**ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 13, 2021**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 17-1276, 20-1505, 20-1510, and 20-1521**
**(consolidated)**

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**NATIONAL POSTAL POLICY COUNCIL, *et al.*,**
***Petitioners,***
**v.**
**POSTAL REGULATORY COMMISSION AND**
**UNITED STATES OF AMERICA,**
***Respondents.***

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**ON PETITION FOR REVIEW OF ORDERS OF**
**THE POSTAL REGULATORY COMMISSION**

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# REPLY BRIEF FOR PETITIONERS ALLIANCE OF NONPROFIT MAILERS, ASSOCIATION FOR POSTAL COMMERNCE, MPA – THE ASSOCIATION OF MAGAZINE MEDIA, AMERICAN CATALOG MAILERS ASSOCIATION, NATIONAL POSTAL POLICY COUNCIL, MAJOR MAILERS ASSOCIATION, AND NEWS MEDIA ALLIANCE

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**STATUTES AND REGULATIONS**





* Authorities upon which we chiefly rely are marked with an asterisk.

## STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Initial Brief of the Mailer Petitioners.

# GLOSSARY

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|---|---|
| Act | Postal Accountability and Enhancement Act |
| Commission | Postal Regulatory Commission |
| Commission Br. | Initial Brief for Respondent in Case Nos. 17-1276, 20-1505, 20-1510, and 20-1521 (June 14, 2021) |
| Order 4258 | *Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 4258 (released Dec. 1, 2017) |
| Order 5763 | *Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020) |
| USPS | United States Postal Service |
| USPS Br. | Corrected Page-Proof Brief of Petitioner in Case No. 20-1521 (Apr. 22, 2021) |

## SUMMARY OF ARGUMENT

### I.

The Commission claims that 39 U.S.C. §3622(d)(3) "unambiguously" and "expressly" authorized it to replace the inflation-based price cap and other statutory requirements as part of its ten-year review. Commission Br. 27-29, 34. But it concedes that the provision does not "spell [this] out," *id.* at 34, and it inserts missing words while ignoring existing ones to support its erroneous interpretation. The Court cannot "add words to the law to produce what is thought to be a desirable result. That is Congress's province." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

The Commission claims that its power to adopt an "alternative system" "necessarily" allows it to jettison statutory requirements because §3622(d)(3) would otherwise be "superfluous." Commission Br. 31, 34. Nothing in the statute supports that radical result and the statute leaves much for the Commission to do, both initially and upon its ten-year review, even with the statutory requirements intact.

The Commission insists that §3622(d)(3) refers to a statutory "system established by the entirety of § 3622." Commission Br. 31. But there is no *statutory* system; the only "system" contemplated by the statute is the one created

by regulation—and it is the regulatory system, not the statutory requirements, that the Commission has the power to alter or replace.

The Commission's interpretation of the statute is not entitled to *Chevron* deference because it is unreasonable in light of the statute's text and history. *See Glob. Tel*Link v. F.C.C.*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

Finally, the Commission does not seriously contend with the Mailers' argument that any delegation should be narrowly interpreted so as to avoid constitutional infirmities. Absent a price cap that coheres Congress' policies, the Commission is left with statutory objectives that it concedes are in tension with one another, Commission Br. 42-43, and thus cannot reasonably be said to provide clear policy and boundaries. *See Gundy v. U.S.*, 139 S. Ct. 2116, 2129 (2019).

**II.**

The Commission's density adjustment is arbitrary and capricious because the Commission failed to assess the adjustment's effects on the very problem—volume decline—that the Commission was ostensibly solving, and it ignored record evidence showing that the adjustment would actually exacerbate the problem.

The Commission also ignored revenues in the density-adjustment formula, which is irrational when the goal of the entire enterprise is to account for

insufficient *revenues* to cover total costs. *See Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020) ("Order 5763") at 6 (J.A._____). Providing rate authority regardless of whether USPS revenues are increasing severs the rational connection between the problem and the solution.

In addition, the Commission's rules are arbitrary and capricious because they do not reasonably account for, let alone balance, the statutory objectives of maximizing incentives to reduce costs and maintaining stable and predictable rates. Having prices rise by amounts that double and triple past increases, based on annual modifications that are unknown until the USPS files its calculations and the Commission approves them, and that go into effect mere months later, will leave the USPS with little incentive to cut costs and will render rates anything but predictable and stable. So, the Commission falls back on USPS's "inherent incentive" "to exercise business judgment about what rates the market can bear." Commission Br. 53. But preventing USPS from pricing monopolistic products at what the market will bear is why Congress limited rates in the first place.

## ARGUMENT

## I. THE COMMISSION'S ARGUMENTS REWRITE THE STATUTE

### A. The Inflation-based Cap Is Obligatory for Any System.

The inflation-based cap is a "requirement[]" that the "system for regulating rates and classes for market-dominant products *shall* include" 39 U.S.C.

§3622(d)(1)(A) (emphasis added). The Commission claims that Congress "unambiguously" and "expressly" authorized it to replace the price cap, the other requirements, and everything else in the statute (apart from the objectives), as part of the ten-year-review process. Commission Br. 27-29, 34 (claiming that §3622(d)(3) allows it to replace the price cap); Order 5763 at 69 (regarding the right to ignore the workshare discount provisions of §3622(e)); *id.* at 361-62 (stating that the factors of §3622(c) are inoperative).[1] (J.A._____, _____-_____). But it does not base this argument on any explicit words in the statute; instead, it *infers* this authority from §3622(d)(3)'s grant of power to "make such modification or adopt such alternative system for regulating rates … as necessary to achieve the objectives."

In support, the Commission claims §3622(d)(3) "clearly refers to the entirety of the initial ratemaking system established by § 3622, of which the price-cap provision is a part. Accordingly, the price-cap requirement of § 3622(d)(1) is part of the 'system … established under' § 3622 that the Commission can modify or replace under § 3622(d)(3)." Commission Br. 30. This argument misreads the

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[1] Before this Court, the Commission appears to have abandoned its earlier position that §3622(c)'s "factors" are inapplicable to the new system (*see* Commission Br. 37), though it does not explain how that can be squared with its construction of the statute.

statute: the Act never references an "initial" system—there is only the system that exists at the time of the Commission's review. The system was not "established by §3622," but via Commission regulations. Moreover, while a price cap is undoubtedly part of the system §3622(d)(3) directs the Commission to review, the "price-cap requirement of §3622(d)(1)" is not. The price cap *requirement* is part of the statute, and the Commission has no authority to change the statute.

To claim otherwise, the Commission not only rewrites the statute, but then relies on adverbs to convince the Court that the statute "clearly," "unambiguously," and "necessarily" means what it has rewritten the statute to say. So the Commission claims that §3622(d)(3) "*unambiguously* empowers the Commission to alter or replace *any aspect* of the *initial* system," Commission Br. 24 (emphasis added); that §3622(d)(3) "*clearly* refers to the *entirety* of the *initial* ratemaking system established by § 3622, of which the price-cap provision is a part," *id.* at 24-25, 30; and that the "broad grant of authority *necessarily* includes authority to alter various components of the *initial* system." *Id.* at 34. But while the word "initial" appears in the Commission's brief a whopping fifty-seven times, that word does not appear in §3622 at all; and the words "entirely" or "any aspect" don't either. Section 3622(d)(1), which includes the price cap and other "requirements," does *not* say that these requirements are applicable to an "initial" system only; and

§3622(d)(3) does *not* say that the Commission can replace "any aspect" of that "initial" system or replace that system in its "entirety."

The reasonable inference is that Congress meant the opposite of what the Commission says, because Congress specified when the price cap could be disregarded (*see* 39 U.S.C. §3622(d)(1)(E) (authorizing Commission to disregard cap in exigent circumstances)) and said nothing to that effect in §3622(d)(3). So while USPS categorizes the exigency provision and the ten-year-review provision as "two different escape valves" that Congress wrote into the Act, USPS Br. 7-8, it cannot explain why Congress would have expressly authorized the Commission to allow above-inflation rates in one "escape valve" but not the other if it intended for the cap to be equally vulnerable in both situations.

The Commission responds to this point by saying that the exigency provision "simply … explain[s] how the cap interacts with other features of the initial ratemaking system," whereas §3622(d)(3) contains a "broad grant of authority" that "expressly allows the Commission to modify or replace the system established under § 3622—a system that includes but is not limited to the price cap—in its entirety." Commission Br. 34. Therefore, according to the Commission, there was no "need for Congress to spell out" that the Commission could modify or replace the price cap. *Id.* But if that power is not "spell[ed] out," then by definition it has not been "expressly" or "unambiguously" granted. The

Commission's argument thus boils down to the circular proposition that Congress did not need to spell out the power in §3622(d)(3) because the power was already there.

In addition to asking the Court to insert words that Congress eschewed, the Commission asks the Court to disregard the words that Congress *did* include. Congress expressly instructed the Commission to review the system "established *under* this section" which, Mailers noted, indicates that Congress limited the Commission's review and modification power to the regulations the Commission established *under* §3622 and not to the provisions of the statute itself. Mailer Br. 23. The Commission erroneously claims that there is no meaningful difference between the phrases "established under" and "established by." Commission Br. 32-33. But as this Court recently held, "[a]s we do with any words enacted by Congress, we must give effect to the preposition it chose." *Am. Lung Ass'n v. E.P.A.*, 985 F.3d 914, 950 (D.C. Cir. 2021) (citing *Telecomms. Res. & Action Ctr. v. F.C.C.*, 801 F.2d 501, 517-18 (D.C. Cir. 1986) (finding decisive Congress' use of the preposition "under" instead of "by"). Section 3622(a) unambiguously states that the Commission "shall by regulation establish (and may from time to time thereafter by regulation revise) a modern system."

In sum, there is nothing "unambiguous" about a statutory interpretation that "depends critically on words that are not there." *Id.* at 951. In this Court's own

words, "[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks [the Court] to add words to the law to produce what is thought to be a desirable result. That is Congress's province." *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2033.

### B. The Act's Structure Does Not Support the Commission's Interpretation.

The Commission asserts that the Act's structure "confirms" the conclusion that Congress authorized the Commission to replace statutory requirements such as the inflation-based cap. Commission Br. 28-29. The Commission points to perceived differences between §3622(a) and §3622(d)(3) to support this assertion, observing that the alternative-system language "speaks in substantially broader terms" that "allows the Commission to adopt an alternative system *entirely*." *Id.* (emphasis added). But again, §3622(d)(3) does not use the word "entirely" and the Court should reject the Commission's attempt to add it. *Am. Lung Ass'n*, 985 F.3d at 950 ("The EPA rewrites rather than reads the plain statutory text.").

Moreover, to say that the "alternative system" power of §3622(d)(3) is broader than the "revision" power of §3622(a) does not mean that the former power is as broad as the Commission contends. Mailers concede that §3622(d)(3) allows the Commission to either modify its regulations or to wholesale replace them, but that says nothing about whether the Commission can upend the statutory requirements. There is no basis to claim that the authority to adopt an alternative

system "necessarily" includes authority to disregard the price cap and other statutory requirements. *Cf.* Commission Br. 34.

Nor can the Commission say that "the mailers' interpretation would render § 3622(d)(3) superfluous." Commission Br. 31. Section 3622(d)(3) required the Commission to take a fresh look at its regulations, and to get the public's input, ten years later, even if it might not otherwise have chosen to do so.

Additionally, limiting the scope of the ten-year review to the regulatory regime, as opposed to the statutory requirements, leaves the Commission with plenty to do. In creating the ratemaking system under §3622(a), the Commission engaged in extensive rulemaking, culminating in the adoption of more than forty-five pages of regulations. All of those regulations were subject to modification or wholesale replacement under §3622(d)(3), without disturbing the inflation-based cap and other statutory requirements. Indeed, commenters recommended major regulatory changes that left §3622(d)(1)'s requirements intact. *See* NPPC *et al.* Reply Comments (Mar. 4, 2020) at 11 (recommending setting rules to encourage volume discounts, contract rates, and innovative pricing categories) (J.A._____); *see also* ANM *et al.* Comments (Mar. 1, 2018) at 19-20 n.6 (compiling changes to the regulatory system adopted by the Commission while preserving the price cap) (J.A._____-_____).

Thus, nothing in the Act's structure requires the Court to undertake the statutory rewrite that the Commission advances.

### C. The Term "System" Refers to the Regulatory System.

The Commission erroneously contends that "the implication of the mailers' argument is that the term 'system' has two different meanings within the same subsection of the same statute." Commission Br. 30. But Mailers' contention is that the word "system" consistently refers to the regulatory system established by the Commission. Mailer Br. 22-23. It is the Commission that gives the word two different meanings when it says that §3622(d)(3) refers to a statutory "system established by the entirety of § 3622" and a "regulatory system created by subsection 3622(a)." Commission Br. 31.

Section 3622 does not "establish" a ratemaking system, "initial" or otherwise. Rather, §3622(a) directed the Commission to establish "by regulation" a "system for regulating market-dominant products." Section 3622(b) states the objectives "such system" must be designed to achieve. Section 3622(c) recites the factors the Commission must consider when "establishing or revising such system." And §3622(d) specifies the required features "[t]he system for regulating market dominant products shall" include, using the precise language of §3622(a). The statute contains no reference to a system outside of the one established by the

Commission through rulemaking. There is simply no "system established by the entirety of § 3622," as the Commission claims. Commission Br. 31.

Absent a statutory "system," the Commission's argument crumbles. Section 3622(d)(3) reads naturally as requiring a review of the regulatory system followed by modifications to that regulatory system, or adoption of an alternative regulatory system. The statutory parameters of the system, including the price cap requirement, remain in place.

### D. The Commission's Interpretation Is Not Entitled to Deference.

The Commission's claim that it should be given deference because the history of §3622(d)(3) "makes clear that Congress intended to allow the Commission to retain, modify, or eliminate the price cap," Commission Br. 29, is refuted by that very history. Limiting the percentage changes in USPS rates was "of primary importance" to Congress, S. Rep. No. 108-318, at 10 (2004), which relied on the Commission's expertise as to *how* to develop the price cap, but not on *whether* to develop the cap. *Id.* at 8.

Accordingly, the Commission is not entitled to deference under *Chevron* because its construction of the statute cannot be squared with the statutory text or with the history of postal regulation. *See Glob. Tel*Link*, 866 F.3d at 418 (*Chevron* step two "can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched

interpretations, and usurp undelegated policymaking discretion") (Silberman, J., concurring); *Am. Lung Ass'n*, 985 F.3d at 944 ("deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress") (internal citations omitted).

### E. The Commission's Construction of the Statute Would Render the Statute Constitutionally Infirm.

The Commission argues that the canon of constitutional avoidance applies only when a statute is susceptible to more than one construction and that the Act permits only one construction that "plainly" permits the Commission to ignore the statute's requirements. Commission Br. 36-37. But as discussed above, what the statute "plainly" provides is that the price cap and other "requirements" are, indeed, requirements.

The Commission argues that even if the canon applies, the statute's objectives and factors provide sufficiently intelligible principles to guide the agency's discretion. Commission Br. 37.[2] But by excising the price cap and every other statutory requirement from the statute, which provide a cohesive framework implementing Congressional policy, the Commission is left with only the objectives, which the Commission itself states are in tension. Commission Br. 42-

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[2] The Commission's assertion that it must heed the factors in its ten-year review is contrary to what it said in Order 5763 below. *See* Order 5763 at 23-24; *see supra* n.1.

43. That leaves the Commission with neither a clear policy directive nor any boundaries on its authority. *Gundy*, 139 S. Ct. at 2129 (internal citations omitted). The statute should be interpreted to avoid this result.

## II. THE FINAL RULES ARE ARBITRARY AND CAPRICIOUS

Contrary to the Commission's framing, Mailers do not contend the rules are arbitrary and capricious merely because they "depart[] too radically from the initial system's price cap" or "disserve[] some of the … Act's objectives." Commission Br. 38. The rules are arbitrary because the Commission's reasoning contradicts itself and because its rules will exacerbate the very problems the Commission purports to solve. Rather than address these criticisms directly, the Commission falls back on the "complexity" of its task, claiming that it "reasonably balanced the competing interests of the Postal Service and its customers." Commission Br. 38-39. But "splitting the difference" is not the standard by which agency actions are evaluated. *See Schurz Commc'ns, Inc., v. F.C.C.,* 982 F.2d 1043, 1050 (7th Cir. 1992). The Commission's decisions must be based on the record and a rational response to the perceived problem.

### A. The Density Factor Is Arbitrary and Capricious.

The Commission observed that revenue reductions during the review period "were largely driven by volume declines." Order 5763 at 6 (J.A._____). But the Commission's solution to this problem—the "density adjustment"—is arbitrary

and capricious because: (1) the Commission failed to adequately consider that its adjustment will actually aggravate the problem of declining density; and (2) the adjustment fails to consider revenue, divorcing the rate authority granted from USPS's actual financial performance. The Commission's brief does not directly address these arguments, much less rebut them.

1. *The Commission unreasonably disregarded the certainty that the density factor will aggravate volume declines.*

The Commission claims that any volume declines caused by higher prices will be "ephemeral" because the demand for market-dominant products is not especially sensitive to changes in price, and "mailers' projections depend on the assumption that demand for market-dominant products is extremely elastic." Commission Br. 63; *cf.* Mailer Br. 40-46.

As it did below, the Commission either misunderstands or ignores Mailers' arguments. Mailers showed that the rate authority will induce further volume declines *even if* accepted price elasticities hold. Mailer Br. 41, 43; *see also* ANM *et al.* Comments (Feb. 3, 2020) at 29 (J.A._____) *and* accompanying Brattle Declaration at ¶¶ 47-53 (J.A._____-_____) (explaining the base case scenario projection "presumes that the Postal Service's current price elasticity estimates provide reliable predictions of how mail volumes will respond to the rate increases in the Commission's order"). Contrary to its claim on brief, *see* Commission Br. 65, the Commission ignored this evidence: when discussing comments on its

density-authority proposal, it did not even *mention* the economic analysis from Mailers' consultants. *See* Order 5763 at 79-99 (J.A._____-_____). Nor did the Commission develop its own projections of the volume decline its rules would induce. *See* ANM *et al.* Comments (Feb. 3, 2020) at 28-29 (J.A._____-_____); *see also Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 4258 (released Dec. 1, 2017) ("Order 4258") at 42-43 (projecting revenue impacts of above-inflation rate increases assuming that volumes would remain steady even while admitting that "recent volume trends and the effects of price elasticity" made that unlikely) (J.A._____-_____).

Thus, the Commission's claim that "[t]he mailers' disagreement with the Commission's economic analysis does not render the analysis arbitrary and capricious" misses the point. Commission Br. 64. The rule is arbitrary because the Commission failed to assess its effects on the very problem—volume decline—it was ostensibly solving, and it ignored record evidence showing that these effects would be negative. *See Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 241 (D.C. Cir. 2008) (finding action arbitrary where the agency "offered no reasoned explanation for its dismissal of empirical data that was submitted at its invitation"); *see also Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463

U.S. 29, 43 (1983) (finding action arbitrary and capricious because "the agency [had not] examine[d] the relevant data").

Furthermore, it was capricious for the Commission to assume that these historical elasticities would hold, given that they are based almost entirely on a period in which the price cap kept rates static in real terms. NPPC *et al.* Comments (Feb. 3, 2020) at 20 (J.A._____); Brattle Decl. at ¶ 42 (J.A._____-_____); Mailer Br. 41. A circumstance in which rates have remained unchanged cannot reasonably be relied upon to assess the effect on demand that will be caused by the substantial price increases authorized by the new rules. Mailers showed that higher price increases would affect volume more drastically than the inflation-capped increases had. Brattle Decl. at ¶¶ 42-46 (J.A._____-_____). But the Commission ignored this evidence and instead relied on its "experience" to conclude otherwise. Order 5763 at 82 (J.A._____). The Commission acted arbitrarily and capriciously when it ignored Mailers' showing that past experience has no predictive value on the volume declines that would result from the considerably higher rates authorized by the density factor. *See, e.g.*, *Am. Radio Relay League*, 524 F.3d at 241.

2. *It was arbitrary and capricious for the Commission to ignore revenues in setting the density-adjustment formula.*

The Commission calls "puzzling" the notion that a reasonable ratemaking system must account for USPS revenues. Commission Br. 66. But the Commission's rules are based on its finding that the system failed to enable the USPS to achieve medium- and long-term financial stability, "evidenced by total revenue being inadequate to cover total costs." Order 5763 at 8 (J.A._____). The relevant statutory objective requires the system to assure "adequate revenues," 39 U.S.C. §3622(b)(5), not to compensate the USPS for increases in per-unit costs. *Cf.* Commission Br. 66-67. It is "puzzling" to design a system that *does not* account for revenues. Because the density authority considers three inputs—costs, volumes, and delivery points—and ignores USPS revenues, it reflects a lack of any "rational connection between the facts found and the choice made." *Farmers Union Cent. Exch., Inc., v. F.E.R.C.*, 734 F.2d 1486, 1499 (D.C. Cir. 1983) (internal citations omitted).

The Commission argues that the Act's price-cap allowed USPS to raise rates without reference to profits or revenues and that the new system is thus no more irrational than the earlier one was. Commission Br. 66. But the price cap was tied to neither revenues nor costs, consistent with economic regulation theory. *See* Willig Decl. at ¶ 11 (explaining that prices in a price-cap system "do not rise with increases in the costs incurred by the firm") (J.A._____). The density authority, by

contrast, reflects cost-of-service principles that Congress expressly abandoned when enacting the Act, and grants the USPS additional pricing authority for declining volumes regardless of the USPS's financial condition.

The question Mailers raised is not whether *each piece* turns a profit. Rather, Mailers fault the Commission for failing to recognize that some categories of mail are more profitable than others, and USPS finances are impacted differently according to what type of volume is lost and what is grown or retained. Mailer Br. 35-36. Thus, the Commission's argument that rate authority tied "to a product's profitability could encourage [USPS] to make inefficient pricing decisions" misses the point. Commission Br. 67. Failing to consider the revenue of the mail remaining in the system means the density factor could wildly overcompensate USPS if the mail mix were to change.

In fact, this scenario played out during the pandemic. While market-dominant volume dropped significantly, competitive-product volume increased, allowing USPS to improve its year-over-year revenues and cash position. Mailer Br. 48. Despite these positive financial results, the density-adjustment formula provided rate authority far in excess of what the formula would have called for in prior years. The Commission defends its failure to update the record to correct for this flaw by ignoring the problem, pointing instead to how the formula was designed to account for the decline in mail density alone. Commission Br. 70. But

that is exactly the problem: the formula provides rate authority that is disproportionate to USPS's needs. Instead of relying on stale findings that were inconsistent with more recent data, the Commission should have chosen to refresh the record. *See Williams Nat. Gas Co. v. F.E.R.C.*, 872 F.2d 438, 449 (D.C. Cir. 1989).

Finally, the Commission argues that its approach takes into account the "relative profitability" of mail classes and products by requiring the Commission to calculate the density authority based on the density of both market-dominant and competitive products and limits the authority to "whichever figure produces less available rate authority." Commission Br. 68. But in both instances, the formula ignores revenue, so "profitability" is not actually being considered in either instance.

### B. The Commission Did Not Reasonably Consider, Let Alone Balance, the Statutory Objectives.

#### *1. The Commission disregarded the impact of the pricing adjustments on maximizing incentives to reduce costs and increase efficiency.*

In adopting its pricing adjustments, the Commission concluded that above-inflation authority "does not reduce [USPS's] incentives to increase efficiency and reduce costs." Order 5763 at 304 (J.A._____); Commission Br. 33. This conclusion is irrational: the ability to collect higher revenues necessarily eases the pressure to reduce costs. *See* Mailer Br. 30-34.

In response, the Commission argues that USPS has "retained the incentives to reduce costs" because the new rule still limits rates. Commission Br. 45-46. Below, the Commission similarly said that above-cap rate authority does not reduce USPS's incentive to increase efficiency and reduce costs because USPS will still "retain 100 percent of costs avoided through increased efficiency." Order 5763 at 304 (J.A._____). But that simply means that the above-cap rate authority does not reduce incentives to zero; it says nothing about whether the new system *weakens* those incentives, much less about whether it *maximizes* them. 39 U.S.C. §3622(b)(1).

If the earlier system did not maximize USPS incentives to reduce costs (*see* Order 5763 at 7-8 (J.A._____-_____)), then the new system will weaken them further still. The Commission has only obliquely addressed this criticism, arguing that because the inflation-based price cap did not allow USPS to cover its losses, it was forced to "defer[] capital investments," thereby diminishing efficiency. Commission Br. 44. But if that is the concern, one would expect the new rules to have required USPS to devote some of its additional revenue to efficiency-improving capital investments. They do not. And the rules direct USPS to transfer all funds collected via the retirement authority to the U.S. Treasury, so those sums would actually *not* be available for capital improvements. Order 5763 at 101

(J.A._____). The result is a rule that weakens the prime incentive for efficiency in the prior system and replaces it with nothing but hope that USPS will do better.

*2. The Commission failed to appreciate the pricing authority's impact on maintaining predictable and stable rates.*

The Commission claims its new system "maintains the predictable prices that are a feature of a price-capped system." Commission Br. 41. It insists that simply by maintaining a price cap—at any level—the new system achieves this objective. Commission Br. 53. This argument is facially unreasonable. The new system permits large class-wide price increases of over 5.5 percent, or in some cases over 7.5 percent, in the first year alone. The system provides for annual modifications that are unknown until USPS files its calculations and the Commission approves them and go into effect mere months later. This is anything but predictable and stable.

Moreover, the Commission had previously rejected a USPS proposal to increase rates on a one-time basis by 7.75% as undermining expectations of stable rates since predicting the impacts of such an unprecedented increase would be difficult. Order 4258 at 45 (J.A._____). But if that increase led to unstable rates, then the final rule surely does, too. Indeed, Order 5763 will lead to even greater instability because it allows for annual adjustments, rather than a one-time increase that would then settle into a more predictable framework. The failure to reconcile this differing treatment of the same facts—where "arguments that formerly

persuaded the Commission and that time has only strengthened are ignored"—is capricious. *Schurz*, 982 F.2d at 1050 (vacating agency order where "contradictions within and among Commission decisions are passed over in silence").

The rules are so unpredictable that even the Commission was unable to forecast the first density factor. In Order 5763, the Commission forecasted that the density factor would typically be around 1%. Order 5763 Appendix A, Table A-1 (J.A._____). However, less than two months later, USPS filed data showing that the density factor would actually be 4.500%. *See Determination of Available Market Dominant Rate Authority*, Docket No. ACR2020, Order No. 5861 (released Apr. 6, 2021) at 4, 6 (referencing and confirming USPS December 31, 2020 calculations of rate authority) (J.A._____-_____).

The Commission's only response is to claim that "the combination of the price cap and the Postal Service's inherent incentives will 'smooth out rate adjustments' and 'promote predictability and stability of rates overall.'" Commission Br. 53-54. But the Commission does not explain the mechanism for that result and cites no evidence to establish its truth.

The only "inherent incentive" that the Commission cites is the incentive "to exercise business judgment about what rates the market can bear." Commission Br. 53. But preventing USPS from pricing monopolistic products at what "the market will bear" is precisely why Congress directed the Commission to regulate

market-dominant rates. This Court has thus rightfully rejected the argument that "market forces" will constrain regulated rates. *Farmers Union Cent. Exch., Inc.*, 734 F.2d at 1530.

## CONCLUSION

The Commission's action is not in accordance with the plain language of the Act, and its rules are arbitrary and capricious. "Both the Supreme Court and the D.C. Circuit have held that vacatur is the presumptive remedy for this type of violation." *In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214, 238 (D.D.C. 2011) (additional citations omitted). Therefore, Mailers ask this Court to vacate the Commission's rules.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with Circuit Rule 32(e)(2) because it contains 4984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point Times New Roman.

/s/ *Matthew D. Field*
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Dated: July 19, 2021

## CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have, this 19th day of July 2021, served a copy of the foregoing document electronically through the Court's CM/ECF system on all registered counsel.

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