No. 21-1124

IN THE

Supreme Court of the United States

NATIONAL POSTAL POLICY COUNCIL, *et al.*,

Petitioners,

v.

POSTAL REGULATORY COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT IN SUPPORT OF PETITIONERS

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent the Association for Postal Commerce states that it is not publicly traded and has no corporate parent. No publicly traded entity has an ownership interest in the Association for Postal Commerce.

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RESPONDENT ASSOCIATION FOR POSTAL COMMERCE'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent Association for Postal Commerce respectfully requests that this Court grant Petitioners' Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Postal Pol'y Council v. Postal Regul. Comm'n*, 17 F.4th 1184 (D.C. Cir. 2021). In its opinion denying Respondents' petition for review, the Court of Appeals misapplied *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and granted the Postal Regulatory Commission (the "Commission") authority to remove Congressionally imposed restrictions on its regulatory authority from a statute, contrary to the plain language of the statute and the principles that ultimately underlie the nondelegation doctrine. The Petition for Writ of Certiorari should be granted, and the opinion reversed and remanded.

STATEMENT OF THE CASE

Under the Postal Accountability and Enhancement Act, specifically 39 U.S.C. § 3622, Congress directed that the Commission "shall . . . establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products." *Id.* § 3622(a). In 39 U.S.C. § 3622(b), Congress listed 9 objectives "such system shall be designed to achieve" and, in 39 U.S.C. § 3622(c), Congress listed 14 factors that, "[i]n establishing or revising such system, the Postal Regulatory Commission shall take into account."

In 39 U.S.C. § 3622(d), Congress listed "Requirements" to which "[t]he system for regulating rates and classes for market-dominant products shall" adhere. The requirements include, *inter alia*, a price cap, *id.* § 3622(d)(1); limitations on how the Postal Service can take advantage of unused authority to increase rates, *id.* § 3622(d)(2); and the requirement that after 10 years the Commission:

> 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). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

Id. § 3622(d)(3).

The next subsection, *id.* § 3622(e), establishes parameters for "workshare discounts," which are "rate discounts provided to mailers for the presorting, prebarcoding, handling, or transportation of mail, as further defined by the Postal Regulatory Commission under subsection (a)." The final subsection, *id.* § 3622(f), provides instructions on how to resolve pending proceedings and requests for modifications in the first year after enactment.

In completing its ten-year review, the Commission concluded that the "alternative system for regulating rates and classes for market-dominant products" adopted under 39 U.S.C. § 3622(d)(3) need not include any of the other requirements of 39 U.S.C. § 3622(d). Pet. App. 3a;[1] Pet. App. 50a-89a. After a notice and comment period, the Commission issued its final order, *Order 5763*, which, in accordance with the Commission's interpretation of 39 U.S.C. § 3622, did not adhere to the requirements of 39 U.S.C. § 3622(d)(1) and (2). Pet. App. 10a. Petitioners and other interested parties, including Respondent, petitioned for review of the Order in the United States Court of Appeals for the District of Columbia Circuit, which denied the petition for review. Pet. App. 30a. Petitioners National Postal Policy Council, American Catalog Mailers Association, Major Mailers Association, News Media Alliance, and National Newspaper Association filed a timely Petition for Writ of Certiorari. Respondent files this brief in support of the Petition.

ARGUMENT

In considering whether 39 U.S.C. § 3622 requires the Commission to respect the requirements of 39 U.S.C. § 3622(d)(1), including the price cap found in 39 U.S.C. § 3622(d)(1)(A), the Court of Appeals correctly recognized that the applicable analysis was that of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 11a. Under *Chevron* step one, a court must "deploy[] the 'traditional tools of statutory construction' to determine 'whether Congress has directly spoken to

1. Citations to "Pet. App." are to the Appendix accompanying the Petition.

the precise question at issue.'" Pet. App. 11a (quoting *Chevron*, 467 U.S. at 842-43 & n.9). If Congress has not explicitly spoken, the court, under *Chevron* step two, "will defer to the Commission's interpretation if it is 'a permissible construction of the statute.'" Pet. App. 11a (quoting *Chevron*, 467 U.S. at 843).

In the present case, there is no dispute that the "precise question at issue" is whether the statutory "Requirements" of 39 U.S.C. § 3622(d)(1), and other provisions in 39 U.S.C. § 3622 limiting the scope of the Commission's authority to adopt regulations, including the price cap of 39 U.S.C. § 3622(d)(1)(A), apply to *any* "system for regulating rates and classes for market-dominant products" that the Commission creates, 39 U.S.C. § 3622(d)(1), or whether the provisions of 39 U.S.C. § 3622(d)(1) are inapplicable to an "alternative" or "modified" regulatory system the Commission adopts under the authority provided by 39 U.S.C. § 3622(d)(3).

The opinion is ambiguous as to which step of *Chevron* the Court of Appeals ultimately employed to reach its decision, but under either scenario, the court erred. The Court of Appeals held, ostensibly under *Chevron* step one, that the "plain meaning of the statutory text" dictates that "during its ten-year review, the Commission may adopt an alternative system and is not necessarily constrained the price cap," [*sic*] in 39 U.S.C. § 3622(d)(1)(A). Pet. App. 16a. But the statute's plain meaning is unambiguously to the contrary. Congress "has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, and required that "[t]he system for regulating rates and classes for market-dominated products *shall*" include a price cap, along with other requirements. 39 U.S.C. § 3622(d)(1) (emphasis added).

The Court of Appeals dismisses this plain statutory command by finding that the "Requirements" of 39 U.S.C. § 3622(d)(1) do not apply to "such alternative systems" as the Commission may adopt under 39 U.S.C. § 3622(d)(3), reasoning that "[i]n § 3622(a) and (d)(1)(A), 'system' refers broadly to a scheme for 'regulating rates and classes for market-dominant products,' not to the subset of schemes that comply with the price cap." Pet. App. 13a.[2] But this formulation evades the question. Even if "system" has a broad meaning, the statute contains other provisions that limit the Commission's discretion as to what the particular system it adopts can do. The original system adopted pursuant to 39 U.S.C. § 3622(a) had to include a price cap not because the term "system" in 39 U.S.C. § 3622(a) referred to a "subset of schemes that comply with the price cap," but because a separate statutory subsection mandates that "[t]he system for regulating rates and classes for market dominant products shall" include a price cap. 39 U.S.C. § 3622(d)(1), (d)(1)(A). The question before the Court of Appeals was whether this statutory limit preventing the Commission from choosing, among all possible regulatory systems, a system that does not include a price cap, applies when the Commission is acting under 39 U.S.C. § 3622(d)(3).

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2. The term "system" does not appear in 39 U.S.C. § 3622(d)(1)(A), but Respondent assumes the Court of Appeals intended to refer to 39 U.S.C. § 3622(d)(1). *Compare id.* ("The *system* for regulating rates and classes for market-dominant products shall . . . ."), *with id.* § 3622(d)(1)(A) ("include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates") (emphasis added).

There is no textual support for the conclusion that Congress intended to create a "subset of schemes" or intended for the term "system" in 39 U.S.C. § 3622(d)(1) to mean only the "original" system first created under 39 U.S.C. § 3622(a) and to exclude a modified or "alternative" system adopted after the review required by 39 U.S.C. § 3622(d)(3). The plain text of the statute is clear that "[t]he system" the Commission creates under 39 U.S.C. § 3622 must include the requirements of 39 U.S.C. § 3622(d)(1), and Congress has not explicitly granted the Commission the power to disregard or delete the requirements when it adopts an "alternative" system. Section 3622(d)(3) does not expressly say the Commission can ignore these requirements when modifying or adopting an alternative regulatory system. The Court of Appeals, however, relies on that silence to reach a contrary conclusion, explaining that 39 U.S.C. § 3622(d)(3) directs that changes to the regulatory system "be 'necessary to achieve the objectives' in 3622(b), but makes no mention of the rate cap." Pet. App. 14a. It further explains that 39 U.S.C. § 3622(d)(3) references an "alternative" system, which, according to the Court of Appeals, indicates that the Commission's "authority following the ten-year review must be broader under § 3622(d)(3)" than under 39 U.S.C. § 3622(a). Pet. App. 15a.

This purported "interpretation" goes too far. To allow the term "alternative" to permit the deletion of the requirements, as the Court of Appeals has implicitly done, is to "allow a small statutory tail to wag a very large dog." *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1347 (2021) (holding that statutory language that granted the Federal Trade Commission ("FTC") the authority to obtain a "permanent injunction" "did [not] authorize the [FTC] directly to obtain court-ordered

monetary relief," because "[a]n 'injunction' is not the same as an award of equitable monetary relief" and "to read [the] words [of the statute] as allowing what they do not say, . . . , is to read the words as going well beyond the provision's subject matter"). Here, the Court of Appeals has "read [the lack of] words as allowing what they do not say." *Id.*

Moreover, as in *AMG*, the structure of the statute at issue supports the conclusion that any "system" adopted under 39 U.S.C. § 3622 must include the limitations in that provision. But following the Court of Appeals' logic regarding 39 U.S.C. § 3622(d)(3)'s reference to "achiev[ing]" only the "objectives" of the statute, not only are the "Requirements" of 39 U.S.C. § (d)(1) now removable from the statute at the Commission's discretion, but so are the directives that the Commission take into account the "Factors" of 39 U.S.C. § 3622(c), that the regulatory system adhere to the "Limitations" of 39 U.S.C. § 3622(d)(2), and that the system comply with the provisions governing "Workshare Discounts" in 39 U.S.C. § 3622(e). The Commission's discretion is now bounded only by the "Objectives" of 39 U.S.C. § 3622(b). Even if Congress had the authority to delegate such broad and unbounded authority, it would have to have done so expressly, not simply by omitting references to these provisions in 39 U.S.C. § 3622(d)(3).

Because there is no textual support for its contrary conclusion, the Court of Appeals expanded its analysis to conclude that "[t]he legislative history supports the Commission's interpretation," a clear invocation of *Chevron* step two, even after the Court of Appeals claimed to have found that the language of the statute was explicit. Pet. App. 15a. But the Court of Appeals'

"legislative history" consists of a single floor statement. The floor statement of a single senator is neither cause to disregard the plain language of the statute or an explicit Congressional grant of authority for an agency to do the same. *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1384-85 (2020) (referring to "a House Report here, a floor statement there" as "one thin reed after another" and noting "[t]he historic presumption of judicial review has never before folded before a couple stray pieces of legislative history").

In eliding *Chevron* step one into step two and granting the Commission the power to excise entire sections of the statute, contrary to the plain language of the text, the Court of Appeals allowed the Commission to rewrite the statute, rather than permitting the Commission to rewrite its regulations within the confines of the statute. This is reversible error on its own. But in permitting the Commission to remove the "Requirements" section of 39 U.S.C. § 3622(d)(1), as well as the other provisions that provide limitations and guidance to the Commission's exercise of authority, the Court recrafted the statute as an impermissible delegation of Congress's power to the Commission. As the Petition explains in detail, Congress cannot delegate to the Commission the power to redraft a statute or to create a new statutory regime out of whole cloth. This is why Congress explicitly provided requirements and limitations that the Commission must meet in creating an alternative system. Had the Court of Appeals applied *Chevron* properly, its analysis would have ceased at step one.

* * * * *

The decision of the Court of Appeals will have devastating consequences for mailers, as the Petition makes clear. If the Commission is permitted to adopt rate systems without any limitations, there will be no protection for a captive market that is vital to the provision of public goods. But beyond the scope of the parties to this case, the opinion is an unprecedented disregard of the protections *Chevron* analysis affords against improper delegations of authority. Permitting courts to read into statutes unlimited grants of authority to agencies, contrary to the language Congress drafted, eliminates the first step of *Chevron* and, under the circumstances here, creates an otherwise unnecessary conflict with the principles of the nondelegation doctrine. This result cannot be countenanced.

CONCLUSION

The Court should grant the Petition and reverse.

Respectfully submitted,

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