Fourth Circuit's lights, the Guidance is unlawful because "the term 'candidate' means 'candidate.'" App. 39. That's not an interpretation. It is tautology. *No one* thinks the statute is strictly limited to situations where "legally qualified candidates" pay. What matters is whether a candidate "uses" the broadcast station. And for decades, the broadcast industry has accorded LUC to party-coordinated and authorized committee media buys, given that they are approved by the candidate and in which the candidate appears, and distinguished them from those that are independent of the candidate, like Super PAC and issue ads. In the simplest terms: candidate authorized ads get LUC and independent third-party ads do not.

1. Consistent With Longstanding Industry Practice, the Guidance Reminded the Broadcast Industry that LUC Applies to Candidate-Party Coordinated Ads.

The Guidance drew precisely the distinction that the statute requires. It did not declare every party advertisement eligible for the LUC but simply reiterated that a candidate may "use" the station through an authorized, coordinated advertisement even when a party committee pays. In at least three ways, the plain text of the statute recognizes that entities other than the candidate may purchase airtime that the candidate "uses." First, Section 315(b)(1) speaks in the passive voice of "charges made for the use" of a station by a candidate. Second, § 315(b)(2) expressly contemplates a broadcast approved by a candidate but paid for by one of the candidate's authorized committees. *See* 47 U.S.C. § 315(b)(2)(C)(ii). Third, FECA's disclaimer provision expressly contemplates a communication "paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents." 52 U.S.C. § 30120(a)(2). Together, these provisions demonstrate that an advertisement may be paid for by someone other than the candidate or their primary committee. As Judge Wilkinson explained, "[a] candidate does not stop 'using' a broadcast station just because his or her authorized message employs a party-coordination mechanism." App. 78 (Wilkinson, J., dissenting). Had Congress intended payment to control, it could have limited the LUC to advertisements "paid for" by the candidate or a specified committee. *See id.* It did not.

The FCC's regulations confirm the same use/payment distinction. They define a candidate "use" by reference to a "candidate appearance (including by voice or picture)," subject to specified exceptions. 47 C.F.R. § 73.1941(b). And the Commission has long distinguished airtime purchased merely to advance an electoral goal from airtime actually "used" by the candidate. In *Bill Stuckey*, the Commission explained that airtime purchased on a candidate's behalf does not qualify for the LUC if the advertisement does not involve candidate use. *In re Bill Stuckey*, 35 F.C.C.2d 937, 937 (1972). But when the candidate appears and is identifiable by voice or picture, "the whole announcement *should be* considered a use by the candidate." *Id.* (emphasis added).

The Fourth Circuit's contrary reasoning was driven by a fundamental misunderstanding. The court believed the Commission to have long prohibited party committee advertisements from receiving LUC. App. 43-46. But that is simply incorrect. Respondent Candidates do not and cannot dispute that the broadcast industry has for decades recognized that "coordinated" spots are both common and entitled to LUC. Lerman Senter PLLC, *Guide to Political Broadcasting Rules* 6 (2024), https://perma.cc/F46N-UVWN. *See also* Nat'l Ass'n of Broad., *Political Broadcast Catechism*, 36 (Ann Bobeck et al. eds., 16th ed. 2004), https://perma.cc/BZ95-C3HR (LUC is triggered by the "use by a candidate" and so is available to coordinated party ads); David D. Oxenford, Davis Wright Tremaine LLP, *Political Broadcasting: Answering Your Questions on the FCC's Rules and Policies* 12 (2009), http://bit.ly/4wrRZHk (political parties may be entitled to LUC where they purchase time in conjunction with a candidate, and where the candidate confirms that this is an "authorized expenditure" made on his behalf).

That recognition would be nonsensical if the FCC "has long recognized 'only candidates or their authorized campaign committees are entitled to the LUC.'" App. 46 (quoting 1992 Political Programming Order, 7 F.C.C. Rcd. 4611, 4613-14 ¶ 23). Indeed, Senator Brown himself has taken advantage of the very rates he now asks this Court to declare unlawful. Further, the court's cherry-picked line from the 1992 FCC Order does not mean what the court suggests. That line concerned *independent* entities—which have never been entitled to LUC and continue to be excluded in the Guidance. In short, Section 315(b) asks whether the candidate "uses" the station, not whether the candidate personally purchases the airtime. There is a fair possibility this Court will reverse.

2. The Guidance Correctly Applied the LUC to Certain Advertisements Purchased by JFCs.

The same distinction between payment and use resolves this question in the JFC context. What's more, section 315(b) "repeatedly refers to candidates and authorized committees as sharing the rights it confers." App. 106. Thus, as with party-coordinated ads, the Commission has long recognized that both candidates and their authorized committees are entitled to LUC. SG Br. at 27. Meanwhile, Section 315 defines the term "[a]uthorized committee[s]" by reference to FECA. 47 U.S.C. § 315(b)(2)(F) (providing that "the terms 'authorized committee' and 'Federal office' have the meanings given such terms by section 30101 of title 52"). And no one disputes that joint fundraising committees may be designated as "authorized committees" of the candidate under FECA. See 52 U.S.C. § 30102(e)(3)(A)(ii). The Communications Act therefore expressly incorporates a definition of authorized committee that encompasses qualifying JFCs.

The lower court held that JFC advertisements could not be a "use" by the candidate, because a large share of the cost would be borne by noncandidate participants under FECA's expense allocation formula. App. 49. But as before, LUC eligibility depends upon whether the candidate is using a station, not on whether she is paying. Nothing in § 315(b) provides that allocating part of an advertisement's expense to a noncandidate JFC participant prevents the participating candidate from "using" the broadcast station.

The Fourth Circuit therefore erred in overturning the Guidance as to both categories of advertisements. Its categorical exclusions replace the inquiry Congress expressly prescribed—whether the candidate "uses" the station—with an inquiry into who purchased the airtime and how the purchaser allocated the expense. The Guidance correctly recognized that candidate-party coordinated advertisements and advertisements purchased by candidate-authorized JFCs can constitute candidate "uses" when they satisfy Section 315(b) and the FCC's rules.

B. Constitutional Avoidance Supports the Guidance's Interpretation.

Were there any doubt as to the proper interpretation of section 315(b), the canon of constitutional avoidance supports the Commission's longstanding interpretation of LUC. Constitutional avoidance mandates that "[w]hen legislation and the Constitution brush up against each other, [a court's] task is to seek harmony, not to manufacture conflict." *United States v. Hansen*, 599 U.S. 762, 781 (2023). The Fourth Circuit's construction withholds a speech-enhancing statutory benefit from candidate-authorized communications because a party or qualifying JFC purchases the airtime, even though similar candidate speech purchased through a principal campaign committee may receive LUC. That differential treatment raises serious First Amendment concerns. *See* App. 79–80 (Wilkinson, J., dissenting); *see also NRSC v. FEC*, 146 S. Ct. 2404, 2416 (2026) (recognizing First Amendment implications of collaboration between political parties and their candidates). Those concerns provide an additional reason to find that the Fourth Circuit erred in failing to consider "use" under § 315(b).

*   *   *

The preexisting understanding of LUC eligibility—which the Guidance merely reaffirmed—has guided mission-critical activities by political candidates (again, including at least one of Respondent Candidates) and broadcasters alike for decades. The lower court prematurely intervened, vacating long-standing industry practice in the form of Guidance that was not yet final and where Respondent Candidates have not exhausted administrative remedies. For that reason alone, this Court should stay the decision below. On the merits, there is no basis in the text of the statute, in FCC regulations, in Commission precedent, or in longstanding industry practice for the revisionary reading adopted by the court below. This Court should stay the lower court's radical, eleventh-hour rewrite of broadcast law.

CONCLUSION

The Emergency Application for a Stay should be granted.

Respectfully submitted,

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