No. 26A274

IN THE
Supreme Court of the United States

NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, ET AL.,

Applicants,

v.

SHERROD BROWN, ET AL.,

Respondents.

ON APPLICATION FOR STAY AND ADMINISTRATIVE STAY PENDING PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' OPPOSITION TO APPLICATION FOR A STAY

David R. Fox
Counsel of Record
Richard A. Medina
Nicole E. Wittstein
Julianna D. Astarita
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
(202) 948-1135

Counsel for Respondents Sherrod Brown, Jon Ossoff, Roy Cooper, and Kristen McDonald Rivet

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INTRODUCTION

Federal law gives "legally qualified candidate[s]," and *only* "legally qualified candidate[s]," a special right to buy advertising time from broadcasters at particularly favorable rates known as "lowest unit charge," or "LUC," in the lead-up to elections. 47 U.S.C. § 315(b)(1). Just last year, the Solicitor General assured this Court that this provision "require[s] broadcasters to charge low rates for candidate spending, but not for party spending—whether coordinated or independent." Reply Brief for the Federal Respondents at 23, *NRSC v. FEC*, No. 24-621 (U.S. filed Oct. 29, 2025). But three months ago, the Federal Communications Commission's Media Bureau reversed course and issued a "Public Notice" that instructs broadcasters, under threat of hefty penalties, to offer lowest unit charge to two categories of non-candidate committees: political parties engaged in coordinated expenditures, and joint fundraising committees ("JFCs") with non-candidate members. App. 106–07. The Fourth Circuit correctly held that the Public Notice is contrary to law, and there is no basis for this Court to stay that judgment.

The Applicant Party Committees, joined by the United States, primarily argue that the Fourth Circuit lacked statutory jurisdiction to review the Public Notice. But the Communications Act expressly provides for judicial review of delegated actions like the Public Notice, subject only to one condition precedent: "the *filing of* an application for review" by the Commission. 47 U.S.C. § 155(c)(7) (emphasis added). Petitioners—four candidates for U.S. Senate and the House of Representatives (the "Candidates")—complied with that requirement by filing an application for review two months before they sued. Any further exhaustion requirement is prudential only, and the Party Committees and the United States waived any prudential exhaustion argument below. Regardless, the Fourth Circuit reasonably held that the Commission constructively denied the Candidates' Application by failing to resolve it despite clearly having decided to reject it, and there is no circuit split on that question.

The Fourth Circuit's decision was equally well-grounded on the merits. Section 315(b)(1)'s plain text grants lowest unit charge only 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." 47 U.S.C. § 315(b)(1) (emphases added). That covers advertisements purchased by the candidate or their principal campaign committee on their behalf, but not advertisements that are purchased by party committees or JFCs who are not, under the Federal Election Campaign Act (FECA) and associated regulations, acting on behalf of candidates when purchasing the ads in question. There is no split on that question either. The Court should deny the Application.

STATEMENT

I. Statutory and Regulatory Background

Section 315(b)(1) of the Communications Act of 1934 entitles "legally qualified candidate[s] for any public office" who "use . . . any broadcasting station" shortly before their elections to do so at "the lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. § 315(b)(1). This valuable entitlement takes effect 45 days before the candidate's primary election and 60 days before the general. *Id.* § 315(b)(1)(A). Its present text was enacted as part of the

Federal Election Campaign Act of 1971 (FECA), which comprehensively regulates federal campaign finances. *See Hernstadt v. FCC*, 677 F.2d 893, 897 (D.C. Cir. 1980).

FECA requires all federal candidates to designate a "principal campaign committee" to accept contributions and make expenditures on the candidate's behalf. 52 U.S.C. § 30102(e)(1). Everyone agrees that stations must offer lowest unit charge for advertisements purchased by those principal campaign committees on behalf of the "legally qualified candidate" they support. This case concerns whether stations must *also* offer lowest unit charge to advertisements purchased by two other categories of committees that are further removed from the candidates themselves: party committees engaged in coordinated expenditures under 52 U.S.C. § 30116(d), and joint fundraising committees established by candidates and non-candidates "solely for the purpose of joint fundraising," *id.* § 30102(e)(3)(A)(ii).

Party Committee Coordinated Expenditures. FECA sharply limits the size of "contributions" that may be made to federal political committees, including candidate committees. *See* 52 U.S.C. § 30116(a). To prevent donors from evading those limits by directly paying vendors on a candidate's behalf, FECA generally treats as contributions, subject to those same limits, expenditures that are "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." *Id.* § 30116(a)(7)(B)(i). But as this Court held a few months ago, political party committees are constitutionally entitled to make unlimited "coordinated" expenditures, which, the Court explained, "are the party's expenditures on, for example, advertisements produced or distributed in consultation with a candidate's campaign." *NRSC v. FEC*, 146 S. Ct. 2404, 2413 (2026).

Joint Fundraising Committees. In addition to establishing a principal campaign committee, FECA allows federal candidates to "designate a political committee established solely for the purpose of joint fundraising by such candidates as an [additional] authorized committee." 52 U.S.C. § 30102(e)(3)(A)(ii); 11 C.F.R. § 102.17(a)(1), (2). Such committees are known as "joint fundraising committees" or "JFCs." A JFC's only permissible purpose is to "collect contributions, pay fundraising costs from gross proceeds and from funds advanced by participants, and disburse net proceeds to each participant." 11 C.F.R. § 102.17(b)(1); *see* 52 U.S.C. § 30102(e)(3)(A)(ii). FEC regulations require JFC participants to split expenses for fundraising in proportion to their share of the proceeds. 11 C.F.R. § 102.17(c)(7).

In recent election cycles, Republican candidates have formed JFCs with non-candidate committees as advertising vehicles. These JFCs are structured to ensure that an overwhelming majority of their proceeds flow to non-candidate committee members, so that the non-candidate committees bear the overwhelming majority of expenses as well.[1] They have then demanded lowest unit charge from broadcasters for advertising that is overwhelmingly funded by non-candidates.

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[1] *See, e.g.*, *Nevada Victory Committee*, FEC, https://www.fec.gov/data/committee/C00890962/ (last visited Sep. 2, 2026); *Wisconsin Victory Committee*, FEC, https://www.fec.gov/data/committee/C00889493/ (last visited Sep. 2, 2026).

II. Procedural Background

The lowest unit charge requirement has existed for decades, but before the Public Notice, the Commission had never provided public guidance on whether party committees engaged in candidate-coordinated spending or JFCs with non-candidate members are entitled to lowest unit charge. The issue came before the Court last year, however, as part of the parties' briefing in *NRSC v. FEC*. Intervenor-Respondents there argued that allowing political parties to make unlimited coordinated expenditures "threaten[ed] to destabilize the lowest-rate-charge system for political advertising" by allowing a "limitless deluge of advertisements from party committees" that "purport to qualify for lowest unit rates." Brief for Intervenor-Respondents at 46–48, *NRSC v. FEC*, No. 24-621 (U.S. filed Sept. 29, 2025).

In response, the Solicitor General assured the Court that no such deluge would occur: lowest unit charge rules "require broadcasters to charge low rates for candidate spending, but not for party spending—whether coordinated or independent." Reply of Fed. Resps. at 23, *NRSC*, No. 24-621 (citing 47 U.S.C. § 315(b)(1)). Even if the Court allowed unlimited coordinated spending, the Solicitor General explained, "broadcasters still would not be required to charge parties special low rates." *Id.* Citing the Solicitor General's statement, the National Association of Broadcasters then advised its broadcaster members that they need not offer lowest unit charge for party-coordinated and JFC ads. Supp. App. 1–3.

On March 30, 2026, the Commission's Media Bureau issued the challenged Public Notice. The Public Notice directs broadcasters to offer lowest unit charge to "(1) authorized committees that engage in joint fundraising with legally qualified candidates for federal office, and (2) [for] advertisements that qualify as coordinated expenditures of political parties and legally qualified candidates for federal office." App. 106. It asserts that "[t]he FCC's rules do not recognize distinctions between types of committees for LUC purposes (*e.g.*, principal campaign committee, joint fundraising committee) provided that the committee is an authorized committee of the candidate under the FECA." App. 107. And it purports to "restate previous Media Bureau guidance"—which it neither cites nor otherwise identifies—that "candidate-party coordinated advertisements are subject to the LUC provisions, provided that the ad otherwise complies with other applicable requirements." *Id.* The Commission has since confirmed that the only past "guidance" on this score consists of "informal oral opinions" conveyed to broadcasters by telephone. App. 97 n.18; FCC C.A. Br. 39.

A week after the Commission issued the Public Notice, Intervenor-Respondents in *NRSC* informed this Court that the Public Notice contradicted the Solicitor General's statement in his reply brief that lowest unit charge did not apply to "*party* spending—whether coordinated or independent." Supplemental Brief for Intervenor-Respondents at 1, *NRSC v. FEC*, No. 24-621 (U.S. filed Apr. 7, 2026). Intervenor Respondents explained that they believed the Solicitor General was right the first time, "and that the new FCC guidance is contrary to the statute," but that the Public Notice showed how allowing unlimited party coordinated expenditures could "upset reliance interests by substantially disrupting the market for broadcast advertising during election seasons." *Id.* The Solicitor General offered no response.

On April 29, 2026, the Candidates timely filed an Application for Review asking the Commission to set aside the Public Notice. On the same day, the Television Bureau of Advertising, Inc., filed a separate petition for reconsideration before the Media Bureau. Supp. App. 8–32. The Candidates' Application explained that the Public Notice is unlawful because it purports to require stations to offer lowest unit charge for advertisements that do not constitute candidate use, in violation of Section 315(b)(1)'s plain text. The Candidates requested expedited relief due to the imminent harm they faced from the Public Notice's unlawful expansion of lowest unit charge to non-candidate advertising. App. 112, 132. But the Commission did nothing.

Meanwhile, the Party Committees were promising to unleash exactly the "deluge" of party-funded, candidate-rate advertising that the Solicitor General had assured the Court would *not* result from *NRSC*. The chair of NRSC and NRCC's sister committee, the RNC, touted in an interview that Republican Party committees stand ready to spend *hundreds of millions* of dollars on coordinated TV advertising "at the candidate rate" to "obliterate" Democratic candidates.[2]

Facing imminent, irreparable harm, the Candidates filed a Petition for Review of the Public Notice in the U.S. Court of Appeals for the Fourth Circuit on June 19, 2026. The Fourth Circuit expedited the appeal to enable a decision before lowest unit charge becomes available on September 4 in advance of the general election. The Party Committees intervened as respondents, and they and the Commission objected

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[2] Matthew Foldi, *INTERVIEW: RNC Chair Joe Gruters on the RNC's Election Integrity Wins and How the GOP Can Defy History in 2026*, Wash. Rep. (June 23, 2026), https://perma.cc/9F8G-UZUR.

to the Fourth Circuit's jurisdiction while simultaneously defending the Public Notice on the merits, with the Commission contending that it "is entirely consistent with Section 315(b)" of the Communications Act. FCC C.A. Br. 36.

The Fourth Circuit heard oral argument at a special sitting on August 7, 2026. By then, the Candidates' Application for Review had been pending before the Commission for more than three months. But when pressed by the panel, the Commission's counsel admitted with "commendable candor" that "it [was] very unlikely that the Commission [would] act" on the Application before lowest unit charge became available on September 4, App. 36 (quoting Oral Arg. at 49:49–50:12)—even though the Commission had already authorized the filing of a brief rejecting the legal basis for the Candidates' Application on the merits, and even though the Commission would have been entitled to deny the Application "without specifying any reasons therefore," 47 U.S.C. § 155(c)(5).

Just ten days later, however—after an oral argument at which two judges seemed inclined to grant relief—the Commission changed course. It filed a notice of supplemental authority informing the court that (1) the Media Bureau had issued an order denying a separate petition for *reconsideration* of the Public Notice by the Television Bureau of Advertising, Inc.; and (2) "the FCC Chairman circulated a proposed order" on the Candidates' Application for Review "dismiss[ing] the application as an improper vehicle" to review the Public Notice in the first place. App.

93. Commissioner Anna M. Gomez published a dissent to the Media Bureau's order.[3] She cautioned that the "FCC is unleashing a flood of coordinated campaign money into broadcast advertising," "forc[ing] [broadcasters] into a fire sale on the one thing that could actually help them compete and increase revenue," and argued that the Commission had done so through irregular procedures "with no opportunity for the public to weigh in."[4]

On August 25, 2026, the Fourth Circuit granted the Candidates' Petition and set aside the Public Notice. The court denied the Party Committees' motion to stay on August 27, and it issued its mandate that same day.

LEGAL STANDARD

A stay pending disposition of a petition for writ of certiorari is an "extraordinary" remedy. *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). "[A]n applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). In close cases, the Court "balance[s] the equities and weigh[s] the relative harms to the applicant and to the respondent." *Id.*

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[3] *Commissioner Gomez's Dissent to the Media Bureau Order*, FCC (Aug. 25, 2026), https://www.fcc.gov/document/commissioner-gomezs-dissent-media-bureau-order.

[4] News Release, FCC, *Commissioner Gomez: FCC to Unleash Dark Money Into Broadcast TV Ads* (August 25, 2026), https://www.fcc.gov/document/fcc-unleash-dark-money-broadcast-tv-ads.

ARGUMENT

I. The Candidates have standing.

The Candidates have standing based on their "concrete and particularized interest in the rules that govern" their campaigns. *Bost v. Ill. State Bd. of Elections*, 607 U.S. 71, 82 (2026). That is particularly clear here, where the Candidates' rival party committees have promised that if the Public Notice stands, they will spend hundreds of millions of dollars "at the candidate rate" to "obliterate" Democratic candidates like Petitioners, characterizing it as "a complete game changer."[5]

The Candidates also have a further, equally concrete interest in preventing their exclusive statutory entitlement to lowest unit charge from being unlawfully diluted by the Public Notice's extension of that benefit to non-candidates who are not entitled to it. This interest is grounded in a "long line of cases holding that affected parties may challenge regulations allowing what a statute prohibits." *Shays v. FCC*, 414 F.3d 76, 94 (D.C. Cir. 2005) (citing cases). That unlawful dilution injures the Candidates both in their political campaigns, where they would face a higher volume of opposing advertising, and in their competition with other advertisers for scarce television inventory. In each case, the unlawful dilution requires them to raise and spend more money in response. After all, as the Party Committees explained below, "commercially reasonable and practical inventory limits constrain the likelihood and frequency of political advertising orders that make it on air." NRSC C.A. Br. 4. By allowing non-candidates to buy more advertising time for less money than would

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[5] Foldi, *supra* note 2.

otherwise be possible, the Public Notice makes it less likely that the Candidates' own ads will air, unless they "pay[] a premium" for non-preemptible time. *See id.* at 4–6.

In challenging standing, the United States first argues the Public Notice does not regulate Candidates, only third parties. U.S. Br. 10. But *Bost* similarly involved a challenge to a rule regulating third parties—there, a ballot counting rule that directly regulated voters and election workers, not candidates or campaigns. *See* 607 U.S. at 74–75. And in any event, Article III does not condition standing on the government directly regulating a challenger's conduct. The Candidates, as Congress's intended exclusive beneficiary of lowest unit charge, are an "object" of the Public Notice even though it directly regulates broadcasters' conduct. *See Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 114 (2025) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). The United States' argument that only broadcasters are proper plaintiffs, U.S. Br. 12, is irreconcilable with *Diamond Alternative Energy*'s demand that standing analysis "recognize[] commonsense economic realities" and draw "commonsense inferences" from "predicable" third-party behavior. *Diamond Alt. Energy*, 606 U.S. at 116.

The United States' reliance on a standing discussion from *McConnell v. FEC*, 540 U.S. 93 (2003), and its related argument that the Candidates lack standing because the Public Notice gives Democratic Party committees low rates too, fails. U.S. Br. at 10–11. *McConnell* held that candidates lacked standing for a constitutional challenge to an increase in candidate contribution limits because they, as candidates, benefitted from that increase. *McConnell*, 540 U.S. at 228. The Public Notice, in contrast, does nothing to help the Candidates—they were already entitled by law to lowest unit charge under the Communications Act's plain text. What the Public Notice does, instead, is to reduce the value of that entitlement by extending it to third parties, which only harms the Candidates. Perhaps Democratic Party committees would benefit, but the Candidates are not party committees, and *NRSC* recognizes and preserves the "distinction" between political parties and candidates as "significant," even when they communicate and coordinate. 146 S. Ct. at 2419.

The D.C. Circuit took a similar approach in *Shays*, 414 F.3d at 86—on which the Fourth Circuit based its ruling and to which the United States offers no response. *Shays* acknowledged that the challenged rules "grant[ed] Shays and Meehan the same legal options as their opponents" but held that they nevertheless were injured by "competition intensified by" the unlawful practices they challenged. *Id.* at 84, 87. In doing so, *Shays* distinguished *McConnell*, explaining that the candidates in *McConnell* had no "right to equal funding" that was threatened by the challenged law, whereas the candidates in *Shays* had a statutory right not to face unlawful campaign practices. *Id.* at 88–89 (citing *McConnell*, 540 U.S. at 227). Here, similarly, the Candidates have an express statutory right to lowest unit charge that the Public Notice devalues. 47 U.S.C. § 315(b)(1).

The United States' argument that evenhanded regulations cannot cause injury is also inconsistent with *Bost*, which found standing even though the challenged rule required Illinois to count all mail ballots received after election day, whether they were cast for Bost or for his opponent. 607 U.S. at 74–75. Despite that symmetry, Bost had standing to challenge the rule whether it "help[ed], hurt, or h[ad] no effect on" his electoral prospects. *Id.* at 77. Candidates "are not common competitors in the economic marketplace." *Id.* They have a legally cognizable "interest in a fair process" and thus "suffer when the process departs from the law." *Id.*

The United States retorts that *Bost* is limited to vote-counting rules. U.S. Br. 12–13. But that just cannot be. The standing requirement flows from Article III's limiting "the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Diamond Alt. Energy*, 606 U.S. at 110 (quoting U.S. Const. art. III, § 2, cl. 1). There is no vote-counting clause in Article III. Like ballot-casting rules, unlawful campaign finance regulations threaten "electoral fairness." *See Randall v. Sorrell*, 548 U.S. 230, 249 (2006). And the injury to the Candidates from the Public Notice is comparable to, but more concrete than, the injury to Bost: an onslaught of more negative advertising than they would otherwise face, along with a higher level of competition for a limited amount of available television advertising time and an accompanying need to adjust their own campaign strategy accordingly. The cost of television advertising dominates modern campaigns; it is not some trivial concern like the "ballot font and typeface" challenges that *Bost* suggested might fall short of justiciability. 607 U.S. at 82 n.7.

II. Applicants have not shown a reasonable probability that the Court will grant certiorari and reverse.

On both reviewability and the merits, Applicants and the United States want to talk about everything except the text of the directly pertinent statutes. That is because on both questions, the text directly supports Candidates.

A. The Fourth Circuit had statutory jurisdiction.

1. Section 155(c)(7) requires only the "filing of" an application for review as a condition precedent to judicial review of delegated action like the Public Notice.

The Fourth Circuit had statutory jurisdiction to review the Public Notice because the Candidates complied with the only "condition precedent" for such review "filing an application for review" by the Commission. 47 U.S.C. § 155(c)(7).[6] If Congress had wanted to require a final decision on that application before judicial review, it would have said so. Congress could have said, for example, that "a final 'order[] disposing of all applications for review filed in any case' shall be a condition precedent to judicial review." *See* 47 U.S.C. § 155(c)(7) (referencing such orders later in the text). Or it could have required both that parties "file" an application for review and that such application be "finally denied by the [Commission] in writing." *See* 28 U.S.C. § 2675. Congress has done just that other analogous statutes. *See, e.g.*, 42 U.S.C. § 405(g) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action[.]"); *id.* § 1997e(a) ("No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted."). "Atextual judicial supplementation is particularly inappropriate

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[6] It is questionable whether even this requirement is truly jurisdictional, rather than a mandatory claim processing rule. *See Santos-Zacaria v. Garland*, 598 U.S. 411, 417 (2023) (explaining the Court "routinely treat[s] as nonjurisdictional threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" and the Court is "yet to hold that any statutory exhaustion requirement is jurisdictional" (citation modified)).

when . . . Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019).

That the Public Notice was issued by the Media Bureau using authority delegated to it by the Commission, instead of by the Commission itself, also poses no statutory barrier to review. Section 155(c)(7) expressly confirms that "judicial review of any order, decision, report, or action made or taken pursuant to a delegation" *is* available, provided only that the condition precedent of "filing" an application for review is met. 47 U.S.C. § 155(c)(7). If Congress had wanted to preclude review of actions taken by the Commission's delegees, it would have provided for review only of *the Commission's order* on the application for review, rather than of the delegated order itself. *Id.* And Section 155(c)(3) confirms Congress's intent by providing that actions taken under delegated authority "shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission." That changes only if and when the action is "reviewed" by the Commission itself, *id.*—past-participle phrasing that "denotes" the review "as being completed." *Participles Generally*, *Chicago Manual of Style* § 5.114 (18th ed. 2024). The portion of *NTCH, Inc. v. FCC* quoted by the Party Committees and the United States is not to the contrary, because it involved a complaint for which judicial review was instead governed by 47 U.S.C. § 208, which lacks similar language. *See* 877 F.3d 408, 413–14 (D.C. Cir. 2017).

2. The Candidates' Petition for Review was timely.

The Hobbs Act's timing provision likewise poses no barrier to review. Whatever its meaning in general, Section 155(c)(7) modifies it in this context. The Court has long recognized that the Hobbs Act's timing rules may be modified by agency-specific statutes that apply them to particular categories of administrative action. In *Stone v. INS*, for example, the Court held that the usual Hobbs Act rule that a reconsideration request tolls the petition for review deadline did not apply to review of deportation orders because the Immigration and Nationality Act contemplated multiple petitions for review in that circumstance. 514 U.S. 386, 393–401 (1995). Similarly here, Section 155(c)(7) expressly makes only "the filing of" an application for review a condition precedent to judicial review of delegated actions, and it then provides that the "time within which a petition for review must be filed . . . shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case." That timing language extends the deadline for filing a petition for review to *allow* a party to wait for a Commission decision. But it does not *require* the party to wait for a Commission decision. Had Congress wished to require waiting, it would have been far simpler to make the "orders disposing of all applications for review filed in any case" the "condition precedent" to judicial review, instead of the mere "filing" of an application. 47 U.S.C. § 155(c)(7).

Then-Judge Scalia's decision in *Western Union Telegraph Co. v. FCC* is not to the contrary. 773 F.2d 375 (D.C. Cir. 1985). *Western Union* did not involve delegated action under Section 155(c), so it construed only the Hobbs Act's unmodified deadline text, not Section 155(c)(7). The Hobbs Act's unmodified text is materially different, providing that a "party aggrieved by [a] final order may, within 60 days after its entry, file a petition to review the order." 28 U.S.C. § 2344. Section 155(c)(7), in contrast, provides that the time "within which a petition for review must be filed . . . *shall be computed from* the date upon which public notice is given of orders disposing of all applications for review filed in any case." 47 U.S.C. § 155(c)(7) (emphasis added). It therefore unmistakably describes the computation of a deadline, rather than using a phrase like "shall commence on" or "shall begin on," which would describe a window with both a mandatory start and end. Moreover, that sentence in Section 155(c)(7) immediately follows the sentence imposing only "the filing of an application for review" as a condition precedent to judicial review, strongly suggesting that Congress did not silently require waiting for a decision on the application for review as well.

As other courts have recognized in the decades since *Western Union*, Congress often uses the "within . . . after" construction to impose a deadline rather than a window. For example, 28 U.S.C. § 1446(b)(1) provides that "the notice of removal of a civil action or proceeding shall be filed *within 30 days after* the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." (emphasis added). The Ninth Circuit has held that this text, which mirrors the unmodified Hobbs Act text, "sets a deadline for removal, not a 'window' for removal[,]" so that "[n]othing in the statute's text can be construed as barring a defendant from filing a notice of removal before formal service." *Mayes v. Am. Hallmark Ins. Co. of Tex.*, 114 F.4th 1077, 1079 (9th Cir. 2024); *see also Novak v. Bank of N.Y. Mellon Tr. Co., NA.*, 783 F.3d 910, 913 (1st Cir. 2015) (per curiam) ("[A] defendant can remove at any time before the removal period runs, including before the clock begins ticking."). That conclusion is even more clear with respect to Section 155(c)(7), because it describes the 60 days as being "computed from" a final Commission decision.

Even if Section 155(c)(7) did impose a filing "window" rather than providing for the calculation of a deadline, that requirement would be non-jurisdictional and subject to equitable exceptions. The Hobbs Act's filing rule is indistinguishable from the statutory deadline specific to decisions by the Merit System Protections Board, which this Court recently held is non-jurisdictional. *Harrow v. Dep't of Def.*, 601 U.S. 480, 484–89 (2024); *see* 5 U.S.C. § 7703(b)(1) ("[A]ny petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board."). And because the deadline is not jurisdictional, it is "excus[able] . . . for equitable reasons." *Harrow*, 601 U.S. at 484. Courts presume that "Congress drafts limitations periods" against certain "background principle[s]," including equitable doctrines on which courts have long relied to ensure mechanical adherence to procedural rules does not result in absurdity or injustice. *See Boechler, P.C. v. Comm'r of Internal Rev.*, 596 U.S. 199, 209 (2022). As explained below, *infra* Arg. § II.A.4, the United States and the Party Committees forfeited any argument against application of those equitable principles by failing to respond to the Candidates' detailed futility argument in the Fourth Circuit.

3. The Public Notice constitutes final agency action.

Both the United States and the Party Committees argue that the Public Notice is not final agency action because it lacks legal effect. But their actions—requesting an extraordinary stay because the vacatur of the Public Notice is supposedly causing irreparable harm—speak louder than their words. If the Public Notice were so insignificant, then the Fourth Circuit's order vacating it and returning to the prior status quo of no formal guidance on the issue should be of little immediate concern.

In fact, the Public Notice readily satisfies the test for reviewable agency action because it "is—in both substance and operation—a legislative rule," notwithstanding "the agency's self-serving characterizations" otherwise. App. 36–37. As explained in detail below, *infra* Arg. § II.B, the Public Notice is both divorced from the text of the Communications Act and inconsistent with the Commission's regulations implementing the LUC requirement. It therefore "supplements a statute," "adopts a new position [that is] inconsistent with existing regulations," and generally "effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) ("agree[ing]" that a policy document would have been legislative in character had it "adopted a new position inconsistent with any of [the agency's] existing regulations"). At the same time, the Public Notice communicates "a *requirement*, such that noncompliance by a broadcaster carries with it hefty penalties." App. 17. And when an action that "an agency has labeled as an interpretive rule or policy statement actually possesses the force of law of a legislative rule," the action "necessarily qualif[ies] as final[.]" 33 Wright & Miller's Fed. Prac. & Proc. Judicial Review § 8361 (2d ed.); *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019) ("[A] legislative rule is . . . necessarily final."). Elsewhere, the United States seems to recognize that the Public Notice meets this test: it argues that the Public Notice "gives" party committees and JFCs "an entitlement to obtain low rates from broadcasters." U.S. Br. 10.

The Party Committees' response that the Public Notice does nothing but "restat[e]" existing Commission policy is wrong. No one has identified a rulemaking, guidance document, adjudication, or agency material of any kind that supports or reflects the purportedly "longstanding" policy announced in the Public Notice. Rather, the Commission has confirmed that the Public Notice is based on nothing but informal advice Media Bureau staff has communicated to broadcasters over the phone. App. 97 n.18; FCC C.A. Br. 39. That is hardly the sort of agency regulation on which the Commission might later base "interpretive guidance." And the length of time the Media Bureau has flouted both the Communications Act's text and proper rulemaking procedures cannot, "though a process akin to adverse possession," immunize the unlawful expansion of the lowest unit charge requirement from judicial review now that the Media Bureau has at last written it down in reviewable form. *United States v. Texas*, 599 U.S. 670, 714 (2023) (Alito, J., dissenting).[7]

Characterizing the Public Notice as mere "guidance" would not help the Party Committees in any event, because even "interpretive rules can be final" and reviewable. *See Cal. Cmtys. Against Toxics*, 934 F.3d at 635. This Court "ha[s] long taken" a "'pragmatic' approach . . . to finality." *U.S. Army Corps of Eng'rs v. Hawkes*

[7] Contrary to the United States' position, this argument does not conflate jurisdiction with the merits. U.S. Br. 20. The fact that the Public Notice was not grounded in any prior written guidance is a different matter from the merits question of whether it conflicts with the Communications Act.

Co., 578 U.S. 590, 599 (2016). Both elements of the *Bennett* test are satisfied here. *First*, the Public Notice plainly "mark[s] the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Section 155(c)(3) of the Communications Act confirms that an integrated Bureau's delegated actions "have the same force and effect" as "actions of the Commission," unless and until they are "reviewed" by the full Commission. The Commission has since made clear it will not review the Public Notice on the merits, thereby confirming the Public Notice marked the end of the Commission's consideration of the issue. App. 29, 93; *see Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016) ("In assessing whether a particular agency action qualifies as final for purposes of judicial review, this court and the Supreme Court have looked to the way in which the agency subsequently treats the challenged action." (collecting cases)).

The statutory penalties for violating the LUC requirement likewise confirm that "legal consequences will flow" from the new rule. *Bennett*, 520 U.S. at 178. The Public Notice communicates "requirements" to broadcasters for the upcoming "election season." App. 106. Courts regularly treat actions that instruct regulated parties how to act, on pain of enforcement action, as final and reviewable. *E.g.*, *Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014) ("If an agency action announces a binding change in its enforcement policy which immediately affects the rights and obligations of regulated parties, then the action is likely final and subject to review."). It is no empty threat: the Media Bureau that issued the Public Notice is also the Commission body that would adjudicate complaints against broadcasters for improperly denying LUC. *See* 47 C.F.R. §§ 0.61(h), 0.111(a)(11). And unlike in *Trump v. California*, No. 26A124, 2026 WL 2473573, at *4 (U.S. Aug. 24, 2026) (per curiam), the Public Notice had already been issued with the same full force and effect as a Commission order when the Candidates sought review. *See* 47 U.S.C. § 155(c)(3).

4. Any prudential exhaustion requirements were waived.

Because the plain text of the Communications Act requires only the filing of an application for review, any further exhaustion of administrative remedies—such as awaiting a decision—is necessarily a matter of judicial discretion. "[W]here Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds as stated in Woodford v. Ngo*, 548 U.S. 81, 84–85 (2006). Most cases challenging delegated action under the Communications Act involve complicated, fact-bound regulatory action and are not especially time-sensitive, and in such cases it will likely make sense for courts, as a prudential matter, to require challengers to wait for a ruling on their application for review before coming to court. But such a requirement is necessarily judge-made and therefore subject to equitable exceptions. *See Ross v. Blake*, 578 U.S. 632, 639 (2016) ("No doubt, judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions.").

The Candidates argued at length in the Fourth Circuit that the *McCarthy* factors excuse any prudential exhaustion requirement here, given the irreparable harm the Candidates faced absent relief by September 4, the gross inadequacy of the Commission's procedures under the circumstances, and the fact that the Petition presented a pure question of statutory construction that would have to be resolved by the Court *de novo* in any event. *See* Candidates' C.A. Opening Br. 46–55. Neither the Party Committees nor the Commission offered any argument in response. *See generally* NRSC C.A. Br.; FCC C.A. Br. And because the Fourth Circuit ultimately determined it had jurisdiction under the constructive-denial doctrine, it did not address *McCarthy* either. Any such prudential argument, including that Section 155(c)(7)'s filing requirement would "mean nothing if the Commission does 'not need to *resolve* the application' prior to judicial review," Appl. 15 (quoting App. 64 (Wilkinson, J., dissenting)), is thus forfeit and cannot justify a stay. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (permitting review of otherwise forfeited issues only where it nevertheless "ha[d] been passed upon" below).

Reading the Communications Act to require only the filing of an application for review while imposing an excusable, prudential requirement to wait for a Commission decision makes good sense. The filing requirement ensures that the Commission has the opportunity to review delegated actions when judicial review is sought, while preventing the Commission from foreclosing timely judicial review in time-sensitive cases like this one where there is no adequate reason to wait. Nor is such a rule especially unusual—it mirrors, for example, Congress's authorization of review by certiorari before judgment in this Court, which allows the Court to take jurisdiction immediately after an appeal is filed if there is a good reason to do so, while the Court's rules and prudential practice ensure that doing so is the exception, not the rule. *See* 28 U.S.C. § 2101(e); Sup. Ct. R. 11.

5. Regardless, the Commission constructively denied the Application for Review.

Even if a Commission decision on the Candidates' Application for Review were a prerequisite to judicial review, the Fourth Circuit correctly found that prerequisite satisfied by the Commission's constructive denial of the Application. The Fourth Circuit's ruling was legally sound and grounded in the unusual facts of this case, making it particularly ill-suited for certiorari. No one seriously contends that there was any doubt on this record that the Commission would ultimately deny the Candidates' Application.

The United States and the Party Committees protest that there is no precedent finding constructive denial by the Commission, but there is no precedent rejecting the possibility either. Constructive denial is a longstanding feature of administrative law. "[W]hen administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Env't Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). In those circumstances, "a denial of a request need not be explicit, but rather may be treated as a 'constructive' denial." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 271–72 (4th Cir. 2013). This Court recently recognized the same principle in circumstances that—unlike this case—do carry jurisdictional consequences, holding that a district court's failure to rule on temporary restraining order motion was reviewable as a denial under 28 U.S.C. § 1292(a)(1), even though there was no actual "order," because the failure to rule "had the practical effect of refusing an injunction to detainees facing an imminent threat of severe, irreparable harm." *AARP v. Trump*, 605 U.S. 91, 94 (2025) (per curiam). The same principle applies here.

The record amply supports the Fourth Circuit's finding that the Commission constructively denied the Candidates' Application for Review. The Candidates filed the Application on April 29, 2026, twice requesting expedited review to ensure relief before lowest unit charge becomes available for the general election on September 4. App. 112, 132. The Commission did nothing for months. It did not seek public comment, it did not issue a decision, and there is nothing in the record to suggest that it even deliberated.[8] When the Commission filed the administrative record in the Fourth Circuit, it consisted only of the Public Notice itself. Supp. App. 4–5.

If the Commission's inaction in the months that followed the Candidates' Application left any doubt, its conduct after they sued eliminates it and makes clear that denial was always a foregone conclusion. In addition to challenging the Fourth Circuit's jurisdiction, the Commission opted to defend the Public Notice on the merits—a pure question of statutory construction to which there is only one right answer: the "best reading" based on "all relevant interpretative tools." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 373 (2024). By authorizing such a defense, the Commission made its position clear: with such a view of the law, the Commission could not possibly reject the Public Notice as contrary to law, the sole basis for the Candidates' Application. Yet the Commission continued to sit on the Application—and continues to sit on it today, even though it could deny it "without specifying any

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[8] *See Comm'r Gomez Dissent*, *supra* note 3.

reasons therefor." 47 U.S.C. § 155(c)(5). At oral argument, even as the Commission's lawyer argued that the Public Notice was lawful, he conceded with "commendable candor" that it was "very unlikely that the Commission [would] act here before" September 4. App. 36 (quoting Oral Arg. at 49:49–50:12). He struggled to explain why the Commission had not simply denied the Application under those circumstances.[9]

The Party Committees and the United States have no persuasive answer to the Fourth Circuit's reasonable conclusion, on this record, that the Commission constructively denied the Candidates' Application. Neither even attempts to argue that the Commission's decision is anything other than a foregone conclusion, and neither has any adequate explanation for why the Commission has not already issued a denial. They argue instead that constructive denial is categorically unavailable in this circumstance. Appl. 13–14; U.S. Br. 20–21. But they have no support for that position. The cases the Party Committees cite, *Bennett* and *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), do not discuss constructive denial at all. The United States focuses as well on the number of months that have elapsed since the Candidates filed their Application, but that misses that the problem is not delay alone, but rather that the Commission has clearly made up its mind on the issue yet refused to issue the order even as the Candidates faced imminent irreparable harm

[9] Ten days later, the Commission filed an unusual supplemental authority notice reporting that the Commission's Chairman had circulated a draft order denying the Candidates' Application, apparently on the ground that review of the Public Notice was never available through an Application for Review. App. 29, 93. The Candidates responded that a dismissal would eliminate any doubt over the Court's jurisdiction. More than two weeks later, that denial order has still not been issued.

from a deluge of discount-priced advertisements from the opposing political party, with the "practical effect of" denying the Application. *AARP*, 605 U.S. at 94. The United States also insists that the Public Notice merely preserved the status quo, but that is both wrong—the status quo, which the Fourth Circuit's order restored, was no formal guidance on this issue—and irrelevant to the constructive denial question.

6. There is no circuit split on statutory jurisdiction.

Finally, and contrary to the United States' argument, U.S. Br. 30, the Fourth Circuit's decision does not open any circuit conflict on these jurisdictional issues. The Fourth Circuit relied on the constructive-denial rationale and therefore expressly did not reach the question whether Section 155(c)(7) otherwise permits review before the Commission decides an application for review. App. 36 & n.8. There cannot possibly be a circuit split on constructive denial in this context, because the United States and the Party Committees concede that there is no precedent on that question. The United States also posits circuit splits over whether delegated orders qualify as orders of the Commission and whether they are final while Commission review is pending, U.S. Br. 28–29, but those arguments ignore that under the Fourth Circuit's approach, there was a final order of the Commission itself—the constructive denial.

Moreover, even the supposed, hypothetical circuit split that would have resulted from adopting the Candidates' Section 155(c)(7) argument that the Fourth Circuit did not reach is paper thin and of little practical consequence. It would flow from the D.C. Circuit and the Eleventh Circuit's description of their rule requiring a Commission decision on the application for review as "jurisdictional," whereas the Candidates contend that such a rule is merely prudential. But both circuits invoked that rule based on fundamentally prudential reasoning that requiring a decision makes good sense. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002); *Richman Bros. Recs., Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997); *see also Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (rejecting a plain-text reading of 47 U.S.C. § 155(c)(7) based only on the reasoning in *Richman Bros.*). They predate this Court's recent clarification that courts may "impose harsh jurisdictional consequences only when Congress unmistakably has so instructed." *Santos-Zacaria*, 598 U.S. at 417. And there is no reason to believe that the actual result in any case would have been different under a prudential rule.

B. The Fourth Circuit correctly held that the plain text of the Communications Act does not require LUC for non-candidate committees.

The Court is unlikely to grant review and reverse on the merits because the Fourth Circuit's statutory analysis is correct: Section 315(b)(1) grants lowest unit charge *only* 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." 47 U.S.C. § 315(b)(1) (emphases added). "Use" by non-candidates is not eligible. *See id.* And as a matter of plain text, "use" requires "active employment" by the user. *Bailey v. United States*, 516 U.S. 137, 144 (1995).

Judge Wilkinson worried that enforcing this language "literal[y]" might leave candidates' campaigns unable to benefit from lowest unit charge. App. 74–75. This concern was misplaced. FECA specifically provides that a federal candidate may designate "authorized committees" who may "make expenditures on behalf of such candidate." 52 U.S.C. § 30101(6). And an expenditure made "on behalf of" a candidate is, without doubt, candidate use. Judge Wilkinson's suggestion that "[i]f a candidate can 'use' a station via his principal committee, perhaps he can do the same via other committees, too," App. 75, misses that campaign finance law precisely regulates when political committees are deemed to act "on behalf of" a candidate, thus answering that question. And the two categories of expenditures at issue here are, for different reasons, *not* ones that can be deemed to have been made "on behalf of" a candidate. Judge Wilkinson's analysis blended the two categories of expenditures together, App. 75–79, but they present distinct issues and must be analyzed separately.

1. Party expenditures are party use, not candidate use.

The problem with party committee coordinated expenditures is simple: these are expenditures *by party committees*, and party committees cannot be designated as candidates' "authorized committees" because party committees support multiple candidates. *See* 52 U.S.C. § 30102(e)(3)(A).[10] Party committees' purchases of advertising time therefore cannot, under FECA, be ones made "on behalf of" a candidate, *id.* § 30101(6), so such purchases are not candidate use. Congress considered an amendment to extend lowest unit charge to party committees, but it failed. *See* DISCLOSE Act, S. 3295, 111th Cong., 2d Sess. § 401(a)(1)(C) (2010).

The fact that the party committee expenditures in question are "coordinated" with candidates does nothing to change the fact that the expenditures ultimately

[10] There is one exception that does not apply here. FECA allows a presidential candidate nominated by a political party to designate the national committee of the party as a principal campaign committee, but only if the national committee maintains separate accounts for that function. 52 U.S.C. § 30102(e)(3)(A)(i).

involve the party's expression, not the candidates', and therefore the party's use. As the Court explained just a few months ago, coordinated expenditures are "*the party's* expenditures on, for example, advertisements produced or distributed in consultation with a candidate's campaign." *NRSC*, 146 S. Ct. at 2413 (emphasis added). In upholding parties' right to make unlimited coordinated expenditures, the Court emphasized that what was at stake was "the freedom of speech *of political parties*," *id.* at 2427 (emphasis added), that parties' and candidates' "interests are not identical," and that coordinated expenditures are made at "the political party's" discretion, *id.* at 2419. Indeed, that the "distinction" between parties and candidates "is significant"—and that "the party is legally and practically free to use [its] funds as it sees fit"—were among the Court's reasons for finding that parties had a right to make unlimited coordinated expenditures. *Id.* Nothing in *NRSC* so much as hints that the party's coordinated expenditures might properly be considered as having been made by or on behalf of the candidate, nor addresses the additional circumvention concerns that such an arrangement would entail.

The Party Committees and the United States have no answer to this. They do not deny that party committees are not and cannot be made authorized committees of the candidates they support, nor that they are, as a result, unable to buy advertising time "on behalf of" those candidates. The Party Committees say that "'use' means 'use,' not 'payment.'" Appl. 15. But they do not offer a plausible competing definition of "use." They suggest in passing that the candidate's mere appearance in an advertisement might suffice on its own. *Id.* The Commission followed that approach decades ago, but it rightly abandoned it in the early 1990s after it led to absurd results in the context of pre-recorded video, with old Ronald Reagan movies counting as candidate use during his campaign and negative attack advertisements potentially counting as use by the targeted candidate. *See In re Codification of Comm'n's Pol. Programming Pol'ys*, 7 F.C.C. Rcd. 678, ¶¶ 30, 35 (1991).

To avoid the nonsensical results that flow from an appearance-based test for "use," the Commission has been clear since the 1990s that the payor's identity does matter for lowest unit charge. An opponent or outside group's negative advertisements that use a candidate's voice or picture to attack him are not the targeted candidate's "use," *id.* ¶ 30, and neither are positive advertisements produced and distributed by "an independent entity," even if they "include an appearance by a candidate," *In re Codification of Comm'n's Pol. Programming Pol'ys*, 7 F.C.C. Rcd. 4611, ¶ 23 (1992); *see also id.* ¶ 18 (making clear that this addresses "an approved appearance" by the candidate). Instead, the Commission has "held that only candidates or their authorized campaign committees are entitled to the LUC pursuant to Section 315(b)." *Id.* ¶ 23. These limitations, the Commission made clear, flow from a construction of "use" in Section 315. *Id.* ¶ 19.

The Party Committees' suggestion that only the candidate's "appearance" matters would reopen these settled issues and reintroduce the absurdities that the Commission's post-1991 focus on the payor appropriately avoids. And a focus on the identity of the payor comports with the plain meaning of the word "use" in the context of paid advertising. When parents buy yearbook ads to congratulate their graduating child, for example, no one would say the graduate has "used" the advertising space even if the graduate's picture appears—and whether or not the parents and the graduate discussed it first.

The United States takes a slightly different approach, arguing that the candidate's authorization of a particular advertisement by "announcing the candidate's approval in the advertisement itself" suffices to make a party-purchased advertisement into candidate use. U.S. Br. 27. The United States insists that this construction explains away any inconsistency between its present position and its assurance to the Court in *NRSC* that, even if the Court allowed unlimited coordinated spending, "broadcasters still would not be required to charge parties special low rates." U.S. Br. 26–27; Reply of Fed. Respondents at 23, *NRSC*, No. 24-621 (citing 47 U.S.C. § 315(b)(1)). But if the test for lowest unit charge is a candidate's appearance and approval, as the United States now says, then coordination is the essential ingredient to get it—the candidate cannot approve a party advertisement he has not discussed with the party. Under the United States' new position, *NRSC* therefore enables exactly the unlimited discounted advertising that the Solicitor General told the Court would not result from that case.

In any event, the United States' argument that candidate "authorization" is the same as candidate "use" is irreconcilable with the statutory text. To "authorize" is to "give formal approval to; to sanction, approve, countenance" something done *by someone else*. *Authorize*, *Oxford English Dictionary* (2d ed. 1989). A candidate's authorizing the airing of an advertisement does not mean he has *himself* used the airtime any more than a vehicle owner authorizing a friend to drive his car makes the vehicle owner the driver. Moreover, the requirement that the candidate appear in and approve an advertisement comes from a separate subparagraph of the statute, Section 315(b)(2), which demands that the candidate appear in and approve every ad as an *additional* precondition for receiving lowest unit charge. 47 U.S.C. § 315(b)(2). Nothing in Section 315(b)(2) purports to displace or substitute for Section 315(b)(1)'s limitation of lowest unit charge to use by legally qualified candidates. If the Section 315(b)(2) disclaimer alone sufficed, then Section 315(b)(1) would be surplus.

2. JFC ads are use by the paying JFC participant.

The problem with JFCs that have non-candidate members is more complicated but equally fatal: the FEC regulations governing their operation ensure that their use is, in substantial part, the use of their non-candidate participants and therefore not "use . . . by" a legally qualified candidate. 47 U.S.C. § 315(b)(1). JFCs are essentially pass-through entities—a "mechanism for individual committees to raise funds collectively." *McCutcheon v. FEC*, 572 U.S. 185, 215 (2014). FEC regulations provide that JFCs "shall collect contributions, pay fundraising costs from gross proceeds and from funds advanced by participants, and disburse net proceeds to each participant." 11 C.F.R. § 102.17(b)(1). JFCs do not get their own contribution limits but instead may collect "the total amount that the contributor could contribute to all of the participants" under the applicable limits, and each participant's share of the contribution is reported as if made directly to the participating committee. *Id.* § 102.17(c)(5), (8). Expenses, too, are allocated between the participating committees based on their pro-rata shares. *Id.* § 102.17(c)(7)(i)(A). And in many recent instances, JFCs have been structured so that participating candidates receive almost none of the proceeds and therefore bear almost none of the expenses for the JFC's advertising. *See supra* Background § I.

The Party Committees and the United States, like Judge Wilkinson, seize on the fact that unlike party committees, JFCs *are* "authorized committees" of participating candidates. 52 U.S.C. § 30102(e)(3)(A)(ii). But that designation merely makes it *possible* for JFCs to act "on behalf of" participating candidates when they fundraise for them. *Id.* § 30101(6). It cannot mean that everything JFCs do is in their capacity as the authorized committee of every participating candidate. Otherwise, JFCs could not engage in their *raison d'être*: joint fundraising. *See id.* § 30102(e)(3)(A)(ii) (allowing JFCs to be formed "solely for the purpose of joint fundraising"). That is because FECA imposes a single, aggregate cap on all contributions "to any candidate *and his authorized political committees* with respect to any election." *Id.* § 30116(a)(1)(A) (emphasis added). If a JFC always acted as every participating candidate's authorized committee in everything it did, it would violate this limit every time it accepted a joint contribution from a contributor above the individual candidate limit, when the whole purpose of JFCs is to accept, divide, and distribute such overlimit contributions. *See* 11 C.F.R. § 102.17(c)(3)(iii), (5). The statutory scheme must be read "as a harmonious whole," *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018), and doing so requires recognizing that JFCs act "on behalf of" a candidate only when receiving the candidate's share of contributions and making the candidate's share of expenditures.

The Party Committees' only response is to say that Section 315 "expressly affords the lowest unit charge to 'the candidate (and *any* authorized committee of the candidate).'" Appl. 15 (quoting 47 U.S.C. § 315(b)(2)(A)). But that is simply wrong—the Party Committees are quoting the wrong sub-paragraph of Section 315(b). Section 315(b)(1) governs lowest unit charge and offers it only to "legally qualified candidate[s]," with not a word about "authorized committees." 47 U.S.C. § 315(b)(1). "Authorized committees" are referenced only in Section 315(b)(2), a separate provision that expressly places conditions on the *candidate's* right to lowest unit charge, by requiring that the candidate certify that "the candidate (and any authorized committee of the candidate)" will include a disclaimer in any broadcast under the Act. *Id.* § 315(b)(2). Nothing about this language suggests that authorized committees *always* get lowest unit charge, regardless of whether an ad was purchased on behalf of the candidate. Otherwise, subparagraph (b)(1) would be surplus.[11]

3. Any constitutional concerns are both waived and unfounded.

To bolster their reading of Section 315, the Party Committees now echo Judge Wilkinson's dissenting opinion in raising potential First Amendment concerns with enforcing the lowest unit charge provision as written. But Judge Wilkinson raised these issues entirely on his own—they were not briefed or argued by any party below,

[11] Judge Wilkinson thought "it would be very strange to ask a candidate to make a pledge about the actions of his authorized committees to obtain the LUC for himself alone." App. 77. But this mistakes the odd corner case of JFCs for the general rule. Candidates do "use" broadcasters via their non-JFC authorized committees, including their principal campaign committees. *See* 52 U.S.C. §§ 30101(6), (7), 30102(e).

including by the Party Committees. This Court does not review issues a party "failed to raise" in the court of appeals and which have "not been adequately briefed and argued," at least absent "exceptional" circumstances the Party Committees do not identify here. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38–39 (1989). The Party Committees did not mention the First Amendment in their merits brief, a point the majority below considered "significant beyond measure" when it declined to reach the issue. App. 50 n.11; *see also Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (per curiam) (enforcing the party-presentation principle to prohibit a court of appeals from deciding issues the parties neither "asserted" nor "had the chance to address").

The argument is meritless in any event. Judge Wilkinson's concern was that limiting lowest unit charge to candidates and their campaigns might "[r]estrict" or "inhibit political-party coordination" with candidates. Appl. 16. But that is just not so. Unlike the coordinated expenditure limits in *NRSC*, which required parties to forgo strategic discussions with candidates if they wanted to spend more than the statutory limits, the lowest unit charge provision as the Fourth Circuit construed it simply provides a payor-based difference in rates: no matter what they discuss with parties, candidates get the candidate rate and parties do not. That does nothing to limit strategic coordination or coordinated expenditures—it simply means that parties do not get a discount that Congress gave only to candidates. Judge Wilkinson's concern that the Candidates' reading of the Communications Act unlawfully "favors some . . . modes of candidate speech while disfavoring others" is therefore misplaced. App. 81 (Wilkinson, J., dissenting).

4. There is no circuit split on these issues.

The Fourth Circuit's decision on these issues does not merit the Court's review in any event. No court has ever held, or even hinted, that party committees or JFCs with non-candidate members are entitled to lowest unit charge, so there is no circuit split on the question. Rather, consistent with Section 315(b)(1)'s text, courts have long recognized that the Communications Act regulates what "broadcasters may . . . *charge candidates*," seeks to "end rate discrimination *against political candidates*" and to "giv[e] *candidates* volume and frequency discounts," and places "'*the candidate* on par with a broadcast station's most favored commercial advertiser.'" *Hernstadt*, 677 F.2d at 894, 898, 900 (emphases added) (quoting S. Rep. No. 96, 92nd Cong., 1st Sess. 2 (1971)); *see also, e.g.*, *KVUE, Inc. v. Moore*, 709 F.2d 922, 933 (5th Cir. 1983) (explaining that federal law regulates "the permissible price for *candidate* advertising" (emphasis added)). And before issuing the Public Notice, the Commission had long agreed that "*only candidates* are entitled to lowest unit charge benefits," and it has "*never* held that independent entities" that support or oppose candidates are "entitled to the lowest unit charge." *In re Codification of the Comm'ns Pol. Programming Pol'ys*, 7 F.C.C. Rcd. 678, ¶¶ 34 n.54, 38 (emphasis added). There is therefore no basis for the Court's review of this question.

III. Equitable factors counsel against a stay.

A. The Party Committees are not irreparably harmed.

The Party Committees' primary claim of irreparable harm is that broadcasters have begun to charge them market rate for television advertisements, as broadcasters are statutorily permitted to do. The Party Committees cast the Fourth Circuit's decision as a "[d]eparture from . . . preordained rules." Appl. 17. But the status quo on this issue was a *lack* of guidance from the Commission as to which groups received the lowest unit charge, as the Fourth Circuit identified. App. 26 (acknowledging that the Public Notice identifies "no previous Media Bureau guidance stating that political parties and joint fundraising committees with non-candidate members can ever be entitled to the LUC"). The Fourth Circuit's judgment restores that status quo.

There is no injunction, only the vacatur of guidance, and broadcasters will ultimately have to decide for themselves whether to offer lowest unit charge to the Party Committees in the absence of the Public Notice, and considering the Fourth Circuit's holding that the Party Committees are not entitled to it. As the Commission explained below, if the Party Committees believe they are now being unlawfully denied lowest unit charge, they can "file a formal complaint to be adjudicated before the FCC," followed by judicial review, and that process is "just the same without the Public Notice or if the Public Notice were vacated." FCC C.A. Br. 22 n.3.[12] Any harm the Party Committees face is therefore not irreparable. In contrast, the Candidates could not pursue a similar remedy to challenge the unlawful grant of lowest unit charge to someone else, so they do face irreparable harm if the Public Notice were reinstated. *See Cal. Communities Against Toxics*, 934 F.3d at 635 (emphasizing that judicial review of substantively "final" guidance is "especially important when viewed

[12] Because the Party Committees chose to intervene in this case, issue preclusion is likely to prevent them from arguing that they are entitled to lowest unit charge. But that does not support their stay request, because it is not irreparable—the barrier would go away if the Court grants review and reverses, even after the election. And if the Court does not reverse, then the Party Committees have no lawful injury at all.

from the perspective of regulatory beneficiaries . . . [who] may only be able to challenge nonlegislative rules via judicial review”). And the Party Committees cannot rely on alleged First Amendment harms that, as explained, they did not raise below.

The Party Committees also claim that the Fourth Circuit’s decision will “throw broadcasters, candidates, and campaigns into confusion.” Appl. 17. But the Party Committees’ characterization of the prior regime as “rules . . . that have governed political advertising for decades,” Appl. 18, ignores the sea change that flowed from *NRSC*’s authorizing unlimited party coordinated spending—precisely the disruption that the United States then argued would be averted by denying candidate rates to parties, as the Fourth Circuit now has, Reply of Fed. Resps. at 23, *NRSC*, No. 24-621.

B. The equities and public interest counsel against a stay.

Finally, the Party Committees reference *Purcell*—a doctrine that counsels judges not to disrupt election rules to avoid confusing *voters* in the leadup to an election. But the Party Committees are not voters who might be confused as they cast their ballots; they are sophisticated, institutional players. Courts ought to assess “factors that animated the Supreme Court’s concern in *Purcell*” before deciding whether it applies. *American Encore v. Fontes*, 152 F.4th 1097, 1121 (9th Cir. 2025). Where the provision in question “does not affect the state’s election processes or machinery,” or “disrupt long standing state procedures,” it is inappropriate to apply *Purcell*. *Id.* Several federal courts have held that campaign finance regulations are not subject to the *Purcell* principle because “it is difficult to imagine . . . that if relief is granted, then voters will be confused about whether, how, where, when or for whom they can vote.” *Chancey v. Ill. Bd. of Elections*, 635 F. Supp.3d 627, 644 (N.D. Ill.

2022); *see also Holland v. Williams*, 457 F. Supp. 3d 979, 996–97 (D. Colo. 2018). The rule in this case is even *more* attenuated from election processes and procedures; it is about the amount that broadcasters may charge non-candidates to air advertisements.

Moreover, rather than sowing confusion, the Fourth Circuit's opinion benefits the public interest by ensuring clarity and definitively determining the correct reading of the Communications Act's requirements. The Fourth Circuit decision protects the very "lines of accountability" that the United States accuses the Fourth Circuit of "blurring." U.S. Br. 30 (quoting App. 67 (Wilkinson, J., dissenting)). "When the meaning of a statute [is] at issue, the judicial role [is] to interpret the act of Congress, in order to ascertain the rights of the parties." *Loper Bright*, 603 U.S. at 385 (citation omitted). The United States would empower the Media Bureau to overstep its authority by enforcing new, unlawful rules on regulated parties while the Commission sits on its hands (intentionally or otherwise) to preclude judicial review until after affected parties suffer irreparable harm. By exercis[ing] its "province and duty . . . to say what the law is," *id.* at 369 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), the Fourth Circuit guaranteed that "those making policy in the executive branch face[d] accountability for [their] missteps [and] abuses," App. 66 (Wilkinson, J., dissenting).

CONCLUSION

The Court should deny the Application.

Respectfully submitted,

David R. Fox
Counsel of Record
Richard A. Medina
Nicole E. Wittstein
Julianna D. Astarita
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
(202) 948-1135
dfox@elias.law
rmedina@elias.law
nwittstein@elias.law
jastarita@elias.law

Counsel for Respondents Sherrod Brown, Jon Ossoff, Roy Cooper, and Kristen McDonald Rivet

No. 26A274

IN THE

Supreme Court of the United States

NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, ET AL.,

Applicants,

v.

SHERROD BROWN, ET AL.,

Respondents.

ON APPLICATION FOR STAY AND ADMINISTRATIVE STAY PENDING PETITION FOR WRIT OF CERTIORARI

APPENDIX TO OPPOSITION TO APPLICATION FOR A STAY

David R. Fox
Counsel of Record
Richard A. Medina
Nicole E. Wittstein
Julianna D. Astarita
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
(202) 948-1135

Counsel for Respondents Sherrod Brown, Jon Ossoff, Roy Cooper, and Kristen McDonald Rivet

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NATIONAL ASSOCIATION OF BROADCASTERS

COUNSEL MEMO
FROM THE LEGAL DEPARTMENT

POLITICAL ADVERTISING
INDEPENDENT COMMITTEES AND "LUC" RATES

Many stations have encountered independent entities such as political action committees (PACs) or political parties, claiming to be "authorized" by a candidate and thus entitled to the "lowest unit charge" (LUC) for political advertising under Section 315(b) of the Communications Act of 1934 (47 U.S.C. § 315(b)). This question has also arisen in related litigation currently pending before the U.S. Supreme Court. This memo presents NAB staff's view of whether such claims, as a general matter, may be valid. This memo is not intended to provide legal advice on how the law or legal principles discussed herein may apply to a broadcast station's specific circumstances. Indeed, each station faces its own unique political and economic environment, and as such, the applicability of these views will vary based on the situation. Stations should seek the advice of their own attorneys when deciding whether an advertisement qualifies for the LUC.

NAB believes that, while a candidate's "authorized committee" is entitled to LUC, other entities are not. Specifically, under the applicable federal laws, a candidate's designated principal campaign committee is entitled to LUC rates, while "joint fundraising committees" and other "hybrid" committees are not. In fact, as detailed below, the Department of Justice, through the Solicitor General, recently reflected a similar view.

Although Section 315(b) only mentions LUC in the context of candidate ads, the FCC has historically interpreted the law to apply to both a "legally qualified candidate" and the "authorized committee of such candidate." Section 315(b)(2) states that an ad by a candidate and any "authorized committee" of the candidate that references an opponent for the same office is only entitled to the LUC if the ad includes the "stand by your ad" statement that the candidate has approved the ad. In a 1972 Public Notice, for instance, the FCC specifically denied that the LUC provision of Section 315(b)(1) applied to political broadcasts by groups, organizations, or persons other than candidates, stating: "The provision applies only to broadcasts by candidates for public office." Similarly, in a 1992 Memorandum Opinion and Order codifying its prior political programming policies, the FCC stated: "[W]e have always held that only candidates or their authorized campaign committees are entitled to the LUC pursuant to Section 315(b). Thus, even if an independent entity produces an advertisement that includes an appearance by a candidate, that independent entity is not entitled to the LUC." Accordingly, it is not sufficient for candidate to "authorize" or approve any particular advertisement. For any entity to claim an entitlement to LUC rates, the entity itself must be the "authorized committee" of a legally qualified candidate.

Section 315(b) defines "authorized committee" by referring to Section 30101 of the Federal Election Campaign Act (FECA) (52 U.S.C. § 30101). Section 30101 states that "[t]he term 'authorized committee' means the principal campaign committee or any other political committee authorized by a candidate under section 30102(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate." Section 30102(e)(1), in turn, provides that each candidate shall designate a committee to serve as the "principal campaign committee of such candidate." The "principal campaign committee" is therefore an "authorized committee" within the meaning of both Section 30101 of the FECA and Section 315(b) of the Communications Act. Section 30102(e)(1) also provides that a candidate "may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate."

Section 30102(e)(3), however, generally limits the designation of additional committees as "authorized committees" to committees that exclusively support a single candidate. Paragraph (3) provides two exceptions to this limitation. First, a candidate for President nominated by a political party may designate the national committee of such political party as "a principal campaign committee."[1] Second, candidates "may designate a political committee established *solely for the purpose of joint fundraising* by such candidates as an authorized committee" (emphasis added). Thus, while such "joint fundraising committees" may be considered "authorized committees" under the FEC's rules, the plain language of the FECA limits their designation as an authorized committee *solely* to regulations regarding *fundraising*, not to any regulatory designations related to active campaigning or buying advertising. The Department of Justice, through the Solicitor General of the United States, essentially took this view in a 2025 filing with the United States Supreme Court, stating that the LUC rules "require broadcasters to charge low rates for candidate spending, ***but not for party spending—whether coordinated or independent***."[2]

NAB thus believes that, pursuant to the terms of Sections 30101 and 30102 of the FECA, only a candidate's designated principal campaign committee is entitled to LUC rates, while "joint fundraising committees" and other "hybrid" committees are not "authorized committees" eligible for LUC rates under Section 315(b) of the Communications Act.[3]

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[1] This, of course, is applicable only to Presidential candidates and, under the terms of Section 30102(e)(3), only where the national committee maintains separate maintains separate books of account with respect to its function as a principal campaign committee.

[2] *Reply Brief for the Federal Respondents at 23, National Republican Senatorial Committee, et al., Petitioners, v. FEC, et al.*, No. 24-261, 2025 WL 3068193 (Oct. 1, 2025) (emphasis added). The Solicitor General added, "Parties could spend more money on advertisements, but broadcasters still would not be required to charge parties special low rates." *Id.*

[3] Note that, as of the date of this writing, the Supreme Court has agreed to hear arguments in a case brought by National Republican Senatorial Committee and others as to whether the First Amendment permits the government to restrict political parties from spending money on

In addition, because the key definition of "authorized committee" is tied to federal campaign finance limitations, it appears that these exceptions are limited to the narrow category of federal candidate committees. Nothing in the FECA, the Communications Act, or the FCC's rules or published cases suggests that these exceptions extend to state or local political parties, or other groups that are purportedly authorized by a state or local candidate. Thus, even if such parties claim to be "authorized" to act for a candidate under state or local law, it does not appear that they would qualify for LUC status under federal law.

NAB's Counsel Memos are intended to serve as a source of general information on legal issues of interest to the broadcast industry. Broadcasters seeking information on how the principles discussed in a Counsel Memo apply to their specific circumstances should seek the advice of their own attorneys.

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campaign advertising with input from the party's candidate for office. (*National Republican Senatorial Committee, et. al. v. FEC, et. al*., 117 F.4th 389 (6th Cir. 2024), *cert. granted,* 2025 WL 1787717 (U.S. Jun. 30, 2025) (No. 24-261).) While some have suggested that the Court's decision in this case may broaden the scope of entities entitled to LUC rates, neither the issues to be addressed in the case nor Section 315(b) of the Communications Act appear to support such an outcome. Indeed, the Solicitor General of the United States has already explicitly denied that the Court's decision will impact LUC rates, stating "[p]arties could spend more money on advertisements, but broadcasters still would not be required to charge parties special low rates." (*Reply Brief for the Federal Respondents at 23, National Republican Senatorial Committee, et al., Petitioners, v. FEC, et al.*, No. 24-261, 2025 WL 3068193 (Oct. 1, 2025).)

Federal Communications Commission
Office of General Counsel—Litigation Division
45 L Street NE • Washington, DC 20554
Tel: (202) 418-1740 • Fax: (202) 418-2819

July 2, 2026

Nwamaka Anowi, Clerk of Court
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Re: *Sherrod Brown, et al. v. FCC & USA*, No. 26-1785

Dear Ms. Anowi:

The Court's June 30 order directed the FCC to promptly "file[] the administrative record or confirm[] that it consists only of the challenged Media Bureau guidance and petitioners' application for review." The FCC hereby confirms that the administrative record in this case consists solely of the challenged Public Notice issued by the FCC's Media Bureau.[1] The petitioners' application for review postdates the challenged guidance and was not before the Media Bureau for its consideration when it issued the Public Notice. Therefore, the application for review is not part of the administrative record on review of that statement.

For the Court's awareness, the Commission has also received a separate petition for reconsideration of the Public Notice on behalf of the Television Bureau of Advertising, Inc.[2] We have attached a copy of that petition for reconsideration to this letter for the Court's convenience. As with petitioners' application for

[1] Public Notice, *FCC Media Bureau Provides Guidance on Entitlement to Lowest Unit Charge for Legally Qualified Candidates for Federal Office and All Authorized Committees*, DA 26-300, 2026 WL 1013722 (Media Bur. Mar. 30, 2026). Though we are supplying the relevant administrative record for the Court as directed, the FCC does not believe the Media Bureau's Public Notice to be a judicially reviewable order, for the reasons set forth in our motion to dismiss and in our forthcoming merits brief.

[2] Petition for Reconsideration or, in the Alternative, for Declaratory Ruling of the Television Bureau of Advertising, Inc., *In re Entitlement to Lowest Unit Charge for Legally Qualified Candidates for Fed. Off. & All Authorized Comms.* (FCC filed Apr. 29, 2026) (copy attached).

review, however, that filing postdates the Public Notice and so is not part of the administrative record on review.

Sincerely,

/s/ Scott M. Noveck
Scott M. Noveck
Counsel

(Enclosure)

cc: All counsel (via CM/ECF)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Entitlement to Lowest Unit Charge for Legally	)	Docket No. ______
Qualified Candidates for Federal Office and All	)	
Authorized Committees	)	DA 26-300

PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR DECLARATORY RULING OF THE TELEVISION BUREAU OF ADVERTISING, INC.

Brad Seitter
President & Chief Executive Officer
Television Bureau of Advertising, Inc.
120 Wall Street
15th Floor
New York NY 10005
(212) 486-1111

April 29, 2026

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Entitlement to Lowest Unit Charge for Legally Qualified Candidates for Federal Office and All Authorized Committees	)))	Docket No. ______ DA 26-300

PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR DECLARATORY RULING OF THE TELEVISION BUREAU OF ADVERTISING, INC.

Pursuant to § 1.106 and § 1.2 of the Federal Communications Commission's (Commission or FCC) rules,[1] the Television Bureau of Advertising, Inc. (TVB) (Petitioner)[2] hereby files this petition for reconsideration or, in the alternative, for declaratory ruling. We respectfully request that the Media Bureau and/or Commission (collectively, FCC) abrogate a recent Public Notice of the Bureau purporting to "remind broadcasters and the public" that the lowest unit charge (LUC) requirements apply to all "authorized committees," including those

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[1] 47 C.F.R. §§ 1.106, 1.2.

[2] TVB is the not-for-profit trade association representing America's local broadcast television industry, including linear and digital platforms. Its members include U.S. television stations, television broadcast groups, advertising sales reps, syndicators, international broadcasters, and associate members. Those members are subject to LUC requirements and rules. TVB actively promotes local media marketing solutions to the advertising community and works to develop advertising dollars for the medium's multiple platforms, including on-air, online, and mobile. The association and its members are directly impacted by the Public Notice at issue in this filing because it would further artificially and unlawfully depress the rates TVB's members could charge for their advertising inventory, beyond what existing LUC requirements already do. Those depressed rates cause significant economic harm to TVB's members. And if the Supreme Court rules in a pending case that limits on coordinated spending are unconstitutional, "[b]roadcasters across the country will face significant increases in advertisements that purport to qualify for lowest unit rates," inflicting even greater economic harm. *Brief for Intervenor-Respondents DNC, DSCC, and DCCC*, at 48, *Nat'l Republican Senatorial Comm. (NRSC), et al., v. Federal Election Commission (FEC), et al.*, No. 24-261 (Sept. 29, 2025).

that engage in joint fundraising with legally qualified candidates for federal office.[3] Under governing law, longstanding precedent, and the position of the U.S. Department of Justice, only a candidate's designated principal campaign committee is entitled to LUC rates, while other types of joint or hybrid committees are not. The Notice thus purports to cement a substantial expansion of the LUC that is contrary to statute, procedurally defective, and unconstitutional. Moreover, this unlawful expansion exemplifies why the LUC statute and the FCC's implementing rules violate the First Amendment, and why the FCC should decline to enforce its LUC rules going forward. Failure to take prompt action on this petition and to repudiate the Public Notice will necessitate judicial review.

I. SUMMARY OF ARGUMENT

The FCC must promptly reconsider and repeal the Bureau's Public Notice. The Notice errs by declaring that Section 315(b) of the Communications Act of 1934 (Act) and referenced provisions of the Federal Election Campaign Act of 1971 (FECA) extend LUC requirements to the ads of any and all political party committees, political action committees (PACs), or other entities that might conceivably have an "authorized" label attached. The Bureau's novel position also ignores the statutory and regulatory limitation of the LUC to ads ***by candidates*** "in connection with" their campaigns, as set forth in Section 315(b)(1) of the Act and Section 73.1942(a) of the FCC's rules. Under this clear language, political party, PAC, or coordinated ads focused on political issues or general fundraising, rather than a single candidate's specific campaign, do not qualify for the LUC. The Notice is also procedurally deficient. While the Public Notice purports to "remind" broadcasters and the public of a pre-existing rule, it actually

[3] FCC Public Notice, *FCC Media Bureau Provides Guidance on Entitlement to Lowest Unit Charge for Legally Qualified Candidates for Federal Office and All Authorized Committees*, DA 26-300 (Mar. 30, 2026) (Notice or Public Notice). LUC rates give candidates the benefits of all discounts offered by a station for the same class and amount of time, without regard to the frequency of the candidate's advertising.

reflects a newly-announced expansion of the LUC rule that should have been considered (if at all) by the full Commission, rather than the Bureau, and in compliance with the notice-and-comment requirements of Section 553 of the Administrative Procedure Act (APA).

The Public Notice also contravenes the First Amendment. The LUC provisions in statute and in rules are discriminatory content-based and speaker-based regulations of speech that cannot withstand First Amendment scrutiny. In addition, the LUC provisions impermissibly infringe broadcasters' own speech and programming decisions. The FCC therefore should determine to no longer enforce Section 73.1942 of its rules, especially given its repudiation nearly 40 years ago of the spectrum scarcity rationale for affording broadcasters reduced constitutional protections. Whatever its legitimacy as an initial matter, the spectrum scarcity rationale has been overcome by the explosion in platform and outlet options in the current media environment. At the least, the FCC must promptly abrogate the Public Notice and its expansion of the LUC requirements as unconstitutional, as well as contrary to statute and procedurally defective. To remove the uncertainty and chill created by the Notice's extension of the LUC in the midst of this political season, the FCC also must confirm that only a candidate and the candidate's designated principal campaign committee are entitled to the LUC.

The March 30 Public Notice is already inflicting both economic and First Amendment harm on broadcasters and other TVB members because of the confusion it has created.[4] The FCC's failure to promptly repudiate and remove that Notice will necessitate judicial review of the FCC's new position on the applicability of the LUC.

[4] *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 155, 164 (2014) (recognizing that the "chill[]" caused by "the threat of future enforcement" of speech restrictions inflicts First Amendment harms).

II. THE PUBLIC NOTICE UPENDS DECADES OF PRACTICE AS TO THE SCOPE OF THE LUC AND IMPROPERLY EXPANDS THE FCC'S RULES AT THE BUREAU LEVEL

For more than five decades, broadcasters, candidates, parties, PACs, and other participants in the political advertising marketplace all understood, under the Act and FCC rules, that only a candidate and their singular designated principal campaign committee were entitled to the LUC. Now, a rapidly growing universe of hybrid committees, joint committees, and other entities are stretching the imprecise wording of Section 315(b)(2) to claim they are "authorized" by a candidate to receive the LUC for political ads, even for ads unconnected to the candidate's specific election campaign. Stations also increasingly receive requests for preferential LUC rates from multiple campaign committees claiming to be authorized by a single candidate. Essentially, these new kinds of party committees and PACs are impersonating a candidate's designated principal campaign committee to avail themselves of the special rates intended by Congress only for candidate ads, and not for issue ads in disguise. These claims have caused real harms by increasing confusion in the political advertising marketplace and creating an untenable environment for broadcast stations seeking to fulfill their obligation to provide reasonable access at LUC rates for legitimately entitled buyers of ads for legally qualified candidates.

The supposedly "authorized" committees stake their claims to the LUC on flawed interpretations of Section 315(b) of the Act and the FCC's LUC rule. Specifically, Section 73.1942(a) of the rules mirrors the text of Section 315(b)(1), and both state that the "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 or her campaign for nomination for election, or election, . . . shall not exceed" the LUC.[5] The statutory provision that first established the LUC in

[5] 47 C.F.R. § 73.1942(a); 47 U.S.C. § 315(b)(1). FECA amended Section 315(b) of the Act to add the LUC provision.

1971 and the FCC's implementing rule make clear that LUC ad rates are for candidates, rather than other political entities, and do not mention "authorized committees" at all. Over 30 years later in the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress amended Section 315(b) of the Act by adding subsection (b)(2) that placed conditions on Federal candidates' entitlement to the LUC. Section 315(b)(2)(A) provides that a Federal candidate shall not be entitled to the LUC for a political ad unless the candidate certifies "that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office" in such an ad, "unless such reference meets" the content and appearance requirements in Section 315(b)(2) for a candidate's "stand by your ad" statement (i.e., "I approve this message").[6]

Given these developments, Petitioner submits that the traditional practice of applying the LUC only to the campaign-connected ads of a candidate or their designated principal campaign committee should be reconfirmed as consistent with the Act and the FCC's LUC rule, Section 73.1942. Unfortunately, the Bureau's Public Notice did the exact opposite by significantly expanding the LUC rule to myriad types of committees and ads to which the rule did not previously apply.

Notably, the Bureau mischaracterizes the Notice as mere "guidance" that "reminds" broadcasters and the public about the LUC requirements.[7] But the Bureau does not cite any Commission orders, Bureau decisions, published decisions, or even earlier Public Notices to support its new claims about the breadth of the LUC's application – because there are none. And

[6] 47 U.S.C. § 315(b)(2)(A). Similarly, if a "candidate for Federal office (or any authorized committee of such candidate)" refers to an opposing candidate without meeting the "stand by your ad" requirements, then the candidate shall not be entitled to the LUC. 47 U.S.C. § 315(b)(2)(B). The content and appearance requirements of the "stand by your ad" messages for broadcast ads are set forth in §§ 315(b)(2)(C) & (D).

[7] Notice at 1.

the Bureau explicitly calls the Notice an "opportunity to restate previous Media Bureau guidance regarding LUC eligibility for candidate-party coordinated ads," but tellingly fails to cite any such previous guidance.[8]

In reality, the Public Notice announces expanded, substantive legal requirements under the LUC rule that presumably can be enforced against broadcasters for alleged noncompliance. These new requirements, moreover, are based on the Bureau's conjectures about application of LUC obligations to new and different types of entities never before addressed by the Commission. As "novel questions" unaddressed by previous FCC decisions, these matters should not have been addressed by the Media Bureau in the first instance.[9]

The Bureau's improper expansion of the LUC to innumerable additional party committees and PACs and countless political ads will profoundly impact broadcasters, a variety of political entities and actors, and even commercial advertisers competing for airtime against a proliferation of political ads. It also creates great uncertainty for both stations and ad buyers by unsettling other portions of the Act and FCC rules dealing with political advertising - including reasonable access, equal opportunities, and no censorship.[10] In sum, the Notice is an ill-timed and disruptive intervention into the 2026 political season.

III. THE NOTICE'S DEFICIENT ANALYSIS OF THE ACT AND FECA FAILS TO JUSTIFY ITS VAST EXPANSION OF THE LUC

[8] *Id*. at 2.

[9] Under 47 C.F.R. § 0.283, "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents" must be "referred to the Commission en banc for disposition," rather than resolved by the Media Bureau pursuant to delegated authority.

[10] *See* 47 U.S.C. § 312(a)(7); 47 C.F.R. § 73.1944(a) (providing federal candidates "reasonable access" to, and the ability to purchase "reasonable amounts of time" for the use of, broadcast stations); 47 U.S.C. § 315(a) ("If any licensee shall permit . . . a legally qualified candidate . . . to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office . . . *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section."); 47 C.F.R. § 73.1941.

The Bureau's analysis of the "authorized" committee question under the Act and FECA consists only of two short paragraphs and a pretextual conclusion. In the first paragraph, the Notice states that, although Section 73.1942 of the rules does not reference a candidate's "authorized committee,"[11] Section 315(b) of the Act, "which section 73.1942 is intended to implement, repeatedly refers to candidates and their authorized committees as [supposedly] sharing the rights it confers."[12] Thus, the Notice claims that the FCC has "long held that the LUC provisions of section 315(b) apply to both candidates and their authorized campaign committees."[13] The Bureau's abbreviated account here is incomplete and potentially misleading.[14]

The Notice then attempts to parse the dense language of FECA and its relation to Section 315 of the Act in three sentences. First, it notes that subsection 315(b)(2)(F) of the Act defines the term "authorized committee" by referring to FECA, which defines an authorized committee as "the principal campaign committee or any other political committee authorized and designated by a candidate to receive contributions or make expenditures on behalf of such candidate."[15] Next, while the Bureau recognizes that "FECA generally prohibits the designation as an authorized committee a political committee that supports more than one candidate," it cites an

[11] Notice at 1, citing 47 C.F.R. § 73.1942(a).

[12] *Id*., citing 47 U.S.C. § 315(b).

[13] *Id*., citing *In the Matter of Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 7 FCC Rcd 4611, 4614, para. 23 (1992) (1992 Political Programming Order).

[14] As described in Section II, in 1971 Congress passed FECA amending § 315(b) to adopt the LUC but making no mention of "authorized committees." *See* 47 U.S.C. § 315(b)(1). In 2002, Congress passed BCRA, which added the "stand by your ad" requirements in § 315(b)(2) – the only provision in § 315 to use the term "authorized committee." The clear differences between § 315(b)(1) and § (b)(2) – disguised by the Notice referring to "section 315(b)" generally – undercut any argument that § 315(b)(2)'s two parenthetical references to "authorized committee" in the "stand by your ad" provisions require that all committees created by parties or PACs with the authorized label somehow "share" the LUC rights granted to candidates under § 315(b)(1).

[15] Notice at 1, citing 47 U.S.C. § 315(b)(2)(F) and 52 U.S.C. § 30101(6).

exception allowing candidates to designate as an authorized committee a political committee "'established solely for the purpose of joint fundraising,'" as though that single exception proves the Bureau's entire argument and somehow justifies the Notice's broad expansion of the LUC rule, including to committees not dedicated to joint fundraising.[16] In the third sentence, the Bureau concludes by stating that the "FCC's rules do not recognize distinctions between types of committees for LUC purposes (*e.g.*, principal campaign committee, joint fundraising committee) provided that the committee is an authorized committee of the candidate under the FECA."[17] But Section 73.1942 of the rules does not refer to any committee(s) of any candidate – a fact the Notice recognized in the previous paragraph. This silence loudly undercuts the Notice's claims.

The Bureau's erroneous conclusion means that broadcasters must provide the LUC to any hybrid, joint, or other committee a political party or PAC can envision, so long as a certain label is attached. However, the Bureau ignores crucial elements of Section 315(b), FECA, and Section 73.1942 of the rules that preclude this boundless approach that the Notice derived from its insufficient statutory analysis. Petitioner submits that only a candidate's designated principal campaign committee is entitled to LUC rates, while other types of joint or hybrid committees are not. As set forth below, this approach is consistent with relevant federal laws and rules, as well as the view of the U.S. Department of Justice, as reflected in a recently filed brief with the U.S. Supreme Court.

The Bureau correctly states that the FCC has long held that the LUC provisions of Section 315(b) of the Act apply to both a legally qualified candidate and their authorized committee,[18] even though Congress adopted the LUC in the context of candidate ads without any

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[16] *Id*. at 2, citing 52 U.S.C. §§ 30102(e)(3)(A) and (A)(ii).
[17] *Id*. at 2.
[18] Notice at 1, citing 1992 Political Programming Order, 7 FCC Rcd at 4614.

reference to any committees. In support, the Bureau cites the 1992 Political Programming Order, in which the FCC stated, "[W]e have always held that only candidates or their authorized campaign committees are entitled to the LUC pursuant to Section 315(b)."[19] But the Notice notably omits the very next sentence in that 1992 order: "Thus, even if an independent entity produces an advertisement *that includes an appearance by a candidate*, that independent entity is *not* entitled to the LUC."[20] Accordingly, even the order on which the Bureau relies makes clear that it is not sufficient for a candidate to merely "authorize" a party, PAC, or other kind of hybrid or joint committee for those committees to obtain the LUC. The entity itself must be <u>the</u> "authorized committee" of a legally qualified candidate.[21]

As the Notice stated, Section 315(b)(2) of the Act defines "authorized committee" by referring to Section 30101 of FECA, which states that the term means the "principal campaign committee or any other political committee authorized by a candidate under section 30102(e)(1) of this title to receive contributions or make expenditures on behalf of such candidate."[22] Section 30102(e)(1) provides that each candidate shall designate a committee to serve as their "principal campaign committee."[23] Therefore, this designated "principal campaign committee" is an "authorized committee" under both Section 30101 of FECA and Section 315(b)(2) of the Act, which refers to Section 30101.

Section 30102(e)(1) of FECA further provides that a candidate "may designate additional political committees . . . to serve as authorized committees of such candidate,"[24] but only if those

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[19] 1992 Political Programming Order, 7 FCC Rcd at 4614.

[20] *Id*. (emphasis added).

[21] That same paragraph of the 1992 order also twice refers to a candidate or the candidate's "authorized committee," in the singular. *Id*. at 4613.

[22] 47 U.S.C. § 315(b)(2)(F); 52 U.S.C. § 30101(6).

[23] 52 U.S.C. § 30102(e)(1).

[24] *Id*.

committees exclusively support a single candidate, subject to two exceptions: (1) a Presidential candidate may designate the national committee of their political party as "a principal campaign committee," and (2) candidates "may designate a political committee established *solely for the purpose of joint fundraising* by such candidates as an authorized committee."[25] Thus, although such "joint fundraising committees" may be characterized as "authorized committees" under FEC rules, the plain language of FECA restricts their designation as an authorized committee exclusively to fundraising, not to other purposes such as campaigning or buying advertising, the latter of which is the only political activity implicating the LUC and associated FCC rules.

The U.S. Department of Justice agrees. A mere five months ago, well after the question of the LUC's applicability to hybrid and joint fundraising committees became a matter of public controversy, the Solicitor General adopted essentially the same view in a 2025 filing with the Supreme Court. Therein, the Solicitor General stated that the LUC rules "require broadcasters to charge low rates for candidate spending, but *not for party spending—whether coordinated or independent*,"[26] adding that, even if the federal limits on coordinated expenditures were removed, "[p]arties could spend more money on advertisements, but broadcasters still would not be required to charge parties special low rates."[27]

Under Sections 30101 and 30102 of FECA, therefore, only a candidate's designated principal campaign committee is entitled to the LUC, while joint fundraising committees, hybrid, and other kinds of committees are not "authorized committees" eligible for LUC rates under

[25] *Id*. at § 30102(e)(3)(A)(i)-(ii) (emphasis added).

[26] *Reply Brief for the Federal Respondents* at 23, *NRSC, et al., v. FEC, et al.*, No. 24-261, 2025 WL 3068193 (Oct. 1, 2025) (emphasis added). NRSC and others brought this case to challenge the constitutionality of federal government limits on coordinated expenditures between political parties and candidates, including spending on advertising. *NRSC, et. al. v. FEC, et. al.*, 117 F.4th 389 (6th Cir. 2024), *cert. granted,* 2025 WL 1787717 (U.S. Jun. 30, 2025) (No. 24-261).

[27] *Reply Brief for the Federal Respondents* at 23.

Section 315(b)(1) of the Communications Act or the FCC's rules. The Bureau's view is thus mistaken and must be corrected.[28]

Beyond its flawed analysis of FECA, the Bureau's reasoning also fails because it relies on an incomplete analysis of Section 315(b) of the Act and FCC rules. At the beginning of Section III, Petitioner explained that the Notice presents a brief, potentially misleading depiction of Section 315(b) and Section 73.1942, which, in addition to the errors identified above, also ignores highly pertinent LUC language in Section 315(b)(1). This language directly governs who is entitled to the LUC, making no references to committees, authorized or otherwise: "The 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 nomination for election, or election, to such office shall not exceed" the LUC.[29] As set forth in Section II, Section 73.1942(a) of the FCC's rules is virtually identical to Section 315(b)(1) of the Act.

Adopted decades later in BCRA, Section 315(b)(2), on the other hand, sets forth the requirements for "stand by your ad messages" that must be met if an ad references a candidate's opponent. Despite the Notice's vaguely misleading statement that Section 73.1942 is "intended to implement" "section 315(b),"[30] the FCC's rule clearly only implements – by copying nearly word-for-word – Section 315(b)(1)'s obligation to provide the LUC to legally qualified candidates in connection with their campaigns. It is only Section 315(b)(2) that uses the term

[28] The Public Notice said nothing about state or local elections. Petitioner believes that, because the controlling definition of "authorized committee" in FECA is linked to federal election finance limitations, the exceptions in Section 30102(e)(1) of FECA seem limited to federal candidate committees. There is nothing else in FECA, the Communications Act, FCC rules, or elsewhere suggesting that these exceptions apply to state or local political parties, or other entities claiming to be "authorized" by a state or local candidate. Thus, even if such entities claimed to be "authorized" by a candidate under state or local law, they would not qualify for the LUC under federal law. The FCC should confirm this understanding of the relevant law.

[29] 47 U.S.C. § 315(b)(1).

[30] Notice at 1.

"authorized committee" and then only in the context of an ad's content. A straightforward reading of the statute thus makes clear that Section 315(b)(1) governs who is entitled to the LUC, while Section 315(b)(2) only governs what a federal candidate and an authorized committee of the candidate must do in order for that "candidate" – not any authorized committee – to receive the LUC (*i.e.*, include a properly formatted "stand by your ad" message in the ad).[31] A proper analysis of the structure and terms of Section 315(b) of the Act and Section 73.1942 of the rules accordingly do not support the Notice's claim that the statute and FCC rules mandate that the LUC be provided to any and all party, PAC, or other committees labeled "authorized." Such a reading unconvincingly mixes different statutory provisions adopted decades apart with very different purposes to arrive at an erroneous conclusion to which a reviewing court would not defer and would almost certainly reject.[32]

Moreover, the plain language of Section 315(b)(1) militates against the Notice's conclusions. Under that provision, only those uses of a station "in connection with" a specific candidate's campaign for election qualify for the LUC.[33] A legally qualified candidate for office, for example, is not entitled to the LUC for ads about the car dealership or insurance company she happens to own.[34] Accordingly, requests for ads that stations have received from allegedly "authorized committees" about ballot issues, candidates in other races, and issues unconnected to the candidate's specific campaign are nothing more than issue ads and are not entitled to the

[31] "In the case of a candidate for Federal office, <u>such candidate</u> shall not be entitled to receive" the LUC for use of a broadcast station unless the candidate certifies that the candidate (and any authorized committee of the candidate) shall not directly refer to another candidate for the same office, unless such reference meets the "stand by your ad" content and appearance requirements. 47 U.S.C. § 315(b)(2)(A) (emphasis added).

[32] *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

[33] "When interpreting a statute, we begin with the text," *Lackey v. Stinnie*, 145 S. Ct. 659, 666 (2025), and "[i]n determining the scope of a statute" specifically, courts similarly "look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981).

[34] *See* FCC, *Political Primer*, 100 FCC 2d 1476, 1514 (1984).

LUC. A very brief, extraneous appearance by a candidate, often tacked onto the end of PAC or party ads, does not transform them into candidate ads "in connection with" the candidate's campaign, regardless of whether the committee is "authorized" by the candidate or the ads are paid for with coordinated funds, as stated in the Solicitor General's recent Supreme Court brief. For these reasons, the Bureau's position by default that all committees of all kinds are entitled to the LUC, so long as they are supposedly "authorized" by a candidate, is arbitrary and unsupported by facts or law.

IV. THE NOTICE'S ANNOUNCEMENT OF NEW POLITICAL BROADCASTING REQUIREMENTS UNDER THE PRETENSE OF A "REMINDER" VIOLATES THE APA

The Bureau inaccurately characterizes the Public Notice as "guidance" intended to "remind" broadcasters about their requirements under the LUC rule and the Act, and to "restate previous Media Bureau guidance regarding LUC eligibility for candidate-party coordinated ads."[35] As observed in Section II, no such "previous" guidance is cited, and it appears nonexistent. In fact, the Notice appears to set forth new substantive LUC requirements that substantially broaden the scope of the FCC's existing rule and that have significant economic implications. And these new requirements, e.g., giving the LUC to party/candidate coordinated advertisements, are mandatory and enforceable, with broadcasters subject to complaints and FCC enforcement actions for claimed noncompliance.[36] In short, the new LUC requirements are rules subject to the APA's notice-and-comment provisions and should not have been announced as a *fait accompli* via a Bureau-level Public Notice.

[35] Public Notice at 1-2.

[36] *See id*. at 2 (declaring that "candidate-party coordinated advertisements are subject to the LUC provisions").

Under the APA, promulgation of a rule generally requires notice published in the Federal Register and an opportunity for interested persons to comment.[37] "A rule is defined very broadly"[38] to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,"[39] which clearly describes the Notice's substantive LUC requirements. Where, as here, a rule has the "force and effect of law" or "alter[s] the rights or interests of parties," it is "subject to the APA's notice-and-comment provisions."[40] The Notice altered the rights and interests of broadcasters and non-authorized committees, but without notice or public comment. Accordingly, these new legal requirements are procedurally defective and cannot be enforced.

The FCC, moreover, cannot "escape" notice-and-comment requirements by labeling the Notice's "substantive legal addition to [the LUC] rule a mere interpretation."[41] The U.S. Court of Appeals for the D.C. Circuit, for example, rejected an agency's claim that its "Guidance" – as the Bureau's Public Notice is labeled – only interpreted an existing rule, when that "Guidance" had "significantly broadened" that rule, which the agency could not legally do without complying with the requisite rulemaking procedures.[42] In another case, the court found that an agency erred by not adhering to the APA's rulemaking requirements when it announced legally binding findings via a press release on its website.[43] The Bureau here similarly erred by releasing on the FCC's website a Public Notice that "expanded the scope" of the legally binding requirements

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[37] 5 U.S.C. §§ 553(b) & (c).

[38] *Safari Club Int'l v. Zinke*, 878 F.3d 316, 332 (D.C. Cir. 2017) (internal citation omitted).

[39] 5 U.S.C. § 551(4).

[40] *City of Billings v. Transportation Sec. Admin*., 153 F.4th 46, 51-52 (D.C. Cir. 2025).

[41] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000). *See* 5 U.S.C. § 553(b) (stating that the APA's rulemaking requirements do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

[42] *Appalachian Power*, 208 F.3d at 1028 (concluding that the "more expansive reading" of the EPA's rule, unveiled in a document labeled as agency "Guidance," could not stand).

[43] *Safari Club*, 878 F.3d at 323.

under the LUC rule without notice and comment[44] or publication in the Federal Register.[45] Nor can the FCC avoid APA procedures by claiming that its Public Notice was only a "clarification" of the LUC rule because the Notice "effects a substantive change" in that preexisting rule.[46]

By adopting this Notice without providing interested parties any opportunity to comment, the FCC furthermore has created inconsistencies and uncertainties as to how these "authorized" ads are supposed to be treated under other FCC rules. For instance, are these "authorized" committee ads entitled to "reasonable access" to broadcast stations, even though reasonable access is governed by a wholly different section of the Act, Section 312?[47] If this Notice is intended to provide reasonable access for these "authorized ads," the resulting burden on broadcasters from having to sell advertising to new classes of political advertisers at artificially low rates dramatically increases. The increased demand also may limit the ability of broadcasters in states with multiple contested federal races to sell advertising to a station's valued commercial advertisers, or to state and local political candidates who have no reasonable access rights.

Application of the revised LUC rules may well rise to the level of an unconstitutional regulatory taking. That inquiry turns on "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed

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[44] *Appalachian Power*, 208 F.3d at 1024; *see also Safari Club*, 878 F.3d at 332-33 (rejecting the label of "informal adjudication" that the agency had tried to attach to its action and concluding that the agency's findings reflected a rule and thus compliance with the APA was required).

[45] "All 'interpretations of generally applicability' and 'statements of general policy' must be published in the Federal Register," even for those policy statements and interpretations that do not require compliance with notice-and-comment rulemaking procedures. *Exelon Gen. Co., LLC v. Local 15, IBEW*, 676 F.3d 566, 577 (7th Cir. 2012), quoting 5 U.S.C. § 552(a)(1)(D).

[46] *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-5, 38 (D.C. Cir. 2005) (rejecting FCC's claim that it merely had provided "clarifications" of an existing rule, and concluding that the FCC's substantive changes to its preexisting rule "can be valid only if it satisfies the notice-and-comment requirements of the APA").

[47] 47 U.S.C. § 312(a)(7).

expectations; and (3) the character of the governmental action."[48] Forcing broadcasters to surrender their valuable airtime to anyone "authorized" by a candidate directly interferes with broadcasters' business model and forces them to bear costs that should be borne by others. The government cannot do so without providing just compensation. U.S. Const., amend. V, cl. 4.

A station's position under the "no censorship" policy of Section 315(a) of the Act may be even more precarious. Under that provision, a broadcaster cannot censor the message of a candidate and, by Supreme Court precedent,[49] it cannot be held liable for any content contained in that ad, including defamatory statements. As the Notice does not address the no censorship provision, stations are left in an untenable position when faced with a claim that an "authorized" ad is defamatory. The station either assumes that the ad is treated like a candidate ad and not censor its message (and risk liability should a court determine that, because Section 315(a) does not mention "authorized" ads, the broadcaster can in fact censor such ads) or the broadcaster can reject the ad to avoid civil liability and face penalties should the FCC determine that these "authorized" ads are treated like candidate ads for all purposes.

The silence of the Notice on these significant matters is deafening – and would likely not exist if the Commission had gone through its normal process for considering important policy changes. The FCC cannot adopt such changes in the manner it did and leave those subject to the regulations at the mercy of the uncertain implications of its actions. "'[R]ules is rules,' no matter their gloss."[50] And the Public Notice assuredly announced "rules" – new requirements that

[48] *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017) (citations omitted).

[49] *Farmers Educ. & Coop., Union of America, North Dakota Div. v. WDAY*, 360 U.S. 525, 535 (1959).

[50] *Safari Club*, 878 F.3d at 332, quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005).

substantially broadened the FCC's existing LUC rule. Accordingly, the FCC should repeal the Notice as contrary to the APA.

V. THE LUC PROVISIONS ARE CONTRARY TO THE FIRST AMENDMENT AND THE NOTICE'S SUBSTANTIAL EXPANSION OF THEM EXACERBATES THEIR UNCONSTITUTIONALITY

The Media Bureau's expansion of its LUC rule to seemingly unlimited third parties further highlights why its LUC rule in 47 C.F.R. § 73.1942 and the underlying statutory provisions in 47 U.S.C. § 315(b)(1) violate the First Amendment. The FCC should not continue to enforce its unconstitutional LUC rule and should abrogate the Notice's new, additional LUC requirements that exacerbate the rule's unconstitutionality.

A. The LUC Provisions Cannot Withstand First Amendment Scrutiny

The pre-existing LUC rule, the new LUC requirements, and the underlying statute are, on their face, content-based and speaker-based restrictions subject to strict First Amendment scrutiny, under which the government must prove that they further a compelling interest and are narrowly tailored.[51] Neither the Bureau nor the Commission can make those showings.

The existing and expanded LUC requirements and Section 315(b)(1) are textbook content- and speaker-based regulations. They apply to (i) specific content, i.e., speech "in connection with" a legally qualified candidate's campaign for nomination/election for public office and now ads that qualify as coordinated expenditures of political parties and legally qualified candidates for federal office; and (ii) specific persons or entities, i.e., "legally qualified candidates" and their "authorized committees," now including an expanded range of joint and hybrid political committees and PACs. The rules and statute are "content based on [their] face," and "subject to strict scrutiny regardless of the government's benign motive [or] content neutral

[51] *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 170-171 (2015).

justification."[52] Even apart from the content- and viewpoint-based nature of the rules and statute, these provisions impermissibly intrude on broadcasters' own speech and programming decisions.

The Notice cited zero grounds for the FCC's existing or additional regulation of political speech, and the LUC rules and their underlying statutory requirements accordingly fail strict (or other) First Amendment scrutiny. That omission is especially glaring given that the "First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"[53] The Supreme Court has recognized "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance," and has consistently rejected other governmental aims, "[h]owever well intentioned," including "reduc[ing] the amount of money in politics" or "level[ing] electoral opportunities by equalizing candidate resources."[54] Thus, the Court has already rejected as insufficient bases for justifying political speech regulation interests very similar to those that the LUC statutory provisions and rules were intended to promote.[55] The FCC's discriminatory regulatory regime does nothing to prevent "quid pro quo" corruption or to further any other legitimate governmental interest.

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[52] *Reed*, 576 U.S. at 165.

[53] *FEC v. Cruz*, 596 U.S. 289, 302 (2022) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

[54] *Id*. at 305, citing *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) and *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749-50 (2011).

[55] Congress passed FECA, which amended Section 315(b) of the Act to include a new LUC provision, as a "comprehensive approach to the problem of political campaign reform and excessively high campaign costs." S. Rep. No. 96, 92d Cong., 1st Sess. 33 (1971). FECA's provisions limited campaign contributions and imposed spending limits on federal candidates/campaigns, while trying to lower campaign costs through provisions such as the LUC. The Supreme Court quickly found many of FECA's provisions, including the campaign spending limits, unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*; *NRSC v. FEC* (pending). Given that candidates are not subject to spending limits, the government's interest in and rationale for maintaining the related content- and speaker-based speech regulations in Section 315(b)(1) has disappeared. Candidates, moreover, do not lack access to a wide range of media outlets today, many of which did not exist in 1971 when FECA was enacted, and they can now reach the public directly without the intermediation of the traditional media at all.

The FCC's regime also effectively compels broadcasters to subsidize certain government-favored speakers and speech via the LUC.[56] "Just as the First Amendment may prevent the government from prohibiting speech," it "may prevent the government from compelling individuals . . . to pay subsidies for speech to which they object."[57] Broadcasters' editorial right to choose programming is protected speech,[58] and the proliferation of "authorized" committee ads and coordinated party/candidate ads would substantially increase the amount of programming content over which broadcasters are deprived of their right to choose or even to decline to subsidize.[59]

The FCC at the least must reverse the recent significant expansion of its discriminatory LUC regulatory regime. Rather than addressing (or even acknowledging) the First Amendment problems inherent in its regime, the Bureau only exacerbated its unconstitutionality by announcing new content- and speaker-based regulations of speech. The FCC's existing LUC rule is unconstitutional on its face. But, at a minimum, its substantial expansion to all manner of committees and political party expenditures violates the First Amendment. The FCC should

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[56] "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (citation omitted), and extends "not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston,* 515 U.S. 557, 573 (1995).

[57] *U.S. v. United Foods*, 533 U.S. 405, 410 (2001). "Any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny." (Thomas, J., concurring). *Id*. at 419.

[58] When a "broadcaster exercises editorial discretion in the selection and presentation of programming, it engages in speech activity." *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

[59] *See* 47 U.S.C. § 315(a); 47 C.F.R. § 73.1941(a) (providing that licensees "shall have no power of censorship over the material broadcast" by legally qualified candidates using a broadcast station).

comport with the basic tenet – "which has for so long been applied by th[e] [Supreme] Court that it is beyond debate" – that statutes should be construed to avoid constitutional questions."[60]

In addition to the First Amendment failings identified above, the expansion of the LUC regime cannot even meet the threshold question – under any constitutional standard – of whether the government has established that it is preventing an actual harm by its speech regulation. When defending a speech restriction, the government "must do more than simply posit the existence of the disease sought to be cured. It must instead point to record evidence or legislative findings demonstrating the need to address a special problem."[61] The courts have "never accepted mere conjecture as adequate to carry a First Amendment burden."[62] The Bureau did not and cannot point to a single instance in the (nonexistent) record showing that expanding the discriminatory LUC regime is needed to prevent some (unidentified) harm. And because there is no actual, identified problem to be solved, there is by definition no compelling (or even substantial) governmental interest justifying the newly expanded LUC requirements. Relatedly, the FCC also cannot show that its new LUC requirements are narrowly tailored.[63] Given that the expansive LUC rules now apply to any committees that might be labeled as "authorized" and to a potentially vast range of coordinated party/candidate ads, they likely will impact "substantially more speech than is necessary" to further any interest the FCC might assert.[64] At the very least,

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[60] *Jones v. U.S.*, 526 U.S. 227, 239-40 (1999).

[61] *FEC v. Cruz*, 596 U.S. at 307 (internal quotation marks and citations omitted).

[62] *Id.* (internal quotation marks and citations omitted).

[63] Strict scrutiny requires the FCC to "advance the State's compelling interest through the least restrictive means," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 452 (2015), and even under intermediate scrutiny, a speech regulation must be shown to alleviate a real harm "in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

[64] *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citation omitted). Given the discriminatory treatment favoring certain ads of candidates/committees/parties under the Notice, these ads could rapidly proliferate to fill stations' advertising airtime to the detriment (or even exclusion) of other political and commercial advertisers. The FCC has no basis for exacerbating the harms that other speakers will suffer under its amended LUC regime.

then, the FCC must abrogate the Notice and confirm that the LUC rule only applies to ads paid for by a legally qualified candidate or its designated principal campaign committee.

B. Broadcasting Is Entitled To Full First Amendment Protections

The FCC's LUC rule and the underlying statutory provision violate the First Amendment under any plausible standard. But to the extent the Notice assumes that broadcasters only enjoy reduced First Amendment protections based on the alleged "scarcity" of spectrum cited in *Red Lion* and its progeny,[65] this position should be rejected.

The theory of scarcity has been well and truly debunked. When determining in 1987 to no longer enforce the fairness doctrine as contrary to the First Amendment, the Commission found that "there is no longer a scarcity in the number of broadcast outlets" available to the public.[66] More significantly, the Commission concluded that the "concept of scarcity – be it spectrum or numerical – is irrelevant" to determining the appropriate First Amendment standard to apply to broadcasting and that the scarcity rationale developed in *Red Lion* and successive cases "no longer justifies a different standard of First Amendment review for the electronic press."[67]

Beyond the Commission, the scarcity rationale has been found to be no longer applicable, economically and scientifically incorrect, and inappropriate for grounding a constitutional rule that affords broadcasting lesser First Amendment protection. When enacting the 1996 Telecommunications Act, Congress found that the "scarcity rationale for government regulation [of broadcasting] no longer applies."[68] Circuit court of appeal judges have pointed

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[65] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine as lawful and applying a different First Amendment standard to broadcasting because spectrum was a scarce resource).

[66] *In re Syracuse Peace Council against Television Station WTVH Syracuse, NY*, 2 FCC Rcd 5043, 5054 (1987), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

[67] *Id*. at 5052, 5055.

[68] H.R. Rep. No. 104-204, at 54 (1995) (citing "significant changes" in audio and video marketplace).

out that "[a]ll economic goods are scarce," and as a "universal fact," scarcity "can hardly explain regulation in one context" (i.e., broadcasting) and "not another" (i.e., print).[69] Judges have noted the "absurdity of this bifurcated approach" to content-based regulation of the media,[70] which permits regulation of broadcasting that would be "intolerable" if applied to other media.[71] Unsurprisingly, the Supreme Court acknowledged criticism of the scarcity rationale as early as the mid-1980s.[72]

The Court has since declined to extend the lesser standard of First Amendment protection applied to broadcasters to any other electronic media, including telephone dial-in services, cable TV, and the internet.[73] Notably, Supreme Court Justices and circuit court judges across the

[69] *Telecomm. Res. & Action Center (TRAC) v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986). Decades ago, the D.C. Circuit specifically noted the "persuasive evidence that the scarcity rationale is no longer tenable." *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998). In addition to erring as an economic matter, *Red Lion* seemed to "assume[] that there is a tangible thing, radio spectrum, of which there is a scarce amount" – an assumption that is "simply incorrect as a matter of scientific fact." FCC Media Bur. Staff Research Paper, J.W. Beresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, at 9 (Mar. 2005). Digital technology and other advances, moreover, have made spectrum use much more efficient and greatly expanded outlets for speech. *See, e.g.*, J. Soriano, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion's Scarcity Rationale*, 15 B.U. Pub. Int. L.J. 341, 344 (2006).

[70] *Action for Children's Tel. (ACT) v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) (en banc) (Edwards, J., dissenting).

[71] *TRAC,* 801 F.2d at 508; *accord FCC v. League of Women Voters*, 468 U.S. 364, 376 1984); *ACT*, 58 F.3d at 672 (Edwards, J., dissenting).

[72] *League of Women Voters*, 468 U.S. at 376 n.11 (noting that the rationale of spectrum scarcity "has come under increasing criticism in recent years," with "[c]ritics, including the incumbent Chairman of the FCC," calling it "obsolete").

[73] *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28 (1989); *Turner,* 512 U.S. at 637; *Reno v. ACLU*, 521 U.S. 844, 867-68 (1997). Beyond the alleged scarcity of spectrum, broadcasting's presence in the home and accessibility to children was relied upon in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to apply a reduced level of First Amendment protection to broadcasting in the context of the FCC's indecency rules. But technologies like cable TV, satellite TV/radio, the internet, and streaming mean that "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 532 (2009) (*Fox TV I*) (Thomas, J., concurring).

political spectrum have found *Red Lion* and *Pacifica* woefully outdated, unmoored from the Court's First Amendment jurisprudence, and leading to "doctrinal incoherence."[74]

Simply put, a constitutional rule denying broadcasters their full First Amendment rights – and lesser rights than afforded to all other media – has no grounding in the Constitution. The First Amendment clearly states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Amendment contains nary a hint that the freedoms under it can vary depending upon the type of speech or press involved or that these freedoms can, in fact, be abridged when applied to certain types of speakers or media outlets but not to others. The Supreme Court already has recognized that it "must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."[75] The reduced First Amendment protections broadcasters receive under *Red Lion* and *Pacifica* are an anachronism that should be repudiated.[76]

Even under the outmoded standards of *Red Lion* and *Pacifica*, however, the LUC provisions in general—and the Public Notice in particular—are unconstitutional. Those standards still require regulations to be "narrowly tailored to further a substantial governmental interest."[77] As explained above, the plethora of other communication avenues available to political

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[74] *Fox TV I*, 556 U.S. at 532-33 (Thomas, J., concurring); a*ccord FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring); *TRAC*, 801 F.2d at 508 (Bork, J., writing for the court); *ACT*, 58 F.3d at 672-73 (Edwards, J., dissenting); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (en banc) (Arnold, J., concurring); *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc).

[75] *Citizens United*, 558 U.S. at 326 (stating that "[s]ubstantial questions would arise" if courts said "what means of speech should be preferred or disfavored," and "in all events, those differentiations might soon prove to be irrelevant or outdated by technologies . . . in rapid flux").

[76] The constitutional protections afforded to broadcasting under the First Amendment cannot turn on "transitory facts" (e.g., scarcity of radio frequencies) but must have a "textual basis in the Constitution." *Fox TV I*, 556 U.S. at 532 (Thomas, J., concurring).

[77] *League of Women Voters*, 468 U.S. at 380.

candidates and parties today obviates the need for government-mandated discounts on their ads, and there is certainly no tailored justification for requiring those discounts only in the broadcasting context. The Public Notice only compounds those problems by unlawfully extending LUC rates to even more political entities. Neither the statutory LUC provisions nor those unwarranted extensions can be squared with the First Amendment.

VI. FAILURE TO TAKE PROMPT ACTION ON THIS PETITION WILL NECESSITATE JUDICIAL REVIEW OF THE FCC'S MAJOR EXPANSION OF THE LUC REQUIREMENTS

Petitioner respectfully requests prompt action on this petition. As discussed, the Bureau's Public Notice dramatically expands the FCC's longstanding position on the applicability of the LUC requirement. The Notice thus already has created uncertainty for broadcasters and other TVB members and raises significant economic and programming questions that impact their planning and chill protected speech, causing First Amendment harms.[78] These harms will be greatly exacerbated if the Supreme Court overturns its existing precedent and holds that limits on coordinated expenditures between political parties and candidates are unconstitutional in *NRSC, et al., v. FEC, et al.*, No. 24-261. Moreover, because the Public Notice is written as if the FCC has long held the position stated in that Notice—and, indeed, is framed as a "remind[er]" about existing requirements—the FCC's failure to take prompt action to repudiate this position alone will confirm that the FCC has already adopted this position, thus requiring judicial review. The FCC therefore should act on this petition before the Supreme Court rules in *NRSC* and advertisers flood Petitioner's members with unlawful claims for LUC rates based on the erroneous Public Notice.

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[78] *See Susan B. Anthony List*, 573 U.S. at 155, 164.

VII. CONCLUSION

For all these reasons, the FCC should grant this petition for reconsideration or, in the alternative, for declaratory ruling, and promptly repudiate and repeal the Public Notice's unlawful and unwarranted expansion of the LUC requirements. The FCC also should determine to no longer enforce its LUC rules in their entirety.

Respectfully submitted,

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Brad Seitter
President & Chief Executive Officer
Television Bureau of Advertising, Inc.

120 Wall Street
15th Floor
New York NY 10005
(212) 486-1111

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