

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, APPLICANT

v.

SHERROD BROWN, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR STAY

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No. 26A476

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REPLY IN SUPPORT OF APPLICATION FOR STAY

The challengers fail to rehabilitate the Fourth Circuit’s order directing the Commission to act within 48 hours on their application for review of the Media Bureau’s public notice, which restated a longstanding position adopted during previous election cycles. First, this Court’s prior stay order held that FCC review is an essential predicate to judicial review under the Communications Act. Yet the challengers would reduce the FCC’s role to a meaningless ritual, arguing (Opp. 20) that the FCC should issue an order that says, “Denied,” so that the Fourth Circuit can get on with telling everyone what the statutory lowest-unit-charge requirement really means. Second, mandamus is available only where it is clear and indisputable that an agency has unreasonably delayed taking action. But the challengers do not identify a single case in which any other court has ever held that a period as short as here triggers that demanding standard. Third, mandamus must be appropriate in the circumstances of the case. The challengers fail to justify judicial intervention to overturn a longstanding agency position just weeks before this year’s elections, when parties and candidates need certainty about advertising rates. This Court should reject the challengers’ invitation to cause electoral chaos and should grant the application for a stay.

A. This Court Is Likely To Reverse The Grant Of Mandamus

1. At the outset, the challengers fail to reconcile the Fourth Circuit’s grant of mandamus with this Court’s prior stay order. See *NRCC v. Brown*, No. 26A274, slip op. (Sept. 4, 2026). In that order, the Court explained that the Communications Act “contemplates that an aggrieved party will file an application for review with the Commission, that the Commission will resolve that application by order, and that public notice of that order will issue before an aggrieved party may petition for further review in federal court.” *Id.* at 3. The scheme established by the statute, and enforced by this Court’s order, reflects Congress’s judgment that “full agency deliberations have something worthwhile to contribute” before judicial review begins. 2026 WL 2493115, at *22 (Wilkinson, J., dissenting). In granting mandamus, however, the Fourth Circuit treated FCC action as a mere box-checking exercise, directing the agency to issue a decision within 48 hours even though the comment period on an overlapping application for review remains open. The challengers similarly treat FCC action as an empty formality, insisting (Opp. 20), as the panel did below, that the Commission “was not required to provide any reasoning.” See Appl. App. 16a (“[T]he Commission is not legally obligated to explain or justify its decision.”). This Court surely did not issue its prior stay just to invite the Fourth Circuit to compel the FCC to perform that hollow ceremony in order to facilitate the immediate re-issuance of the Fourth Circuit’s merits ruling.

In addition, this Court’s prior stay order reflected the equitable judgment that the lowest-unit-charge rules should remain stable “in the critical weeks leading up to the midterms.” *NRCC*, slip op. 3. That is presumably why the Court issued its order on September 4, the date that the lowest-unit-charge requirement took effect for this election cycle. See Appl. App. 28a (Wilkinson, J., dissenting). The Fourth Circuit

“ignored [this] Court’s concern and unraveled its work” through a last-minute “intrusion into the nation’s electoral process.” *Id.* at 25a.

2. Even putting aside this Court’s prior stay order, the government is likely to prevail because the challengers have not shown a clear and indisputable right to relief. The challengers fail to identify any case in which any court has ever held that an agency’s allowing an application for review without a statutory deadline to remain pending for a few months amounts to “unreasonabl[e] delay,” 5 U.S.C. 706(1), warranting mandamus relief. To the contrary, they concede (Opp. 17), with considerable understatement, that “delays of this length may not typically trigger mandamus relief.” That alone provides an adequate basis for a stay.

The challengers claim (Opp. 17) that the “unique circumstances of this case” justify mandamus, but just the opposite is true. To start, the challengers themselves have contributed to the delay by filing a baseless petition for review, seemingly triggering the court of appeals’ “exclusive jurisdiction,” 28 U.S.C. 2349(a), and raising doubts about whether the FCC even had the authority to act while the petition for review remained pending. Even apart from those doubts, it was hardly unreasonable for the FCC to refrain from acting while parallel litigation was proceeding in court. It made little sense for the Commission to devote time and energy to an application for review that, according to the challengers, it had already “constructively denied.”

In addition, the comment period for the challengers’ application for review closed on September 30, and the comment period for the broadcasters’ overlapping application remains open. See Stay Appl. 5-6. An agency does not engage in unreasonable delay by waiting to receive and consider relevant comments—especially where, as here, it has *shortened* its usual comment period to accommodate the challengers’ desire for expedition. See *id.* at 11. The challengers now suggest (Opp. 18)

that the solicitation of public comments is a ruse designed to delay judicial review. But it was entirely appropriate for the FCC to solicit public comments, given that the Fourth Circuit, the challengers, and television broadcasters all previously criticized it for failing to take that very step. See Appl. App. 7a (Fourth Circuit faulting the FCC for failing “to solicit public comment”); Stay Opp. at 25, *NRCC*, *supra* (No. 26A274) (challengers objecting that the FCC “did not seek public comment”); *id.* Supp. App. at 21 (broadcasters objecting to the lack of “notice or public comment”).

If that were not enough, it is also reasonable for the FCC to defer action on the challengers’ application for review until after this year’s elections. As noted, the Media Bureau’s public notice reaffirmed a longstanding interpretation that the Bureau had applied across previous election cycles. This Court has repeatedly emphasized that courts should refrain from changing election rules in the period immediately before an election. See, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 7-8 (2006) (per curiam). The FCC is entitled to conclude that it should likewise refrain from acting on the application for review during the election campaign, lest it create confusion about the meaning of the lowest-unit-charge requirement after the requirement has already taken effect.

The challengers’ contrary arguments lack merit. The challengers observe (Opp. 16-17) that no agency rule sets a specific deadline for the Commission to act on their application. But that just means that the Commission is entitled to decide, on a case-by-case basis, how much time to take. A court is entitled to intervene only if it is clear and indisputable that the Commission has engaged in unreasonable delay, and the challengers have fallen well short of that standard here.

The challengers also argue (Opp. 18) that, because the FCC’s briefs contain a “forceful defense” of the Media Bureau’s public notice, the FCC Commissioners do not

“need [more] time to make up their minds and prepare a reasoned decision.” But what the FCC’s General Counsel says in a brief does not necessarily reflect what the FCC’s Commissioners will ultimately decide in an order. After all, it is a foundational principle of administrative law that statements made by agency lawyers in litigation are not equivalent to decisions made by the agency itself. See, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962) (“The court may not accept counsel’s *post hoc* rationalizations for agency action[.] * * * For the courts to substitute * * * counsel’s discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review.”). In all events, even if the FCC Commissioners had made up their minds, it would be reasonable for them to release their decision after, rather than during, the ongoing election campaign.

The challengers likewise suggest (Opp. 18) that, because this case involves a “pure question of statutory interpretation” that courts must decide *de novo*, further FCC deliberations are pointless. But the Communications Act’s requirement that FCC review precede judicial review contains no exception for questions of statutory interpretation. See 47 U.S.C. 155(c). That is presumably because Congress deemed FCC review valuable even for such questions. Moreover, although agencies’ views on statutory questions are not entitled to deference, they are entitled to “respectful consideration.” *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 386 (2024). It is inconsistent with the respect that courts owe to agencies, and with the role that the Communications Act’s review scheme envisions for the FCC, to demand that the FCC “simply * * * issu[e] an order that sa[ys], ‘Denied,’” Opp. 20, so that the Fourth Circuit can get on with deciding for itself what the statute really means.

In the end, the challengers’ theory boils down to the notion that, because the Media Bureau’s public notice concerns campaign finance, the FCC was required to

act on their application fast enough to enable judicial review before this year's mid-term elections. That premise is flawed. It is commonplace for contested campaign-finance rules to remain in effect for one or more election cycles before courts eventually resolve disputes about their lawfulness. See, e.g., *NRSC v. FEC*, 146 S. Ct. 2404, 2414 (2026) (resolving in 2026 campaign-finance case that began during the 2022 election cycle). Nothing in the Communications Act requires otherwise. The statute entitles the challengers to an FCC decision on their application, see 47 U.S.C. 155(c)(4), but it does not guarantee them a decision on the expedited timeline they prefer—particularly where, as here, the challenged policy has been in place for years before this election cycle. Indeed, mandamus is especially unwarranted given that the parties most directly affected by the Bureau's notice—the broadcasters forced to charge lower rates for certain political advertising—are not demanding pre-election judicial review, and that the challengers' purported indirect harm consists of nothing more than a desire for political speech to cost more money for both the candidates they oppose and those they themselves support.

3. The government is independently likely to succeed because mandamus is plainly inappropriate given the challengers' unreasonable delay in seeking relief. The Media Bureau's public notice was issued on March 30, and the challengers waited a whole month before seeking FCC review on April 29. See Stay Appl. 4. They then wasted several more months in pursuing the baseless jurisdictional theory that the Fourth Circuit could intervene even before the FCC acted—a theory that would have enabled them to evade the heightened standard for mandamus. See *id.* at 4-5. Only in September, after that tactic failed and more than five months after the Media Bureau issued its public notice, did they finally seek mandamus. See *id.* at 5. The challengers cannot excuse that delay by claiming (Opp. 22) that, if they "had sought

mandamus relief sooner,” the FCC would have argued that “too little time had passed.” In the FCC’s view, mandamus would not be appropriate at any time before this year’s elections. But if mandamus were appropriate at all, it should have been sought back in June, when the challengers petitioned for judicial review—not now, weeks before the midterms, after the lowest-unit charge requirement has taken effect and been in force since September 4.

To grant mandamus at this late date would be inconsistent with the equitable principle that courts generally should not tinker with election rules shortly before an election. See *Purcell*, 549 U.S. at 7-8. Overturning the Media Bureau’s interpretation of the lowest-unit-charge requirement now, after the requirement has already taken effect for this year’s elections, would “lead to disruption and to unanticipated and unfair consequences for candidates [and] political parties.” *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The challengers have no response to that point, beyond repeating their erroneous arguments (Opp. 22-23) that any delay is attributable to the FCC rather than to their own flawed litigation choices.

B. The Other Factors Favor A Stay

Contrary to the challengers’ suggestion (Opp. 12-13), this case warrants this Court’s review. The Fourth Circuit countermanded the stay order that this Court previously issued, violated the principle that courts should not toy with election rules in the period preceding an election, and disregarded well-established limits on the scope of mandamus. The challengers observe (Opp. 13) that they have not found “any case where this Court has granted certiorari to review a lower court’s equitable finding that an agency had unlawfully delayed taking a discrete action,” but that is only because the Fourth Circuit’s egregious decision is unprecedented—as confirmed by the challengers’ failure to cite a single case granting mandamus to compel agency

action after a period of delay as short as the one at issue here. This Court’s intervention is thus warranted because the Fourth Circuit “use[d] a writ of mandamus more aggressively * * * than has ever yet been attempted.” Appl. App. 27a (Wilkinson, J., dissenting); see Sup. Ct. R. 10(a) and (c) (certiorari appropriate when a court of appeals resolves a federal question “in a way that conflicts with relevant decisions of this Court” or “depart[s] from the accepted and usual course of judicial proceedings”).

The challengers are also wrong to deny (Opp. 25) that the Fourth Circuit’s order causes irreparable harm to the FCC. An agency plainly suffers irreparable harm when a court “demands at gunpoint an agency decision” within 48 hours. Appl. App. 28a (Wilkinson, J., dissenting). The challengers observe (Opp. 25) that the FCC has a statutory obligation to act on their application for review, but they ignore that agency has no obligation to act on their preferred timeframe. Compelling the agency to act now causes irreparable harm, both by “improperly intrud[ing] on a coordinate branch,” *Trump v. California*, No. 26A139, slip op. 9 (Aug. 24, 2026), and by rushing the agency into issuing a decision before it has had the opportunity to receive, much less consider, public comments on the broadcasters’ overlapping application.

The challengers similarly err in contending (Opp. 23-24) that, because the Fourth Circuit merely ordered the FCC to act and did not issue a final decision on the merits, the party committees do not face irreparable harm. In their petition for a writ of mandamus below, the challengers emphasized that the Fourth Circuit panel had “already held” that the Media Bureau’s public notice “violates federal law.” C.A. Pet. for Mandamus 14. The panel, for its part, reiterated when issuing mandamus that it had already ruled that the public notice “is plainly contrary to law and cannot stand.” Appl. App. 9a. The whole point of the mandamus order is thus to “allow the [panel] to reach the merits and recapitulate its own earlier conclusions, disrupting settled

campaign finance rules in the hot breath of an impending election.” *Id.* at 28a (Wilkinson, J., dissenting). At a minimum, the Fourth Circuit’s order creates significant uncertainty about what rates broadcasters may charge for the rest of the election cycle. “Neither parties nor candidates nor broadcasters have any idea how to plan, contractually or otherwise, for the rest of the election season.” *Id.* at 25a. That uncertainty amounts to irreparable harm.

The challengers identify no equities that outweigh those serious harms. They contend (Opp. 23) that “broadcasters are being compelled to offer substantial unlawful discounts to party committees and [joint fundraising committees],” but they have no standing to invoke the broadcasters’ interests. Indeed, it is telling that the broadcasters, the entities most directly affected by the Media Bureau’s public notice, have not sought immediate judicial intervention and are content to allow FCC proceedings to continue. The challengers separately complain (Opp. 27) that the Media Bureau’s public notice enables “parties and [joint fundraising committees] to blanket the airwaves with discount advertising”—*i.e.*, to engage in more political speech for less money. But the challengers’ desire to mute their opponents’ political speech is not a cognizable harm, much less an adequate basis for denying a stay of the Fourth Circuit’s indefensible mandamus order.

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This Court should stay the court of appeals’ order pending the filing and disposition of a petition for a writ of certiorari.

Respectfully submitted.

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