ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 13, 2021

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Nos. 17-1276, 20-1505, 20-1510, and 20-1521
(consolidated)**

NATIONAL POSTAL POLICY COUNCIL, *et al.*,
Petitioners,
v.
**POSTAL REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,**
Respondents.

**ON PETITION FOR REVIEW OF ORDERS OF
THE POSTAL REGULATORY COMMISSION**

**MOTION OF PETITIONERS
ALLIANCE OF NONPROFIT MAILERS,
ASSOCIATION FOR POSTAL COMMERNCE,
MPA – THE ASSOCIATION OF MAGAZINE MEDIA,
AMERICAN CATALOG MAILERS ASSOCIATION, NATIONAL
POSTAL POLICY COUNCIL, MAJOR MAILERS
ASSOCIATION, AND INTERVENORS NATIONAL
NEWSPAPER ASSOCIATION AND NEWS MEDIA ALLIANCE
FOR STAY**

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The Alliance of Nonprofit Mailers, American Catalog Mailers Association, Association for Postal Commerce, MPA – The Association of Magazine Media, Major Mailers Association, National Postal Policy Council, National Newspaper Association, and News Media Alliance ("Movants") respectfully request a stay of Postal Regulatory Commission ("Commission") rules that will lead to unprecedented and unlawful postal rate hikes effective August 29, 2021. Pursuant to Federal Rule of Appellate Procedure 18(a)(2)(B)(ii), Movants' request is supported by the sworn statements of the American Lung Association, Consumer Reports, Inc., Disabled American Veterans, Meredith Corporation, Multi Media Channels, LLC, Wounded Warrior Project, Inc., and Yankee Publishing, Inc.

INTRODUCTION

Six months ago, Movants requested a stay of the Commission's final rules, (*Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020) ("Order 5763")) (Exhibit 1), which authorize above-inflation price increases over market-dominant mail in violation of the Postal Accountability and Enhancement Act (the "Act"). *See* Motion of Petitioners ANM *et al.* for Stay and Expeditious Consideration (Jan. 27, 2021) ("Initial Stay Motion"). Movants had previously requested a stay of the rules from the Commission and were denied. *See Order Denying Stay*, Docket No. RM2017-3, Order No. 5818 (released Jan.

19, 2021) (Exhibit 2). In the Initial Stay Motion, Movants argued that they would be "irreparably harmed in the absence of a stay: they will be forced to pay higher rates, compelled to reduce their mailings … and are precluded by statute from recovering the overcharges even if the rules are later found unlawful." Initial Stay Motion at 2.

The Commission responded that the mailers failed to show that Order 5763 would imminently and irreparably harm them, because several procedural steps needed to effectuate the higher rates had not yet been taken. *See generally* Postal Regulatory Commission's Opposition to Stay (Feb. 8, 2021) ("PRC Stay Opp.") at 2, 17-18 (Exhibit 3). The Commission noted that Order 5763 "does not itself increase the price [mailers] must pay for any particular market-dominant products" and that, at that time, the Postal Service had "not yet determined how to exercise any of the rate authority conferred by the order." *Id.* at 17. The Commission characterized impending price increases as "hypothetical" "unless the Postal Service first gives the public ninety days' notice" and the Commission "then conduct[s] a notice-and-comment proceeding to review the proposed increase." *Id.* at 17-18. "Unless and until the Postal Service proposes specific rate increases," reasoned the Commission, "there is no way to know whether and how those increases might harm" Movants. *Id.* at 18. This Court then denied the Initial Stay Motion because it found that the mailers had "not demonstrated the type of imminent and irreparable harm necessary for a stay." Order, Doc. No 1887800 (Mar. 1, 2021) (Exhibit 4).

The basis for the Court's denial of a stay no longer exists. The Postal Service *has* invoked its rate authority, and in fact has determined to use "virtually all" of it. *See United States Postal Service Notice of Market-Dominant Price Change*, Docket No. R2021-2 (released May 28, 2021) ("USPS Notice") (Exhibit 5) at 1. The Commission *has* conducted its notice-and-comment review of the proposed price changes. *See Notice and Order on Price Adjustments and Classification Changes for Market Dominant Products*, Docket No. R2021-2, Order No. 5905 (released June 1, 2021) (Exhibit 6). And the Commission *has* approved them for implementation. *See Order on Price Adjustments for First-Class Mail, USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes*, Docket No. R2021-2, Order No. 5937 (released July 19, 2021) ("Order 5937") (Exhibit 7). There is nothing speculative or "hypothetical" about these rate increases: they will be the largest price increases levied on the Postal Service's monopoly customers since the Act's passage. Movants know the specific price increases that will be charged to individual postal products, they know exactly when (August 29, 2021 at 12:01a.m.) the price increases will take effect, and they know "whether and how those increases might harm" them. *But cf.* PRC Stay Opp. at 18. As shown below, Movants have clearly demonstrated the type of imminent and irreparable harm necessary for a stay. And as was the case when Movants filed the Initial Stay Motion, Movants still satisfy the other *Virginia Petroleum Jobbers* factors.

BACKGROUND

Congress enacted the Act in 2006, keenly aware of the Postal Service's statutorily granted monopoly over the delivery of letters and access to the mailbox. Congress therefore categorized postal products as either competitive or market-dominant, the latter being products over which the Postal Service "exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products." 39 U.S.C. §3642(b)(1).

In enacting the Act, Congress created a regulatory structure granting the Commission "enhanced review and oversight responsibilities for market-dominant products" in order to safeguard captive customers of the Postal Service's monopoly. *See* S. Rep. No. 108-318, at 6-7, 19 (2004) ("in recognition that some customers have no non-Postal Service alternatives because of the Congressionally-established restrictions on the carriage of letters outside the mail … this legislation requires that any product subject to this monopoly remain within the market-dominant category."). Shielding mailers against potential abuses of the Postal

Service's market power was Congress's expressed policy. The Senate Governmental Affairs Committee Report explains:

> In establishing the postal regulatory structure in the bill, the Committee has attempted to balance the Postal Service's need for additional flexibility with the public and mailing community's need for increased financial transparency and established safeguards *to protect against unreasonable use of the Postal Service's statutorily-granted monopoly.*

Id. at 19 (emphasis added).

Congress determined that a price cap on market-dominant price increases was the appropriate mechanism to accomplish its goals. Placing limits on the percentage changes in postal rates was "of primary importance" to Congress. *Id.* at 10. Thus, §3622(d)(1)(A) of the Act—titled "Requirements"—states that "[t]he system for regulating rates and classes for market-dominant products shall … include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission" equal to the change in the Consumer Price Index.

The Commission infers that §3622(d)(3) of the Act—which instructs the Commission to review the ratemaking system ten years after the Act's passage and authorizes the Commission to modify or adopt new regulations implementing the system—grants it the power to override not only the *regulations* but the Act's requirements themselves, including the inflation-based cap. Consequently, Order

5763 adopted rules allowing the Postal Service to increase rates for market-dominant products at levels well in excess of inflation.

Movants again ask this Court to stay implementation of the Commission's rules, because we represent the very market-dominant customers that Congress sought to protect against the Postal Service's monopoly abuses. After this Court denied our Initial Stay Motion, the Commission determined that the Postal Service would be allowed to increase class-wide prices up to 7.562 percent in year one on many of the products our members purchase. *See Determination of Available Market Dominant Rate Authority*, Docket No. ACR2020, Order No. 5861 (released Apr. 6, 2021) at 6 (Exhibit 8).

On May 28, 2021, the USPS notified the Commission and mailers of its proposed price changes. Including inflation-based authority of 1.244 percent, "as a result of the new system, the Postal Service has available approximately 6.8 percent of pricing authority for compensatory classes and approximately 8.8 percent of pricing authority for non-compensatory classes. *The Governors have determined to use virtually all of this authority at this time.*" USPS Notice at 1 (emphasis added). On July 13, 2021, the Postal Service rejected Congress's plea to reconsider implementing these price increases in August and using all of its rate authority, and reaffirmed to Congress that it does not believe "the new rules went far enough." *See* Ltr. from Peter R. Pastre to the Hon. Glenn Grothman (July 13,

2021) (Exhibit 9). On July 19, 2021, the Commission formally approved price increases of **6.814 percent** for First-Class Mail, **6.814 percent** for Marketing Mail, **8.771 percent** for Periodicals, **8.804 percent** for Package Services, and **6.808 percent** for Special Services. Order 5937 at 2, Table I-1. Movants purchase mail products from the Postal Service in all of these classes.

The rate increases will become effective in only one month without the requested relief. A stay is necessary to effectuate Congress's policies, abide by the Act's requirements, and protect captive mailers from the largest price increases they have ever faced since the Act's passage.

ARGUMENT

I. LEGAL STANDARD

A motion for stay shall be granted if the movants demonstrate: (i) that the movant is likely to prevail on the merits; (ii) that the movant is likely to suffer irreparable injury absent relief; (iii) that other parties will not suffer harm if relief is granted; and (iv) that a stay is in the public interest. *See Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

II. MOVANTS DEMONSTRATE ALL FOUR *JOBBERS* FACTORS

A. Movants Will Be Irreparably Harmed Absent A Stay

Recognizing that "[t]he first two factors of the traditional standard are the most critical," *Nken v. Holder*, 556 U.S. 418, 434 (2009), Movants begin with harm. The Commission's arguments against Movants' previous request for a stay—that rate increases were "hypothetical" until the Postal Service proposed specific adjustments and the Commission approved them—are now moot. *Cf.* PRC Stay Opp. at 17-18. The Commission described Movants' claims of harm as "particularly speculative" because the above-CPI rate authority it granted to the USPS was on a class-wide basis and did not dictate prices charged to specific postal products within each class. *Id.* at 18. "Unless and until the Postal Service proposes specific rate increases, there is no way to know whether and how those increases might harm petitioners." *Id.*

Now we know. We know, for example, that within the First-Class Mail class, some products will face lower-than-class-average increases (*e.g.*, postcards and single-piece domestic letter prices will rise by five percent) whereas other products will face increases twice as large (flat-shaped mail prices will increase by more than 10 percent). *See* Order 5937 at 75. We know concretely how these increases will harm Movants.

Movants' members will expend millions of additional dollars in postage fees should the impermissible increased rates be permitted to go into effect. Consumer Reports will pay an additional $1.78 million in postage in the next year, and more than $9 million cumulatively in extra postage from 2021-2025. Brophy Decl. at ¶ 13 (Exhibit 10). The American Lung Association will spend an additional $400,000 in postage next year, and more than $1.5 million in extra postage from

2021-2015. Finstad Decl. at ¶ 11 (Exhibit 11). Disabled American Veterans ("DAV") estimates that it will pay "nearly half a million dollars in additional costs this year alone, and one and a half million dollars in additional costs in 2022." Burgoon Decl. at ¶ 10 (Exhibit 12). For smaller mailers such as local or regional newspaper and magazine publishers, the increased postage costs will be devastating. *See* Wood Decl. at ¶¶ 17-18 (Exhibit 13) (increased postage costs of $194,298 this year would exceed Multi Media Channels's average net earnings over the past three years "and cause the company to continue to lose money even with planned efficiency changes to our operation."); Trowbridge Decl. at ¶ 5 (Exhibit 14) ($93,727 in additional postage costs this year will wipe away half of Yankee Magazine's margins).

The Commission has not contested that this financial harm is irreparable, nor could it. Movants are unable to recover the additional postage paid during the pendency of the appeal, even if the Court were to eventually find the rate increases unlawful. 39 U.S.C. §3681. When a movant will be unable to sue to recover any monetary damages against a government agency in the future, such "financial loss can constitute irreparable injury." *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) (additional citation omitted).

Moreover, the harm to Movants extends beyond the increased postage payments. The increase in postage costs will force Movants into two undesirable outcomes: either Movants must divert funds from mission-critical activities in order to maintain their current mailing or Movants must reduce their mailing and correspondingly reduce their ability to reach the public. Either way, the ability of Movants to educate, advocate, and provide direct services will be significantly curtailed. *See, e.g.*, Hamre Decl. at ¶ 11 (Exhibit 15) (describing the specific loss of services for veterans that will occur should WWP be forced to pay an additional $1.7 million in postage fees); Burgoon Decl. at ¶ 11 (reduced mailings will curtail veterans' benefits, such as rides to medical appointments, career fairs, and free benefits counseling services on which veterans depend); Wood Decl. at ¶ 19 (MMC will be "reducing news coverage and providing less service to our customers"). These harms, too, will be irreparable. *See id.* ("In MMC's experiences, lost customer relationships driven by cuts in our news coverage are irreversible."); Brophy Decl. at ¶ 17 (once publications leave the mail, they will not return).

These harms are also unavoidable: Movants' members rely on the Postal Service and cannot simply mitigate the negative impacts of the postage increases. This is true for smaller, regional mailers like MMC and Yankee. *See* Wood Decl. at ¶ 9 ("There is no other economically viable alternative for MMC to deliver its newspapers."); Trowbridge Decl. at ¶ 7 (*Yankee* magazine's "alternative sources of subscriptions are not good enough to reduce or eliminate our use of direct mail," and efforts to convert subscription, renewal, and invoice communications to email have not been well received by consumers). It is also true for large media companies, like Meredith, which historically had been able to mitigate postage increases. But "[i]n today's leaner business environment, particularly with the COVID-19 pandemic and contraction in the paper and printing industries, cost reduction opportunities are more limited." Harty Decl. at ¶ 15 (Exhibit 16). Veterans' and consumer advocate charities, too, have no choice but to endure the harm caused by these unprecedented price increases. Hamre Decl. at ¶ 12 (for Wounded Warrior, "Alternative solicitation methods cannot replace the value of direct mail to WWP's donor audience. Online and e-mail outreach is limited to those who have an e-mail address. WWP's donor base skews demographically toward the elderly, many of whom do not use e-mail. Those in our donor base who do not have an e-mail address are typically unwilling to donate online with a credit card."); Burgoon Decl. at ¶¶ 7-8 (for DAV, "hard copy mail is the primary, and donor preferred, channel we use to communicate with our active and prospective supporters … members … and volunteers." 90 percent of DAV's donations are received from donors and members acquired through direct mail); *see also* Brophy Decl. at ¶ 9 (explaining that nearly half of Consumer Report's membership revenue derives from print solicitations and 80 percent of all fundraising donations originate from the mail). This loss of income will further exacerbate the harm caused by the rate increase, and likely cause a decrease in mail volume. *See* Finstad Decl. at ¶ 14 ("Postage increases reduce ALA mail volume" and, consequently, revenues); Harty Decl. at ¶ 16 ("We estimate the proposed price increases will result in an approximately 30 percent reduction in our mailpiece volume.").

In short, the rate increases will cause irreparable harm that far exceeds the immediate financial injury of increased postage rates. The very nature and existence of Movants' businesses and nonprofit missions are at stake.

B. Movants Are Likely to Succeed on the Merits of Their Appeal

The merits of this case have now been fully briefed, and there is a substantial likelihood that Mailer Petitioners will prevail on appeal. At a minimum, this case presents serious legal questions of statutory interpretation and the reasonableness of agency rulemaking. *Nat'l Treasury Emps. Union v. Horner*, 1987 U.S. Dist. LEXIS 14946, *1 (D.D.C. 1987) ("Even where the court does not agree that the movant has a substantial likelihood of success on appeal, a stay is appropriate when a serious legal question is presented, when little harm will befall the party resisting the stay, and where denial of the motion will inflict great injury on the movant.").

Movants explained why we are likely to win on the merits when we first sought a stay from this Court. *See* Initial Stay Motion at 5-13. Those arguments are equally valid now; indeed, the arguments on brief reinforce this conclusion. The Commission's rules violate the Act's clear mandate that an inflation-based cap is a "requirement[]" that the "system for regulating rates and classes for market-dominant products *shall* include…." 39 U.S.C. §3622(d)(1)(A) (emphasis added). The parties' briefs reaffirm that the Commission has acted beyond its statutory authority, and that it cannot prevail on the merits. To do so would require this Court to rewrite the Act and ignore the words Congress actually wrote.

The Commission's key merits argument is that 39 U.S.C. §3622(d)(3) "unambiguously" and "expressly" authorizes it to modify or replace all aspects of the initial ratemaking system, including the CPI cap. Initial Brief for Respondent in Case Nos. 17-1276, 20-1505, 20-1510, and 20-1521 (June 14, 2021) ("Commission Br.") at 27-29, 34 (Exhibit 17); *see also* PRC Stay Opp. at 9 ("expressly") and 10 ("unambiguously"). The Commission's argument grossly misrepresents what the statute says. Section 3622(d)(1) of the Act sets forth the "requirement" that the regulatory system of ratemaking created and overseen by the Commission "shall" include an inflation-based price cap. Section 3622(d)(3) permits the Commission to modify its regulations or even adopt alternative regulations, but it does not say that the Commission can override the statutory requirements governing its regulations—expressly, unambiguously, or otherwise. In fact, §(d)(3) does not mention the inflation-based cap *at all*, which means that, by definition, it does not unambiguously or expressly authorize the Commission to weaken or replace the price cap in the ten-year review. The Commission cannot succeed on the merits because its statutory interpretation "rewrites rather than reads the plain statutory text." *Am. Lung Ass'n v. E.P.A.*, 985 F.3d 914, 950 (D.C. Cir. 2021). "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks [the Court] to add words to the law to produce what is thought to be a desirable result. That is Congress's province." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

The Commission also argues that its rules are not arbitrary and capricious because its alterations to the ratemaking system "appropriately balanced the competing interests of the Postal Service and its customers." Commission Br. at 3. The Commission's duty, however, is not to simply "split the difference" between the USPS's and the mailers' positions: it is to create regulations designed to achieve the nine statutory objectives that Congress identified, duly incorporating the statutory requirements. A compromise rule is still arbitrary and capricious if it fails to account for important objectives, makes the problem to be solved even worse, or ignores important facts. The Commission committed all of these errors.

The Commission's density adjustment is arbitrary and capricious because the Commission failed to assess the adjustment's effects on the very problem—volume decline—that the Commission was ostensibly solving, and it ignored record evidence showing that the adjustment would actually exacerbate the problem.

The Commission also ignored revenues in the density-adjustment formula, which is irrational when the goal of the entire enterprise is to account for insufficient *revenues* to cover total costs. Providing rate authority regardless of whether USPS revenues are increasing severs the rational connection between the problem and the solution.

In addition, the Commission's rules are arbitrary and capricious because they do not reasonably account for, let alone balance, the statutory objectives of maximizing incentives to reduce costs and maintaining stable and predictable rates. Allowing prices rise by amounts that triple and quadruple past increases, based on annual modifications that are unknown until the USPS files its calculations and the Commission approves them, and that go into effect mere months later, will leave the USPS with little incentive to cut costs and will render rates anything but predictable and stable. So, the Commission falls back on USPS's "inherent incentive" "to exercise business judgment about what rates the market can bear." Commission Br. 53. But preventing USPS from pricing monopolistic products at what the market will bear is why Congress limited rates in the first place.

C. The Remaining Factors Support a Stay

The remaining two factors—harm to another party and the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Taken together, they clearly support imposition of a stay here.

The Postal Service will not be harmed by the imposition of a temporary stay while the appeal is pending. The Commission's claim that "enjoining the order would undermine the Postal Service's ability to supply critical mail services" lacks credibility. *See* PRC Stay Opp. at 18. This year the Postal Service has been sitting on historically high levels of cash. As of June 30, 2021, it has more than *$23 billion* sitting in the U.S. Treasury available to it—$7 billion more than it had when Movants sought a stay six months ago. *See* Bureau of Fiscal Service, Treasury, *Monthly Statement of the Public Debt of the United States* 12 (June 30, 2021), https://www.treasurydirect.gov/govt/reports/pd/mspd/2021/opdm062021.pdf. The Postal Service may use that money for any purpose. 39 U.S.C. §2003(a). The USPS imposed an inflation-capped price increase on mailers in January of this year, it can continue to file rate adjustments subject to the CPI cap while the appeal is pending, and it may utilize unused rate authority in future years. The legality of the Commission's actions is now fully briefed and before this Court, with oral argument scheduled for mid-September. There is simply no possibility that the

Postal Service will cease operating, or that the public will stop receiving its mail, if a temporary stay were issued.

Conversely, absent a stay, the public at large will suffer harm. The reduction in newspaper publishing in response to large postage increases means that certain small and rural communities will become a "news desert." Wood Decl. at ¶ 11. Other mailers will attempt to offset the postage increases by cutting jobs. Trowbridge Decl. at ¶ 10. Consumers will be impacted as well, as mailers will be forced to pass the increased costs onto consumers in the form of higher prices for print media. Harty Decl. at ¶ 17. This will likely result in certain demographics of customers, such as the elderly and those living in rural areas with limited access to the Internet, having reduced access to information. *Id.* ("This proposed price increase would impede the ability of mail with unique educational, cultural, scientific, and informational value to reach its readers. We expect that certain demographics of consumers, such as those in rural communities or the elderly, would be particularly impacted as they are less easily able to switch to digital content if Meredith were to reduce its print circulation."). And the recipients of charitable programs, including veterans, will receive fewer benefits. Hamre Decl. at ¶ 12 (postage increases will "limit[] the critical programs and services we offer to wounded warriors, Service members, their families, and their caregivers.").

CONCLUSION

Movants are likely to prevail on their merits in this appeal because the Commission has contravened the plain language of the statute by allowing USPS to increase prices faster than the rate of inflation. That unlawful act will cause Movants' members significant and irreparable harm beginning August 29, when they will be forced to pay these illegal prices, curtail program activities, and lose customers and donors, without the prospect of refunds if the prices are ultimately declared illegal. Because it is flush with cash and can always reinstitute its price increases if the Commission prevails, the Postal Service will suffer no harm from the stay. Accordingly, Movants ask this Court to stay Order 5763 until the resolution of this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Circuit Rule 32(e)(2) because it contains 4026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point Times New Roman.

/s/ Matthew D. Field
Matthew D. Field

Dated: July 23, 2021

CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 18(C)

I hereby certify that prior to the filing of this Motion, I gave notice to all parties through electronic mail.

/s/ Eric S. Berman
Eric S. Berman

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 23rd day of July 2021, served a copy of the foregoing document electronically through the Court's CM/ECF system on all registered counsel.

/s/ Elizabeth C. Rinehart
Elizabeth C. Rinehart

Exhibit 1	*Order Adopting Final Rules for the System of Regulating Rates and Classes for Market Dominant Products*, Docket No. RM2017-3, Order No. 5763 (released Nov. 30, 2020) ("Order 5763")
Exhibit 2	*Order Denying Stay*, Docket No. RM2017-3, Order No. 5818 (released Jan. 19, 2021)
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