[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

NATIONAL POSTAL POLICY COUNCIL *Petitioner,* v. POSTAL REGULATORY COMMISSION, *Respondent.*	Case No. 17-1276
NATIONAL POSTAL POLICY COUNCIL AND MAJOR MAILERS ASSOCIATION, *Petitioners,* v. POSTAL REGULATORY COMMISSION, *Respondent.*	Case No. 20-1505
ALLIANCE OF NONPROFIT MAILERS, et al., *Petitioners,* v. POSTAL REGULATORY COMMISSION, *Respondent.*	Case No. 20-1510
UNITED STATES POSTAL SERVICE, *Petitioner,* v. POSTAL REGULATORY COMMISSION, *Respondent.*	Case No. 20-1521

THE UNITED STATES POSTAL SERVICE'S RESPONSE IN OPPOSITION TO A STAY PENDING JUDICIAL REVIEW AND EXPEDITIOUS CONSIDERATION

Pursuant to Federal Rules of Appellate Procedure 18 and 27 and D.C. Circuit Rules 18 and 27, the United States Postal Service respectfully opposes the motion for a stay filed by Petitioners Alliance of Nonprofit Mailers, American Catalog Mailers Association, Association for Postal Commerce, MPA – The Association of Magazine Media, Major Mailers Association, and National Postal Policy Council (collectively "the Mailers"). The Mailers seek to stay final rules of the Postal Regulatory Commission ("Commission") while their petitions for review are pending in this Court. Because the Mailers have not met their burden of establishing the four criteria required for a stay, this Court should deny their motion.[1]

BACKGROUND

A. The Postal Accountability and Enhancement Act

Enacted in November 2006, the Postal Accountability and Enhancement Act of 2006 ("the Act") required the Commission to establish (within 18 months after the Act's enactment) "a modern system for regulating rates and classes for market-dominant products," and authorized the Commission to "revise" that system "from time to time thereafter." 39 U.S.C. § 3622(a). The Act further provided that the system shall be designed to achieve nine discrete statutory "objectives" set forth in

[1] In the event the Court denies the Mailers' motion for a stay, the Mailers also request that the Court expedite a decision on the merits. Motion at 21-22. Although the Postal Service does not believe that the Mailers' motion satisfies the standards for expedited consideration, the Postal Service does not oppose that aspect of the Mailers' request.

39 U.S.C. § 3622(b), and also that the Commission, in establishing or revising such system, shall "take into account" 14 specified "factors." *Id.* § 3622(c). The Act required the "system" to include certain features, including a price cap based on the Consumer Price Index (CPI), *id.* § 3622(d)(1)(A), (D), as well as procedures that would allow prices to rise above the price cap "due to extraordinary or exceptional circumstances." *Id.* § 3622(d)(1)(E).

But the Act did not require that this "system" remain in place forever. To the contrary, Section 3622(d)(3) of the Act directed the Commission, "[t]en years after the date of enactment of the . . . Act and as appropriate thereafter," to "review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c)." *Id.* § 3622(d)(3). If the Commission determined in these review proceedings "that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c)," the Act specifically authorized the Commission to "make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." *Id.* The petitions before this Court arise from the "ten-year review" proceedings under Section 3622(d)(3).

B. Proceedings Under 39 U.S.C. § 3622(d)(3)

The Commission initiated ten-year review proceedings in December 2016. On December 1, 2017, the Commission issued Order No. 4257, *Order on the Findings and Determination of the 39 U.S.C. 3622 Review*, PRC Docket No. RM2017-3, in which it found that the initial rate-regulation system had failed to achieve the objectives in 39 U.S.C. § 3622(b), taking into account the factors in Section 3622(c). In particular, the Commission concluded that the initial system had failed to "assure adequate revenues, including retained earnings, to maintain financial stability," *id.* § 3622(b)(5), or to maintain "reasonable" (*i.e.*, compensatory) rates, *id.* § 3622(b)(8). *See* Order No. 4257 at 165-78, 229-36, 274.

Having concluded that the rate-regulation system had failed to achieve certain objectives, the Commission then considered whether, and the extent to which, changes to the system were necessary to achieve the statute's objectives. On November 30, 2020, the Commission issued Order No. 5763, *Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, PRC Docket No. RM2017-3, which made several changes to the system, including by providing the Postal Service with additional pricing flexibility to address certain drivers of the Postal Service's large annual net losses that the Commission found were largely outside the Postal Service's control. Order No. 5763 at 23.

The proceedings have given rise to four petitions for review in this Court – three by the Mailers,[2] which allege that the Commission's revisions to the rate-regulation system were unwarranted and unjustified, and one by the Postal Service,[3] which contends that the revisions were inadequate to remedy the initial system's failures. This Court has consolidated the four petitions.

On January 27, 2021, the Mailers filed the instant motion for a stay. The Mailers had previously filed a motion for a stay with the Commission, which the Commission denied on January 19, 2021.

STANDARD OF REVIEW

A stay is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985), that is an "intrusion into the ordinary processes of administration and judicial review," *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is "not a matter of right," but rather "an exercise of judicial discretion." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926) (citation omitted). As the party seeking the stay,

[2] *National Postal Policy Council v. Postal Regulatory Comm'n* (D.C. Cir. No. 17-1276) (filed Dec. 29, 2017); *Nat'l Postal Policy Council, et al. v. Postal Regulatory Comm'n* (D.C. Cir. No. 20-1505) (filed Dec. 18, 2020); and *Alliance of Nonprofit Mailers, et al. v. Postal Regulatory Comm'n* (D.C. Cir. No. 20-1510) (filed Dec. 18, 2020).

[3] *U.S. Postal Serv. v. Postal Regulatory Comm'n* (D.C. Cir. No. 20-1521) (filed on December 29, 2020).

the Mailers "bear[] the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

This Court considers four factors when deciding whether to grant a stay: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *See Nken*, 556 U.S. at 426; *Virginia Petroleum Jobbers*, 259 F.2d at 925; D.C. Cir. R. 18(a). This Court has treated the first factor as "a key issue – often the dispositive one," *Greater New Orleans Fair Hous. Action Ctr. v. HUD*, 639 F.3d 1078, 1083 (D.C. Cir. 2011), the "most important factor," *Aamer v. Obama*, 742 F.3d 1023, 1028 (D.C. Cir. 2014), and a "foundational requirement," *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019). Accordingly, this Court has declined to consider the remaining three factors if a party cannot demonstrate a likelihood of success. *See id.*

ARGUMENT

I. The Mailers Are Unlikely to Succeed on the Merits of the Statutory and Constitutional Arguments Their Motion Advances

The Mailers' motion makes two merits arguments: that the Commission misconstrued Section 3622(d)(3) as empowering it to modify or replace the initial system's price cap if necessary to achieve the objectives set forth in Section 3622(b); and that, even if the Commission permissibly interpreted the statute, such

interpretation should be disregarded in order to avoid constitutional issues. As discussed below, both arguments should fail.

A. The Commission Correctly Concluded that 39 U.S.C. § 3622(d)(3) Authorizes Modification or Replacement of the Initial CPI-Based Price Cap

The question before this Court is whether the CPI-based price cap in 39 U.S.C. § 3622(d)(1) is a permanent fixture of any rate-regulation system that the Commission may design, or whether instead the Commission could modify or replace it under Section 3622(d)(3) if necessary to achieve the objectives in Section 3622(b). As explained below, the Commission correctly adopted the latter interpretation.

1. All parties agree that the CPI-based price cap was a mandatory component of the initial "system" that the Commission was required under Section 3622(a) to establish upon the Act's enactment. *See* 39 U.S.C. § 3622(a) (requiring the Commission to establish a "modern system for regulating rates and classes for market-dominant products" within 18 months after the Act's enactment); *id.* § 3622(d)(1)(A) ("The system for regulating rates and classes for market-dominant products shall" include, among other things, a CPI-based price cap). As a required feature of that initial system established under Section 3622(a), the price cap was necessarily part of that system; indeed, no one disputes that the price cap was the centerpiece of the initial system that Section 3622(a) required the Commission to

establish. Accordingly, even though the Commission was given the power to "revise" the initial system "from time to time," it was not authorized to alter or replace the price cap during the initial ten-year period, even if the Commission believed that the cap was preventing the system from achieving the objectives in Section 3622(b).

But the same Act that required the Commission to establish an initial system with a CPI-based price cap also required the Commission, ten years after the Act's enactment, to review that system to determine whether it was meeting the nine objectives in Section 3622(b), taking into account the 14 factors in Section 3622(c). 39 U.S.C. § 3622(d)(3). And, if the Commission concluded in this ten-year review that the initial "system" was not achieving the objectives, it was broadly empowered and expressly authorized to "modif[y]" that "system" or adopt an "alternative system" as necessary to achieve the statutory objectives. *Id.* Because 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).

The Mailers' position, however, is that the CPI-based price cap is permanent and cannot be modified under Section 3622(d)(3). They contend that "[t]he system" subject to a strict CPI-based price cap under Section 3622(d)(1) should be read as referring not to the initial system established under Section 3622(a), but to "*any*

system" of rate regulation, including a system adopted under Section 3622(d)(3). *See* Motion at 8 (Section 3622(d)(1) imposes the price-cap "requirement on '*[t]he* system'—as in *any* system").

But that is not what the statute says. Section 3622(d)(1) does not say "any system," but plainly refers back to the system established under Section 3622(a). And Section 3622(d)(3) does not exclude the price cap from the scope of the Commission's mandatory review of that system, does not limit the scope of modifications or type of alternative system the Commission may adopt "as necessary to achieve the objectives," and does not defer to Section 3622(d)(1) or suggest that the modified or alternative system must retain the price cap. Instead, Section 3622(d)(3) requires the Commission to review the entire existing system (which includes the price cap) and, if the Commission determines that the initial ratemaking system has not satisfied the statute's objectives (taking into account the statute's factors), makes *all* features of the initial ratemaking system, *including* the price cap, subject to revision or replacement to the extent necessary to achieve the objectives.

Reading Section 3622(d)(3) as implicitly requiring strict maintenance of a CPI-based price cap would relegate the ten-year review to nothing more than a mandatory checkpoint that confers no more substantive authority to revise the system than that already conferred by Section 3622(a). Such a reading would be particularly nonsensical under circumstances, as here, where the Commission

concludes during its mandatory review that the CPI-based price cap is the principal reason why the initial regulatory system failed to achieve the objectives of Section 3622(b), and that altering or replacing the price cap is necessary to achieve those objectives. Under the Mailers' logic, the Commission might recognize such a problem under Section 3622(d)(3) but would be powerless to fix it. Yet the fact that Congress expressly authorized the establishment of a wholly "alternative system," beyond mere revisions to the initial system, shows that Congress intended to authorize more fundamental changes than the Mailers posit here.

An "alternative" to a system that requires prices to be capped at CPI is a system that does *not* contain such a requirement. If the Commission's power to adopt an "alternative system" remained constrained by the rigid CPI-based price cap and other requirements of Section 3622(d)(1), then that power would not be materially different from the power to "revise" or "modif[y]" the system, and the distinction between "modification" and "alternative system" in Section 3622(d)(3) would be surplusage.

The Mailers largely ignore Section 3622(d)(3)'s broad authorization of an "alternative system," instead arguing that Congress would have mentioned the price cap had it intended to authorize the Commission to alter or remove it under Section 3622(d)(3). In support of that argument, the Mailers contrast Section 3622(d)(3) with two other sections, 3622(d)(1)(E) and 3622(d)(2)(C), that make express

reference to the price cap. Motion at 9-10. This purported contrast fails to account for the provisions' markedly different functions. The latter two provisions mention the price cap because they involve ratemaking limitations during the initial ten-year period when the price cap was statutorily mandated: Section 3622(d)(1)(E) is a safety valve that allows rate increases above the CPI-only price cap in exceptional circumstances, and Section 3622(d)(2)(C) limits the extent to which the Postal Service can exceed the cap by applying unused (and "banked") pricing authority from previous years. By contrast, Section 3622(d)(3) delegates broader authority to the Commission to replace the entire ratemaking system (including not only the price cap, but also the safety valve and the restriction on banked pricing authority) following the initial ten-year period. *See Ass'n of Oil Pipe Lines v. FERC*, 281 F.3d 239, 244 (D.C. Cir. 2002) (distinguishing a safety valve from the prospect of "systemic errors" in the default price cap). It is thus not surprising that Section 3622(d)(3), unlike the other two provisions, does not mention the price cap.

2. Even if the language of Section 3622(d)(3) were capable of being read in the manner advanced by the Mailers (and we dispute such capability, particularly when the text is considered in context), the statute's legislative history makes Congress's intent plain. Section 3622(d)(3) was part of a compromise between two postal-reform bills passed by the House and Senate, respectively, in the 109th Congress. The House bill would have given the Commission the discretion to design

whatever type of regulatory system the Commission deemed appropriate to achieve specified statutory objectives, and an ostensible CPI-based limitation could be waived whenever the Commission determined reasonable, equitable, and necessary. *See* H.R. 22, 109th Cong. § 201(a) (2005); *see also* H.R. Rep. No. 109-66, pt. 1, at 48 (2005) (noting that the purpose of giving the Commission this authority was to ensure that the regulatory system could "respond to changes in mail volume, technologies, and other factors"). By contrast, the Senate bill, S. 662, would have required the imposition of a permanent CPI-based price cap that could be exceeded in only limited circumstances. S. 662, 109th Cong. § 201 (2005) (as substituted by the Senate in an engrossed amendment to H.R. 22, 109th Cong. § 201 (2006)).

Ultimately, the House and Senate sponsors of the respective bills agreed to a compromise bill, which was introduced as H.R. 6407 at the end of the 109th Congress and enacted into law as the Act. The Act adopted the Senate language regarding Section 3622, but added Section 3622(d)(3). Although there were no committee hearings or committee report on H.R. 6407, the Act's primary Senate sponsor, Senator Susan Collins, provided an authoritative explanation of the addition of Section 3622(d)(3) upon introducing the compromise bill:

> The compromise legislation before the Senate replaces the current lengthy and litigious rate-setting process with a rate cap-based structure for products such as first class mail, periodicals, and library mail. For 10 years, the price changes for market-dominant products like these will be subject to a 45-day prior review period by the Postal Regulatory Commission. The Postal Service will have much more

> flexibility, but the rates will be capped at the CPI. That is an important element of providing 10 years of predictable, affordable rates, which will help every customer of the Postal Service plan.
>
> After 10 years, the Postal Regulatory Commission will review the rate cap and, if necessary, and following a notice and comment period, the Commission will be authorized to modify or adopt an alternative system.
>
> While this bill provides for a decade of rate stability, I continue to believe that the preferable approach was the permanent flexible rate cap that was included in the Senate-passed version of this legislation. But, on balance, this bill is simply too important, and that is why we have reached this compromise to allow it to pass. We at least will see a decade of rate stability, and I believe the Postal Rate Commission, at the end of that decade, may well decide that it is best to continue with a CPI rate cap in place. It is also, obviously, possible for Congress to act to reimpose the rate cap after it expires. But this legislation is simply too vital to our economy to pass on a decade of stability.

152 Cong. Rec. S11,675 (daily ed. Dec. 8, 2006) (statement of Sen. Collins). As it comes from a primary sponsor of the Act, this statement "carries considerable weight." *See Corley v U.S.*, 556 U.S. 303, 318 (2009). This is particularly true here, for two reasons. First, the statement is the sole pre-enactment explanation of the intent of Section 3622(d)(3)'s congressional framers. Second, it cannot be downplayed as a self-serving effort to advance a preferred view of the statute. As Senator Collins noted, she would have preferred the Senate approach of mandating a permanent CPI price cap, but the Act instead gave the Commission the authority under Section 3622(d)(3) to "review the rate cap" and to "modify or adopt an alternative system." 152 Cong. Rec. S11,675. She also noted that, ultimately, the

question of whether to "continue with a CPI rate cap in place," or to set forth a modified or alternative system, is for the Commission to determine. *Id.*

This legislative history affirms the Congressional purpose that is also plainly evident in Section 3622(d)(3)'s text. For a ten-year period, the "system" regulating rates for market-dominant products was required to include a CPI-based price cap as an interim measure. Thereafter, the Commission was required to determine whether the system was actually achieving the objectives that Congress intended it to achieve. If the Commission made the threshold determination that the current system was not achieving the objectives (taking into account the factors), the Commission was empowered to design a system that would achieve the objectives, and was free to modify or abandon the price cap as it deemed necessary to that task.

3. The Mailers' remaining arguments do not come close to overcoming these clear expressions of Congressional intent. The Mailers maintain that it is simply implausible that Congress would cede the design of the rate-regulation system to the Commission. Motion at 13. But there is nothing unusual about Congress's decision. Section 3622(d)(3) fits within a history of Congressional delegations of decision-making authority concerning postal ratemaking. And other regulatory agencies, like the Federal Communications Commission ("FCC") and the

Federal Energy Regulatory Commission ("FERC"), have operated under similarly broad, if not broader, authority.[4]

Nor did the Commission's interpretation of Section 3622(d)(3) run afoul of this Court's decision in *Carlson v. Postal Regulatory Commission*, 938 F.3d 337 (D.C. Cir. 2019). Motion at 11. *Carlson* had nothing to do with the permanence of the price cap or the scope of Section 3622(d)(3). Instead, that case concerned whether the initial "system" established under Section 3622(a) required the Commission to determine whether individual rate adjustments comported with the objectives in subsection (b), taking into account the factors in subsection (c).

Finally, in revising the system under Section 3622(d)(3)**,** the Commission did not claim the power to "ignore" other provisions of Section 3622, such as the factors in subsection (c) and the workshare ceiling and exceptions in subsection (e). Motion at 10-11. The Commission accounted for subsection (c)'s factors (which is all that Section 3622(d)(3) requires) in its interpretation and application of the objectives,

[4] *E.g.*, 16 U.S.C. §§ 824d(a)-(b), 824e(a) (requiring rates and charges of FERC-regulated utilities to be "just and reasonable" and not unduly discriminatory or preferential, and authorizing FERC to determine and fix such rates); 47 U.S.C. § 201(b) (requiring charges for and classes of FCC-regulated communications services to be "just and reasonable," and allowing FCC to "prescribe such rules and regulations as may be necessary in the public interest"); *id.* at § 205(a) (authorizing FCC "to determine and prescribe" "just and reasonable charge[s]"); *id.* § 543(b)(1), (2)(C) (requiring FCC to ensure that basic cable service rates are "reasonable" and that rates not exceed what they would be if there were effective competition, and setting forth seven factors for FCC to "take into account").

see generally Order No. 4257 at 18-21, 48-52, 157-58, 255-57, 274-75, and the revised system that the Commission adopted preserves subsection (e)'s ceiling and exceptions. *Compare* 39 U.S.C. § 3622(e) *with* Order No. 5763 at 200, 224 & att. at 51-58. Whatever the Mailers' specific concern may be regarding the Commission's treatment of subsections (c) and (e), they fail to articulate it, let alone carry their burden of persuasion.

In short, the Commission correctly interpreted the scope of Section 3622(d)(3), and did not exceed the authority that Congress delegated to it in determining that modifications to the price cap were necessary to achieve the objectives of Section 3622(b).

B. Section 3622(d)(3) Does Not Raise Constitutional Concerns

The Mailers' alternative argument, that interpreting Section 3622(d)(3) in accordance with Congress's intent places the Act in constitutional jeopardy, is baseless and does not support reading Section 3622(d)(3) in the atextual manner that the Mailers urge. There is nothing constitutionally suspect about Congress allowing the Commission to modify or replace the initial rate-regulation system in furtherance of express statutory objectives, just as it assigned the role to the Commission to establish the rate-regulation system for the initial 10-year period pursuant to specified parameters.

The Mailers' Presentment Clause argument appears to be that, by allowing the Commission to establish a rate-regulation system under Section 3622(d)(3) that would permit above-CPI price increases, Congress somehow impermissibly authorized the Commission to effectively repeal portions of the Act and to substitute its policy choices for those of Congress. Motion at 14-15. This argument founders on the incorrect premise that Congress established the CPI price cap as a permanent fixture of postal rate regulation and that its alteration would thus be tantamount to its "repeal." As discussed above, the Commission has not unconstitutionally rewritten the statute, but instead is effectuating Congress's clear intent. The Mailers do not claim that it would have been unconstitutional for Congress to permit the Commission to select a different rate-regulation system from the outset, as the House bill would have done. It is unclear why it would be any less constitutional that Congress provided for the Commission to do so after ten years.

The Mailers' reliance on the nondelegation doctrine, Motion at 15, fares no better. The nondelegation doctrine does not prevent Congress from legislating in broad terms or leaving a degree of discretion to an Executive Branch actor, so long as Congress sets forth an "intelligible principle" to which the actor must conform. *E.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Here, the statute certainly contains an intelligible principle – it allows the Commission to replace the initial system (1) only after first determining that the initial system had failed to

achieve nine specified statutory objectives, taking into consideration 14 additional statutory factors, and (2) only to the extent necessary to achieve the nine statutory objectives. Each of those objectives and factors states a specific public-policy interest – including, among other things, high-quality service standards, predictability and stability in rates, pricing flexibility, revenue sufficiency, and simplicity of rate structure. Those detailed standards demonstrate that Section 3622(d)(3) does not come close to approaching the outer bounds of delegation standards that the Supreme Court has upheld – virtually without fail – as constitutional. *E.g.*, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600-02 (1944) (upholding Federal Power Commission's selection of a rate formula under a statute requiring only that rates be "just and reasonable"); *see also Whitman*, 531 U.S. at 474-75 (citing cases upholding broad legislative standards for regulatory authority, including where the relevant standards were merely that prices or regulations be "in the public interest" or "generally fair and equitable," and further noting that the Court has only twice ever found a statute to lack "the requisite 'intelligible principle'").

II. The Mailers Have Not Carried Their Burden As to the Remaining Factors

Because the Mailers' motion has failed to demonstrate a likelihood of success and thereby satisfy the "most important" and "foundational" factor, this Court should

deny extraordinary relief on that basis alone. In any event, the Mailers have failed to carry their burden as to the remaining factors as well.

A. The Mailers Will Not Suffer Irreparable Harm Absent a Stay

The Mailers have not shown that they will suffer irreparable harm unless a stay is granted. The Mailers seek to stay implementation of the Commission's rules. *See* Motion at 1 (requesting "that this Court stay the implementation of [the Commission's] final rules . . . that enlarge the [Postal Service's] ratemaking authority"). But they do not claim to be harmed, let alone irreparably, by the rules themselves, which simply modify the regulatory system in which the Postal Service can change prices for its market-dominant products. Instead, the harm the Mailers identify – price increases – is contingent on events that have not yet transpired and some that may not transpire. First, the Commission must determine the pricing authority available to the Postal Service. Then, the Postal Service Governors must decide whether, when, and the extent to which to raise prices pursuant to that authority. Even then, further Commission proceedings are required before any such price increases can take effect. Accordingly, the Mailers' claim is based on sheer supposition and does not provide a basis for suspending the Commission's rules. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (movants must "substantiate the claim that irreparable injury is 'likely' to occur" and "provide . . .

proof indicating that the harm is certain to occur in the near future") (citation omitted).

Even if the mere prospect of a rate increase later this year were enough to establish that the harm is sufficiently likely or imminent, the Mailers' claim that price increases during the pendency of the instant appeal will "seriously harm" their member businesses and organizations, Motion at 17, is entirely speculative. The motion provides no quantitative indication of the relative role of postage expenses in mailers' budgets, which might enable an evaluation of impact.

Finally, the Mailers' argument concerning irreparability depends entirely on the eventuality that the new rules may be invalidated and that any price changes under those rules may be declared unlawful. Motion at 18. As related in the previous section, however, that eventuality is unlikely to materialize.

B. A Stay Will Harm the Postal Service

Staying the Commission's revisions to the rate-regulation system pending judicial review would have a detrimental impact on the Postal Service by keeping in place a legacy system that has already caused the Postal Service to suffer net losses in each of the 14 years since the Act's passage, including a $9.2 billion net loss in FY2020 alone, *see* U.S. Postal Serv. Annual Report, Form 10-K, at 58 (*available at* https://go.usa.gov/xs3rG), and a cumulative net deficiency of more than $80 billion. *Id.* at 59. Importantly, the Mailers are asking for a stay not of whatever price changes

the Postal Service may eventually file under the Commission's new rules, but of the new rules themselves. This raises the prospect that, if the rules are ultimately upheld on review and price changes are implemented only after that point, the Postal Service may forever lose the accrual of the first year of pricing authority that the Commission has found necessary to offset the noncompensatory rates and financial instability caused by the legacy system.

The Mailers downplay those harms, claiming that the Postal Service has sufficient cash on hand to avoid being driven out of business during this Court's review, but the Commission held three years ago that financial stability is not simply or even primarily a question of whether the Postal Service can sustain operations. Order No. 4257 at 163-71. Moreover, it is undisputed that the Postal Service has been able to sustain operations and maintain its relatively low liquidity position only by forgoing needed investments and accumulating a growing backlog of unpaid debts, including $63.4 billion for statutorily mandated pension and retirement-benefits between 2012 and 2020. *See* U.S. Postal Serv. FY2021 Integrated Financial Plan at 9 (*available at* https://go.usa.gov/xs3r6).

A patently noncompliant ratemaking system has already forced the Postal Service to suffer 14 years of net losses, insufficient investment, and staggering debt, with consequential harms to the American public's confidence in and financial stability of its postal system. Even though the Postal Service maintains that the

Commission's revisions to the system are insufficient to correct the legacy system's failures, there is certainly no reason to further defer any effort at correction and to allow those harms to persist unabated into the future.

C. A Stay is Not in the Public Interest

Finally, the public interest favors denial of the Mailers' request. The Mailers argue that the public interest favors a stay because the Commission "exceeded its statutory authority." Motion at 20. As discussed above, the Commission correctly interpreted the statute. In fact, the statutory scheme would be offended by further, unwarranted delay in enacting measures "necessary to achieve the objectives" that the legacy system has failed to achieve. 39 U.S.C. § 3622(d)(3).

The Mailers' other argument, that the mailing public favors lower prices, is too nebulous to be cognizable. Undetermined at this time is whether, when, and by what amounts postal prices would increase under the new rules. Even assuming that the Commission's rules will ultimately lead to somewhat higher prices for market-dominant products, that is only because prices have been capped at noncompensatory levels for the past 14 years. The postal system is not cost-free; someone must pay for it. Congress decided that postal costs are borne by users of the system, and so the only available tool is precisely what Congress provided: a ratemaking system that is reasonably compensatory and adequate to provide for the postal system's current and future needs. 39 U.S.C. §§ 404(b), 3622(b)(5), (b)(8).

Seen properly in this light, neither the Mailers nor the public are harmed by steps aimed at correcting unfairly low rates in order to sustain the system on which the Mailers rely. Failing to do so would harm the mailing public by prolonging and deepening the Postal Service's financial instability and by continuing to delay the sort of investments that a more stable Postal Service could make and the efforts to close the net-revenue gap that the legacy system has produced.

CONCLUSION

For the foregoing reasons, the Mailers' motion for a stay should be denied.

Dated: February 8, 2021

Respectfully submitted,

THOMAS J. MARSHALL
Executive Vice President & General Counsel

CAROLINE R. BROWNLIE
Managing Counsel, Legal Strategy

STEPHAN J. BOARDMAN
Chief Counsel, Appellate & Commercial Litigation

/s/ *Morgan E. Rehrig*
Morgan E. Rehrig
David C. Belt
Office of the General Counsel
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260
(202) 268-2962
morgan.e.rehrig@usps.gov

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E) and 27(d)(2)(A), that the foregoing Response of the United States Postal Service uses proportionately spaced, 14-point type, and contains 5,184 words as measured by Microsoft Word, a word processing system that includes footnotes and citations in word counts.

/s/ Morgan E. Rehrig
Morgan E. Rehrig
Counsel for the U.S. Postal Service
February 8, 2021

CERTIFICATE OF SERVICE

I certify that on February 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Morgan E. Rehrig
Morgan E. Rehrig
Counsel for the U.S. Postal Service