No. 18-853

In the Supreme Court of the United States

UNITED PARCEL SERVICE, INC., PETITIONER

v.

POSTAL REGULATORY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Congress directed the Postal Regulatory Commission (Commission) to establish price floors for products sold by the U.S. Postal Service in the competitive marketplace. The Commission must ensure that the price floor for each competitive product covers the "costs attributable" to that product, 39 U.S.C. 3633(a)(2), defined as the "postal costs attributable to such product through reliably identified causal relationships," 39 U.S.C. 3631(b). The Commission also must separately ensure that the price floors for "all competitive products collectively cover * * * an appropriate share of the institutional costs of the Postal Service." 39 U.S.C. 3633(a)(3). Under this regime, all postal costs must be classified as either "costs attributable" or "institutional costs."

Historically, the Commission directed the Postal Service to include in the "costs attributable" to each product the marginal cost of the last unit of the product. In 2015, petitioner filed a petition with the Commission that urged the agency to modify its methodology for identifying "costs attributable." The Commission rejected the proposal on the ground that it rested on unverifiable assumptions and was inconsistent with the statute. The Commission nevertheless made other adjustments to improve its cost-attribution methodology to account for some of petitioner's concerns. The questions presented are as follows:

1. Whether the court of appeals correctly upheld the Commission's order, which rejected petitioner's proposed modifications of the Commission's methodology for identifying "costs attributable" to particular products but adjusted that methodology in other respects.

2. Whether *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should be overruled or clarified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-34a) is reported at 890 F.3d 1053. The amended order of the Postal Regulatory Commission (Pet. App. 35a-226a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2018. A petition for rehearing was denied on July 27, 2018 (Pet. App. 1a-2a). On October 15, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 24, 2018. The petition was filed on December 26, 2018 (a Wednesday following two successive holidays). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the lawfulness of a cost-attribution methodology adopted by the Postal Regulatory Commission (Commission) to determine (among other things) statutorily required price floors for the Postal Service's competitive products. Petitioner filed a petition with the Commission that urged the agency to modify its cost-attribution methodology in certain respects. The Commission rejected petitioner's proposal, but it adopted other changes to improve its methodology, in part to address the concerns that petitioner had raised. Petitioner filed petitions for review of the Commission's determination and of a subsequent Commission order amending its regulations to implement that determination. The court of appeals denied the petitions. Pet. App. 3a-34a.

1. a. For most of the Nation's history, Congress regulated postal rates directly. *National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 462 U.S. 810, 813 (1983). In 1970, Congress conferred ratemaking authority on the agency now called the Postal Regulatory Commission (previously the Postal Rate Commission). Postal Reorganization Act, Pub. L. No. 91-375, § 3621, 84 Stat. 760 (39 U.S.C. 404(b)). In doing so, "Congress recognized that the increasing economic, accounting, and engineering complexity of ratemaking issues" made them ill-suited for Congress and its staff, and that ratemaking duties were better entrusted to an "expert[]" agency "composed of 'professional economists, trained rate analysts, and the like.'" *Greeting Card Publishers*, 462 U.S. at 822-823 (citation omitted).

In delegating ratemaking authority to the Commission, the Postal Reorganization Act adopted the "[b]asic * * * principle that, to the extent 'practicable,' the Postal Service's total revenue must equal its costs."

Greeting Card Publishers, 462 U.S. at 813 (quoting 39 U.S.C. 3621 (1982)). The Act directed the Commission to recommend rates "in accordance with" a series of factors, including "'the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.'" *Id.* at 813-814 (quoting 39 U.S.C. 3622(b)(3) (1982)).

In *Greeting Card Publishers*, this Court rejected a challenge to the Commission's implementation of that "attribution" requirement. See 462 U.S. at 823-834. The Court "agree[d] with the [Commission's] consistent position that Congress did not dictate a specific method for identifying causal relationships between costs and classes of mail," and instead had "'envision[ed] consideration of all appropriate costing approaches.'" *Id.* at 826 (citation omitted). The Court also upheld the Commission's determination "that, regardless of method, the Act requires the establishment of a sufficient causal nexus before costs may be attributed" to a class of mail, and stated that, "when causal analysis is limited by insufficient data," the Commission should "'press for . . . better data,' rather than 'construct an attribution' based on unsupported inferences of causation." *Id.* at 826-827 (citation omitted); see *id.* at 833 ("The statute requires attribution of any cost for which the source can be identified, but leaves it to the Commissioners, in the first instance, to decide which methods provide reasonable assurance that costs are the result of providing one class of service.").

b. In 2006, Congress enacted the Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (Accountability Act), which placed additional

restrictions on the rates the Postal Service may charge and authorized the Commission to implement those restrictions by regulation. Among other things, the Accountability Act was designed to codify the view of "attributable" costs that had previously been adopted by the Commission and upheld by this Court in *Greeting Card Publishers*. To achieve that result, the Accountability Act prohibited the Commission from "mak[ing] classes [of mail products] responsible for the recovery of costs for which an extended inference of causation was claimed." S. Rep. No. 318, 108th Cong., 2d Sess. 9-10 (2004) (Senate Report). It also assigned to the Commission "the technical decision of what cost analysis methodologies are sufficiently reliable at any given time to form the basis for attribution." *Id.* at 9.

The Accountability Act classifies all Postal Service products as either "market-dominant" or "competitive," 39 U.S.C. 3642(b)(1), and it imposes different parameters on the rates for the two types of product. Market-dominant products are products over which the Postal Service "exercises sufficient market power" that it can raise prices or decrease quality "without risk of losing a significant level of business to other firms offering similar products." 39 U.S.C. 3642(b)(1). To prevent the Postal Service from leveraging its statutory monopoly to overcharge consumers, the Accountability Act requires a price cap, enforced by the Commission, to restrict the Postal Service's ability to increase rates for each class of market-dominant products. 39 U.S.C. 3622(a) and (d)(1); see 39 C.F.R. 3010.1-3010.66.

Competitive products, in contrast, are those for which the "Postal Service faces meaningful market competition." Pet. App. 5a (citation omitted). To prevent the Postal Service from using revenues from its market-

dominant products to defray costs competitive products would otherwise have to be priced to cover, the Accountability Act requires the Commission to "prohibit the subsidization of competitive products by market-dominant products." 39 U.S.C. 3633(a)(1). The Act also requires the Commission to establish a price floor for each competitive product. The price floor for each product must cover that product's "costs attributable." 39 U.S.C. 3633(a)(2). The Act further requires that the price floors for all competitive products in the aggregate must "collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service." 39 U.S.C. 3633(a)(3).[1]

The Accountability Act defines "costs attributable" as those "direct and indirect postal costs attributable to such product through reliably identified causal relationships." 39 U.S.C. 3631(b). It does not define the term "institutional costs." It is undisputed, however, that all Postal Service costs must be classified as either "costs attributable" or "institutional costs." Pet. App. 17a; see Pet. 18. The Commission therefore treats "institutional costs" as a "'residual'" category containing those costs that do not satisfy the Act's definition of "costs attributable." Pet. App. 6a (citation omitted). To classify a particular postal

[1] When the Commission issued the orders at issue here, the "collective share" was set at 5.5% of institutional costs. Pet. App. 11a. In January 2019, the Commission adopted a new formula for calculating the minimum percentage of institutional costs that must be recovered from competitive products collectively. Order No. 4963 (Jan. 3, 2019). Under the formula, which became effective on March 2, 2019, the appropriate share is 8.8% for Fiscal Year 2019. *Id.* at 28. Petitioner has sought court of appeals review of the order adopting the new formula. See *United Parcel Serv., Inc.* v. *Postal Regulatory Comm'n*, No. 19-1026 (D.C. Cir.) (petition for review filed Feb. 4, 2019).

cost, the Commission first considers the extent to which that cost can be attributed "to [a specific] product through [a] reliably identified causal relationship[]." *Id.* at 6a-7a (citation omitted; first set of brackets in original). Any cost that cannot be attributed in this manner, to a product, class, or group, is classified as an institutional cost. *Ibid.*

2. a. This case concerns the Commission's approach to determining the amount of costs attributable to a particular product. The costs a firm incurs to produce any unit of a product consist of both fixed costs and variable costs, and the Commission applies different approaches to those two types of costs.

Fixed costs are costs that "remain constant regardless of overall product volume." Pet. App. 7a. The total cost to a firm of an executive's salary, for example, may remain the same irrespective of how many units of a particular product are made. Under the Commission's historical cost-attribution method, the only fixed costs that are classified as "costs attributable" are "product-specific [fixed] costs * * * 'uniquely associated with an individual product,'" such as the cost of advertising that product. *Ibid.* (citation omitted). The Commission's treatment of fixed costs is not at issue here.

Variable costs, in contrast, are costs that vary with output—*i.e.*, the amount of a product produced—such as the cost of wage labor or the cost of raw materials. Pet. App. 188a. The Commission has long maintained that only marginal costs—*i.e.*, the cost of producing one additional unit of a product—bear a sufficiently reliable causal relationship to a product to be attributable to that product. See, *e.g.*, Op. & Recommended Decision, vol. 1, at 137, Docket No. R80-1 (Postal Rate Comm'n Feb. 19, 1981). The Commission historically directed the Postal Service to determine the variable cost incurred

by a product by calculating what the Commission termed the product's "volume-variable cost[]," Pet. App. 9a, which is the marginal cost of a product multiplied by the volume of the product produced, see *id.* at 202a.

Implementing the Commission's historical approach, the Postal Service calculated a product's volume-variable cost using a four-step process. Pet. App. 7a-10a. First, it identified the various activities, such as highway transportation, that account for a product's cost,. *Id.* at 7a. Second, for each activity, the Postal Service identified the "unit of measurement that best captures the activity's 'essence,'" which it termed the "'cost driver.'" *Ibid.* (brackets and citation omitted). For example, the cost driver for highway transportation is "cubic-foot-miles," meaning the cost of transporting one cubic foot of mail one mile. *Id.* at 8a, 201a. Third, the Postal Service allocated the costs of each activity among the products involving that activity. *Id.* at 8a. It did so by making estimates (called "distribution keys") of the share of an activity's total cost for which each product is responsible, based on worksite observations and statistical sampling. *Ibid.* Fourth, the Postal Service summed the costs of each activity undertaken to produce a product, and multiplied that total by the number of units produced. *Id.* at 9a-10a. The "costs attributable" to a product were the volume-variable cost plus the fixed costs. See *id.* at 7a-10a (discussing concrete examples and illustrative graphs); *id.* at 198a-206a (describing Commission's approach in detail).

b. The Commission's historical approach did not completely account for all variable costs the Postal Service incurred. Pet. App. 10a-11a. "Under the principle of diminishing marginal costs, the cost of adding each new unit—in economic parlance, that unit's 'marginal cost'—decreases as production quantity increases, due

to the efficiency gains that result from scaling up operations." *Id.* at 8a. The cost of producing any one unit of a product is therefore typically different from the cost of producing any other unit: the last unit produced costs the least, and all preceding units cost more.

The difference between the cost of the last, lowest-cost (or "marginal") unit and that of the preceding units is known as "inframarginal cost[]." Pet. App. 11a. Historically, the Commission did not treat inframarginal costs as part of the volume-variable cost (and thus as "costs attributable"). *Ibid.* In the Commission's judgment, inframarginal costs did not bear a sufficiently reliable causal relationship to a particular competitive process to warrant classifying them as "costs attributable." *Ibid.* Instead, "the Commission classified all inframarginal costs as institutional costs." *Ibid.* As a result, a competitive product's price did not need to cover those inframarginal costs completely. Rather, under 39 U.S.C. 3633(a)(3), the price of that product—together with the prices of all other competitive products—needed only to "collectively cover what the Commission determine[d] to be an appropriate share of the institutional costs of the Postal Service." *Ibid.*

3. In 2015, petitioner—a private logistics firm that competes with the Postal Service—filed a petition with the Commission requesting that the agency initiate proceedings to modify its existing cost-attribution methodologies. C.A. App. 9-177. As relevant here, petitioner urged the Commission to require the Postal Service to classify all inframarginal costs as "costs attributable." Pet. App. 12a. Petitioner proposed that the inframarginal costs of a particular activity should be apportioned among products based on the Postal Service's distribution keys, *i.e.*, its estimates of the proportion of the

number of units of each activity's cost driver (such as cubic-foot-miles for highway transportation) that are used to calculate volume-variable costs. *Ibid.* The Postal Service would then be required to set prices for each competitive product high enough to cover those (previously unattributed) inframarginal costs. *Ibid.*; see C.A. App. 36-62.

In a September 2016 order (amended in October 2016), the Commission rejected petitioner's proposal. Pet. App. 35a-226a. It determined that "the record * * * does not support a finding that [all] inframarginal costs can be attributed * * * through 'reliably identified causal relationships,'" as required by the Accountability Act. *Id.* at 40a-41a (citation omitted). The Commission explained that, although all inframarginal costs are variable—in the sense that they change with volume—only a "portion of inframarginal costs * * * have a causal relationship with products" under the Commission's longstanding view of causation. *Id.* at 103a-104a. It found that petitioner's proposal rested on "unverifiable," "untenable," and "unsupported" assumptions that "lack[ed] an empirical basis." *Id.* at 79a, 83a, 92a-93a, 98a. The Commission also explained that, even under petitioner's broader view of which costs are causally linked to a particular product, petitioner's proposed cost-attribution method was unreliable. *Id.* at 81a-100a.

Although the Commission rejected petitioner's proposal, it nonetheless considered—"[i]n the course of its analysis" of that proposal—whether a different cost-attribution method could reliably attribute to a particular product the portion of inframarginal costs that *is* "causally related" to that product's production "but not currently attributed." Pet. App. 41a; see *id.* at 109a-111a.

The Commission observed that, in the course of fulfilling its statutory obligation to "prohibit the subsidization of competitive products by market-dominant products," 39 U.S.C. 3633(a)(1), it had previously approved a method to calculate the overall "incremental cost" of all competitive products taken together. See Pet. App. 50a, 52a-54a, 58a, 86a-88a. Incremental costs are the costs "that would disappear were the Postal Service to stop offering those products for sale." *Id.* at 4a. They represent "the difference between the [Postal Service's] total costs . . . and the total costs without [the] product[s]" in question. *Id.* at 13a-14a (citation omitted; first and second sets of brackets in original). The Commission found that a "reliably identified causal relationship" exists "between incremental costs and products," and that considering "incremental costs significantly improve[s] the accuracy of the attribution of costs to products because [incremental costs] include inframarginal costs that are causally related to products," whereas "the current methodology for attribution" omitted them. *Id.* at 109a.

The Commission had previously applied the incremental-cost approach to the Postal Service's competitive products taken as a whole. See Pet. App. 53a-54a. Used in that manner, incremental costs reflected the marginal cost of producing that increment, *i.e.*, all of the Postal Service's competitive products. See *id.* at 206a. The Commission determined, however, that applying the incremental-cost method to a different increment—a single competitive product—could more accurately estimate that product's marginal cost, because the method "sums together the marginal cost of each piece of mail contained within the product." *Id.* at 80a. The Commission concluded that

applying the incremental-cost approach in this way "represent[ed] a significant improvement over the current methodology" and "results in the attribution of those inframarginal costs that meet the statutory requirements for cost attribution." *Id.* at 41a; see *id.* at 110a.

"Based on the Commission's findings that incremental costs can be linked to products through reliably identified causal relationships and that the use of an incremental costs methodology represents a significant improvement from the current attribution methodology," the Commission determined that it "must require the Postal Service to attribute those costs." Pet. App. 111a. The Commission accordingly determined that, at the product level, "[a]ttributable costs shall now include those inframarginal costs calculated as part of a product's incremental costs, as well as volume-variable costs and product-specific costs." *Ibid.*

To implement that determination, the Commission issued a notice that proposed conforming changes to its rules. 81 Fed. Reg. 63,445 (Sept. 15, 2016) (C.A. App. 1179-1188). After receiving comments, it adopted final revisions to its rules. 81 Fed. Reg. 88,120 (Dec. 7, 2016) (C.A. App. 1193-1207).

4. Petitioner filed petitions for review in the court of appeals, challenging both the Commission's September 2016 order and its subsequent order adopting the final rules. Pet. App. 4a-5a; see 16-1354 Pet. for Review 1 (Oct. 7, 2016); 16-1419 Pet. for Review 1-2 (Dec. 12, 2016). The court denied the petitions. Pet. App. 3a-34a.

The court of appeals held that the Commission's revised methodology is consistent with the Accountability Act. Pet. App. 17a-27a, 34a. The court explained that the Act "requires a competitive product to cover only those costs that can be attributed to the product 'through

reliably identified causal relationships.'" *Id.* at 34a (quoting 39 U.S.C. 3631(b)). "In establishing this causal requirement," the court observed, "Congress expected that 'the expert ratesetting agency, exercising its reasonable judgment' would 'decide which methods sufficiently identify the requisite causal connection between particular services and particular costs.'" *Ibid.* (quoting *Greeting Card Publishers*, 462 U.S. at 827). "Here," the court held, "the Commission did exactly that, settling on a cost-attribution methodology that implements its statutory mandate and falls well within the scope of its considerable discretion." *Ibid.*

Petitioner contended that the Commission's approach conflicts with the Accountability Act because it includes within "institutional costs" a portion of a product's variable costs—namely, those "inframarginal costs not included in a product's incremental cost[s]." Pet. App. 17a. Petitioner argued that "'institutional costs' unambiguously refers to 'costs, such as overhead and executive compensation, associated with operating the Postal Service *as an establishment*, independent of production,' and so excludes all variable costs, including inframarginal costs." *Ibid.* (quoting Pet. C.A. Br. 35). In rejecting that challenge to the Commission's methodology, the court of appeals explained that petitioner had "never dispute[d] the Commission's view that 'all Postal Service costs are . . . either attributable or institutional.'" *Ibid.* (brackets and citation omitted). Petitioner's argument, the court observed, therefore hinged on the premise that "all variable costs * * * are 'attributable' under the statute." *Ibid.* The court found that premise to be unsubstantiated. *Ibid.*

The court of appeals explained that petitioner had "offer[ed] no basis for believing that the Accountability Act unambiguously compels 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." Pet. App. 17a-18a (quoting 39 U.S.C. 3631(b)) (brackets omitted). Petitioner instead contended that a dictionary definition of "institutional" as meaning "'of, relating to, involving, or constituting an institution'" requires "exclud[ing] variable costs." *Id.* at 18a (citation omitted). The court found that dictionary definition "fully consistent with classifying some variable costs as institutional," explaining that some "[v]ariable postal costs, such as the hourly wages of employees who deliver the mail, 'relate to' the Postal Service no less than do fixed postal costs, such as the Postmaster General's annual salary." *Ibid.* The court also rejected petitioner's reliance on a law-review article (written by one of petitioner's amici) and a passage in the Senate Report that described overhead costs as "institutional costs." The court explained that neither source compelled the conclusion that the term "institutional" in this context excludes all variable costs. *Ibid.*

Finding "no indication that the statute requires [petitioner's] reading," the court of appeals concluded that the Commission's interpretation of "institutional costs" was reasonable and should be accorded deference under *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 18a-19a. The court explained that the Commission's position is "consisten[t] with statutory structure"; that it is "support[ed] [by] the established meaning 'institutional costs' held in the postal ratemaking context long prior to the Act's 2006 enactment"; and that the legislative history indicated that, "in employing a known term of art in the statute, 'Congress intended it to have its established meaning.'" *Id.* at

19a-20a (quoting *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991)).

Petitioner argued in the alternative that the court of appeals should not give "*Chevron* deference" to the Commission's interpretation of "institutional costs" "because the Commission made 'no reasonable attempt to grapple with or even refer back to the statutory text.'" Pet. App. 25a (quoting Pet. C.A. Br. 45). The court rejected that contention. *Id.* at 25a-27a. The court explained that the term "'[i]nstitutional costs' * * * ha[d] [an] established meaning[] in the postal ratemaking context," and that "the longstanding definition[] upon which the Commission relied create[s] no anomalies and flow[s] sensibly from text, history, and statutory structure." *Id.* at 25a-26a. The court further explained that the Commission's orders under review "are faithful to th[at] meaning[]." *Id.* at 25a. The court concluded that "the Commission had no need to say anything more" and "had no duty to expressly justify its decision to continue embracing" that definition. *Id.* at 25a-26a.

The court of appeals also rejected petitioner's argument that the Commission's interpretation of the term "institutional costs" in the Accountability Act "represent[ed] an unexplained deviation from the Commission's prior reading of the term." Pet. App. 26a (citing *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016)). The court explained that the statements on which petitioner had relied were "cherry-picked and shorn of context." *Ibid.* The court concluded that "the Commission has never taken the view that all variable costs, including all inframarginal costs, bear an adequate causal relationship with specific products to be counted among costs attributable or—what amounts to the same

thing—that no variable costs may be considered institutional costs." *Id.* at 26a-27a.[2]

ARGUMENT

In the orders at issue here, the Commission declined to adopt petitioner's proposed modifications of the agency's cost-attribution methodology, finding that the proposal rested on unfounded assumptions about causation and thus would be inconsistent with the Accountability Act. The Commission made other adjustments to its methodology, however, that were designed to address some of the concerns petitioner had raised. In taking that approach, the Commission acted well within its statutory authority. Applying settled administrative-law principles, the court of appeals correctly upheld the Commission's determination, and its decision does not conflict with any decision of this Court or another court of appeals.

Petitioner contends (Pet. 11-31) that this Court should grant review to overrule or clarify the doctrine of *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which courts generally defer to an administrative agency's reasonable interpretation of an ambiguous statute that it

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[2] Petitioner also argued below that the Commission's methodology conflicts with the Accountability Act's definition of "costs attributable," which includes not only "direct" but also "indirect postal costs," Pet. App. 21a (quoting 39 U.S.C. 3631(b)), and that the Commission's interpretation of "indirect postal costs" should not be accorded deference. In addition, petitioner challenged the Commission's orders as arbitrary and capricious, in violation of 5 U.S.C. 706(2)(A). The court of appeals rejected those arguments as well, Pet. App. 21a-34a, and petitioner has not pressed those challenges in this Court.

administers, at least when that interpretation is articulated in a regulation or other action carrying the force of law. But petitioner has not demonstrated any special justification sufficient to warrant that result.

In any event, this case would be an exceedingly poor vehicle to address the continuing vitality of *Chevron*. Even before *Chevron* was decided, the Court had recognized that Congress intended to vest the Commission with broad discretion to make highly technical, policy-laden determinations concerning the attribution of costs to specific Postal Service products. Overruling or altering *Chevron* would provide no reason to depart from that settled understanding.

Wholly apart from any judicial deference, moreover, the Commission's decision here embodies the correct, and by far the best, construction of the Accountability Act. It is undisputed that, under the Act, all Postal Service costs are either "costs attributable" or "institutional" costs. And the statutory text compels the Commission's determination that the Act does not require—or, indeed, permit—the attribution to a particular product of any costs, including inframarginal costs, other than those linked to that product through a "reliably identified causal relationship[]." 39 U.S.C. 3631(b). Petitioner's real dispute is with the Commission's expert economic judgment that the particular costs petitioner urged the Commission to include have not been shown to be linked to particular products through such causal relationships. That highly technical determination about the statute's application to particular facts does not implicate *Chevron*.

This case likewise provides no occasion to address petitioner's alternative argument that *Chevron* should be

clarified to apply only where the agency provides an adequate explanation of its reasoning. The court below applied the standard articulated by this Court's cases, as have other courts of appeals. Petitioner's dispute is with the court's determination that no additional explanation was necessary in these particular circumstances because the Commission's position adhered to its longstanding view grounded in well-established definitions of existing statutory terms. Further review is not warranted.

1. a. The Accountability Act instructs the Commission to establish price floors for the Postal Service's competitive products. 39 U.S.C. 3633(a)(2) and (3). The price floor for each product must cover the "costs attributable" to that product, *ibid.*, defined as those "postal costs attributable to such product through reliably identified causal relationships," 39 U.S.C. 3631(b). In addition, the price floors for "all competitive products" must "collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service." 39 U.S.C. 3633(a)(3).

At issue here is the Commission's decision to classify some, but not all, inframarginal costs as "costs attributable" under Section 3631(b) and to treat the remaining inframarginal costs as "institutional" costs. The Accountability Act does not define "institutional" costs. But as petitioner acknowledges and did not dispute below, "all postal costs" are either "'institutional costs'" or "'costs attributable.'" Pet. 18; see Pet. App. 17a. The Commission designates as "institutional" costs any "residual costs" that remain after identifying and subtracting all "costs attributable." Pet. App. 49a, 81a. The central dispute here concerns whether the Commission correctly determined which inframarginal costs constitute "costs attributable."

On that question, the Commission rejected petitioner's proposal to treat *all* inframarginal costs as "costs attributable," and instead included only the subset of inframarginal costs that constitute "incremental costs." See Pet. App. 41a, 109a-111a. The Commission determined that petitioner's proposal to treat all inframarginal costs as "costs attributable" was "inconsistent with the Accountability Act[]" because the proposal "fail[ed] to reliably identify a causal relationship ... between all of the inframarginal costs it seeks to attribute and products." *Id.* at 13a (citation omitted). The court of appeals correctly upheld that determination. *Id.* at 17a-21a.

Consistent with the applicable statutory directive, the Commission focused on whether petitioner had reliably identified a causal relationship between all inframarginal costs and products. The Accountability Act instructs the agency to attribute to particular products only "direct and indirect postal costs attributable to such product through reliably identified causal relationships." 39 U.S.C. 3631(b); see 39 U.S.C. 3633(a)(3). By its terms, the Act thus requires the Commission to assess the existence and reliability of a purported causal relationship between a particular cost and a particular product.

The Accountability Act codifies the understanding of "attributable" that the Commission had adopted and this Court had upheld in *National Association of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810 (1983). The Court explained that the phrase "attributable costs" in the Postal Reorganization Act was not a "term of art in law or accounting," and that, "[i]n the normal sense of the word, an 'attributable' cost is a cost that may be considered to result from providing a particular class of service." *Id.* at 827. The Court "agree[d] with the [Commission's] consistent position that Congress

did not dictate a specific method for identifying causal relationships between costs and classes of mail," and that Congress instead "'envision[ed] consideration of all appropriate costing approaches.'" *Id.* at 826 (citation omitted). The Court also agreed with the Commission's view "that, regardless of method, the Act require[d] the establishment of a sufficient causal nexus before costs may be attributed," which the Commission "ha[d] variously described * * * as demanding a 'reliable principle of causality,' or 'reasonable confidence' that costs are the consequence of providing a particular service, or a 'reasoned analysis of cost causation.'" *Ibid.* (citations omitted). The Court in *Greeting Card Publishers* accordingly found that the Commission had "acted consistently with the statutory mandate and Congress' policy objectives in refusing to use" particular methodologies that "lack[ed] an established causal basis." *Id.* at 829.

In this case, applying the same basic understanding, the Commission considered petitioner's submission in detail but found that multiple assumptions on which its proposal was premised were unsubstantiated. Pet. App. 12a-13a. In particular, the Commission concluded that a key assumption underlying petitioner's proposed method to calculate total inframarginal costs—the "constant elasticity assumption"—"cannot be justified" because it "requires other untenable assumptions" and "lacks an empirical basis, as the Postal Service has not experienced the levels of volume necessary to verify th[e] assumption." *Id.* at 83a. The Commission also observed that the constant-elasticity assumption "may inaccurately represent the shape of the cost curve at very low levels of volume," and that "[a]pplying [that] assumption to levels of volume far beyond the range of actual

experience produces results that are inadequately supported and unreliable." *Id.* at 83a-84a. The Commission further found that petitioner's approach to allocating inframarginal costs among products "relie[d] on" another "unverifiable assumption," namely, "that the proportion of inframarginal costs incurred by that product is identical to the proportion of the cost driver of that product." *Id.* at 98a.

The Commission concluded, however, that a portion of inframarginal costs can be linked to particular products "through reliably identified causal relationships" and so can (and therefore must) be properly classified as costs attributable. 39 U.S.C. 3631(b). Pet. App. 109a-111a. The Commission explained that a "reliably identified causal relationship[]" exists "between *incremental* costs"—the costs that would disappear if a specific product was not produced—"and products." *Id.* at 109a (emphasis added). The Commission had previously used the concept of incremental costs to determine the marginal cost of all of the Postal Service's competitive products taken together, and it explained that the same analysis could be applied to particular products, which would "significantly improve the accuracy of the attribution of costs to products." *Ibid.* In drawing the line between inframarginal costs that are incremental costs and those that are not, and treating only the former as "costs attributable," the Commission faithfully implemented the Accountability Act's directive.

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 18-19) that the Commission's position gives the term "institutional costs" "no meaning," and that the term "institutional" should be read in accord with its ordinary meaning to "refer[] to the costs of the institution as a whole rather than costs associated

with particular products." The Commission's approach, however, is fully consistent with that understanding. The Commission classifies as "institutional" only those costs that are *not* linked to particular products through reliably identified causal relationships, Pet. App. 41a, and therefore are not verifiably "associated with particular products." Pet. 18-19.

Petitioner "agree[s]," moreover, with the Commission and the court of appeals "that all postal costs must go into one of two categories: 'institutional costs' and 'costs attributable.'" Pet. 18 (quoting 39 U.S.C. 3633(a)). The Commission's approach, under which "institutional costs" include all costs that do not constitute "costs attributable" because no "reliably identified causal relationship" links them to a particular product, follows logically from that undisputed understanding. Petitioner's contrary view would treat "costs attributable" as including costs that do not satisfy the statutory definition of that term.

Statutory history confirms the propriety of the Commission's approach. The Postal Reorganization Act required the Commission to ensure that "each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class * * * plus that portion of all other costs of the Postal Service reasonably assignable to such class." *Greeting Card Publishers*, 462 U.S. at 814 n.3 (citation omitted). The Commission interpreted the term "costs attributable" to encompass only product-specific fixed costs and volume-variable costs, and it adopted the term "institutional costs" as a gloss on the phrase "all other costs." See, *e.g.*, Op. & Recommended Decision, vol. 1, at 99, Docket No. R74-1 (Postal Rate Comm'n Aug. 28, 1975); Op. & Recommended Decision, vol. 1, at 227, Docket No. R97-1 (Postal

Rate Comm'n May 11, 1998). The courts of appeals took the same approach. See, *e.g.*, *United Parcel Serv., Inc.* v. *United States Postal Serv.*, 184 F.3d 827, 844 (D.C. Cir. 1999) (per curiam); *Mail Order Ass'n of Am.* v. *United States Postal Serv.*, 2 F.3d 408, 425 (D.C. Cir. 1993) (per curiam); *Direct Mktg. Ass'n* v. *United States Postal Serv.*, 778 F.2d 96, 101 (2d Cir. 1985). When Congress enacted the Accountability Act, it codified this "existing regulatory structure." Senate Report 9-10. Congress's decision to incorporate into the Accountability Act a known term with an established regulatory meaning confirms that "Congress intended [the term] to have [that] established meaning." See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991).

Petitioner also contends (Pet. 20-22) that the Commission's approach improperly equates costs linked to a product through a reliably identified causal relationship with "a product's theoretical minimum cost." Pet. 20. According to petitioner, the Commission equated those two concepts "by using an incremental-cost test that identifies only costs for a product at the end of the cost curve (where costs are cheapest) and not for products earlier on in the curve (where costs are greater)." *Ibid.* But the Commission did not assume, as petitioner suggests (Pet. 21-22), that "all products use only the latest, lowest-priced cost-driver units and so bear the minimum possible inframarginal costs." See Pet. App. 30a.

Instead, the Commission determined that only those inframarginal costs that would disappear if the Postal Service ceased to produce a particular product—the incremental inframarginal costs—are properly viewed as being caused by the production of that product. Pet. App. 4a. As the court of appeals explained, "the Com-

mission simply declined to assume that any given product incurred more than the minimum cost that could reliably be assigned to it." *Id.* at 31a. "Attributing *more* than this amount," as the court observed, "necessitates guesswork, and the Commission sensibly concluded that such guesswork was inconsistent with" the statutory definition of "costs attributable," which encompasses only those costs that bear "reliably identified causal relationships" to particular products. *Ibid.*

Petitioner emphasizes the Commission's acknowledgment in the court of appeals that the incremental-cost test "almost certainly underestimates the inframarginal costs a product actually incurred." Pet. 21 (quoting Gov't C.A. Br. 39). But the Commission's recognition of that fact does not undermine its decision not to include as costs attributable those inframarginal costs that are not incremental costs. The Commission's longstanding position is that the only costs caused by a particular product are marginal costs—*i.e.*, the costs that would disappear if the product were not produced—not costs "actually incurred" in its production. *Ibid.*; see pp. 6-7, *supra*. The Commission's quoted statement reflects that position, as well as its recognition of the current limits of available data and reliable methodologies for attributing costs to products. Although additional inframarginal costs might well be incurred by a particular product, the Act does not allow the Commission to attribute those costs to the product absent a "reliably identified causal relationship[]" between them. 39 U.S.C. 3631(b). Because the Commission determined that no such causal relationship has yet been reliably identified, it properly classified those additional costs as "institutional" costs rather than as "costs attributable." Pet. App. 40a-41a.

That is precisely the approach Congress envisioned. In enacting the Postal Reorganization Act, "Congress adopted" the view "that, unless a reliable connection is established between a class of service and a cost, allocation of costs on cost-of-service principles is entirely arbitrary." *Greeting Card Publishers*, 462 U.S. at 829 n.24. Instead of "'construct[ing] an attribution' based on unsupported inferences of causation," Congress "envision[ed] that," if "causal analysis is limited by insufficient data," the Commission "w[ould] 'press for . . . better data.'" *Id.* at 827 (citation omitted).

Petitioner's real disagreement thus is not with the Commission's reading of the statute, but instead with the agency's highly technical determination that petitioner's submission had failed to demonstrate a reliably identified causal relationship between the disputed subset of inframarginal costs and each competitive product. That factbound judgment about intricate economic methodology and the inadequacy of empirical support for assumptions underlying petitioner's proposal does not warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioner principally contends (Pet. 11-23) that the Court should grant review to overrule its holding in *Chevron* that courts ordinarily should defer to an agency's reasonable construction of an ambiguous provision of a statute that it administers. See *Chevron*, 467 U.S. at 843-845. That is incorrect.

a. "Although 'not an inexorable command,' * * * this Court has always held that 'any departure' from the doctrine [of *stare decisis*] 'demands special justification.'" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (citations omitted). Here, however, 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.

b. More importantly, this case would be an unsuitable vehicle to reconsider the ongoing vitality of *Chevron* because deference under *Chevron* is immaterial to the outcome here. That is so for at least two reasons.

First, irrespective of *Chevron*, the Commission's determination of how to allocate Postal Service costs would be entitled to substantial deference under this Court's pre-*Chevron* precedent specific to postal ratemaking. In *Greeting Card Publishers*, decided a year before *Chevron*, this Court explained that "[a]llocation of costs is not a matter for the slide-rule," but instead "involves judgment on a myriad of facts" and "has no claim to an exact science." 462 U.S. at 825 (quoting *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945)). The Court agreed with the "Commission's consistent position that Congress did not dictate a specific method for identifying causal relationships between costs and classes of mail." *Id.* at 826. Instead, in this as in other ratemaking contexts, Congress "le[ft] to the ratesetting agency the choice of methods by which to perform this allocation." *Ibid.* The central impetus for creating the Commission was "Congress['s] recogni[tion] that the increasing economic, accounting, and engineering complexity of ratemaking issues" made them ill-suited for Congress, and that the ratemaking function was better entrusted to an "expert[ ]" agency "composed of 'professional economists, trained rate analysts, and the like.'" *Id.* at 822-823 (citation omitted).

In construing the Postal Reorganization Act in *Greeting Card Publishers*, the Court found "no reason to suppose" that Congress had intended to "den[y] to the expert ratesetting agency, exercising its reasonable

judgment, the authority to decide which methods sufficiently identify the requisite causal connection between particular services and particular costs." 462 U.S. at 827. It accordingly held that the Commission's "interpretation of th[e] statute is due deference." *Id.* at 821; see *id.* at 825. The same approach is appropriate with respect to the Commission's current cost-allocation decisions under the Accountability Act. Overruling *Chevron* thus would have no material effect on the outcome here because deference would be independently warranted in this context.

Second, regardless of what form of judicial deference applies to the Commission's interpretation of the Accountability Act, its cost-allocation decisions here should be upheld because they reflect the correct, and by far the best, understanding of the Act. For the reasons explained above, the Commission's view that "costs attributable" do not include inframarginal costs that fall outside incremental costs—and therefore in the Commission's judgment are not linked to particular products by reliably identified causal relationships—follows inexorably from the statute's text and structure. See pp. 17-24, *supra*. Petitioner concedes (Pet. 18) that costs that do not constitute "costs attributable" must be "institutional" costs. Having determined that the disputed subset of inframarginal costs are not "attributable" under the statutory standard, the Commission necessarily concluded that those disputed costs are institutional.

In the court of appeals, the Commission argued that its interpretation of the Accountability Act should be upheld as reflecting the "unambiguously correct" reading of the statute. Pet. App. 21a. The court of appeals found it unnecessary to decide whether that was so, but

the textual analysis set forth above provides a fully sufficient, independent basis for rejecting petitioner's challenge to the Commission's statutory interpretation. If the Court granted review in this case, the proper disposition therefore would be to affirm the court of appeals' judgment, regardless of whether *Chevron* was correctly decided. See, *e.g.*, *Dahda* v. *United States*, 138 S. Ct. 1491, 1498-1500 (2018) (affirming on alternative ground).

c. For similar reasons, there is likewise no merit to petitioner's alternative contention (Pet. 23-27) that the Court should grant review to clarify further the proper scope of *Chevron* deference in light of *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). As explained above, the proper disposition of this case does not depend on whether *Chevron* deference applies at all. See pp. 25-27, *supra*. The outcome therefore cannot depend on whether, under *Encino Motorcars*, a particular amount of explanation by an agency is a prerequisite to *Chevron* deference.

The clarification that petitioner urges is also unnecessary. This Court stated three decades ago that, "where the agency itself has articulated no position on [an interpretive] question," "an agency counsel's interpretation of a statute" should not be accorded *Chevron* deference. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). *Encino Motorcars* illustrates the same uncontroversial principle, see 136 S. Ct. at 2125, which

all 13 courts of appeals have recognized and applied.[3] Indeed, the court of appeals applied that principle in this case. Pet. App. 25a-26a (rejecting petitioner's argument that the Commission's interpretations of the Accountability Act did not warrant deference because its explanations were too spare).

Petitioner's real disagreement again is with the application of that settled principle to the circumstances of this case. That disagreement does not warrant this Court's review. In any event, the court of appeals was correct in holding that the Commission's explanation of its reasoning was sufficient. As the court explained, the Commission's order used terms with "established meanings in the postal ratemaking context," and the "longstanding definitions upon which the Commission relied create no anomalies and flow sensibly from text, history, and statutory structure." Pet. App. 25a-26a. The Commission accordingly "had no need to say anything more" about its interpretation of those terms in

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[3] See, *e.g.*, *O'Connell* v. *Shalala*, 79 F.3d 170, 179 (1st Cir. 1996); *Chao* v. *Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227 (2d Cir. 2002); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 345 & n.11 (3d Cir. 2006); *Sierra Club* v. *United States Dep't of the Interior*, 899 F.3d 260, 286-287 (4th Cir. 2018); *Luminant Generation Co.* v. *EPA*, 675 F.3d 917, 927-928 (5th Cir. 2012); *Smith* v. *Aegon Cos. Pension Plan*, 769 F.3d 922, 927 (6th Cir. 2014), cert. denied, 136 S. Ct. 791 (2016); *Pennington* v. *Didrickson*, 22 F.3d 1376, 1383 (7th Cir.), cert. denied, 513 U.S. 1032 (1994); *Morriss* v. *BNSF Ry. Co.*, 817 F.3d 1104, 1111 n.4 (8th Cir.), cert. denied, 137 S. Ct. 256 (2016); *Presidio Historical Ass'n* v. *Presidio Trust*, 811 F.3d 1154, 1166 (9th Cir. 2016); *Southern Utah Wilderness Alliance* v. *Dabney*, 222 F.3d 819, 829 (10th Cir. 2000); *Animal Legal Def. Fund* v. *United States Dep't of Agric.*, 789 F.3d 1206, 1221-1222 (11th Cir. 2015); *Animal Legal Def. Fund, Inc.* v. *Perdue*, 872 F.3d 602, 615 (D.C. Cir. 2017); *Boyd* v. *OPM*, 851 F.3d 1309, 1314 n.2 (Fed. Cir. 2017).

the statute and "had no duty to expressly justify its decision to continue embracing" those meanings. *Ibid.* At a minimum, even if the Commission articulated its interpretation of the statute with "less than ideal clarity," "the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

3. Finally, petitioner suggests (Pet. 16-17) that the Court should grant review because it has granted certiorari (and recently heard argument) in *Kisor* v. *Wilkie*, No. 18-15 (argued Mar. 27, 2019), to reconsider whether an agency's reasonable interpretation of its own regulations warrants deference. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); see also *Auer* v. *Robbins*, 519 U.S. 452 (1997). That is incorrect.

Chevron and *Seminole Rock* deference rest on different footings, which is why even the petitioner in *Kisor* argued that overturning *Seminole Rock* would not undermine the validity of *Chevron*. See Pet. Br. at 45-47, *Kisor*, *supra* (No. 18-15); see also Gov't Br. at 19-22, *Kisor*, *supra* (No. 18-15). Even the most vocal critics of *Seminole Rock* deference have recognized as much. See, *e.g.*, *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212-1213 (2015) (Scalia, J., concurring in the judgment); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 619-621 (2013) (Scalia, J., concurring in part and dissenting in part). Whatever conclusion the Court reaches in *Kisor*, its decision in that case will provide no sound basis for granting review of this distinct question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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