

Nos. 12-1095, 12-1110 & 12-1157

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

ELAINE J. MITTLEMAN,
Petitioner in No. 12-1095,

VENICE STAKEHOLDERS ASSOCIATION, et al.,
Petitioners in No. 12-1110,

PAUL McCLUNG, et al.,
Petitioners in No. 12-1157,

v.

POSTAL REGULATORY COMMISSION,
Respondent,

UNITED STATES POSTAL SERVICE,
Intervenor for Respondent.

ON PETITIONS FOR REVIEW FROM THE
POSTAL REGULATORY COMMISSION

**RESPONSE TO PETITION FOR REHEARING
AND REHEARING EN BANC**

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INTRODUCTION AND SUMMARY

Title 39, section 404(d)(5) of the U.S. Code provides for administrative review by the Postal Regulatory Commission of a determination by the Postal Service to “close or consolidate any post office.” 39 U.S.C. § 404(d)(5). It further provides that the judicial review provisions of the Administrative Procedure Act “shall not apply to any review carried out by the Commission under this paragraph.” *Ibid.*

As a unanimous panel of this Court correctly concluded, section 404(d)(5) expressly bars judicial review under the APA of Commission decisions concerning alleged post office closures and consolidations. *See* Slip Opinion (“Slip Op.”) 7-10. And, as this Court also correctly recognized, 39 U.S.C. § 3663, which provides a general mechanism for judicial review of final Commission decisions in accordance with the APA, does not undermine that conclusion. This Court properly harmonized the two statutes by explaining that section 404(d)(5) carves out a “specific exception” to the APA review otherwise generally available under section 3663. Slip Op. 11.

Petitioners do not argue that this holding—which interpreted specific statutory language directed at a particular type of Commission order—conflicts with any precedent of this Court or the Supreme Court. Rather, they argue that this Court erred in not interpreting section 3663 to abrogate the more specific provision found in section 404(d)(5). They further suggest that the Court erred in declining to adjudicate a petition that had become moot. Neither of these incorrect contentions provides any basis for granting rehearing, and the petition should therefore be denied.

STATEMENT

A. Statutory Background

When Congress created the United States Postal Service as an “independent establishment of the executive branch of the Government of the United States,” 39 U.S.C. § 201, it also granted the Postal Service the authority to “determine the need for post offices . . . and to provide such offices . . . as it determines are needed.” *Id.* § 404(a)(3). Congress later established certain procedural requirements regulating the Postal Service’s decision to close or consolidate an existing post office. *See* Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, § 9(a), 90 Stat. 1303, 1310-11 (1976) (codified, as amended, at 39 U.S.C. § 404(d)).

To ensure compliance with those procedural requirements, Congress provided an avenue for limited administrative review: “A determination of the Postal Service to close or consolidate any post office may be appealed by any person served by such office to the Postal Regulatory Commission[.]” 39 U.S.C. § 404(d)(5). The Commission then “review[s] such determination on the basis of the record before the Postal Service.” *Ibid.* The Commission may set aside a Postal Service determination if it finds it to be “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) without observance of procedure required by law; or (C) unsupported by substantial evidence on the record.” *Ibid.*

In addition to limiting the scope of administrative review, Congress has taken steps to ensure that disputes over post office closures or consolidations are resolved

quickly and efficiently. For example, the Commission must issue its decision no later than 120 days after an appeal is received, and the Commission need not comply with the formal hearing requirements of the APA in conducting its review. *See id.*

§ 404(d)(5), (6). And of particular relevance here, Congress expressly provided that the judicial review provisions of the APA—“[t]he provisions of . . . chapter 7 of title 5”—“shall not apply to any review carried out by the Commission under this paragraph.” *Id.* § 404(d)(5).

B. Procedural Background

In recent years, the Postal Service has suffered severe financial difficulties. Among other initiatives, the Postal Service has explored ways to reduce costs by streamlining its network of retail postal facilities. These consolidated proceedings concern decisions by the Postal Service to modify retail service in three communities: Falls Church, Virginia; Venice, California; and Spring Dale, West Virginia.

1. After extensive review, in 2011, the Postal Service rendered a final determination to close the Pimmit Branch in Fairfax County, Virginia, and transfer its services to a new, recently opened facility in Falls Church. *See* Joint Appendix (“JA”) 6-11. Petitioner Elaine Mittleman filed an administrative appeal with the Commission under 39 U.S.C. § 404(d)(5) seeking to set aside the Postal Service’s determination to close the Pimmit Branch. JA 14-16.

In January 2012, the Commission dismissed Mittleman’s appeal. JA 26-38. Applying a decades-old line of precedent, the Commission determined that 39 U.S.C.

§ 404(d) did not apply to the Postal Service's discontinuance of the Pimmit Branch because the action was "part of a broader plan to rearrange the postal network" in the community by transferring retail services to a new facility. JA 36. The Commission thus determined that it lacked jurisdiction over the appeal. JA 37.

2. In 2011, the Postal Service announced its decision to relocate the retail operations of the Venice Post Office to another facility across the street. JA 55-58. Several petitioners filed an administrative appeal with the Commission under 39 U.S.C. § 404(d)(5) seeking to set aside the Postal Service's decision. JA 59-64. The Postal Service moved to dismiss the proceeding, arguing that 39 U.S.C. § 404(d) did not apply because its plans "d[id] not involve the discontinuance of a facility," but rather a "relocation" that would not cause any "reduction in the level of service provided to the Venice community." JA 79 (internal quotation marks omitted).

The Commission dismissed petitioners' appeal in January 2012. JA 75-83. Applying its longstanding precedent, the Commission reaffirmed that "Postal Service decisions to relocate a post office are not subject to appeal under 39 U.S.C. § 404(d)." JA 80.

3. In 2011, the Postal Service issued a final determination to close the Spring Dale Post Office. JA 88-101. In November 2011, petitioner Paul McClung filed an appeal with the Commission under 39 U.S.C. § 404(d)(5) seeking to set aside the Postal Service's determination. JA 102-04. McClung, later joined by other petitioners, argued that the Postal Service had failed to comply with the procedural requirements

of 39 U.S.C. § 404(d) and had based its financial estimates on unreliable information. *See, e.g.*, JA 102-03.

The Commission exercised jurisdiction over the appeal, and in February 2012, its review resulted in a tie vote. Two commissioners opined that the Postal Service had complied with all statutory requirements, *see* JA 114-29, while the remaining two commissioners disagreed and filed separate dissenting opinions, *see* JA 130-33, 134. According to the Commission's established practice, the tie vote indicated the absence of a majority to grant the relief requested by petitioners. Because petitioners sought to set aside the Postal Service's determination to close the Spring Dale Post Office, the Commission's denial had the effect of affirming the Postal Service's closure determination. *See* JA 115 n.4.

Although the Postal Service's determination to close the facility was affirmed by the Commission, the Postal Service later rescinded its final determination, and the Spring Dale Post Office remains open. Slip Op. 6.

C. Proceedings In This Court

1. Petitioners then filed these three petitions seeking judicial review of the Commission's respective decisions. The Commission moved to dismiss each petition, explaining that Congress had precluded petitioners from obtaining judicial review under these circumstances because 39 U.S.C. § 404(d)(5) provides that the judicial review provisions of the Administrative Procedure Act "shall not apply to any review

carried out by the Commission under this paragraph.” 39 U.S.C. § 404(d)(5). In August 2012, a motions panel of this Court referred disposition of the motions to the merits panel, consolidated the petitions, and directed full briefing.

2. After oral argument, a unanimous panel of this Court denied relief as to each of the three petitions for review. As an initial matter, the Court considered whether any of the petitions were moot. The Court concluded that the petition concerning the Spring Dale Post Office (No. 12-1157) no longer presented a live controversy, as the Postal Service had rescinded its decision to close that post office, and petitioners thus had “received all the relief they sought.” Slip Op. 6. Accordingly, because the dispute was moot, the Court declined to resolve the merits of the issues raised by the Spring Dale petitioners. *Ibid.*

The Court next interpreted the language in section 404(d)(5) stating that the Commission’s review of post office closures or consolidations is not subject to “chapter 7 of title 5.” The Court concluded that this language precluded judicial review of Commission decisions under the Administrative Procedure Act, because chapter 7 of title 5 contains the provisions for judicial review under the APA. Slip Op. 7-8. Thus, section 404(d)(5) “withdraws the authority that the APA would otherwise grant a court to review the Commission’s review.” *Id.* at 7 (emphasis omitted).

The Court noted that its conclusion was supported both by case law interpreting an analogous statutory provision and by the legislative history of section

404(d)(5). Slip Op. 9. The Court explained that 39 U.S.C. § 410(a) uses similar language barring the application of chapter 7 of title 5 to the Postal Service, and noted that this language had consistently been held to preclude judicial review under the APA. *Ibid.* The Court also explained that although earlier versions of the bill that led to the enactment of section 404(d)(5) would have provided for judicial review, the conference committee decided to take out those provisions, stating that “*instead there shall be a right of appeal*” to the Commission. *Id.* at 10.

The Court also rejected petitioners’ reliance on 39 U.S.C. § 3663, a statute generally providing for review of the Commission’s “final order[s] or decision[s].” Slip Op. 10-13. Recognizing that this statute appeared to conflict with section 404(d)(5) under these circumstances, the Court harmonized the two statutes by construing section 404(d)(5) as a “specific exception” to section 3663’s more general grant of review. *Id.* at 11. The Court further explained that in enacting section 3663, Congress had given no indication that it intended to repeal the limitation on judicial review contained in section 404(d)(5). *Id.* at 12. To the contrary, even as it “made numerous changes to other provisions” of that statute, Congress “left completely intact the provision of § 404(d)(5) that precludes APA review of Commission decisions regarding post office closures and consolidations.” *Id.* at 12-13.

As a final matter, the Court declined to consider whether there might exist a basis for non-statutory review on an *ultra vires* theory, explaining that “petitioners do

not contend that the Commission exceeded the scope of its statutory authority in dismissing their appeals.” Slip Op. 14.

ARGUMENT

The Court’s Decision Is Entirely Correct And Does Not Warrant Rehearing.

1. This Court correctly concluded that petitioners are not entitled to judicial review of the Commission’s decisions under the APA. Through 39 U.S.C. § 404(d)(5), Congress established a form of appellate oversight over Postal Service determinations to close or consolidate post offices by permitting affected customers to seek speedy review of those determinations by the Postal Regulatory Commission. But Congress also took care to ensure that the Postal Service’s management decisions would not become the subject of protracted and burdensome litigation. As this Court recognized, although Congress had considered the possibility of allowing for judicial review of post office closures, it ultimately rejected that approach, instead deciding to provide exclusively for expedited review by an expert agency. Slip Op. 10.

Thus, the statute expressly declares that “[t]he provisions of . . . chapter 7 of title 5 shall not apply to any review carried out by the Commission under this paragraph.” 39 U.S.C. § 404(d)(5). As this Court recognized, chapter 7 of title 5, entitled “Judicial Review,” is part of the Administrative Procedure Act and includes a partial waiver of the United States’ sovereign immunity from suit, 5 U.S.C. § 702; a cause of action for review of “final agency action,” *id.* § 704; and an enumeration of

the bases upon which such agency action may be held unlawful and set aside by a court, *id.* § 706. *See* Slip Op. 7-8. By expressly exempting the Commission’s decisions under section 404(d)(5) from these provisions of Chapter 7—and by channeling customer complaints about post office closures to a speedy, expert administrative process—Congress manifested its intent to conserve judicial resources and preclude the type of additional review that the petitioners sought here.

The Court also properly concluded that the statute relied upon by petitioners, 39 U.S.C. § 3663, can afford no basis for judicial review under these circumstances.

See Slip Op. 10-13. Section 3663 provides:

A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia. *The court shall review the order or decision in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, on the basis of the record before the Commission.*

39 U.S.C. § 3663 (emphasis added). Although section 3663 thus ordinarily authorizes petitions in this Court for review of Commission decisions under the APA—and this Court has reviewed a number of such petitions for review, *see* Petition for Rehearing & Rehearing En Banc (“Pet.”) at 2—Congress has made clear that the APA “shall not apply” to Commission decisions reviewing post office closure or consolidation determinations. 39 U.S.C. § 404(d)(5). Section 3663 must yield to Congress’s contrary directive precluding APA review in that specific context. *See RadLAX*

Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) (recognizing that where a specific statute expressly precludes what a general statute would allow, “the specific provision is construed as an exception to the general one”); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) (“[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”). As this Court properly concluded, the only way to give effect to both the final clause of section 404(d)(5) and section 3663 is to construe the former provision as an exception to the latter one. Slip Op. 11.

The circumstances of section 3663’s enactment provide further evidence that Congress did not intend it to override section 404(d)(5). Section 3663 was enacted in 2006 as part of the Postal Accountability and Enhancement Act (“PAEA”), Pub. L. No. 109-435, § 205, 120 Stat. 3198, 3216-17 (2006)—a law which, among other things, replaced the Postal Rate Commission with the Postal Regulatory Commission. In the same enactment, Congress also transferred the Postal Rate Commission’s authority to review post office closure or consolidation determinations to the Postal Regulatory Commission, *see id.* § 604(a), 120 Stat. at 3241; relocated that review authority within the statute, *see id.* § 1010(e), 120 Stat. at 3261-62 (redesignating subsection 404(b) as subsection 404(d)); and enacted a new provision specifying when an administrative appeal under the redesignated section 404(d)(5) is deemed to be “received” by the Commission, *id.* § 1006(a), 120 Stat. at 3258 (codified at 39 U.S.C. § 404(d)(6)). This Court recognized that by amending portions of section 404(d)—

even as it simultaneously repealed or replaced many other provisions of Title 39, *see, e.g.*, Pub. L. No. 109-435, §§ 201(a)-(b), 205, 404(a), 503(a), 1002(a)—Congress evinced its intent that the terms of section 404(d)(5) that remained unchanged should continue to be given effect. Slip Op. 12-13.

2. The arguments made by petitioners in support of rehearing are without merit. Petitioners' complaints about possible "confusion" created by the coexistence of both sections 404(d)(5) and 3663 are misplaced. Pet. 2-3, 4, 9-10. Any uncertainty that may have existed has now been clarified by this Court's decision, which explains that, notwithstanding section 3663, section 404(d)(5) should be read in accordance with its plain terms: it "grants the *Commission* authority to review "[a] determination of the Postal Service to close or consolidate any post office," but "withdraws the authority that the APA would otherwise grant a *court* to review the Commission's review." Slip Op. 7.

Contrary to petitioners' suggestion, the panel did not "confuse[] a cause of action in district court with a petition for review in this Court." Pet. 7. Rather, the Court looked to *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006), in the course of interpreting section 404(d)(5)'s statement that "chapter 7 of title 5" shall not apply to Commission decisions. It was wholly appropriate for the Court to consider cases discussing the judicial review provisions of the APA in determining what Congress intended by including language precluding application of "chapter 7 of title 5." It was equally proper for the Court to look to cases arising from district-court litigation in

inquiring whether *ultra vires* review might similarly apply in the context of a direct-review statute. *Cf.* Pet. 11-12. And, most importantly, the Court was correct to conclude that it need not consider whether such non-statutory review would be available here, given that “petitioners do not contend that the Commission exceeded the scope of its statutory authority in dismissing their appeals.” Slip Op. 14.¹

The opinion likewise is not “blind” to the “fundamental policy that administrative orders should be subject to judicial review.” Pet. 9. Petitioners overlook that this “policy” is simply a presumption of Congress’s intent, and that Congress possesses the ability to foreclose judicial review under the APA if it wishes to do so. The “presumption favoring judicial review of administrative action” can “be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent.” *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). Here, as the Court correctly concluded, section 404(d)(5) contains precisely such “specific language” foreclosing judicial review. And because that holding is limited by its terms to the statute at issue here, it does not present any “issue[] of exceptional importance”

¹ Petitioners emphasize their disagreement with the Commission’s underlying decisions, including the Commission’s determination that it lacks the authority under section 404(d)(5) to review relocations of postal facilities. Pet. 13-14. But as this Court properly recognized, the necessary effect of section 404(d)(5)’s final clause is to prevent petitioners from obtaining further review of these arguments. *See* Slip Op. 7 (“Congress has precluded this court from examining the Commission’s handiwork under the APA”). In any event, for the reasons explained in the Commission’s brief, *see* Respondent Br. at 27-44, the Commission’s decisions resolving the administrative appeals were reasonable and consistent with longstanding agency precedent.

(Pet. 5) concerning principles of judicial review more generally. *Cf.* Fed. R. App. P. 35(a)(2).

Petitioners' discussion of *Independent Producers Group v. Library of Congress*, 759 F.3d 100 (D.C. Cir. 2014) ("*IPG*"), similarly reflects their misunderstanding of these principles. The *IPG* decision cited the Court's opinion in this case for the unremarkable proposition that, in the absence of a request for non-statutory review, a court need not consider whether such review would be available. *See id.* at 108. Contrary to petitioners' suggestion, the Court in *IPG* did not "challenge the strong presumption in favor of judicial review." Pet. 14.

Petitioners' reliance on section 3663 similarly does not advance their position. Pet. 6-7, 9-11. This Court was correct to employ the canon of statutory interpretation that "the specific governs the general." *RadLAX Gateway Hotel, LLC*, 132 S. Ct. at 2070. Sections 404(d)(5) and 3663 both concern the circumstances under which APA review of Commission decisions is available, and this Court properly harmonized the two by "constru[ing] [the specific provision] as an exception to the general one." Slip Op. 11 (quoting *RadLAX*, 132 S. Ct. at 2071). A contrary interpretation would render the final clause of section 404(d)(5) without any effect. Moreover, notwithstanding petitioners' assertion that a "reader . . . looking at § 3663" would not easily locate this exception, Pet. 10, it was entirely natural for Congress to codify its preclusion of judicial review in section 404(d)(5)—the very statute that an individual must invoke in the first instance in order to obtain Commission review.

3. Petitioners' arguments regarding the Spring Dale Post Office are insubstantial. Petitioners do not dispute the Court's determination that the petition became moot once the Postal Service rescinded its decision to close the Spring Dale Post Office. *Cf.* Pet. 3-4, 14-15. Instead, petitioners state that the Court's opinion "ignores the important issue of tie votes by the Commission." Pet. 14. As the Court correctly explained, however, "[w]hen a case is moot, a federal court is without jurisdiction to decide it." Slip Op. 6. Because "a federal court [lacks] the power to render advisory opinions," *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993), the Court properly declined to issue the "guidance" that petitioners seek. Pet. 4, 15.

Petitioners also question why the Court resolved the Spring Dale petition on mootness grounds rather than on the grounds employed for the other two provisions. *See* Pet. 2, 3. But "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted). In any event, if the Spring Dale petition had not become moot, the petition would have been properly denied for the same reason that the others were denied—section 404(d)(5) "precludes judicial review of Commission decisions regarding [post office] closures and consolidations under the APA." Slip Op. 9.

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing en banc should be denied.

Respectfully submitted,

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SEPTEMBER 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2014, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey E. Sandberg
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response comports with the page limitation established by this Court's order of August 29, 2014, because it does not exceed 15 pages. The opposition was prepared in 14-point Garamond, a proportionately spaced typeface.

/s/ Jeffrey E. Sandberg
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