No. 18-853

In The Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

POSTAL REGULATORY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner United Parcel Service, Inc. ("UPS"). For reasons stated below, Landmark respectfully urges the Court to grant *certiorari*.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The *Chevron* doctrine, which requires federal courts to defer to federal agencies' interpretation of statutes, violates the separation of powers. It hinders the courts' ability to exercise their constitutional duty to adjudicate disputes. The problems it creates go beyond the judiciary. In the wake of *Chevron*, all branches of the federal government are complicit in

[1] Counsel for *Amicus Curiae* provided notice of its intention to file this brief to counsel for parties. No person other than *Amicus Curiae*, its members, or its counsel has authored this brief in whole or in part. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Petitioner has consented to the filing of this brief. Respondent Postal Regulatory Commission has consented to the filing of this brief. Amazon Inc. has consented to the filing of this brief.

ongoing damage to the constitutional system. Federal agencies of the Executive Branch promulgate regulations and orders exceeding their statutory delegation of authority. The Legislative Branch enables agency malfeasance by passing vaguely worded statutes to defer accountability to unelected bureaucrats who have no stake in the practical effects of their decisions.

The Court can correct this imbalance. It should grant *certiorari* and consider whether the Postal Regulatory Commission ("PRC" or "Commission") violated the separation of powers and exceeded its statutory authority when it issued an order that violates both the text and purpose of the 2006 Postal Accountability Act ("Accountability Act" or "Act"). The Court should then consider whether the reflexive deferral to an agency's "reasonable" interpretation of purportedly ambiguous or undefined terms in a statute is constitutional. By granting *certiorari*, the Court can assert the proper role of the judiciary under Article III.

In short, *certiorari* presents the Court with the opportunity to address the constitutionality of the Court's practice of deferring to federal agencies' interpretation of federal statutes. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This case demonstrates how granting unfettered deference to administrative agencies in interpreting their authority under the law has created an imbalance in our constitutional framework. Rather than exercise power with proper deference to other branches of government, federal agencies disregard the expressed limits of the law. With the

approval of the judiciary, federal agencies function as quasi-legislative bodies promulgating regulations and orders beyond their statutory authority. The PRC is the latest federal agency to usurp legislative authority to effectuate an internal policy preference – here ensuring that it maintains its power to subvert competition in the package shipping market.

Postal Regulatory Commission Order No. 3506 ("the Order") interprets relevant provisions of the Accountability Act to benefit the institutional interests of the Postal Service. It contravenes the intended purpose of the Act – to ensure a "level playing field" for private businesses that do not enjoy the inherent competitive advantages of the Postal Service (i.e., monopoly over letter delivery and use of mailboxes). *See* H.R. Rep. No. 109-66, at 44 (2005). The Order fails to provide any explanation when defining important statutory terms to undercut fair and even competition. Because of deference afforded to agencies under *Chevron*, the circuit court refused to consider whether terms defined by PRC comported with the text and meaning of the Accountability Act. The circuit court simply accepted the PRC's interpretation as reasonable and ruled accordingly.

As the circuit court has abetted PRC's usurpation of legislative authority, this case presents the ideal opportunity for the Court to reconsider the "premises that underlie *Chevron* and how courts have implemented that decision." *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). Granting *certiorari* allows the Court to address the "type of

reflexive deference" exhibited by the judiciary when determining whether an agency has acted outside its statutory delegation of authority. *Id.* at 2120.

When agencies violate constitutional separation of powers principles, the judiciary should exercise their Article III authority by engaging in a substantive review of agency actions. U.S. Const. art. III, § 1. Courts should defer to agencies only when Congressional delegation of authority is clear. When agencies exceed the authority conferred by Congress, courts should prohibit bureaucratic excess. Ambiguity, in other words, should not automatically trigger deference.

ARGUMENT

The Court should grant *certiorari* and overturn *Chevron*. This case presents an opportunity to state decisively that *Chevron* deference should not be automatically applied because clever government lawyers can craft an argument that shows a statute's language may be ambiguous and then present a "reasonable" interpretation of this language. Accepting this case will re-establish the judiciary's role in exercising its independent duty to determine what the law is. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

The U.S. Postal Service holds a congressionally authorized monopoly over markets for some of its products, letter delivery for example. For other products such as package shipping, it competes with private

businesses. To ensure fair competition and to prevent the Postal Service from using its monopoly in one market to subsidize its costs in another, the Accountability Act imposes certain conditions when calculating the costs of competitive products. 39 U.S.C. § 3633. The PRC must allocate the costs of shipping competitive products into two categories, "institutional costs" and "costs attributable." 39 U.S.C. § 3633. Each term has a specific meaning and courts should not automatically defer to the PRC's self-serving interpretation of either of them.

The circuit court never performed a textual analysis of the Act. It did not independently analyze the meaning of the key statutory term "institutional cost." As a result, it gave its imprimatur to an agency position that contravenes the Act's purpose – to facilitate competition and to ensure the Postal Service does not use its inherent advantages to undercut costs associated with shipping packages. Instead, the circuit court deferred to the PRC's interpretation of relevant terms, concluding that the PRC's interpretation of the statutory term "institutional costs" could be considered reasonable and so demanded deference. *UPS v. Postal Regulatory Commission*, 890 F.3d 1053, 1063 (D.C. Cir. 2018).

I. PRC's actions violate the text and purpose of the Accountability Act.

PRC's Order fails to ensure rates for competitive products are fairly set and, in so doing, violates both the text and purpose of the Accountability Act.

A. The Order violates the text of the Accountability Act.

Under the Act, the Postal Service is free from rate regulation in the competitive products market provided the PRC:

> (1) does not subsidize its package business with revenues from its mail monopoly, 39 U.S.C. § 3633(a)(1);
>
> (2) ensures "that each competitive product covers its cost attributable," 39 U.S.C. § 3633(a)(2) (defined as "the direct and indirect postal costs attributable to such product through reliable identified causal relationships"), 39 U.S.C. § 3631(b); and
>
> (3) obligates the Postal Service to account for an "appropriate share of the institutional costs of the Postal Service," 39 U.S.C. § 3633(a)(3).

Thus, costs are allocated between two categories: "institutional" and "costs attributable." PRC has traditionally defined "costs attributable" narrowly to include only "volume variable" costs. App. 48a. PRC previously calculated "volume variable" costs by the marginal cost of the last unit multiplied by total volume. App. 205a-206a. Costs accrued by shipping units

before the last unit (which are, because of economics of scale, inherently higher than the last unit cost) are termed "inframarginal" costs and traditionally lumped in as institutional costs. App. 49a.

The traditional method for determining costs attributable resulted in an undervaluation of the actual cost for shipping packages. This meant that the Postal Service could set its rates for shipping packages at levels lower than those of its competitors such as UPS and, in so doing, undermined the actual costs associated with shipping packages.

The new definition, promulgated by PRC in its Order for "costs attributable," does not go far enough. PRC's new definition designates a small portion of inframarginal costs as "costs attributable." App. 1a-2a-104a, 109a. Yet the Order only designates those inframarginal costs associated with the lowest-priced percentage of units rather than total inframarginal costs. App. 79a. It does not designate all of the inframarginal costs as "costs attributable."[2]

PRC's new definition continues to allow a faulty calculation and continues to allow the Postal Service to undercut pricing in the competitive products marketplace. The Order uses the lowest possible metric for calculating inframarginal costs and, by extension, for determining costs attributable. PRC's new definition

[2] *Amicus* directs the Court to the useful diagram in Petitioner's brief at page 6 for a visual breakdown of PRC's new calculation of "costs attributable."

continues to be an inaccurate valuation for the actual costs associated with shipping packages.

The PRC also disregards the plain meaning of the term "institutional." According to the PRC, the term functions as a catch-all, encompassing all "residual costs." App. 49a. Any costs not attributable under PRC's narrow definitions of inframarginal costs and volume variable costs are therefore automatically categorized as institutional. The PRC defines institutional in the negative – no actual consideration is given to the term's meaning. Because the Act does not specifically define the term "institutional cost" and because the circuit court defers to the agency, the PRC can define certain terms in any way it sees fit. *Chevron* thus prevents the Court from engaging in any substantive analysis of whether PRC has acted properly.

B. The Order violates the purpose of the Accountability Act.

Congress designed the Accountability Act to promote competition between the Postal Service and private businesses and to prevent the Postal Service from improperly using its monopoly powers. S. Rep. No. 108-318, at 19, 27 (2004). The Order violates this purpose because it permits the Postal Service to allocate certain costs away from the competitive products market. This allows the Postal Service to continue to undercut pricing in the competitive products market. The Act requires the PRC to "prohibit subsidization of competitive products by market-dominant products." 39 U.S.C.

§ 3633(a)(1). Rather than follow the directive of the statute by "ensuring each competitive product covers its costs attributable," the PRC allocated a portion of those costs to institutional costs. Shifting a portion of those costs into the "institutional cost" bucket means the Postal Service will continue to offer cheaper rates for shipping packages. This violates the purpose of the Act because it undermines competition by subsidizing the costs of competitive products.

The Order should receive greater judicial scrutiny because it results in an outcome that conflicts with the purpose of the Act – to facilitate competition between the Postal Service and private companies that seek to compete in the package shipping market. Instead, the circuit court defers to PRC's interpretation because of *Chevron*'s directive that agencies are automatically entitled to deference when interpreting statutory terminology.

II. The lower court abetted PRC's violations of the Accountability Act when it reflexively deferred to PRC's interpretation.

UPS argued that classifying all inframarginal costs not included in a product's incremental costs as "institutional" is inconsistent with that term's unambiguous meaning. *UPS*, 890 F.3d at 1061. The circuit court dismissed this argument, deferred to the PRC's interpretation and performed no substantive analysis of UPS's argument. *Id.* at 1063. In so doing, it placed an untenable burden on UPS. It required UPS to show

"unambiguously" that the Act obligated the Commission "to treat each variable cost as a 'cost attributable' without first considering whether it possesses the statutorily requisite 'reliably identified causal relationship[]' with any one product." *Id.* at 1061 (*citing* 39 U.S.C. § 3631(b)). This obligation is common in agency disputes post *Chevron*. Aggrieved parties face an often insurmountable burden. They must show that a statute supports their position "unambiguously." This places an unreasonable burden on private parties and removes the duty of courts to engage in an Article III analysis.

The circuit court engaged in no substantive statutory analysis – it deferred to the PRC's interpretation of statutory terms not explicitly defined within the statute. The circuit court relied on *Chevron* and deferred to PRC's interpretation of both "institutional costs" and "indirect postal costs." *Id.* at 1063, 1065.

Again, the dictates of *Chevron* compelled the circuit court to abdicate its Article III function and perform no independent analysis of crucial statutory terms. Instead, the circuit court simply concluded PRC had acted within the bounds of "reasonableness" and upheld PRC's actions.

III. *Certiorari* is necessary to overturn *Chevron* and reassert the judiciary's role in determining whether administrative agencies are exceeding their statutory authority.

Chevron instructs courts to uphold an agency's "reasonable resolution of an ambiguity in a statute the agency administers." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (*citing Chevron*, 467 U.S. at 842-843). There are recognized limits to this deference as "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). Additionally, while "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretative gerrymanders under which an agency keeps parts of a statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. at 2708. Despite these dictates, the Order contravenes the clearly stated goal of the Accountability Act – it undermines competition by ensuring the Postal Service continues to enjoy an improper advantage in establishing rates for competitive products.

This case provides the ideal opportunity for the Court to address the limits of *Chevron*. The circuit court essentially washed its hands of whether the Order contravenes the Accountability Act. Instead, the circuit court ruled that *Chevron* obligated deference to the Postal Service's statutory interpretation.

The Commission's actions "bring into bold relief the scope of the potentially unconstitutional delegations

we have come to countenance in the name of *Chevron* deference." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). In failing to stop an agency for enacting a practice that violates the governing statute, the Commission has "without any particular fidelity to the text" determined that it will continue to undermine competition.

The Court "should be alarmed that [the Commission] felt sufficiently emboldened" by past decisions to issue an order contravening the purpose of the Act.

When agencies are emboldened to craft new laws or issue orders in clear violation of statutory directives by "reasonably" interpreting their administrative rules, and courts abdicate their responsibility by deferring to an agency's interpretation, what recourse exists for citizens who seek fair and impartial adjudication? Courts stand as a bulwark against tyranny. When courts allow agencies' actions to go "unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (Gorsuch, J., concurring). In the administrative law jurisprudence of today, "courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Id.* at 1153.

Deferring wholesale to an agency's interpretation of a statute "raises serious separation-of-powers

questions." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). Deference "precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." *Id.* (*citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

This case highlights the constitutional principle that "[t]he judicial power as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring). Landmark acknowledges at times a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 120-121 (1976). Thus, "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues and defeat the Framers' design of a workable National Government." *Loving v. United States*, 517 U.S. 748, 758 (1996).

But there are limits to an agency's authority. In *Marshall Field & Co. v. Clark*, the Court states: "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The Court then distinguished the actions, "[t]he first cannot be done; to the latter no valid objection can be made." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-693 (1892)

(*quoting Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). "The legislature cannot delegate a power to determine some fact or state of things on which the law makes or intends to make, its own action depend." *Marshall Field & Co. v. Clark*, 143 U.S. at 694.

Chevron empowered agencies to engage in legislative actions and courts have failed to fulfill "their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1153 (Gorsuch, J., concurring). *Chevron* also violates the principle that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Id*. (*citing La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

In short, "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference." *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting). Thus, "[a]n agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency." *Id.*

The Service's actions suggest concerns expressed by Chief Justice Roberts are prescient: "It would be a bit much to describe the result 'as the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at

315 (*citing Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

Chevron abets the accumulation of all powers, legislative, executive, and judiciary into the hands of the administrative state. In the words of the Chief Justice, "[t]he accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Id.* at 313. This accumulation poses a danger to liberty and runs contrary to the principle of separation of powers.

This case presents the optimal vehicle for reexamining the role of the judiciary in determining the legitimacy of the federal regulatory process. Today federal agencies violate the principle of separation of powers by serving as legislators, enforcers, and judges. The Court can stop these unconstitutional actions by granting *certiorari*.

CONCLUSION

For these reasons, Landmark respectfully urges the Court to grant Petitioner's *Writ of Certiorari*.

Respectfully submitted,

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