No. 18-853

IN THE

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

VALPAK FRANCHISE ASSOCIATION, *et al.*,
Intervenors.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The briefs in opposition of the Postal Regulatory Commission ("PRC") and intervenors conspicuously fail to defend the correctness of *Chevron*, despite persistent questioning of that decision and this Court's current reconsideration of *Auer*. Instead, respondents focus almost entirely on arguments that would form alternative bases for affirmance not considered by the D.C. Circuit. These alternative arguments are irrelevant to whether this Court should reconsider *Chevron* deference and whether there is any impediment to doing so in this case. There is no question that this Court can reconsider *Chevron* here because the D.C. Circuit's decision rested solely and expressly on application of *Chevron* deference. This case thus provides an excellent vehicle for this Court to reconsider *Chevron*.

Respondents argue that this case is a poor vehicle because there is supposedly a basis for deference outside of *Chevron* and because the PRC's statutory interpretation is supposedly correct. These purported vehicle problems, however, have nothing to do with whether the Court can reconsider *Chevron* in this case. It undeniably can because *Chevron* deference was the express basis for the decision below. The idea that there are other potential arguments to support the judgment means only that this Court would remand if *Chevron* is overturned or limited, and the D.C. Circuit could address these arguments in the first instance.

In any event, these alternative bases for affirmance are meritless. As to the applicability of supposed non-*Chevron* deference, the deference to agencies for interpretation of statutes is *Chevron* deference, and no court has suggested that there is some different, special basis for deference to the PRC. As to the supposed correctness of the PRC's interpretation, the briefs in

opposition miss the key point that the plain meaning of "institutional" is not "residual," and the plain meaning of "reliably identified causal relationships" is not the theoretical minimum. And while respondents rely on *National Association of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810 (1983) ("*NAGCP*"), that case undermines their argument, as it holds—in language that the briefs in opposition ignore entirely—that costs attributable through "reliably identified causal relationships" are *all* variable costs. This standard is directly contrary to the PRC's Order.

ARGUMENT

I. RESPONDENTS FAIL TO DEFEND *CHEVRON* DEFERENCE

Neither the PRC nor intervenors make any effort to defend the correctness of *Chevron* deference. The fact that the Government does not claim that *Chevron* is correct highlights the need for this Court to reconsider this doctrine.

The *only* argument respondents make against this Court's reconsidering *Chevron* is the PRC's lone statement (BIO 24-25) that "petitioner has put forth no special justification that would warrant overturning *Chevron*, which has been on the books for many years and reflects a fundamental principle of administrative law." The PRC ignores, however, the numerous special justifications UPS did set forth (Pet. 11-15): the chipping away at *Chevron* deference with various exceptions, the enormous difficulties in applying *Chevron*, the conflict with the Administrative Procedure Act, and the separation-of-powers problems with shifting authority away from both Congress and the judiciary. Accordingly, given these intractable problems with *Chevron* deference and the statements

of several Justices questioning its validity (*see* Pet. 12-13), the time has surely come to revisit *Chevron*.

Furthermore, as UPS explained (Pet. 16-17), this Court's consideration of whether to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), in *Kisor v. Wilkie*, No. 18-15 (argued Mar. 27, 2019), further supports review of *Chevron* now. The PRC (BIO 29) and intervenors (BIO 27) argue that *Chevron* and *Auer* rest on different foundations. But there is no doubt that there is substantial overlap, as both implicate separation of powers and concerns about excessive deference to agencies. Indeed, the argument against deference is stronger for *Chevron* than for *Auer* because interpreting statutes (as opposed to regulations) is an exercise of power that clearly belongs to the judiciary, as stated in the Administrative Procedure Act. And while intervenors posit (BIO 26) that there are thousands of other cases this Court can take to reconsider *Chevron*, they do not cite a single pending petition on the issue other than the instant one.

II. RESPONDENTS FAIL TO IDENTIFY ANY ACTUAL OBSTACLE TO RECONSIDERING *CHEVRON* IN THIS CASE

A. This Case Is The Ideal Vehicle To Overrule *Chevron*

Respondents suggest several supposed vehicle problems with this case, but none undermines the simple fact that the D.C. Circuit expressly relied on *Chevron* deference. There is thus no impediment to this Court reviewing the validity of *Chevron* deference here, then remanding for consideration of respondents' alternative bases for affirmance.

Even putting aside that these alternative bases for affirmance are not actually vehicle problems, they also fail on the merits.

1. Respondents err in arguing that some non-*Chevron* species of deference applies here.

First, the PRC (BIO 25-26) and intervenors (BIO 11) argue that, regardless of *Chevron*'s validity, deference is required under *NAGCP*. But the fact that *NAGCP* did not use the words "*Chevron* deference" (because it pre-dated *Chevron* by one year) does not change the fact that it applied the exact same doctrine: "An agency's interpretation of its enabling statute must be upheld unless the interpretation is contrary to the statutory mandate or frustrates Congress' policy objectives." *NAGCP*, 462 U.S. at 820-21. And it rested on the exact same case law as *Chevron*. *See Chevron U.S.A. Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 843 nn. 9, 11 (1984) (relying on *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981)); *NAGCP*, 462 U.S. at 821, 833 (same). Respondents cite no case suggesting that *NAGCP* provides some special sort of deference to the PRC. Rather, courts—including the D.C. Circuit in this very case—apply *Chevron* deference to the PRC and treat *NAGCP* as supporting that approach. *See* App. 27a-28a, 34a; *see also United Parcel Serv., Inc. v. U.S. Postal Serv.*, 184 F.3d 827, 843 (D.C. Cir. 1999); *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223-24 (3d Cir. 1992). Thus, there is no plausible argument that overruling *Chevron* deference would somehow leave intact the deference expressed in *NAGCP* (or other cases pre-dating *Chevron* but applying the same deference to particular agencies).

Second, the PRC suggests (BIO 25-26) and intervenors expressly argue (BIO 11-14) that there is an

independent basis for deference to the PRC that does not apply to other agencies. While respondents rely heavily on *NAGCP* for the supposedly special status of the PRC, *NAGCP* says nothing about treating the PRC differently from any other agency. Its discussion of deference does not suggest that the statute gives the PRC some unique deference, but rather only that the statute does not *deny* the PRC the usual degree of deference to agencies. *See NAGCP*, 462 U.S. at 827 ("[T]here is no reason to suppose that § 3622(b)(3) denies to the expert ratesetting agency, exercising its reasonable judgment, the authority to decide which method sufficiently identify the requisite causal connection between particular services and particular costs."). That still leaves the question what that usual deference should be, *i.e.*, the question of *Chevron* deference.

Intervenors go outside *NAGCP* to argue (BIO 11-12) that the Accountability Act has particularly vague terms that necessarily warrant deference. However, they provide no reason to believe the word "institutional" and the phrase "reliably identified causal relationships" are so vague that they are somehow immune from judicial interpretation. Nor do they cite any case law suggesting that *Chevron* deference should have yet another step in determining its application that looks at how much deference is theoretically embodied in the statutory language.[1]

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[1] Intervenors further argue (BIO 13-14) that Congress intended to give deference to the PRC. But nothing that intervenors cite suggests that Congress intended to give deference to the PRC's interpretation of the statutory terms "institutional" and "reliably identified causal relationships," as opposed to its application of the statutory requirements to the facts.

Third, the PRC (BIO 25) and intervenors (BIO 12-13) suggest that ratemaking warrants special deference. However, this argument erroneously conflates a challenge to the interpretation of a statute with a challenge to the reasonableness of a rate. The issue in this petition is not the reasonableness of rates, but the interpretation of specific statutory language that is, contrary to the PRC's suggestion (BIO 16, 24), not "highly technical," or technical at all: "institutional" and "reliably identified causal relationships." *See* 39 U.S.C. §§ 3631(b), 3633(a). In any event, the statute here does not concern the broad allowance of any "just and reasonable" rate, as in the cases respondents cite. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *Colo. Interstate Co. v. Fed. Power Comm'n*, 324 U.S. 581, 603 (1945).

2. Respondents also argue that the PRC's interpretation of the Accountability Act is correct. But the PRC's erroneous interpretation of the Accountability Act, which the D.C. Circuit accepted based on *Chevron* deference, perfectly exemplifies the problems with *Chevron*.

First, as UPS explained (Pet. 18-19), the PRC's interpretation of "institutional costs" as merely "residual costs" defies the plain meaning of "institutional." The PRC (BIO 16) argues that "institutional" must mean "residual" because there are only two categories and all costs that do not fall within "costs attributable" must be treated as institutional costs. But that argument misses the point: Congress's determination that all costs that are not attributable are "institutional costs" necessarily informs the meaning of "costs attributable." If "costs attributable" is defined so narrowly that the residual costs are to a large extent *not* costs of the institution as a whole, then "costs

attributable" is not being defined correctly, and the term "institutional" is effectively written out of the statute. And that is exactly what happened here, where the PRC interpreted "costs attributable" without consideration of whether the costs not attributed—almost half of all costs—were actually institutional costs. *See* Pet. 6-8.

Indeed, intervenors recognize (BIO 17) that "institutional costs" mean "costs (both fixed and variable) that relate to the institution, rather than a single product." But the PRC did *not* define institutional costs in this way, referring to them only as residual costs. App. 49a. Nor did the PRC make any effort to determine which costs "relate to the institution." App. 81a ("[T]he Postal Service only calculates and attributes volume-variable and product-specific fixed costs and designates the residual costs as institutional."). Thus, under intervenors' own interpretation of "institutional costs," the PRC erred in defining "institutional" as only "residual"—and the D.C. Circuit erred in accepting that definition, App. 6a-7a, 17a-21a.[2]

Second, as UPS explained (Pet. 20-22), the PRC erred in interpreting "reliably identified" as the theoretical "minimum" by adopting an economic theory in which *every* product is treated as the last (and cheapest) product on the cost curve. Respondents do not dispute that this interpretation is erroneous.

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[2] The PRC (BIO 21-22) and intervenors (BIO 17) also suggest that, historically, "institutional costs" were treated only as a residual category, but as UPS explained (Pet. 19 n.4), the prior cases in the postal ratemaking context did not suggest that the word "institutional" is considered meaningless in the analysis. And there was no concern about non-institutional costs being treated as institutional because, under *NAGCP*, all variable costs were deemed "costs attributable." 462 U.S. at 830.

Instead, the PRC (BIO 22-23) and intervenors (BIO 20-21, 25) suggest that the PRC did not adopt this interpretation and simply found that anything more than incremental costs could not be reliably attributed. The PRC's Order, however, made no such finding: it makes no effort to attribute costs greater than incremental costs, and thus makes no finding that they cannot be reliably attributed. And respondents cannot overcome the PRC's concession below that the incremental-cost test identifies only the theoretical "minimum" cost a "product could possibly have incurred." PRC Br. 39; *see also id.* (conceding that its approach "almost certainly underestimates the inframarginal costs a product actually incurred").

Moreover, the PRC's interpretation conflicts with the interpretation that this Court provided in *NAGCP*, whereby "variable costs" have "reliably indicate[d] causal connections" to a product, 462 U.S. at 829-30, and thus, additional costs were properly rejected only where they were "not measurably variable," *id.* at 816-17.

Variable costs is the measure that UPS proposed, and that the PRC claims is too unreliable, notwithstanding that it was the test proposed to and affirmed by this Court in *NAGCP*. This Court never suggested that marginal or incremental costs were sufficient, which would thereby treat as unattributed an enormous subset of variable costs. Nor did the Court suggest that reliability required near-certainty, but rather only "'reasonable confidence,'" *id.* at 826, a standard that the PRC does not mention in its Order (or its BIO) and that cannot be reconciled with its limitation of attribution to the theoretical minimum.

In addition, as UPS explained (Pet. 22) and respondents ignore, the PRC's Order conflicts with the admitted purpose of the statute to "'ensure that the

Postal Service competes fairly in the provision of competitive products.'" App. 182a (quoting *Senate Report* at 19 (2004)). As the Order concedes, "[t]he purpose of the incremental cost test is not to ensure that the Postal Service is competing fairly in the marketplace." App. 106a-07a. And, in fact, it undermines that purpose by allowing the PRC not to attribute an enormous amount of variable costs, and thereby to understate its costs dramatically when determining the prices for its package-delivery services. In short, the application of *Chevron* here has improperly allowed for an interpretation in conflict with both the plain text and the recognized purpose of the statute—and absent *Chevron* deference, this interpretation would be rejected.[3]

B. Alternatively, This Case Is The Ideal Vehicle To Limit *Chevron* Because The Decision Below Conflicts With *Encino Motorcars*

The PRC (BIO 27-28) and intervenors (BIO 23-24) argue that this case is not a proper vehicle to consider a conflict with *Encino Motorcars, LLC v. Navarro*, 136

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[3] Intervenors argue (BIO 18-19) (but the PRC does not) that UPS supposedly failed to raise a statutory argument regarding "costs attributable" in the district court. That is simply incorrect: UPS had an entire sub-section in its brief, under the main heading "**The Commission's Interpretation Defies Statutory Text**," UPS Opening Br. 34, devoted to the argument that "[t]he Commission's decision . . . defies the requirement that the Postal Service attribute to each product—both competitive and market-dominant—*all* 'postal costs attributable to such product through reliably identified causal relationships,'" *id.* at 43 (quoting 39 U.S.C. §§ 3631(b), 3633(a)(2)). In any event, as UPS explained (Pet. 20-21 n. 5), there is no difference between the arbitrary-and-capricious standard and *Chevron* deference as applied to statutory interpretation.

S. Ct. 2117 (2016), because it simply applied *Encino Motorcars* to the facts. That is incorrect. The PRC's Order provided *no* reasoned explanation for its interpretation of "institutional" as "residual" or its interpretation of "reliably identified causal relationships" as the theoretical minimum. Thus, as UPS explained (Pet. 24-25), the D.C. Circuit did not apply *Encino Motorcars*: it created new exceptions to it where there is supposedly no change in policy position and the interpretation is based on "established meanings" and "longstanding definitions." App. 25a-26a.

The intervenors suggest (BIO 24) that the D.C. Circuit did not limit *Encino Motorcars* to a change in policy position, but that is the D.C. Circuit's exact (and only) description of the holding of *Encino Motorcars*, and it cited *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989), for essentially the same proposition. App. 26a. In any event, there is no question that the D.C. Circuit held that "established meanings" and "longstanding definitions" sufficed even with no explanation in the Order. App. 25a. Moreover, neither the D.C. Circuit nor the PRC nor intervenors identified any reasoned explanation in prior orders. Rather, as UPS explained (Pet. 25-26), those prior orders provide mere conclusory interpretations, and they pre-date the Accountability Act. Thus, the question is squarely presented whether the existence of conclusory, prior orders allows an agency to receive *Chevron* deference without a reasoned explanation for its statutory interpretation.

III. RESPONDENTS FAIL TO REFUTE THE IMPORTANCE OF THE *CHEVRON* ISSUE AND THE UNDERLYING QUESTION OF POSTAL PRICING

Neither the PRC nor intervenors dispute the importance of resolving the proper limitations on *Chevron* deference. And while they dispute the importance of the conflict with *Encino Motorcars*, that dispute rests largely on the incorrect assumption that the D.C. Circuit simply applied *Encino Motorcars* to the facts. But the D.C. Circuit's holding—creating a substantial exception to *Encino Motorcars* where the agency relies on historical practice—implicates numerous cases and warrants this Court's review.

Furthermore, as UPS explained (Pet. 29-31), the importance of the proper interpretation of the Accountability Act also supports granting this petition. The intervenors argue (BIO 28) that the importance of this issue does not matter because the questions presented concern only *Chevron*, but the resolution of *Chevron* in this case would ensure that the Accountability Act is interpreted in accordance with its plain language. Intervenors also argue (BIO 28) that Congress and the President's Task Force on the United States Postal System are focused on postal costing, but that does not affect the importance of the proper interpretation of the law as it currently stands.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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