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

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court should reconsider the doctrine of *Chevron* deference in a case involving the exercise of an agency's rate-setting authority, where the agency's entitlement to deference does not rest on *Chevron*, and where the agency's reading of the applicable statutory text is unambiguously correct.

2. Whether the D.C. Circuit correctly applied the Court's recent decision in *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117 (2016), to the facts of this case.

PARTIES TO THE PROCEEDING

United Parcel Service, Inc., petitioner on review, was petitioner below.

Postal Regulatory Commission, respondent on review, was respondent below.

Amazon.com Services, Inc., National Association of Letter Carriers, AFL-CIO, Parcel Shippers Association, United States Postal Service, Valpak Franchise Association, Inc., and Valpak Direct Marketing Systems, Inc., respondents on review, were intervenors supporting respondent below.

RULE 29.6 DISCLOSURE STATEMENT

Amazon.com Services, Inc. is a wholly-owned subsidiary of Amazon.com, Inc. Based on a review of statements filed with the Securities and Exchange Commission pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as of March 20, 2019, no publicly held corporation beneficially owns 10% or more of Amazon.com, Inc. stock.

Parcel Shippers Association is a nonprofit corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT 4

A. Statutory Background 4

B. The Commission's Order 7

C. D.C. Circuit Proceedings 9

REASONS FOR DENYING THE PETITION 10

I. THIS CASE WOULD BE AN EXCEPTIONALLY POOR VEHICLE TO RECONSIDER *CHEVRON* 10

A. The Commission's Decision Would Be Entitled To Deference Even If *Chevron* Were Overruled 10

B. UPS's Interpretation Fails Irrespective Of Whether The Commission Receives Deference 15

1. The term "institutional costs" is not limited to the fixed costs of operating the Postal Service as a whole 15

2. The term "costs attributable" cannot include variable costs that bear no "reliably identified causal relationship[]" to a single product 18

TABLE OF CONTENTS

Page

II. CERTIORARI IS UNWARRANTED TO REVIEW THE PANEL'S FACTBOUND APPLICATION OF *ENCINO MOTORCARS* 22

III. THERE IS NO URGENCY TO REVIEW *CHEVRON* THROUGH THIS FLAWED VEHICLE 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES:

Chevron, U.S.A., Inc. v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*

City of Arlington v. *FCC*, 569 U.S. 290 (2013) 12

Decker v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 27

Direct Mktg. Ass'n v. *USPS*, 778 F.2d 96 (2d Cir. 1985) 17

Encino Motorcars, LLC v. *Navarro*, 136 S. Ct. 2117 (2016) ..... *passim*

ESI Energy, LLC v. *FERC*, 892 F.3d 321 (D.C. Cir. 2018) 25

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 17

In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 13

Mail Order Ass'n of Am. v. *USPS*, 2 F.3d 408 (D.C. Cir. 1993) 17

Montgomery County v. *FCC*, 863 F.3d 485 (6th Cir. 2017) 26

Nat'l Ass'n of Greeting Card Publishers v. *U.S. Postal Serv.*, 462 U.S. 810 (1983) ..... *passim*

Newsweek, Inc. v. *USPS*, 663 F.2d 1186 (2d Cir. 1981) 18

STATUTES:

39 U.S.C. § 2011(a)(2)(B) 7

TABLE OF AUTHORITIES—Continued

Page(s)

39 U.S.C. § 3622(b)(3) 5

39 U.S.C. § 3622(b)(9) 6

39 U.S.C. § 3622(c)(2) 7

39 U.S.C. § 3622(c)(10)(A)(i) 6

39 U.S.C. § 3622(e)(3)(A) 7

39 U.S.C. § 3631(b) ..... *passim*

39 U.S.C. § 3633(a)(2) 2, 6, 7, 11

39 U.S.C. § 3633(a)(3) 2, 7

Administrative Procedure Act 19

Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006) ..... *passim*

Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) ..... *passim*

LEGISLATIVE MATERIAL:

H.R. Rep. No. 109-66, pt. 1 (2005) 7

S. Rep. No. 108-318 (2004) 7

OTHER AUTHORITIES:

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016) 12

Merriam-Webster Dictionary (online ed. 2019), https://www.merriam-webster.com/dictionary/institutional (last updated Mar. 26, 2019) 17

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BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS

INTRODUCTION

UPS observes that there are "many thousands of cases" that apply principles of *Chevron* deference. Pet. 28. It is difficult to think of a worse vehicle to reconsider that seminal decision than this one.

The order under review concerns the economic model used by the Postal Regulatory Commission (the "Commission") to evaluate postal rates. Under its governing statute, the Commission is required to ensure that the United States Postal Service charges a rate for each competitive postal product that covers

the product's "costs attributable," which the statute defines as the "postal costs attributable to such product through reliably identified causal relationships." 39 U.S.C. §§ 3631(b), 3633(a)(2). All other postal costs are known as "institutional costs." *Id.* § 3633(a)(3). To determine which costs fall into each bucket, the Commission employs complex mathematical models that attribute costs to individual products to the extent consistent with sound economics.

In 2015, UPS—a competitor of the Postal Service—petitioned the Commission to adopt a *different* mathematical model that UPS had devised. In a detailed, 125-page decision and order, the Commission largely rejected UPS's proposal. The agency concluded that UPS's model rested on multiple "unverifiable assumptions," and thus did not satisfy the statutory requirement that costs be attributed through "reliably identified causal relationship[s]." Pet. App. 79a. The agency did, however, modify its model in part to take into account what it found to be the meritorious parts of UPS's proposal. On review, the D.C. Circuit unanimously upheld the Commission's decision, explaining that because the agency's interpretation of the statute was "perfectly reasonable," the court did not need to determine whether it was "also unambiguously correct." *Id.* at 19a-21a.

This complex decision would present an exceptionally poor vehicle to reconsider the *Chevron* doctrine. *First*, the Commission's entitlement to deference in this unique rate-setting context does not rely on *Chevron*. In 1983—one year before *Chevron*—the Court held that the Commission is "due deference" when interpreting the postal ratesetting statute in light of the unique "structure of the Act," the statutory "history," and the general discretion afforded to

"ratesetting agenc[ies]." *Nat'l Ass'n of Greeting Card Publishers* v. *U.S. Postal Serv.*, 462 U.S. 810, 821, 827 (1983). UPS has not asked this Court to reconsider *Greeting Card Publishers*, which is independently entitled to *stare decisis*. Because that decision would remain good law even if *Chevron* were overturned, the question of *Chevron*'s validity simply is not presented here.

Furthermore, several features of the statutory scheme create special justifications for deference above and apart from the rationales underpinning *Chevron*. Those features include the open-ended nature of the statutory terms, the discretion customarily accorded to ratesetting agencies, the structure and history of the statute, and Congress's subsequent ratification of the Commission's approach in 2006. *See id.* at 826-833; Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006). These features of the statutory regime would likely entitle the Commission to deference even if *Chevron* were overturned. Because the Court would need to consider and reject each of these statute-specific considerations in order to deny deference, they make this a profoundly unsuitable vehicle to reconsider the general question of *Chevron*'s validity.

Second, the issue of deference is academic in this case because the Commission's decision is "unambiguously correct." Pet. App. 21a. UPS's principal statutory argument is that the Commission erred by interpreting the term "institutional costs" to include all postal costs that are not "costs attributable." But that construction is compelled not only by the plain text of the statute but by UPS's own position that "all postal costs must go into one of [those] two

categories." Pet. 18. As a matter of basic logic, once the Commission identified the "costs attributable," all other costs *must* be institutional costs. This case thus does not involve the construction of ambiguous statutory text; it involves subtraction. UPS's alternative argument that the Commission misapplied the phrase "reliably identified causal relationships" was not pressed or passed on below, rests on a misreading of the Commission's decision, and is meritless in any event.

Perhaps because this case presents such a weak vehicle to reconsider *Chevron*, UPS also urges the Court to review the D.C. Circuit's application of *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117 (2016). The Court should decline. The splitless, factbound application of a three-year-old decision is not an appropriate use of this Court's certiorari jurisdiction. And even a cursory read of the D.C. Circuit's decision demonstrates that it correctly articulated and applied the rule of *Encino Motorcars*.

If this Court wishes to reconsider the *Chevron* doctrine, it will not need to wait long for an appropriate vehicle. It should not strain to reconsider that decision here. The petition should be denied.

STATEMENT

A. Statutory Background

Prior to 1970, Congress set postal rates itself. That system was often criticized for its arbitrariness, anticompetitive effects, and departures from sound economics. *Greeting Card Publishers*, 462 U.S. at 813, 822-823. Congress sought to remedy these problems by enacting the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), which established the Postal Rate Commission and empowered

that "expert[]" and "politically insulated" body to set postal rates based on a number of statutory criteria. *Greeting Card Publishers*, 462 U.S. at 823. The central criterion Congress prescribed was that each class or type of postal product must "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." 84 Stat. at 760 (then codified at 39 U.S.C. § 3622(b)(3)).

The Commission has long interpreted this statutory language to establish a two-tier rate system. Pet. App. 19a, 50a-51a. In 1975, it issued an order explaining that the "direct and indirect postal costs attributable to [a] class or type" of postal product refer to that product's *marginal costs*—that is, the costs that "vary with" each additional unit of a product. *Greeting Card Publishers*, 462 U.S. at 815. The Commission thus required that postal rates be set to ensure that each product "bears" its marginal costs in full. Conversely, the Commission interpreted "all other costs of the Postal Service" (which it referred to as "institutional" costs) to mean any costs *but* the marginal costs of individual products. Pet. App. 19a. The Commission defined those "institutional costs" to include both the fixed costs of operating the Postal Service as a whole and the variable costs concurrently caused by *multiple* types of products, where those costs cannot be reliably linked to any particular product. *Id.* The cost of paying a delivery driver who carries multiple products, for example, is an institutional cost because it does not bear an identifiable causal relationship with any given product. As the statute required, the Commission "reasonably assign[ed]" those institutional costs

to individual products based on a variety of considerations. *Greeting Card Publishers*, 462 U.S. at 823.

In *Greeting Card Publishers*, this Court upheld the Commission's "two-tier ratesetting structure" as a reasonable interpretation of the statute. *Id.* at 833-834. It explained that the Commission was "due deference" in interpreting the statute given not only the deference usually afforded administrative agencies, but also the history and structure of the Postal Reorganization Act, the longstanding principle that Congress "leaves to the ratesetting agency the choice of methods by which to perform th[e] allocation," and the absence of any "specific method for identifying causal relationships between costs and classes of mail." *Id.* at 821, 825-826. The Court found that "Congress did not intend to bar the use of any *reliable method of attributing costs*," and that the Commission's approach was reasonable. *Id.* at 830 (emphasis added).

Congress codified the Commission's longstanding approach in the Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006) ("Accountability Act"). The Accountability Act amended the Postal Reorganization Act to provide that the Commission must ensure that the rates for each competitive postal product cover its "costs attributable," which Congress defined—borrowing the language used by the Supreme Court and the Commission—as "the direct and indirect postal costs attributable to [a] product through *reliably identified causal relationships*." 39 U.S.C. §§ 3631(b), 3633(a)(2) (emphasis added). Further borrowing the Commission's terminology, Congress in several instances referred to the remaining costs as "institutional costs," *see id.* § 3622(b)(9), (c)(10)(A)(i),

(e)(3)(A), and provided that the Commission must ensure that "all competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service," *id.* § 3633(a)(3).[1] The drafters in both Houses of Congress expressly stated that their aim was to continue the Commission's current approach, reflect the Supreme Court's ruling in *Greeting Card Publishers*, and retain the broad discretion that had long been vested in the Commission. *See* S. Rep. No. 108-318, at 9-10 (2004); H.R. Rep. No. 109-66, pt. 1, at 49 (2005).

B. The Commission's Order

In 2015, UPS filed a petition requesting that the Commission dramatically alter its longstanding and judicially approved approach to cost attribution. Pet. App. 39a. In particular, UPS proposed that the Commission redefine "institutional costs" as limited to the fixed costs of operating the Postal Service as a whole, and allocate *all* remaining costs—including variable costs that are concurrently caused by multiple products—to individual products. *See id.* at 55a-56a. In order to assign these "inframarginal costs" to individual products, UPS proposed that the Commission adopt a complex allocation model designed by UPS's paid economist. *Id.* at 56a-57a. Not inci-

[1] In two other parts of the Accountability Act, Congress retained the original "all other costs" language from the Postal Reorganization Act to refer to residual costs, further demonstrating that "institutional costs" are synonymous with "all other costs." 39 U.S.C. §§ 2011(a)(2)(B), 3622(c)(2); *cf.* Pet. 18 (insisting that "Congress did not create two categories consisting of 'costs attributable' and 'all other costs' ").

dentally, this formula would have required the Postal Service to charge substantially higher rates for various postal products, enhancing UPS's ability to sell competing products. *Id.* at 11a-12a.

Numerous entities submitted comments opposing UPS's proposal. Among other serious problems, they observed that UPS's model rested on the assumption that each product had "constant elasticity"—that is, that the product's costs would change at a constant rate with each additional unit of output. *Id.* at 60a-76a. They also pointed out that UPS assumed that each product's contribution to the Postal Service's variable costs was "random." *Id.* at 91a-92a. But as these commenters explained, the assumption of constant elasticity is plainly incorrect; among other things, it would mean that a product has *no* fixed costs. And there is no empirical support for the assumption that products contribute to the Postal Service's costs in a "random" way.

In a thorough, 125-page order and decision, the Commission largely rejected UPS's proposal. It explained that, in light of the serious flaws identified by the commenters, UPS's methodology failed to "reliably identif[y] causal relationships" between individual products and most inframarginal costs. *Id.* at 87a-111a. The Commission agreed, however, to expand the definition of attributable costs to include "incremental costs," which are the "inframarginal costs in a very small range of a component's cost curve where the constant elasticity assumption has been empirically verified based on observed volumes." *Id.* at 87a-88a. The Commission determined that it could reliably attribute such incremental costs to an individual product without

generating the serious problems entailed by UPS's broader proposal. *Id.*

C. D.C. Circuit Proceedings

Dissatisfied with the Commission's refusal to adopt UPS's model in its entirety, UPS petitioned for review of the Commission's decision in the D.C. Circuit. It argued that the Commission erred in interpreting the term "institutional costs" to include any costs that lack a "reliably identified causal relationship[ ]" with an individual product.[2] It also argued that the Commission's reasons for rejecting UPS's cost-attribution methodology were arbitrary and capricious. The Intervenor Respondents, which had opposed UPS's proposal in the Commission proceedings, intervened to defend the Commission's decision.

A panel of the D.C. Circuit unanimously upheld the Commission's order. It explained that the Commission's conclusion that "institutional costs" are a residual category for all costs that cannot be attributed to a single product through "reliably identified causal relationships" was supported by the text and structure of the statute and "the established meaning 'institutional costs' held in the postal rate-making context long prior to the [Accountability] Act's 2006 enactment." *Id.* at 18a-19a. The panel explained that because the Commission's interpretation of the term "institutional costs" was "perfectly reasonable under *Chevron*," it did not need to decide

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[2] UPS also made a separate textual argument that the Commission incorrectly defined the term "indirect costs." Pet. App. 21a-25a. UPS has not raised that argument in its petition, and so it is forfeited.

whether the Commission's interpretation was "not only permissible, but also unambiguously correct." *Id.* at 19a, 21a.

The panel also rejected UPS's contention that the Commission's decision was arbitrary and capricious. It explained that the Commission "sensibly concluded" that UPS's approach did not "reliabl[y] identif[y] causal relationships" because UPS's model required "guesswork" and relied on "unverifiable assumption[s]." *Id.* at 31a.

UPS petitioned for rehearing en banc. No judge called for a vote, and the petition was denied.

REASONS FOR DENYING THE PETITION

I. THIS CASE WOULD BE AN EXCEPTIONALLY POOR VEHICLE TO RECONSIDER *CHEVRON*.

UPS asks the Court to grant certiorari to decide whether to overrule the *Chevron* doctrine. Whatever the certworthiness of that broader question, this case presents an exceptionally poor vehicle to address it. The Commission is entitled to deference for a myriad of statute-specific reasons that would likely survive a decision overruling *Chevron*. And deference of any kind is unnecessary to support the decision below because UPS's statutory arguments are unambiguously incorrect.

A. The Commission's Decision Would Be Entitled To Deference Even If *Chevron* Were Overruled.

This case does not present the principal question on which UPS seeks review. The Commission's entitlement to deference does not rest exclusively on *Chevron*. And for no fewer than five reasons, the

agency would likely continue to be entitled to deference even if *Chevron* were overturned.

First, in 1983—one year *before Chevron*—this Court held that the Commission's "interpretation of the [postal rate] statute is due deference." *Greeting Card Publishers*, 462 U.S. at 821. The Court gave several reasons for deferring to the agency: that "Congress did not dictate a specific method for identifying causal relationships between costs and classes of mail"; that Congress generally "leaves to the ratesetting agency the choice of method by which to perform th[e] allocation" of costs; and that the agency "reasonably construed the Act as establishing a two-tier ratesetting structure" which it still employs today. *Id.* at 826, 833. The Court's decision did not rely on the *Chevron* doctrine, which had not yet been formulated. And as a precedent of this Court, it is entitled to *stare decisis* independently of *Chevron*.

That is reason enough to deny the petition. UPS has not asked this Court to overrule *Greeting Card Publishers*. Nor has it offered any reason that this decision—in contrast to the *Chevron* decision that succeeded it—was incorrect. The Court should not grant certiorari to review *Chevron* in a case where the agency's entitlement to deference does not rest on *Chevron* in the first place.

Second, the relevant statutory text exudes discretion for the agency. It states that the Commission shall "ensure that each competitive product covers its costs attributable," and it defines "costs attributable" as the "direct and indirect postal costs attributable to [each] product through *reliably identified* causal relationships." 39 U.S.C. §§ 3631(b), 3633(a)(2) (emphasis added). By their terms, these

provisions assign the Commission the role of "identif[ying]" causal relationships. And they use a metric—"reliabl[e]"—that necessarily entails policy judgments grounded in economics and agency expertise. *See Greeting Card Publishers*, 462 U.S. at 827 (Congress granted the Commission authority to "exercis[e] its reasonable judgment").

It would be virtually impossible for courts to apply these terms without deference to the agency. Such an inquiry would entail *de novo* review of competing economic and mathematical models to determine which postal cost causal relationships are "reliably identified." Even Justices who have expressed concern about *Chevron*'s scope have acknowledged that deference is warranted where a statute uses open-ended, policy-laden terms like these. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016) (explaining that "*Chevron* makes a lot of sense in certain circumstances," such as where a statute uses a term like "unreasonable" that requires a "policy decision"); *City of Arlington* v. *FCC*, 569 U.S. 290, 325 (2013) (Roberts, C.J., dissenting) (stating that "under anyone's theory a court must defer to the agency's reasonable interpretations of th[e] terms" of a statute granting an agency rulemaking authority to regulate "common carrier[s]" and proscribe "unreasonable condition[s]"). Thus, even if *Chevron*'s general principle of agency deference were overturned, it is likely that the Commission would continue to receive deference in construing such language.

Third, the subject-matter of the statute at issue—ratemaking on a complex economic question—is one for which agencies received deference long before *Chevron* was issued. The Court stated in 1968 that

"the view of administrative rate making uniformly taken by this Court" has been that an agency's "broad responsibilities * * * demand a generous construction of its statutory authority" and that there is "'legislative discretion implied in the rate making power.'" *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (citation omitted). Decades of decisions were to the same effect. *See id.* (citing cases); *see also, e.g.*, *Colo. Interstate Co.* v. *Fed. Power Comm'n*, 324 U.S. 581, 589 (1945) ("When Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation.").

That longstanding rule, like the holding of *Greeting Card Publishers*, is entitled to *stare decisis*. And it makes sense: "Allocation of costs * * * has no claim to an exact science," and requires the exercise of the agency's "judgment on a myriad of facts." *Colo. Interstate Co.*, 324 U.S. at 589; *see Greeting Card Publishers*, 462 U.S. at 825-826. Denying deference to rate-setting agencies like the Commission, and thus requiring courts to construe rate statutes to permit "only one allocation formula," would be obviously unworkable and would compel courts to veer far beyond their institutional competence. *Colo. Interstate Co.*, 324 U.S. at 589. Such deference therefore could (and should) remain even if *Chevron* were overturned.

Fourth, as this Court explained in *Greeting Card Publishers*, Congress specifically enacted the Postal Reorganization Act to vest discretion in the agency. Congress was dissatisfied with the political manner in which postal ratesetting had been carried out by

Congress, and it designed the statute "to substitute the educated and politically insulated discretion of experts for its own." 462 U.S. at 822-823. Perhaps it goes too far to assume that every ambiguous statutory term is an implicit delegation of gap-filling authority to the responsible federal agency. But it is abundantly evident that Congress intended to make such a delegation here.

Fifth, when Congress enacted the Accountability Act in 2006, it codified this Court's longstanding understanding of the statute. The drafters made especially clear that they wished to continue to give the Commission broad discretion on postal costing and rate setting issues, explicitly borrowing language from the agency's longstanding administrative decisions. Moreover, the drafters specifically approved of and indicated their intent to ratify the Court's decision in *Greeting Card Publishers*, which had long held that the agency's construction of the statute should receive deference. *See supra* pp. 6-7.

For all of these reasons, the Court would need to do much more than overrule *Chevron* to deny the Commission deference. It would also need to overrule *Greeting Card Publishers*; hold that agencies are not entitled to deference even in the construction of broad grants of policymaking authority; overturn its longstanding line of precedent granting deference to agencies engaged in ratesetting; consider (and disregard) the unique history of the Postal Reorganization Act; and ignore Congress's ratification of this Court's precedent in the Accountability Act.

The *Chevron* question is thus in all likelihood not presented here at all. At minimum, reaching that question would require the Court to run a gauntlet of

sui generis rationales for deference, *all* of which the Court would need to reject before deciding the question on which UPS asks the Court to grant certiorari. There is no reason for the Court to decide that seismic question in such a profoundly unsuitable context.

B. UPS's Interpretation Fails Irrespective Of Whether The Commission Receives Deference.

Furthermore, the question of *Chevron*'s validity is not presented here because UPS's statutory arguments fail irrespective of whether the Commission receives deference. The D.C. Circuit suggested as much: It explained that the Commission's interpretation "flows sensibly from text, history, and statutory structure"; that "[o]ne could reasonably infer" that Congress intended to ratify the Commission's interpretation; and that, accordingly, the court did not need to determine whether, in addition to being "perfectly reasonable," the Commission's interpretation is "unambiguously correct." Pet. App. 18a-21a, 25a-26a. It is. UPS's construction flies in the face of plain text and basic logic, and so would fail regardless of whether the Commission is entitled to deference.

1. *The term "institutional costs" is not limited to the fixed costs of operating the Postal Service as a whole.*

UPS's principal textual argument is that the Commission erred by interpreting "institutional costs" to include all costs that do not bear a "reliably identified causal relationship[]" with a single product. Rather, UPS claims, the term "institutional costs" should be limited to the fixed costs of running the

Postal Service as a whole. Pet. 18. That is plainly incorrect.

As UPS acknowledges, "institutional costs" and "costs attributable" are complementary terms. "[A]ll postal costs must go into one of [those] two categories." *Id.*; *accord* Pet. App. 48a ("All Postal Service costs are classified as either attributable or institutional costs."). "[C]osts attributable" are specifically defined by statute as limited to those costs that, "with respect to a product," bear a "reliably identified causal relationship[ ]" to "such product." 39 U.S.C. § 3631(b). Thus, as a matter of simple logic, institutional costs are any costs that do *not* bear a reliably identified causal relationship to a single product. Institutional costs therefore include both the fixed costs associated with operating the Postal Service generally, and the variable costs associated with multiple products that cannot be "reliably" attributed to particular products—for instance, the costs of paying wages to a driver who delivers many different types of products. *See* Pet. App. 18a.

UPS proposes to give "institutional costs" a narrower definition: In its view, institutional costs are limited to "the costs of the institution *as a whole*." Pet. 18 (emphasis added). But that interpretation would place the statute at war with itself. It would exclude from the definition of institutional costs numerous costs that do not bear a "reliably identified causal relationship[ ]" with any given product. 39 U.S.C. § 3631(b). But those costs cannot be categorized as attributable costs without violating the express definition of that term. *Id.*; *see Greeting Card Publishers*, 462 U.S. at 826 (attributable costs must be "the consequence of providing a particular service"). UPS's interpretation thus contravenes the

basic principle that statutes must be read "as a symmetrical and coherent regulatory scheme," and that courts must "'fit, if possible, all parts into a harmonious whole.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

UPS contends that its interpretation is necessary to "give[] some meaning" to the term "institutional costs." Pet. 18. Not so. The term "institutional costs" bears its ordinary meaning under the Commission's interpretation—it refers to costs (both fixed and variable) that relate to the institution, rather than to a single product. That accords with the ordinary meaning of the word. *See* Merriam-Webster Dictionary (online ed. 2019), https://www.merriam-webster.com/dictionary/institutional (last updated Mar. 26, 2019) (defining "institutional" to mean "of or relating to an institution"). It also adheres to the Commission's consistent definition of "institutional costs" since at least 1975. Pet. App. 19a; *see id.* at 50a-51a (citing prior orders applying this approach). What is more, this Court upheld the Commission's basic interpretation in *Greeting Card Publishers*—as have multiple lower courts since then—and Congress made clear that it wished to codify the Commission's longstanding interpretation in the Accountability Act. *Id.* at 50-51a; *see Mail Order Ass'n of Am.* v. *USPS*, 2 F.3d 408, 425 (D.C. Cir. 1993) (per curiam) (upholding Commission's interpretation); *Direct Mktg. Ass'n* v. *USPS*, 778 F.2d 96, 101 (2d Cir. 1985) (similar).

UPS finds fault in the fact that the Commission's interpretation means that over 40% of postal costs qualify as "institutional." *See* Pet. 19. But nothing in the statutory text or structure suggests that

Congress expected a particular ratio of attributable to institutional costs. And, indeed, the Congress that enacted the Accountability Act saw "no reason for changing" existing attribution standards even though it recognized that institutional costs then made up "40 percent of the Postal Service's costs." Pet. App. 21a (citations omitted).[3]

2. The term "costs attributable" cannot include variable costs that bear no "reliably identified causal relationship[ ]" to a single product.

UPS's second statutory argument is also without merit. UPS asserts that the text of the statute prohibits the Commission from interpreting "costs attributable" to refer to the "minimum costs" that can be reliably attributable to a particular product. Pet. 20-21. Instead, it contends, the statute compels the Commission to attribute to individual products variable costs caused by multiple products, even if doing so "necessitates guesswork." Pet. 20 (quoting Pet. App. 31a).

As an initial matter, this statutory argument is not properly before the Court. In the D.C. Circuit, UPS

[3] UPS claims that, in 1983, this Court "understood" that more costs would be attributed over time. Pet. 19. But the quotations UPS cites merely state the Court's expectation that the Postal Service would "seek to improve [its] *data*." *Id.* (emphasis added) (quoting *Greeting Card Publishers*, 462 U.S. at 833-834 & n.29). And there is no evidence that Congress enacted even that vague expectation into law when it revised the statute in 2006. *See Newsweek, Inc.* v. *USPS*, 663 F.2d 1186, 1200 (2d Cir. 1981) ("There is nothing in the legislative history" of the 1970 Postal Reorganization Act "to suggest that attribution of fifty percent of postal costs is inadequate.").

did not argue that the Commission violated the text of the statute by assigning to each product its "minimum" reliably attributable cost. *See* UPS Br. 34-45 (setting forth UPS's statutory arguments). Instead, it argued that this approach was arbitrary and capricious under the Administrative Procedure Act because the Commission failed to "articulate a satisfactory explanation" for its attribution method and relied on "empirically unverifiable" assumptions. UPS Br. 50-56 (citations omitted). The D.C. Circuit understood the argument the same way: It stated that "UPS argues that the Commission's adoption of an incremental-cost approach to attribution was itself *arbitrary and capricious*" because it assigned products "the minimum possible inframarginal costs." Pet. App. 30a-31a (emphasis added). The court decided the issue on the same terms, holding that UPS misunderstood the Commission's reasoning and that the Commission "sensibly concluded" that its approach was appropriate. *Id.* at 31a.

UPS's efforts to recast its arbitrary and capricious argument as a statutory objection are wholly unconvincing. It claims that it "raised this [argument] as a *Chevron* issue," Pet. 20 n.5, but the pages of its lower-court brief that it cites include only a general statement of the standard of review, UPS Br. 33-34, and an argument that the Commission failed to explain the basis for a *different* portion of its statutory analysis, UPS Br. 45-46. These pages contained no reference, let alone statutory objection, to the Commission's assignment of the "minimum" costs reliably attributable to a product.

Moreover, UPS's attempt to show that the D.C. Circuit addressed this unraised statutory claim strains credulity. UPS quotes the court's statement,

in the very last line of its opinion, that "the Commission's exercise of its authority was reasonable and reasonably explained." Pet. App. 34a; *see* Pet. 21 n.5. But that statement was summing up the entirety of the court's statutory analysis; it was not addressed to the "minimum costs" argument. *See* Pet. App. 34a. UPS also implies that there is no difference between *Chevron* Step Two and the arbitrary-and-capricious test. *Id.* (calling these tests "functionally equivalent"). But not every arbitrary-and-capricious claim is a *Chevron* challenge in disguise. This case is a perfect illustration: UPS argued in the D.C. Circuit that the Commission's reasoning was arbitrary and capricious because the Commission lacked evidentiary support for its selection of a particular economic approach for modeling costs. That is plainly different than a textual challenge under *Chevron*.

In any event, there is a reason UPS never made this late-breaking (and now forfeited) statutory argument below: it is meritless. The Commission did not conclude that it was required to attribute costs with "absolute certainty," or that only the "theoretical minimum" costs associated with a product could be deemed "attributable." Rather, the Commission found—and the D.C. Circuit agreed—that the agency could attribute only "the minimum cost *that could reliably be assigned to*" a particular product. Pet. App. 31a (emphasis added). That construction mirrors the plain text of the statute. *See* 39 U.S.C. § 3631(b). It is also the construction that this Court upheld in *Greeting Card Publishers* and that UPS itself endorses—namely, that attributable costs are those costs that may be attributed with "reasonable confidence" as "the consequence of providing a particular service." Pet. 21 (quoting 462 U.S. at 826).

All of these formulations require the same thing: that the Commission attribute to a product those costs, and only those costs, that can "reliably be assigned" to it.

In this case, the Commission correctly concluded that the only costs that can be reliably assigned to a particular product are its marginal and incremental costs. That is because those are the only costs that the Commission can reliably determine are caused by a single product, and that would be eliminated if that product were no longer provided. The remaining inframarginal costs, in contrast, are caused by *multiple* products. Because offering any one of multiple products would be independently sufficient to incur these costs, it is impossible—at least under any economic model that UPS or anyone else has so far identified—to identify a "reliabl[e] * * * causal relationship[]" between those costs and any single product, as the plain text of the statute requires. 39 U.S.C. § 3631(b).

In its petition, UPS does not even attempt to identify a "reliabl[e]" economic model for attributing the remaining inframarginal costs to individual products. It simply asserts that the Order "makes no effort" to do so. Pet. 21. But the Order *did* consider, in exhaustive detail, the methods that UPS proposed for allocating these costs to individual products, and found them largely unreliable. *See* Pet. App. 55a-111a. UPS does not attempt to challenge that amply well supported analysis here.

UPS suggests that the Commission's straightforward interpretation of the statute circumvents its "purpose," because it risks underestimating the costs of some competitive products. Pet. 22. But the

Accountability Act has dual purposes: it is designed to prevent not only *under*estimating but also *over*estimating the costs of competitive products. The Commission's approach satisfies both of those imperatives. Adopting the "random" allocation methodology that UPS proposed would flout them. Pet. App. 91a-92a.

* * *

In short, *Chevron* deference was unnecessary to support the decision below. Before it could reach the *Chevron* question, moreover, this Court would have to consider a series of complex, statute-specific reasons for deference. And each of UPS's statutory arguments is unambiguously wrong, waived, or both—making the question of deference academic in any event. UPS's request that the Court use this patently unsuitable vehicle as the case to reconsider *Chevron* should be denied.

II. CERTIORARI IS UNWARRANTED TO REVIEW THE PANEL'S FACTBOUND APPLICATION OF *ENCINO MOTORCARS*.

UPS also asks the Court to grant certiorari to review the D.C. Circuit's application of *Encino Motorcars* to the facts of this case. The Court should decline.

In *Encino*, the Court explained that *Chevron* deference is warranted only where an agency "follow[s] the correct procedures in issuing" the challenged regulation. 136 S. Ct. at 2125. One such procedural requirement is "a reasoned explanation for [a] change" in policy." *Id.* Thus, where an agency fails to give a "reasoned explication" for a change in its "longstanding earlier position," the agency's inter-

pretation "does not receive *Chevron* deference." *Id.* at 2127.

The D.C. Circuit faithfully applied that principle here. In response to UPS's argument that the Commission was not entitled to deference because "the interpretation reflected in the orders represents an unexplained deviation from the Commission's prior reading of the term * * * institutional costs," the panel accurately explained that, under *Encino*, an "agency must provide 'a reasoned explanation' for a change in policy position." Pet. App. 26a (quoting *Encino*, 136 S. Ct. at 2125). The court then found that standard satisfied under the facts of this case. As the panel explained, "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." *Id.* at 26a-27a. "Indeed, it was the Commission's previous classification of *all* inframarginal costs * * * as institutional that prompted UPS to petition the Commission in the first place." *Id.* at 27a. UPS's argument to the contrary, the court found, relied on "cherry-pick[ing]" a handful of sentences from prior orders, "shorn of context." *Id.* at 26a.

UPS seeks review of this factbound application of *Encino Motorcars*. But the application of a correctly stated rule of law to a single ratemaking order does not merit this Court's certiorari jurisdiction. Still less is certiorari warranted where the precedent is less than three years old, and UPS has not identified a division in authority among the Courts of Appeals.

UPS tries to manufacture a few reasons for certiorari, but none is convincing. *First*, UPS claims that

the D.C. Circuit "narrow[ed]" *Encino* by holding that an agency need only give a reasoned explanation where it has made "a *change* in policy position." Pet. 24-25 (quoting Pet. App. 26a). That is a clear misreading of the decision below. UPS's only *Encino*-based argument in the lower court was that "the order represents an unexplained *deviation* from the Commission's prior reading of the term" institutional costs. Pet. App. 26a (emphasis added). The D.C. Circuit therefore responded to that argument by stating that the agency *did not* deviate from its prior policy, let alone in an unexplained manner. The D.C. Circuit did not say or suggest that an agency is required to give an adequate explanation *only* when it changes policy. And, indeed, in the immediately surrounding paragraphs, the panel considered UPS's arguments that the Commission was not entitled to deference because its decision was not adequately explained, and rejected those arguments on the merits, too. *Id.* at 25a-27a; *see also id.* at 27a-34a (considering and rejecting UPS's arguments that the Commission's decision was unreasoned).

Second, UPS claims that the panel held that "an agency need *never* grapple with the statute, and still must receive *Chevron* deference, simply because the agency supposedly acted consistent with past practice." Pet. 26. Actually, the panel said the opposite. It explained that "*no* amount of historical consistency can transmute an unreasoned statutory interpretation into a reasoned one." Pet. App. 25a (emphasis added; citation omitted). It thus held that the agency was entitled to deference in its construction of the term "institutional costs" not because the agency had adopted it before, but because "the longstanding definitions upon which the Commission

relied create no anomalies and flow sensibly from text, history, and statutory structure." *Id.* at 25a-26a; *see id.* at 18a-21a (describing the "established meaning" of the term "institutional costs" in "the postal ratemaking context").[4]

Third, UPS recapitulates its argument that the Commission was not entitled to deference for its supposedly unexplained interpretation of the term "reliabl[e]" to mean "theoretical minimum." Pet. 26. Again, UPS did not raise this argument below, which is why it appears nowhere in the D.C. Circuit's analysis of UPS's *Chevron* and *Encino* arguments. *See* Pet. App. 25a-27a. This argument also rests, once again, on the false premise that the agency equated "reliable" with "theoretical minimum"; in fact, the agency simply concluded that marginal and incremental costs are the only costs that can be reliably attributed to individual products based on the economic and mathematical models devised by any party. Far from failing to explain that conclusion, the Commission devoted dozens of pages to supporting it, including a detailed economic analysis that considered (and ultimately rejected) alternative mathematical approaches. *Id.* at 55a-111a; *see, e.g.*, *id.* at 59a (describing UPS's proposal for "an order-

[4] UPS claims that a prior D.C. Circuit decision, *ESI Energy, LLC* v. *FERC*, 892 F.3d 321 (D.C. Cir. 2018), held that "agencies [may] obtain *Chevron* deference simply by citing past decisions." Pet. 28. That is a puzzling characterization. *ESI* upheld an agency decision because it properly relied on a prior decision of *the D.C. Circuit*, not a prior decision of the agency. *See ESI*, 892 F.3d at 329-330 (explaining that "FERC reasonably relied *on our decision*" and that "reliance *on our opinion* is proper" (emphases added)).

neutral test for cross-subsidization through the use of the Shapley value").

Finally, given that UPS's characterization of the D.C. Circuit's opinion is incorrect, it is unsurprising that the split UPS identifies is non-existent. In *Montgomery County* v. *FCC*, 863 F.3d 485 (6th Cir. 2017), the Sixth Circuit declined to defer to an agency rule that said "nothing at all" to justify its statutory interpretation. *Id.* at 491. In the decision below, the D.C. Circuit similarly held that an agency is required to give a reasoned justification for its decision to merit deference. *See* Pet. App. 25a-34a. It merely found (correctly) that the agency did so in this case. There is no daylight between the rule applied by these two courts.

III. THERE IS NO URGENCY TO REVIEW *CHEVRON* THROUGH THIS FLAWED VEHICLE.

UPS identifies no reason why the Court should use this profoundly flawed vehicle to reconsider *Chevron*. As petitioner acknowledges, thousands of cases apply *Chevron*, Pet. 28, including multiple cases decided by the D.C. Circuit practically every week. The vast majority of those cases would furnish a superior vehicle to this one. Unlike in this case, courts often make clear that *Chevron* deference was necessary to uphold an agency's decision. And the basis for that deference is typically *Chevron* alone, not—as here—a constellation of statute-specific reasons that could well survive *Chevron*'s invalidation.

What is more, the economics of postal costing are complex. If this Court wishes to reconsider *Chevron*, it should do so in a straightforward case of statutory interpretation, not one laden with difficult economic

concepts and inscrutable jargon. *See, e.g.*, Pet. 6 (chart of "'[v]olume-variable' costs included in incremental costs" and "[i]nframarginal costs included in incremental costs"); *see also* Pet. App. at 9a ("The downward-sloping curve shows a hypothetical activity's diminishing marginal cost (marked on the vertical axis) as production quantity (marked on the horizontal axis, and measured in cost-driver units) increases.").

Nor will the Court need to wait long for a more suitable petition asking the Court to overrule *Chevron*. UPS acknowledges that multiple recent petitions have asked just that. Pet. 17-18 n.3. More petitions have been filed since then. *See, e.g.*, Pet. for Certiorari, *City of Taunton* v. *EPA*, No. 18-446 (Oct. 5, 2018). UPS's amici have filed in support of multiple of these petitions, repeating large sections of their briefs verbatim from one case to the next. *Cf. California Sea Urchins Comm'n* v. *Combs*, No. 17-1636.

UPS contends it would be "prudent" for the Court to reconsider *Chevron* "at the same time" it reconsiders *Auer* deference in *Kisor* v. *Wilkie*, No. 18-15 (cert. granted Dec. 10, 2018). Pet. 16. But the Court has never justified *Auer* as an extension of *Chevron*. As Justice Scalia explained, that "conceivable justification for *Auer* deference" is "not one that is to be found in [the Court's] cases"—unsurprisingly, given that *Chevron* is based on a theory of implicit delegation from *Congress*, while *Auer* rests on the theory that the agency has special expertise in interpreting its *own* rules. *Decker* v. *Nw. Envt'l Def. Ctr.*, 568 U.S. 597, 618-619 (2013) (Scalia, J., concurring in part and dissenting in part). Thus, "*Auer* is not a logical corollary to *Chevron*," *id.*, and overruling it

would not necessarily affect *Chevron*. And to the extent *Kisor* did impact the *Chevron* doctrine, it would still not affect *this* case, which is governed by pre-*Chevron* precedent on administrative ratemaking.

UPS also argues that "[t]he underlying issue of postal costing" is important. Pet. 29. UPS, however, has not asked this Court to review any question except the validity and scope of *Chevron*. *See* Pet. i. Nor have its amici contended that the result in this case somehow adversely affects them. If UPS truly believed the underlying issue of postal costing merited this Court's review in its own right, UPS would have petitioned for review of the D.C. Circuit's case-specific rulings on that issue, but, tellingly, it did not.

In any event, UPS's concerns are dramatically overstated. The very sources it cites show that both Congress and the President's Task Force on the United States Postal System are focused on postal-costing issues. *See, e.g. id.* at 29 (discussing Task Force addressing postal-costing issues); *id.* at 30 (citing statement of legislator discussing postal-costing issues). And the Commission's revision of its costing methods in the order UPS challenges, and subsequent orders increasing the portion of institutional costs allocated to competitive products, show that the Commission has been responsive to the policy concerns UPS raises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 2019