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Shoshana Grove, Secretary
Postal Regulatory Commission
901 New York Avenue N.W. Suite 200
Washington, DC 20268-0001

Re: Commission Review of System of Rate Regulation Under 39 U.S.C. § 3622(d)(3)

Dear Ms. Grove:

On behalf of the Alliance of Nonprofit Mailers; the Association for Postal Commerce; the Association of Marketing Service Providers; the Direct Marketing Association; EMA; MPA-The Association of Magazine Media; the National Association of Advertising Distributors, Inc.; and the Saturation Mailers Coalition, please see the attached White Paper addressing the limits of the Commission's authority with respect to the review to be conducted under 39 U.S.C. § 3622(d)(3).

Sincerely,

/s/ Matthew D. Field

Matthew D. Field
David M. Levy
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LIMITATIONS ON THE COMMISSION'S AUTHORITY UNDER SECTION 3622(D)(3)

PREPARED FOR THE POSTAL REGULATORY COMMISSION

39 U.S.C. § 3622(d)(3) directs the Postal Regulatory Commission ("PRC" or "Commission"), ten years after the enactment of the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. 109-435, 120 Stat. 3198 (2006), to "review the system for regulating rates and classes for market-dominant products established under this section." This White Paper considers whether the Commission's authority under Section 3622(d)(3) includes the power to rescind or substantially modify the Consumer Price Index ("CPI") cap established under Section 3622(a) and (d). For the reasons explained here, the answer is no.

EXECUTIVE SUMMARY

In recent months, it has been suggested that the Commission could use the ten-year review to eliminate or substantially modify the CPI-based cap on class-average revenue per piece imposed by 39 U.S.C. §§ 3622(d)(1) and (2). The argument runs as follows: Section 3622(d)(3) provides that the Commission's ten-year review shall include a determination of whether the "system for regulating rates and classes for market-dominant products established under this section" is achieving the "objectives" of Section 3622(b), "taking into account the factors of" Section 3622(c). If the Commission finds that the "system" is not achieving the Section 3622(b) "objectives" in light of the Section 3622(c) "factors," the Commission "may, by regulation, make such modifications or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives." *Id.* § 3622(d)(3). The CPI cap is part of the regulatory system for market-dominant products. So, the theory goes, the Commission, on finding that the CPI cap is not achieving the "objectives" of Section 3622(b), may eliminate the

cap and replace it with some other regulatory "system" or substantially relax the manner in which the cap now operates. This theory fails on two independent grounds:

(1)

The argument is an impermissible construction of the statutory language. Section 3622(d) defines the CPI cap as a binding and mandatory "requirement," not just a discretionary "objective" or "factor." *Id.* § 3622(d)(1). The Commission may not interpret as permissive a statutory provision that is so plainly mandatory. Further, inferring such authority from Section 3622(d)(3) would stretch the "review" of the regulatory scheme far beyond the bounds allowed by the language of Section 3622(d)(3) and Supreme Court precedent such as *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

Moreover**,** eliminating the CPI cap would contravene the *overall* structure and purpose of PAEA and, in particular, the relationship between Section 3622(d)(3) and Section 3622(a). The "system" that Section 3622(d)(3) directs the Commission to review and possibly modify after ten years is the same "system" that Section 3622(a) directed the Commission to create. The statute requires that both Commission actions be based on the same "objectives" and "factors" enumerated in Sections 3622(b) and (c). The Commission has repeatedly acknowledged that those "objectives" and "factors," and the "system" of regulation that Congress directed the Commission to build on them, are all subordinate to the "quantitative pricing standards" of PAEA, including the CPI cap. The role of the CPI cap in the statutory hierarchy is absolute, "central," and "indispensable"; the Commission's role in "establishing" the "system for regulating rates and classes" is secondary and interstitial. Docket No. R2010-4, *Rate Adjustment Due to Extraordinary*

or Exceptional Circumstances, Order No. 547 (Sept. 30, 2010) at 10–13, 49–50 [hereinafter Order No. 547]; *accord* Docket No. RM2009-3, *Consideration of Workshare Discount Rate Design*, Order No. 536 (Sept. 14, 2010) at 16–17, 35–36 [hereinafter Order No. 536]; *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), *on remand*, Order No. 1427 at 17–19. Nothing in the text, structure, or legislative history of PAEA suggests that the Commission's authority to review, modify, or replace the "system" of regulation under Section 3622(d)(3) is broader than the Commission's authority to "establish" the "system" of regulation under Section 3622(a).

(2)

The proposed reading of Section 3622(d)(3) would raise constitutional issues. A fundamental canon of statutory construction bars agencies from construing a statute in a way that even raises serious doubts about its constitutionality. Construing Section 3622(d)(3) to authorize the Commission to eliminate the CPI cap would do just that. In *Clinton v. State of New York*, 524 U.S. 417, 438–99 (1998), the Supreme Court held that the Presentment Clause of the Constitution, U.S. Const., Art. I, § 7, cl. 2, bars Congress from delegating to the executive branch the authority to amend or repeal statutes. In addition, wholesale repeal or modification of the CPI Cap would implicate the Constitutional limitations on the power of Congress to delegate its legislative function to administrative agencies under cases such as *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

* * *

In sum, PAEA established a system of rate regulation whereby the Postal Service cannot raise rates by more than CPI, as applied at the class level, absent extraordinary or exceptional

circumstances. The Commission is not empowered to subvert the judgment of Congress by replacing this constraint with an alternative method of regulating rates.

ANALYSIS

I. PAEA ESTABLISHED THE CPI CAP AS A BINDING CONSTRAINT THAT THE COMMISSION MAY NOT REPEAL OR SUBSTANTIALLY MODIFY.

The text, structure, purpose, and legislative history of Section 3622 make clear that the CPI cap mandated by Section 3622(a) and (d) is a fixed and binding constraint that the Commission has no authority to repeal or substantially loosen under Section 3622(d)(3).

A. The Binding Character of the Price Cap Is the Linchpin of the Statute.

As always, the first step in divining the meaning of a statute is "the language of the statute itself." *Caraco Pharm. Labs v. Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012); *CSX Transp., Inc. v. Alabama Dept. of Rev.*, 131 S. Ct. 1101, 1107 (2011). The plain language of Section 3622 establishes the CPI cap as the primary requirement of any system of rate regulation developed by the Commission and prevents the Commission from eliminating that requirement during its 10-year review of the system. PAEA § 401, codified at 39 U.S.C. § 3622(d)(1)(A), prescribes the CPI cap in mandatory terms ("requirements" and "shall"):

> ***Requirements***.--
>
> (1) In general.--The system for regulating rates and classes for market-dominant products ***shall***--
>
> > (A) include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal

> variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates; . . . .

39 U.S.C. § 3622(d)(1)(A) (emphasis added).

The CPI cap limits the annual increase in average revenue per piece on any market-dominant class of mail to the rate of inflation. Section 3622(d) provides two exceptions to the CPI cap: exigent circumstances (§ 3622(d)(1)(E)) and the use of prior rate increase authority that has been banked (§ 3622(d)(2)(C)). Beyond these two exceptions, this CPI cap is absolute. Order No. 536 at 16, 35–36; *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012), *on remand*, Order No. 1427 (Aug. 9, 2012) at 17–19. As noted above, Section 3622(d), in contrast to Section 3622(b) ("Objectives") and Section 3622(c) ("Factors"), is entitled "Requirements."

Other provisions of Section 3622,—e.g., the rounding provision,[1]—flesh out how the price cap shall be implemented. The provisions that leave the PRC some discretion—e.g., Section 3622(d)(1)(C), which directs the Commission to develop procedures for reviewing non-compliance with the CPI rate cap—concern interstitial details and enforcement procedures.

The CPI cap is the linchpin of PAEA. In the Commission's own words, the role of the CPI cap in the statutory hierarchy is absolute, "central" and "indispensable." Order No. 547 at 10–13, 49–50; *accord* Order No. 536 at 16–17, 35–36. Through PAEA, Congress sought to create a profit

[1] 39 U.S.C. § 3622(d)(2)(B) ("Nothing in this subsection shall preclude the Postal Service from rounding rates and fees to the nearest whole integer, if the effect of such rounding does not cause the overall rate increase for any class to exceed the Consumer Price Index for All Urban Consumers.").

motive for the Postal Service and improve efficiencies in the postal networks by eliminating the break-even mandate.[2] To replace the break-even mandate as the main safeguard for users of market-dominant mail products, Congress required the adoption of a price cap linked to the rate of inflation. Order No. 547 at 10–12. "PAEA removed any reference to cost-of-service regulation, establishing the price cap as the *only regulatory model to be used under the new rate system*." *Id.* at 10 (emphasis added). "The broad flexibility" in pricing otherwise allowed the Postal Service by PAEA "underscores the importance of the price cap as a protection mechanism for ratepayers." *Id.* at 12. "The price cap . . . stands as the single most important safeguard for mailers." *Id.* at 13. The "role of the price cap is central to ratemaking, and the integrity of the price cap is indispensable if the incentive to reduce costs is to remain effective. Therefore, it would undermine the basic regulatory approach of the PAEA if the Postal Service could pierce the price cap routinely." *Id.* at 49–50.

The mandatory language used by Congress in establishing the CPI cap (the Commission "shall" establish a regulatory system, including the "requirement" of the CPI cap) and the central role of the CPI cap in the PAEA ratemaking scheme foreclose any claim that the statute makes the CPI cap merely optional. "The word 'shall' is ordinarily 'the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (citations omitted); *see also Lopez v. Davis*, 531 U.S. 230, 231 (2001) ("Congress used 'shall' to impose discretionless obligations"). Although the courts sometimes treat "shall" as permissive when treating the word as mandatory would produce results

[2] *See* Gov't Accountability Office, GAO-07-684T, U.S. Postal Service: Postal Reform Law Provides Opportunities to Address Postal Challenges 1, 17–19 (2007), *available at* http://www.gao.gov/assets/120/116185.pdf.

that are "inconsistent with the manifest intent of the legislature or repugnant to the context of the statute," *Kakeh v. United Planning Org., Inc.* 655 F. Supp. 2d 107, 124–25 (D.D.C. 2009), the plain meaning and purpose of the language mandating the CPI cap are aligned: the binding character of the cap is the linchpin of the statute.

B. Section 3622(d)(3) Directs the Commission to Review the Ratemaking System that It Established in 2007, not Repeal or Modify the CPI Cap Established by Congress.

By contrast, nothing in 39 U.S.C. § 3622(d)(3) suggests its directive to review and modify the "system for regulating rates and classes" previously adopted by the Commission under Section 3622(a) includes the power to repeal the *statutory price cap itself.* To the contrary, *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.* forecloses such a construction. In *MCI*, the Federal Communications Commission ("FCC") held that its statutory authority to "modify" rate-filing requirements entitled the agency to eliminate tariff-filing requirements for some telecommunications services. *Id.* at 224–25. The Supreme Court rejected this position, holding that the power to "modify" did not permit the agency to make major changes to a regime established by Congress under basic rules of statutory construction. *Id.* at 234. More broadly, the Supreme Court stated that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to "modify" rate-filing requirements." *Id.* at 231.[3]

[3] The dissenting justices in *MCI* would have allowed the agency to "modify" the Communications Act's tariff filing requirement because in their view, the provision, while important, was not "the

MCI makes clear that substantive provisions "at the heart" of the statute may not be amended through modifications. Because the provisions of Section 3622 establishing the CPI cap are "at the heart" of price regulation of market dominant mail under PAEA, the Commission cannot effectively introduce "a whole new regime of regulation" that is "not the one that Congress established." *See MCI*, 512 U.S. at 234. A statutory provision calling for the review of a regulatory system cannot reasonably be interpreted as a basis for a complete overhaul of the fundamental principles of the system. Such an interpretation would take Section 3622(d)(3) far beyond "plausibility." *Accord Christensen v. Harris Cnty.*, 529 U.S. 576, 590 n.* (2000) (Scalia, J., concurring in part and concurring in judgment) (noting "the implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency)"). The Commission can, and indeed must, evaluate and modify the regulatory scheme set up in response to PAEA—but the modifications or alternative systems are bound by CPI cap established in Section 3622(d)(1)(A).

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heart of the common-carrier section of the Communication Act." *Id.* at 237 (Stevens, Blackmun, and Souter, JJ., dissenting). As noted above, the PRC has acknowledged that the price cap provision is in fact the central feature of PAEA. Hence, Section 3622(d)(3) could not be interpreted to allow the modification of the CPI cap even under the reasoning of the dissent. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) ("*Amtrak*"), distinguished by Justice Scalia, is also inapposite. The "contextual context" of the term "required" at issue in that case involved a determination of whether the agency action at issue was "necessary" or merely useful; under PAEA, by contrast, the PRC is "required" to review the regulatory system, but the contextual context makes clear that the PRC cannot modify or repeal the price cap.

Moreover, as the Supreme Court has pointed out, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001). Nothing in the language of Section 3622(d)(3) specifically authorizes the PRC to modify the CPI cap; indeed, Section 3622(d)(3) does not even refer to the cap requirements. Congress may not be deemed to have authorized elimination of the price cap—"the single most important safeguard for mailers" in PAEA[4]—by omission or indirection. Section 3622(d)(3) may not be read as allowing the Commission to remove this fundamental protection during the 10-year review without express and explicit authorization in the statutory text.

Pursuant to the authority granted by 39 USC § 3622(d)(3), the Commission is free to modify its regulations or adopt alternative regulations to meet the objectives of Section 3622(b) if the PRC determines that the existing system of regulation is not doing so; however, the regulatory scheme must still meet the basic requirements contained in Section 3622(d)(1). Thus, any modified system for regulating rates would be subject to the CPI cap, absent congressional amendment. "[T]he power to issue regulations is not the power to change the law." *U. S. v. New England Coal & Coke Co.*, 318 F.2d 138, 143 (1st Cir. 1963).

C. The Relationship Between Section 3622(a) and Section 3622(d)(3) Confirms that the Commission's Authority to Revise the Ratemaking System Does Not Extend to the CPI Cap.

In construing the statute, the Commission may not interpret its provisions in isolation, but must consider each one in light of the overall "structure and purpose of the statute. The

[4] Order No. 547 at 13.

Commission itself has recognized that PAEA, like all statutes, must be interpreted as a coherent and symmetrical regulatory scheme and, if possible, all parts must be fitted into a harmonious whole." Order No. 547 at 25 (citing *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975); *Cody v. Cox*, 509 F.3d 606, 609 (D.C. Cir. 2007)), *remanded on other grounds*, *USPS v. PRC*, 640 F.3d 1263 (D.C. Cir. 2011); *accord K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). "The meaning of words should be determined by specific context in which they are used and within the broader context of the statute as a whole." Order No. 547 at 25 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983); *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997); *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132–33 (2000)). The overall structure of PAEA provides further confirmation that Section 3622(d)(3) does not authorize the Commission to rescind or substantially modify the CPI cap.

Section 3622(d)(3), which authorizes the Commission to modify its "system for regulating rates and classes for market-dominant products," mirrors Section 3622(a), which authorized the Commission to "establish" the "system for regulating rates and classes for market-dominant mail" in the first instance. A word or phrase that appears in two or more provisions of the same Section of a statute is presumed to have the same meaning each time. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

This conclusion is reinforced by the explicit references in Section 3622(d)(3) to the "objectives" of Section 3622(b) and the "factors" of Section 3622(c) as the criteria to govern the ten-year review. These "objectives" and "factors" are the *same* "objectives" and "factors" that

Section 3622(b) and (c) directed the Commission to consider in 2007 when initially establishing a "system for regulating rates and classes" for market-dominant mail under Section 3622(a). Hence, the Commission's authority to *modify* the "system for regulating rates and classes" under Section 3622(d)(3) must be regarded as coextensive with the Commission's initial authority to *establish* the "system" under Section 3622(a):

<table>
<tr><th>Section 3622(a)</th><th rowspan="6">Section 3622(d)(3)

Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.</th></tr>
<tr><td>The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, by regulation establish (and may from time to time thereafter by regulation revise) a modern system for regulating rates and classes for market-dominant products.</td></tr>
<tr><th>Section 3622(b)</th></tr>
<tr><td>Objectives.— Such system shall be designed to achieve the following objectives, each of which shall be applied in conjunction with the others: [list of objectives omitted]</td></tr>
<tr><th>Section 3622(c)</th></tr>
<tr><td>Factors.— In establishing or revising such system, the Postal Regulatory Commission shall take into account— [list of factors omitted]</td></tr>
</table>

This parallelism precludes any claim that Section 3622(d)(3) authorizes the Commission to rescind or substantially modify the CPI cap. As the Commission has repeatedly acknowledged, the Commission's role in establishing a "system of regulation" under Section 3622(a) was merely to fill in the gaps between the "quantitative pricing standards" established by Congress in Sections

3622(d)(1)(A), 3622(d)(2), 3622(e) and 3626. Nothing in the language, structure or history of PAEA suggests that it gave the Commission greater authority to override or repeal the CPI cap when *reviewing* or *modifying* the "system for regulating rates" under Section 3622(d)(3) than when initially *establishing* the same "system" under Section 3622(a). Accordingly, the Commission's authority to *modify* the "system" under Section 3622(d)(3) must likewise be regarded as subordinate to the CPI cap.

At the top of the statutory hierarchy of PAEA are the three "quantitative pricing standards" that are hard-wired into Title 39: the CPI cap imposed by Section 3622(d)(1)(A) and (2); the limit on worksharing discounts imposed by Section 3622(e); and the constraints imposed by Section 3626 on the rate relationships between preferred mail and regular mail. The Commission has recognized that the "out-of-bounds" lines established by these three "objective, quantitative pricing standards" are "mandatory":

> Under the system that the Commission has established, the Postal Service enjoys a general prerogative to set market dominant rates, subject to only a few, clear "out-of-bounds" lines drawn by the PAEA. These "out-of-bounds" lines consist of pricing restrictions in three areas—the cap on class prices (*see* section 3622(d)), the limit on workshare discounts (*see* section 3622(e)), and revenue ceilings for the various categories of preferred mail (*see* section 3626). Congress framed each of these requirements as objective, quantitative pricing standards, made their application mandatory, and placed each in a self-contained section of the PAEA.

Order No. 536 at 16. These self-contained "quantitative" provisions "directly and comprehensively address issues of flexibility, including when deviations from the standard are warranted, and the procedures to be followed in such situations." *Id.* at 34.

The "factors" and "objectives" of sections 3622(b) and (c)—and therefore the Commission's authority to establish a "system for regulating rates" under Section 3622(a) or modify such a "system" under Section 3622(d)(3)—are subordinate to the CPI cap and the other quantitative pricing standards:

> Quantitative pricing standards are at the top of the statutory hierarchy. Next in the hierarchy are the qualitative "objectives" listed in section 3622(b), followed by the qualitative "factors" listed in section 3622(c). Under this hierarchy, violations of the three quantitative pricing requirements are "out of bounds." The Postal Service has broad flexibility to develop prices to achieve the qualitative objectives and factors of sections 3622(b) and (c) *so long as its prices are "in bounds" because they satisfy these quantitative requirements*.

Order No. 536 at 36 (emphasis added), *on further consideration*, Docket No. RM2010-13, *Consideration of Technical Methods to Be Applied in Workshare Rate Design*, Order No. 1320 (April 20, 2012), *aff'd*, *USPS v. PRC*, 717 F.3d 209 (D.C. Cir. 2013). "[U]nder accepted rules of statutory construction when a general, qualitative pricing standard . . . conflicts with a specific qualitative pricing standard, such as the limit on workshare discounts, the pricing standards that are specific and mandatory should prevail over those that are general and discretionary." Order No. 536 at 37 (citations omitted); *accord id*. at 16–17.[5]

[5] The objectives and factors of Sections 3622(b) and (c) are also subordinate to 39 U.S.C. §§ 403(c) and 3662(c), the statutory safeguards against undue discrimination. *USPS v. PRC*, 747 F.3d 906, 913 (D.C. Cir. 2014) ("*GameFly II*") (the "system for regulating rates and classes" established by the Commission under Section 3622(a), and the objectives and factors of Sections 3622(b) and (c), do not govern the Commission's exercise of its authority under Sections 403(c) and 3662(c)).

The Commission reaffirmed the subordinate and limited role of Sections 3622(b) and (c) in the Annual Compliance Determination ("ACD") for Fiscal Year 2010. Rejecting the Public Representative's contention in Docket No. ACR2010 that the attributable cost provision of 39 U.S.C. § 3622(c) stood on equal footing with the CPI-based price cap of Section 3622(d), the Commission held that the price cap trumps the attributable cost floor:

> The Public Representative reasons that the statutory price cap and the attributable cost floor provision in section 3622(c)(2) are on equal footing. This is based on the contention that section 3622(c)(2) is a quantitative requirement, notwithstanding its location with the cluster of statutory factors the Commission identified, in Order No. 536, as qualitative . . . .
>
> Section 3622 creates a hierarchy based on "requirements," sections 3622(d) and (e), "objectives," section 3622(b), and "factors," section 3622(c). With the exception of an exigent rate request and use of banked pricing authority, the PAEA's price cap mechanism in section 3622(d)(1)(A) takes precedence over the statutory pricing objectives and factors in sections 3622(b) and (c), even if some of these can be considered quantitative. Therefore, to the extent an objective or factor with a quantitative component can be seen as competing with the price cap, the price cap has primacy . . .
>
> [T]he objectives and factors, including those that can be regarded as quantitative operate within the context of the price cap; they are not on an equal footing with it.

FY 2010 ACD (Mar. 29, 2011) at 18–19 (footnotes omitted).

On review of the 2010 ACD, the Court of Appeals agreed, finding that "the pricing" of Periodicals Mail "is subject to special statutory restrictions" inapplicable to the pricing of Standard Mail flats. *USPS v. PRC*, 676 F.3d 1105, 1108 (D.C. Cir. 2012). On remand, the Commission reiterated that it faced greater statutory constraints in raising prices for Periodicals than Standard Mail flats because the former constituted a class, and hence was subject to the CPI cap:

> Moreover, the fact that Periodicals has only two products (Within County and Outside County Periodicals), neither of which covered its attributable costs, limits the opportunity for the Postal Service to improve attributable cost coverage by means of price increases while remaining within the Periodicals class price cap.

Docket No. ACR2010-R, *Annual Compliance Report, 2010*, Order No. 1427 (Aug. 9, 2012) at 17. Because "96 percent of class revenues are provided by Outside County Periodicals, the Postal Services does not have the same flexibility to set prices substantially above the price cap as it does with respect to products within Standard Mail." *Id*. at 18 (citing FY2010 ACD at 94).

The Commission acknowledged this legal constraint again in its Annual Compliance Review for the Fiscal Year 2011, ACR2011. The Commission again declined to impose an above-CPI rate increase on Periodicals Mail despite finding that the class failed to cover its attributable costs. The Commission explained, *inter alia*, that "unlike Standard Mail, Periodicals as a class fails to cover costs, thus foreclosing a rebalancing pricing strategy." FY 2011 Annual Compliance Determination (Mar. 28, 2012) at 17 (emphasis added).

Finally, interpreting the Commission's general authority under Section 3622(d)(3) as a license to override or revoke the specific prescriptions of PAEA concerning the relationships between market-dominant price increases vs. inflation (Section 3622(d)(1)(A) and (B)), workshare discounts vs. cost avoidances (Section 3622(e)), and preferred rates vs. regular rates (Section 3626) would also violate the "fundamental rule of statutory construction" that, when two statutory provisions are arguably in conflict, "specific provisions trump general provisions." *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003). This canon of construction applies with particular force where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC*

v. Amalgamated Bank, 132 S. Ct. 2065, 2070–72 (2012) (citations omitted); *accord Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *Mail Order Ass'n of Am. v. USPS*, 986 F.2d 509, 515 (D.C. Cir. 1993).

D. The Legislative History of PAEA also Indicates that the CPI Cap Is Mandatory.

The legislative history of PAEA does not support a contrary conclusion. As a general matter, the legislative history of a statute is entitled to much less weight than the text and structure of the statute, particularly when the meaning of the latter is clear. "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). As discussed above, the text and structure of Section 3622 make clear that the CPI cap is binding and not open to rescission by the Commission. The legislative history of PAEA is not to the contrary.

The legislative history of PAEA is sparse and scattered across several bills, including H.R. 22 and S. 622, which eventually combined to form H.R. 6407. None of the legislative history speaks to the purpose or proper interpretation of the review provision of Section 3622(d)(3), which appears to have been added to H.R. 6407 without hearings, Committee consideration, or floor debate. *See Whitman*, 531 U.S. at 468 (denying an agency the ability to fundamentally revise a regulatory scheme based on "vague terms or ancillary provisions" because Congress does not "hide elephants in mouseholes"). By contrast, the only report regarding the CPI rate cap requirement stems from H.R. 22, and states that "[t]he legislation *would mandate* that the average rate for any market dominant product *could not* rise more than the annual increase in the Consumer Price Index

(CPI), unless a larger increase would be necessary to ensure the viability of the Postal Service." H.R. Rep. No. 109-66, Part 1, at 86 (2005) (emphasis added). This intent is bolstered by the fact that the final version of PAEA in H.R. 6407 denoted Section 3622(d) "requirements" rather than "allowable provisions" as proposed in H.R. 22. The language and legislative history from earlier, *unenacted* bills show that Congress contemplated giving the Commission more discretion regarding the rate cap, and was fully capable of drafting language to do so.

* * *

In sum, the text and structure of the statute demonstrate that the CPI cap is a non-discretionary requirement that the Commission may not remove through regulation. As the Postal Service's Office of Inspector General has acknowledged, eliminating the CPI cap would require an act of Congress.[6]

II. CONSTRUING SECTION 3622(d)(3) TO AUTHORIZE THE COMMISSION TO ELIMINATE THE CPI CAP WOULD VIOLATE THE CONSTITUTIONAL-DOUBT CANON OF INTERPRETATION.

Interpreting Section 3622(d)(3) to authorize rescission of the CPI cap would also raise constitutional issues. The constitutional-doubt canon prohibits agencies from construing statutes in such a way as to raise serious doubts about their constitutionality. *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Lowe v. SEC*, 472 U.S. 181, 227 (1985); *Edward J.*

[6] *See* USPS OIG, Revisiting the CPI-Only Price Cap Formula, RARC-WP-13-007, at iv (Apr. 12, 2013) (noting that "[i]f Congress decides to continue using a price cap" the USPS would need to use "alternative approaches" to "improve its financial condition").

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). There is a serious doubt that construing Section 3622(d)(3) to authorize the Commission to rescind the CPI cap would pass muster under the Presentment Clause of the Constitution, U.S. Const. Art. 1, § 7, cl. 2, or the constitutional limits on the delegation of legislative authority.

Removal or substantial modification of the CPI cap would effectively repeal 39 U.S.C. §§ 3622(d)(1)(A), (D), (E) and 3622(d)(2), the provisions that established the creation of the CPI cap and continue to require its use as a constraint on market-dominant rates. The Presentment Clause, however, does not allow a bill to become law without first passing both houses of Congress and being "presented" to the President, who "shall sign it" if he approves it, but "return it," *i.e.*, veto it, if he does not. U.S. Const., Art. 1, § 7, cl. 2. The Presentment Clause also bars Congress from delegating to the executive branch the authority to *amend* or *repeal* statutes. *Clinton*, 524 U.S. at 438–49.

In *Clinton*, the Supreme Court struck down as contrary to the Presentment Clause a provision of the Line Item Veto Act, 2 U.S.C. § 691 *et seq.*,[7] that authorized the President to veto individual line items of spending legislation. Allowing the President to exercise a line item veto, the Court held, would allow "truncated versions" of bills passed by Congress to become law, a result at odds with the "'finely wrought' procedure that the Framers designated." 524 U.S. at 440. "If the Line Item Veto Act were valid," the Court explained,

[7] Line Item Veto Act, Pub. L. 104-130, 110 Stat. 1200 (1996), *invalidated by Clinton v. State of New York*, 524 U.S. 417 (1998).

> it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as "Public Law 105–33 as modified by the President" may or may not be desirable, but it is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

Id. at 448–49.

Clinton may not be distinguished on the theory that rescission of the CPI cap would amount merely to a case-specific suspension or waiver of the cap, or a revision of a statutory table of examples. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Republic of Iraq v. Beaty*, 556 U.S. 848, 861 (2009); *Terran v. Sec'y of HHS*, 195 F.3d 1302, 1307–08, 1312–14 (Fed. Cir. 1999); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124–26 (D.D.C. 2007). The suspensions, waivers, and revisions upheld in those cases were temporary, peripheral or limited adjustments to a larger statutory scheme. Rescission of the CPI cap, by contrast, would nullify the constraint that the Commission has acknowledged is the "central" and "indispensable" core of PAEA. Such rescission would moot and therefore repeal the congressionally mandated Exigency Provision. *See supra* p.5. Eliminating the CPI cap would go beyond pruning the leaves, twigs, or peripheral branches of PAEA; it would uproot the law at its very trunk and taproot.

Furthermore, the suspensions, waivers and revisions upheld in *Marshall Field*, *Republic of Iraq*, *Defenders of Wildlife*, and *Terran* were all found to "execut[e] the policy that Congress had embodied in the statute," *Clinton*, 524 U.S. at 444; *accord Republic of Iraq*, 556 U.S. at 861 (the statutory "proviso *expressly* allowed the President to render certain statutes inapplicable") (emphasis in original). Section 3622(d)(1)(E), which authorizes the Commission to approve above-CPI increases in certain "extraordinary" or "exceptional" circumstances, is an example of a

constitutionally-permissible suspension or waiver provision of this kind. By contrast, nothing in the language, structure, or history of PAEA implies, let alone states expressly, that the Commission is allowed to discard the CPI cap under Section 3622(d)(3). Order No. 547 at 10–13, 49–50.

Wholesale repeal or modification of the heart of PAEA would additionally infringe upon the powers of Congress, as the OIG has recognized. *See supra* note 8 and accompanying text. The non-delegation doctrine recognizes that the Constitution gives Congress the power to legislate, and Congress may not delegate that power to administrative agencies through standardless delegations of authority. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989); *see also Panama Ref. Co.*, 293 U.S. at 430; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529–31.

Allowing the Commission to eliminate or modify the congressionally-established CPI cap as part of its ten-year review, with no guidance or limits as to what alternative system can replace it, would entail just such a standardless delegation. Congress could not have intended to provide the Commission with unfettered discretion to repeal every substantive ratemaking provision of PAEA through a regulatory process—let alone effected this standardless delegation through an amendment that was added at the last moment to a substitute bill that was signed by the President without Committee consideration or debate. Such revision would run counter to the intelligible standards Congress set through its mandatory requirements in Section 3622.

By contrast, interpreting Section 3622(d)(3) as requiring the Commission to review its regulations and amend or provide for alternative regulatory schemes *within* the mandatory framework set by Congress provides an "intelligible principle" to narrow the agency's discretion and thus avoids the serious constitutional problem posed by the broader interpretation of Section

3622(d)(3) that administrative rescission of the CPI cap would require. "A construction of the statute that avoids [an] open-ended grant should certainly be favored." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion); *see also Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) (construing statute to avoid non-delegation question); *cf. Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to . . . giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

The mandatory requirements and limitations of Section 3622, discussed *supra* Section I, form the basis for this guidance. The more reasonable and Constitutionally-sound analysis indicates that Section 3622(d)(3) requires the Commission to review the system to regulate rates that it set up through Congress's guidance, and revise only those aspects of the system that Congress left to the Commission's discretion as needed to meet the objectives set by Congress. The "heart" of the system, the CPI rate cap, may only be amended through Congressional action.

CONCLUSION

For these reasons, the Commission can and must declare that its 2017 Review under Section 3622(d) (3) will not result in any alteration to Sections 3622(d)(1) and (2) or Section 3622(e). While formal initiation of the review will not occur for several years, the Commission should resolve this issue now, so that when the review is commenced the Commission and all interested parties are focused on the matters that do lie within the Commission's discretion, thereby enabling the review process to produce results which advance the purposes of PAEA.

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