ORAL ARGUMENT NOT YET SCHEDULED

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

NATIONAL POSTAL POLICY COUNCIL, *et al.*, Petitioners, v. POSTAL REGULATORY COMMISSION, Respondent.	Case Nos. 17-1276, 20-1505, 20-1510, 20-1521

REPLY

In the Postal Accountability and Enhancement Act (the "Act"), Congress instructed the Postal Regulatory Commission (the "Commission") to establish regulations governing market-dominant rates. Congress identified requirements that this regulatory system must incorporate and instructed the Commission to review those regulations ten years after enactment. Movants do not dispute that the Commission can modify or adopt alternative *regulations* governing the rate system.

But Respondents go much farther. They claim Congress created a bifurcated rate system: an initial system to which the requirements applied, and a separate, post-ten-year review system to which they do not. But there is no "initial" system and there are no "initial" requirements. There are statutory requirements and there is a Commission-created system that is subject to review and modification. Congress

never wrote the requirements out of the Act, but Respondents seek to do so. For that reason alone, Movants are likely to prevail on the merits and a stay is warranted.

Respondents also characterize as speculative massive price increases that the Postmaster General himself admits are imminent. They claim on one hand that the Postal Service might not use its newfound rate authority while arguing on the other hand that a stay will harm the Postal Service by preventing it from using that same authority. Respondents also do not contest that the Postal Service has sufficient resources to operate, while Movants and the public generally would be unable to recoup price increases that are later declared unlawful. Under these circumstances, a temporary stay maintaining the *status quo* is in order.

I. The Commission has exceeded its statutory authority attempting to "fix" a problem that only Congress can address

This Motion principally turns on whether the price cap Congress established in §3622(d)(1) of the Act is a permanent requirement of the system for regulating the rates of market-dominant postal services or whether it can be disregarded after ten years. The former interpretation relies on the statute's straightforward text, Congress's longstanding role in this area, and constitutional considerations.

Respondents endorse the latter interpretation, necessarily rewriting the statute. Respondents argue, for example, that §3622(d)(1) sets forth requirements for an "initial" ratemaking system. *See* Commission Opp. at 10; Postal Service Opp. at 6.

Indeed, the Commission's Opposition and the Postal Service's Opposition use the word "initial" in this context twenty-four and twenty-five times, respectively.

But neither the word "initial," nor any analogous word, appears in §3622(d)(1). Instead, §3622(d)(1) specifies that its "[r]equirements" "shall" apply, without limitation, to "[t]he system for regulating rates and classes for market-dominant products," and §3622(d)(3) mandates a ten-year review without any indication that the statutory requirements would cease to apply.

Rather than create an "initial" system, Congress, in §3622(a), directed the Commission to adopt rules to regulate rates and, in §3622(d)(1), required that the system contain the price cap and certain other elements. In 2007, the Commission adopted regulations putting that system in place—the bulk of which consisted of elements adopted at the Commission's discretion while duly enshrining the statutory requirements. In §3622(a), Congress authorized the Commission to review and revise its regulatory system "from time to time"; and in §3622(d)(3), it required that the Commission undertake such a review ten years hence.

The Postal Service's claim that "[b]ecause the price cap was part of the initial system that Congress required the Commission to review, it follows that the price cap, like the other components of that system, was subject to potential modification or replacement under Section 3622(d)(3)," Postal Service Opp. at 7, is a *non sequitur*. Section 3622(d)(1) does not say that its requirements apply to an "initial"

system only. And the §3622(d)(3) directive to review the system after ten years does not render the §3622(d)(1) requirements any less mandatory.

The Commission claims the word "alternative" in §3622(d)(3) conveys authority to adopt a new system of its own devising. Commission Opp. at 10. But "alternative" simply means that the Commission could adopt a system different from the one it established earlier; it says nothing about repealing the statutory requirements. The Commission can adopt an alternative system that replaces every single rule it originally enacted. But that system must still have a CPI-limited price cap, per the statutory requirements. Likewise, any alternative system must account for the statutory factors of §3622(c) and comport with the workshare requirements of §3622(e).

The Commission, however, claims that "[a]s a textual matter, §3622(d)(3) refers to the 'system . . . established under this section'—that is, the system established by the entirety of §3622, and not merely the regulatory system created by subsection 3622(a)." Commission Opp. at 13. But the Commission misreads that passive clause. That clause refers to the system the *Commission* "established" "under" §3622(a)—which contained the Commission's complex procedural and substantive framework for regulating rates while duly including the requirements *Congress* imposed in §3622(d)(1). Under the Commission's argument, the *statute* "established" the system. But the statute does not "establish . . . a modern system"

for rate regulation at all; it directs the Commission to do so. Whenever Congress used the word "established" throughout the statute, it refers to *the Commission's* rulemaking work. *E.g.*, §3622(a)(1) (the "Commission shall . . . by regulation establish . . . .").

Similarly, the Postal Service asserts that §3622(d)(1) "*plainly* refers back to the system established under Section 3622(a)" and does not govern a system established under §3622(d)(3). Postal Service Opp. at 8 (emphasis added). But that is hardly "plain," as §3622(d)(1) does not reference §3622(a); and §3622(d)(1) appears in the same subsection as §3622(d)(3), rather than in §3622(a). The plain text of §3622(d)(1) is an unequivocal statement that "*the* system" must contain a CPI-based price cap. (emphasis added).

Respondents' reliance on legislative history is equally unavailing. Although both the Commission (at 15) and Postal Service (at 12) cite the same lone floor statement by Senator Collins, neither cites any cases allowing a single legislator's comment to trump statutory language or even to resolve a statutory ambiguity. The Postal Service's reliance on *Corley v. United States*, 556 U.S. 303 (2009), is inapt because in *Corley*, the sponsor's statements did not stand alone; they were corroborated by the statements of several other Senators and by other aspects of the statute's legislative history, which is not the case here. *Corley*'s use of the sponsor's statement was thus consistent with the general proposition that "courts may infer

legislative intent from a sponsor's statement . . . only where the statement is consistent with a statute's language and other legislative history." 2A Norman & Shambie Singer, *Sutherland Statutes and Statutory Construction* §48:15 (7th ed. 2014).

Respondents argue that Movants' interpretation of the statute renders the ten-year review process "superfluous." Commission Opp. at 13; Postal Service Opp. at 8. But the Commission retains substantial discretion, even with the price cap in place. The statute says nothing about how the price cap should be calculated, whether the revenues or volumes to which it applies should be determined on a forward-looking or retroactive basis, what impact changes in service standards or preparation requirements should have on the cap, or myriad other features of the system that could have a material impact on the system of regulation and the cap.

Per §3622(a), the Commission engaged in extensive rulemaking to address such issues, culminating in the adoption of more than forty-five pages of comprehensive regulations. *See* Order No. 43 (Oct. 29, 2007); *see also* Docket No. RM2007-1, *Regulations Establishing System of Ratemaking*, Order No. 15 (May 17, 2007) at 2-5 (requesting comments in consideration of alternative methods for calculating CPI cap limitation and annual rate changes); Order Nos. 26 and 27, 72 Fed. Reg. 50744 (Sept. 4, 2007) (further discussion of alternatives); Order No. 43 (Oct. 29, 2007) (further discussion of alternatives and adoption of final rules).

Since then, the Commission has made numerous other changes to the regulatory system—all while maintaining the CPI cap. *See, e.g.*, Order No. 303, Docket No. RM2009-8, *Amendment to the System of Ratemaking Regulations* (Sept. 22, 2009); Order No. 1786, Docket No. RM2013-2, *Review of Commission's Price Cap Rules* (July 23, 2013); Order No. 2086, Docket No. RM2014-3, *Calculation of Percentage Change in Rates for Price Cap Purposes* (June 3, 2014); Order No. 4393, Docket No. RM2016-6, *Rule on Motions Concerning Mail Preparation Changes* (Jan. 25, 2018).

Similarly, in the proceedings below, parties recommended numerous major regulatory changes to improve the Postal Service's ability to address contemporary circumstances, all consistent with the §3622(d)(1) requirements and readily characterizable as "modified" or "alternative." *See, e.g.*, *NPPC et al.* Reply Comments at 11 (Mar. 4, 2020) (recommending setting rules to encourage volume discounts, contract rates, and innovative pricing categories). Thus, the ten-year review was far from superfluous even with the statutory requirements remaining in place.

By imposing requirements in §3622(d)(1), Congress intentionally limited the Commission's discretion, which comports not only with Congress's longstanding preeminent role in postal policy but also with constitutional requirements. *See* Movants' Mot. for Stay at 13-16. Respondents say little about those constitutional

requirements other than to claim that the statutory "objectives" and "factors" provide the requisite "intelligible principle" to guide the Commission's discretion. Commission Opp. at 16-17 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)); Postal Service Opp. at 16-17 (same).[1] And both Respondents ignore that the "intelligible principle" must be one to which the agency must be "directed to conform." *Whitman*, 531 U.S. at 472. The objectives here provide no directive to which the Commission must conform; instead, they are open-ended and oft-conflicting "general aims" that reflect no bottom-line requirements. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541, 543 (1935).

In the Act, Congress set as national policy that the Postal Service is to meet revenue needs and retirement prefunding obligations by cutting costs and acting like an efficient business. The price cap serves this purpose.[2] If Respondents believe that purpose has been frustrated since the Act's enactment, that frustration does not

---

[1] The Commission's assertion that "(d)(3) does not set forth the factors as policy goals to be achieved," (Order No. 5763 at 361-62), undermines this claim. *See also id.* at 69 ("[S]ubsection (e), like the other parts of section 3622, is part of the system subject to review and potential modification or replacement under paragraph (d)(3)"). The Postal Service argues the Commission has not "ignore[d]" subsections (c) or (e), Postal Service Opp. at 14, but this is semantic sophistry; the Commission acknowledged the subsections and then rendered them toothless.

[2] *See* Docket No. R2013-11, *Order Granting Exigent Price Increase*, Order No. 1926 (Dec. 24, 2013) at 175 ("Under the PAEA, the price cap was to operate in situations in which postal volumes were rising, as well as situations in which postal volumes were declining. . . . [T]he Postal Service is expected to respond to the declining volumes by reducing costs and improving efficiencies.").

empower the Commission to rewrite the existing statute to "fix" a problem that only Congress has the power to rectify.[3]

II. The Other Factors Likewise Support a Stay

Movants are entitled to a stay whether or not they are likely to succeed on the merits given that, at a minimum, this appeal presents a serious legal question. "An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public, and when denial of the order would inflict irreparable injury on the movant." *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 565 F. Supp. 2d 23, 29 (D.D.C. 2008) (citation omitted). "There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." *Id.* Here, the remaining factors support a stay and the Court should decline the Postal Service's invitation to ignore them. *Cf.* Postal Service Opp. at 5.

The balance of harms strongly favors a stay. For captive customers of the Postal Service's monopoly products, the injury from the authorized above-inflation price increases is substantial (equating to a $2.3 *billion* annual surcharge on mailers)

[3] Order No. 4257 is similarly flawed, finding the current system has failed despite recognizing that the Postal Service's financial difficulties result primarily from the Congressionally mandated prefunding requirements in 5 U.S.C. §8909a(d). Petitioners will demonstrate on brief that the Commission's finding was arbitrary and that the final rules will not resolve the problems the Commission identified.

and irreparable (it cannot, by law, be refunded even if Movants were to prevail in their appeal).

That harm is also certain to occur. Respondents note that the Commission's final rules do not by themselves increase prices above inflation but, rather, authorize the Postal Service to do so. Movants have not suggested otherwise. But that hardly renders the price increases "hypothetical" (Commission Opp. at 17) or "sheer supposition" (Postal Service Opp. at 18). The Postal Service has sought above-inflation pricing power for over a decade, has indicated that it intends to utilize the new rate authority given it, and the Postmaster General himself confirmed on January 26, 2021, that this "new pricing authority [is] an important part of the solution we *will* be proposing" and that the next rate increase is "imminent." *See* MTAC Virtual Open Session (Jan. 26, 2021), *available at* https://PostalService.zoomgov.com/rec/share/3JY2Lpv8x3FOAc_r5X7UBL9_OabEeaa81SgarvQNmLB4buzoNTa2jl_ SRt3kkzs.

These price increases are not a "mere prospect," (Postal Service Opp. at 19), but a certainty, and Respondents' characterization of their impact on Movants as speculative ignores large swaths of the agency record. *See generally* ANM *et al.* Comments at 28-39 (Feb. 3, 2020).

Neither Respondent has shown that a stay would harm the Postal Service. The Postal Service misleadingly blames the price cap for its "staggering debt" and

"harms to the American public's confidence in and financial stability of its postal system" and expresses alarm that it may "forever lose the accrual of the first year of pricing authority." Postal Service Opp. at 20. Yet the Postal Service's cash holdings, cash flow, and access to liquidity are undeniably far stronger than when the ten-year review began. On the same day that the Commission and the Postal Service filed their oppositions, the Postal Service reported to the Commission that its first quarter FY2021 revenues increased by more than $2 billion over the same period in FY2020, and that it earned more than $318 million profit during the recent quarter. *See* U.S. Postal Service, FY2021 Form 10-Q at 3, *available at* https://about.usps.com/what/financials/financial-conditions-results-reports/fy2021-q1.pdf. The "staggering debt" is almost completely a function of missed prefunding payments, for which the Postal Service has suffered no consequences other than to its balance sheet. *See* ANM *et al.* Comments at 24 (Feb. 3, 2020).

As for the public's confidence, the Postal Service just last year boasted that "Americans' opinion of [it] remains highly positive," after a Pew Research Survey showed that 91 percent of respondents reported a favorable view of the Postal Service. *See* "U.S. Postal Service Tops List Again as Americans' Favorite Government Agency" (Apr. 15, 2020).

For these reasons, the public interest favors a stay. Absent a stay, price increases on businesses, and on the magazines, greeting cards, catalogs, newsletters, and charitable appeals enjoyed by hundreds of millions of Americans are imminent.

Conclusion

The Court should issue a stay maintaining the *status quo* until the merits of this appeal can be addressed. Furthermore, as neither Respondent opposes expedition (*see* Commission Opp. at 20; Postal Service Opp. at 1 n.1), Movants also request that the Court adopt an expedited briefing and oral-argument schedule for this appeal.

[*signatures on next page*]

DATED: February 16, 2021

Respectfully submitted,

/s/ Eric S. Berman

Eric S. Berman
Matthew D. Field
Ian D. Volner
Elizabeth C. Rinehart
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 344-4661 (Berman)
(202) 344-8281 (Field)
esberman@venable.com
mfield@venable.com
idvolner@venable.com
lcrinehart@venable.com

Attorneys for Petitioners Alliance of Nonprofit Mailers, Association for Postal Commerce, MPA - The Association of Magazine Media, and American Catalog Mailers Association

William B. Baker
Ayesha N. Khan
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W., Suite 700
Washington, D.C. 20004
(571) 317-1922
wbaker@potomaclaw.com

Attorneys for Petitioners National Postal Policy Council and Major Mailers Association

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,577 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Eric S. Berman
Eric S. Berman
Attorney for Petitioners Alliance of Nonprofit Mailers, Association for Postal Commerce, MPA - The Association of Magazine Media, and American Catalog Mailers Association

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, a true and accurate copy of the foregoing Reply was filed electronically with the Clerk of Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Eric S. Berman
Eric S. Berman