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Board Memo 033-2021: NAPS Newsbreak – Briefing is Complete in NAPS Lawsuit

Executive Board,

On May 11, 2021, the National Association of Postal Supervisors filed its reply brief in the United States Court of Appeals for the District of Columbia Circuit, responding to arguments made in briefs filed last month by the Postal Service and United Postmasters and Managers of America.

Attached is the Newsbreak and copies of the briefs filed in the case.

Please share the attached with our membership. This memo and attachments will also be posted on the NAPS website.

Thank you and be safe.

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May 13, 2021

NAPS Newsbreak

NAPS Completes Briefing of Appeal in Lawsuit Against U.S. Postal Service

On May 11, 2021, the National Association of Postal Supervisors filed its reply brief in the United States Court of Appeals for the District of Columbia Circuit, responding to arguments made in briefs filed last month by the Postal Service and United Postmasters and Managers of America.

Refuting the Postal Service's arguments that the requirements of the law are mere "policy guidelines," NAPS's brief explains why its members' rights are enforceable in court. NAPS further explained that, by providing no supervisory differential for thousands of supervisors and by entirely failing to consider private sector-compensation in comparable employment when setting EAS pay, the Postal Service violated enforceable statutory requirements. It also explained how the Postal Service's refusal to recognize NAPS's representation of most Headquarters and Area EAS employees and its refusal to recognize NAPS's representation of its over-4,100 postmaster members violates the law. As NAPS briefed the Court, the law requires that the Postal Service consult with NAPS regarding pay packages and other programs that affect all supervisory and managerial employees, *i.e.*, all EAS employees who are NAPS members.

Oral argument before a three-judge panel of the Court of Appeals is likely to occur sometime in the fall.

All the briefs filed may be found on the NAPS website at naps.org

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5280

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

National Association of Postal Supervisors,

Plaintiff-Appellant,

v.

United States Postal Service,

Defendant-Appellee,

United Postmasters and Managers of America,

Intervenor Defendant-Appellee.

On appeal from the United States District Court
for the District of Columbia

CORRECTED BRIEF FOR APPELLANT

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February 19, 2021

Certificate as to Parties, Rulings, and Related Cases

Parties

Appellant (Plaintiff below) is the National Association of Postal Supervisors ("NAPS"). Appellee (Defendant below) is the United States Postal Service ("USPS" or the "Postal Service"). The United Postmasters and Managers of America ("UPMA") intervened in the district court and is also an appellee here. There were no amici in the district court nor, at the time of filing, before this Court.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, NAPS certifies that it is a nonstock corporation incorporated in Virginia, that it is not a publicly held corporation, that it does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Rulings Under Review

The ruling under review is the district court's order of July 17, 2020 (Judge Royce C. Lamberth), JA 53, and accompanying memorandum opinion issued the same day, JA 39. The memorandum opinion is published at *National Association of Postal Supervisors v. U.S. Postal Service*, No. 1:19-CV-2236-RCL, 2020 WL 4039177 (D.D.C. July 17, 2020).

Related Cases

The case on review has not previously been before this Court or any other, save the district court from which it originated. The undersigned counsel is unaware of any related cases currently pending in this Court or any other court.

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Legislative History

Authorities upon which we chiefly rely are marked with asterisks.

Glossary of Abbreviations

2016–2019 Pay Package – the United States Postal Service's 2016–2019 pay package for its "Field" Executive and Administrative Schedule personnel

APA – Administrative Procedure Act

EAS – Executive and Administrative Schedule

NAPS – National Association of Postal Supervisors

PRA – Postal Reorganization Act

UPMA – United Postmasters and Managers of America

USPS – United States Postal Service

Jurisdictional Statement

The district court had jurisdiction pursuant to 39 U.S.C. § 409(a), which states that "[e]xcept as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." The court also had jurisdiction under 28 U.S.C. § 1339, which states that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service." This Court has jurisdiction under 28 U.S.C. § 1291, because this appeal is from the district court's grant of the Postal Service and UPMA's motions to dismiss on July 17, 2020, which disposed of all parties' claims. Appellant filed its notice of appeal on September 11, 2020.

Statement of the Issues

1. Whether non-statutory review is available for supervisory organizations like NAPS to challenge the Postal Service's violations of the Postal Reorganization Act.

2. Whether NAPS's claims that the Postal Service failed to pay any supervisory differential or conduct any evaluation comparing supervisory and managerial pay to the private sector are cognizable under non-statutory review, because such failures, if proven, violated statutory mandates (i.e., are *ultra vires*).

3. Whether NAPS's claims that the Postal Service refused to consult with NAPS regarding its members who are postmasters or whom the Postal Service categorizes as "Headquarters" and "Area" EAS employees are cognizable under non-statutory review because such refusals, if proven, violated statutory mandates (i.e., are *ultra vires*).

Pertinent Statutes

39 U.S.C. § 101. Postal policy

. . .

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

. . .

39 U.S.C. § 1003. Employment policy

(a) Except as provided under chapters 2 and 12 of this title, section 8G of the Inspector General Act of 1978, or other provision of law, the Postal Service shall classify and fix the compensation and benefits of all officers and employees in the Postal Service. It shall be the policy of the Postal Service to maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy. No officer or employee shall be paid compensation at a rate in excess of the rate for level I of the Executive Schedule under section 5312 of title 5.

. . .

39 U.S.C. § 1004. Supervisory and other managerial organizations

(a) It shall be the policy of the Postal Service to provide compensation, working conditions, and career opportunities that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel; to provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel; to establish and maintain continuously a program for all such personnel that reflects the essential importance of a well-trained and well-motivated force to improve the effectiveness of postal operations; and to promote the leadership status of such personnel with respect to rank-and-file employees, recognizing that the role of such personnel in primary level management is particularly vital to the process of converting general postal policies into successful postal operations.

(b) The Postal Service shall provide a program for consultation with recognized organizations of supervisory and other managerial personnel who are not subject to collective-bargaining agreements under chapter 12 of this title. Upon presentation of evidence satisfactory to the Postal Service that a supervisory organization represents a majority of supervisors, that an organization (other than an organization representing supervisors) represents at least 20 percent of postmasters, or that a managerial organization (other than an organization representing supervisors or postmasters) represents a substantial percentage of managerial employees, such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees.

(c) (1) The Postal Service and the supervisors' organization shall, unless otherwise mutually agreed to, meet at least once each month to implement the consultation and direct participation procedures of subsection (b) of this section.

(2) (A) At least 7 days before each meeting, each party shall—

(i) provide notice of agenda items, and

(ii) describe in detail the proposals such party will make with respect to each such item.

(B) Grievances of individual employees shall not be matters which may be included as agenda items under this paragraph.

(d) (1) In order to facilitate consultation and direct participation by the supervisors' organization in the planning and development of programs under subsection (b) of this section which affect members of the supervisors' organization, the Postal Service shall—

(A) provide in writing a description of any proposed program and the reasons for it;

(B) give the organization at least 60 days (unless extraordinary circumstances require earlier action) to review and make recommendations with respect to the program; and

(C) give any recommendation from the organization full and fair consideration in deciding whether or how to proceed with the program.

(2) If the Postal Service decides to implement a program described in paragraph (1) of this subsection, the Postal Service shall before such implementation—

(A) give the supervisors' organization details of its decision to implement the program, together with the information upon which the decision is based;

(B) give the organization an opportunity to make recommendations with respect to the program; and

(C) give such recommendations full and fair consideration, including the providing of reasons to the organization if any of such recommendations are rejected.

(3) If a program described in paragraph (1) of this subsection is implemented, the Postal Service shall—

(A) develop a method for the supervisors' organization to participate in further planning and development of the program, and

(B) give the organization adequate access to information to make that participation productive.

(4) The Postal Service and the supervisors' organization may, by agreement, adopt procedures different from those provided by this subsection.

(e) (1) The Postal Service shall, within 45 days of each date on which an agreement is reached on a collective bargaining agreement between the Postal Service and the bargaining representative recognized under section 1203 of this title which represents the largest number of employees, make a proposal for any changes in pay policies and schedules and fringe benefit programs for members of the supervisors' organization which are to be in effect during the same period as covered by such agreement.

(2) The Postal Service and the supervisors' organization shall strive to resolve any differences concerning the proposal described in paragraph (1) of this subsection under the procedures provided for, or adopted under, subsection (d) of this section.

(3) The Postal Service shall provide its decision concerning changes proposed under paragraph (1) of this subsection to the supervisors' organization within 90 days following the submission of the proposal.

(f) (1) If, notwithstanding the mutual efforts required by subsection (e) of this section, the supervisors' organization believes that the decision of the Postal Service is not in accordance with the provisions of this title, the organization may, within 10 days following its receipt of such decision, request the Federal Mediation and Conciliation Service to convene a factfinding panel (hereinafter referred to as the "panel") concerning such matter.

(2) Within 15 days after receiving a request under paragraph (1) of this subsection, the Federal Mediation and Conciliation Service shall provide a list of 7 individuals recognized as experts in supervisory and managerial pay policies. Each party shall designate one individual from the list to serve on the panel. If, within 10 days after the list is provided, either of the parties has not designated an individual from the list, the Director of the Federal Mediation and Conciliation Service shall make the designation. The first two individuals designated from the list shall meet within 5 days and shall designate a third individual from the list. The third individual shall chair the panel. If the two individuals designated from the list are unable to designate a third individual within 5 days after their first meeting, the Director shall designate the third individual.

(3) (A) The panel shall recommend standards for pay policies and schedules and fringe benefit programs affecting the members of the supervisors'

organization for the period covered by the collective bargaining agreement specified in subsection (e)(1) of this section. The standards shall be consistent with the policies of this title, including sections 1003(a) and 1004(a) of this title.

(B) The panel shall, consistent with such standards, make appropriate recommendations concerning the differences between the parties on such policies, schedules, and programs.

(4) The panel shall make its recommendation no more than 30 days after its appointment, unless the Postal Service and the supervisors' organization agree to a longer period. The panel shall hear from the Postal Service and the supervisors' organization in such a manner as it shall direct. The cost of the panel shall be borne equally by the Postal Service and the supervisors' organization.

(5) Not more than 15 days after the panel has made its recommendation, the Postal Service shall provide the supervisors' organization its final decision on the matters covered by factfinding under this subsection. The Postal Service shall give full and fair consideration to the panel's recommendation and shall explain in writing any differences between its final decision and the panel's recommendation.

(g) Not earlier than 3 years after the date of the enactment of this subsection, and from time to time thereafter, the Postal Service or the supervisors' organization may request, by written notice to the Federal Mediation and Conciliation Service and to the other party, the creation of a panel to review the effectiveness of the procedures and the other provisions of this section and the provisions of section 1003 of this title. The panel shall be designated in accordance with the procedure established in subsection (f)(2) of this section. The panel shall make recommendations to the Congress for changes in this title as it finds appropriate.

(h) (1) In order to ensure that postmasters and postmasters' organizations are afforded the same rights under this section as are afforded to supervisors and the supervisors' organization, subsections (c) through (g) shall be applied with respect to postmasters and postmasters' organizations—

(A) by substituting "postmasters' organization" for "supervisors' organization" each place it appears; and

(B) if 2 or more postmasters' organizations exist, by treating such organizations as if they constituted a single organization, in accordance with such arrangements as such organizations shall mutually agree to.

(2) If 2 or more postmasters' organizations exist, such organizations shall, in the case of any factfinding panel convened at the request of such organizations (in accordance with paragraph (1)(B)), be jointly and severally liable for the cost of such panel, apart from the portion to be borne by the Postal Service (as determined under subsection (f)(4)).

(i) For purposes of this section—

(1) "supervisors' organization" means the organization recognized by the Postal Service under subsection (b) of this section as representing a majority of supervisors;

(2) "members of the supervisors' organization" means employees of the Postal Service who are recognized under an agreement between the Postal Service and the supervisors' organization as represented by such organization;

(3) "postmaster" means an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors;

(4) "postmasters' organization" means an organization recognized by the Postal Service under subsection (b) as representing at least 20 percent of postmasters; and

(5) "members of the postmasters' organization" shall be considered to mean employees of the Postal Service who are recognized under an agreement—

(A) between the Postal Service and the postmasters' organization as represented by the organization; or

(B) in the circumstance described in subsection (h)(1)(B), between the Postal Service and the postmasters' organizations (acting in concert) as represented by either or any of the postmasters' organizations involved.

Statement of the Case

I. Introduction

In the Postal Reorganization Act of 1970 ("PRA" or "the Act"), Pub. L. No. 91-375, 84 Stat. 719, Congress recognized the "vital" role that "supervisory and

other managerial personnel" play in the "process of converting general postal policies into successful postal operations." 39 U.S.C. § 1004(a). Congress determined, therefore, to protect the rights of supervisory and managerial personnel to fair and adequate compensation through certain guarantees regarding their pay and their authority to participate in the development of compensation packages. Congress required, among other things, a pay differential between postal supervisors and the employees they supervise and pay that is competitive with comparable private-sector work. To protect these rights, Congress directed that the Postal Service allow organizations representing supervisory and other managerial employees "to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees." *Id.* § 1004(b).

The Postal Service's 2016–2019 pay package for its "Field" Executive and Administrative Schedule ("EAS") personnel ("2016–2019 Pay Package") ignores these requirements. In direct contravention of statutory mandates, that pay package pays thousands of supervisors less than tens of thousands of clerks and carriers under their supervision. In preparing the pay package, the Postal Service did not attempt to set pay comparable to what workers in the private market earn or even study private pay rates.

Using the procedures guaranteed to it by the PRA, Appellant the National Association of Postal Supervisors ("NAPS"), a recognized organization of supervisory personnel, objected to the 2016–2019 Pay Package's shortcomings. The Postal Service largely ignored those objections, even after a factfinding panel convened pursuant to the PRA held a hearing and found that the pay package violated the Act.

Moreover, the Postal Service refuses to allow NAPS to participate in the development of compensation programs for thousands of NAPS's lawful members. The Postal Service has limited its consultation with NAPS on compensation matters to only employees whom the Postal Service classifies as "Field" EAS employees. The Postal Service has determined, without explanation, that NAPS is not entitled to consult on behalf of members who are "Area" or "Headquarters" EAS employees, though this distinction is nowhere to be found in the PRA. The Postal Service has also misread the PRA to deny NAPS the right to consult on compensation packages for its thousands of members who are postmasters.

Misreading this Court's precedent and the mandatory language of the PRA, the district court found that NAPS had no cause of action to challenge any decision of the Postal Service related to supervisory and managerial employee pay or representation, even when the Postal Service acted outside of the authority conferred by Congress. Contrary to the district court's holding, this Court has long

held that "non-statutory" review is available for just this kind of case. Because NAPS has pled that the Postal Service's 2016–2019 Pay Package and its refusal to consult with NAPS regarding all of NAPS's members violates clear congressional directives, its claims are cognizable under non-statutory review. The district court should be reversed.

II. Statement of Facts

A. The Postal Reorganization Act sets forth the rights of postal supervisory and managerial employees to fair compensation and to participate in the development of their pay packages.

The Postal Service employs approximately 49,000 people in EAS positions. Compl. ¶ 1, JA 5. They are managers, supervisors, postmasters, and other middle-management professional and administrative employees. Compl. ¶¶ 1, 6, JA 5, 7. Their work, performed under the direction of the Postal Service's approximately 500 executives, includes managing the organization's approximately 442,000 career and 133,000 non-career employees, including clerks and carriers. Compl. ¶¶ 1, 6, JA 5, 7.

In the PRA, 39 U.S.C. § 101 *et seq.*, Congress recognized the "vital" role these supervisory and managerial employees play in the Postal Service, *id.* § 1004(a). Although supervisory and managerial employees are not entitled to form collective-bargaining units, unlike the craft employees they supervise, *id.* § 1202(1), Congress accordingly placed a number of substantive and procedural

obligations on the Postal Service to ensure that EAS employees receive fair compensation.

Substantively, the Postal Service must:

- "provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel," *id.* § 1004(a);
- "maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy," *id.* § 1003(a); *accord id.* § 101(c) ("[T]he Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States"); and
- "provide compensation, working conditions, and career opportunities that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel . . . [and] establish and maintain continuously a program for all such personnel that reflects the essential importance of a well-trained and well-motivated force," *id.* § 1004(a).

Procedurally, the Postal Service is required to allow "recognized organizations of supervisory and other managerial personnel who are not subject to collective-bargaining agreements . . . to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees." *Id.* § 1004(b). A "'supervisors' organization' means the organization recognized by the Postal Service . . . as representing a majority of supervisors." *Id.* § 1004(i)(1). Before implementing any compensation programs under section 1004(b), the Postal Service must describe the program to the supervisors' organization, including "giv[ing] . . . the information on which the decision is based"; allow the organization time to make recommendations; and "give such recommendations full and fair consideration, including the providing of reasons to the organization if any of such recommendations are rejected." *Id.* § 1004(d)(2). If, after this process, the supervisors' organization believes the program does not fulfill the PRA's requirements, it may request the Federal Mediation and Conciliation Service to convene a factfinding panel to resolve the differences between the parties. *Id.* § 1004(f). "The Postal Service shall give full and fair consideration to the panel's recommendation and shall explain in writing any differences between its final decision and the panel's recommendation." *Id.* § 1004(f)(5).

B. The Postal Service's 2016–2019 Pay Package violates the Postal Reorganization Act.

NAPS is a supervisors' organization within the meaning of the PRA. Compl. ¶¶ 2, 10, JA 6, 8. NAPS's members are approximately 27,000 active and retired postal managers, supervisors, postmasters, and other professionals. Compl. ¶ 2, JA 6. In September 2017, the Postal Service sent NAPS its belated, proposed pay package for "Field" EAS employees for fiscal years 2016–2019. Compl. ¶ 16, JA 9. NAPS objected to many of the provisions of that package.

Among other things, the package fails to provide any differential in pay between thousands of supervisors and the employees they supervise. Compl. ¶ 35, JA 13. The Postal Service purports to meet 39 U.S.C. § 1004(b)'s pay differential requirement by setting a 5% supervisory differential adjustment between supervisors' pay and the pay of clerks and carriers. Compl. ¶ 3, JA 13. But the Postal Service's decision to base the differential on the salary of lower-paid clerks eliminates the differential altogether for thousands of NAPS's members who supervise tens of thousands of employees in higher-paid positions. Compl. ¶¶ 37–39, JA 13–14. The level of supervisory pay relative to clerk and carrier pay is further eroded by the fact that clerks and carriers earn overtime at higher rates and after fewer hours of work than their supervisors and earn larger and more regular pay increases. Compl. ¶¶ 32, 40–41, JA 12, 14–15. Thus, the proposed package provides many thousands of supervisors with no pay differential at all.

The compensation offered by the Postal Service for non-postmaster positions also falls significantly below that provided in comparable jobs in the private sector. Compl. ¶¶ 21–34, JA 10–12. In fact, before releasing its proposal the Postal Service had not conducted any studies of private sector pay, although it was required by 39 U.S.C. §§ 101(c) and 1003(a) to consider private sector pay when setting EAS employee pay. Compl. ¶ 23, JA 10. The compensation offered to EAS "Field" employees lags behind private sector pay for a number of reasons. These included that the Postal Service refuses to pay locality pay, Compl. ¶ 24, JA 10; refuses to tie pay increases to the market or inflation and provides pay increases at rates far below the private sector, Compl. ¶¶ 25–30, JA 10–12; refuses to pay bonuses, Compl. ¶ 31, JA 12; and denies pay increases to employees at the top of their pay grade, in favor of one-time, lump-sum payments, Compl. ¶ 33, JA 12. The Postal Service's inadequate EAS compensation contributes to the already distressingly low morale among supervisory and managerial employees and to the Postal Service's difficulty in filling supervisory positions. Compl. ¶¶ 42–51, JA 15–17.

The Postal Service rejected almost all of NAPS's recommendations regarding ways to address these problems. Compl. ¶ 52, JA 17. The Postal Service issued its "final" 2016–2019 Pay Package on June 28, 2018 (and revised it slightly on July 20, 2018). Compl. ¶ 19, JA 9. Contravening the PRA, the Postal Service

did not provide NAPS with the information underlying its decision or its reasons for rejecting NAPS's recommendations. Compl. ¶¶ 53–54, JA 17. NAPS timely requested asked the Federal Mediation and Conciliation Service to convene a factfinding panel. Compl. ¶ 20, JA 10.

After a hearing, the factfinding panel issued its unanimous findings and recommendations on April 30, 2019. Compl. ¶ 66, JA 19. The panel largely agreed with NAPS that the Postal Service's 2016–2019 Pay Package violates the PRA by, among other things, failing to take into account private sector compensation and failing to provide adequate pay differentials between supervisors and their staff. Compl. ¶ 67, JA 19–20. The panel agreed that these problems contributed to the Postal Service's difficulty retaining a motivated workforce and attracting and retaining candidates for supervisory positions. Compl. ¶ 67, JA 19–20.

The Postal Service rejected most of the panel's findings and recommendations. Compl. ¶ 70, JA 22. In the final 2016–2019 Pay Package, issued on May 15, 2019, the Postal Service made no changes to the supervisory differential, refused to provide retroactive salary increases (including to bring pay in line with market rates), and refused to engage a compensation expert to advise on pay comparability with the private sector, each of which the factfinding panel had recommended. Compl. ¶¶ 69–74, JA 21–22.

C. The Postal Service refuses to consult with NAPS regarding its postmaster and "Headquarters" and "Area" employee members.

While the Postal Service ignored NAPS's input on the 2016–2019 Pay Package, it refuses to consult with NAPS *at all* regarding pay packages for certain categories of NAPS's members.

NAPS's members include 7,500 employees whom the Postal Service classifies as "Headquarters" or "Area" EAS employees, as opposed to "Field" EAS employees. Compl. ¶ 57, JA 18. The PRA does not distinguish between "Field," "Headquarters," and "Area" EAS employees—*all* EAS employees qualify as "supervisory and other managerial personnel who are not subject to collective bargaining agreements" and so may be represented by NAPS, if they so elect. 39 U.S.C. § 1004(b); Compl. ¶ 102, JA 26. Nevertheless, the Postal Service refuses to allow NAPS to consult on and participate in the development of pay packages for any of these personnel, Compl. ¶ 59, JA 18—even for those whom it recognizes NAPS represents for other purposes, *see* Compl. ¶ 58, JA 18. Instead, the Postal Service issued a pay package for "Area" and "Headquarters" employees without any consultation with NAPS and without any explanation for why it treats "Headquarters" and "Area" employees differently than "Field" employees. Compl. ¶¶ 62–63, JA 18–19. Although the pay package purports not to apply to some "Area" and "Headquarters" employees whom the Postal Service recognizes as NAPS members, the Postal Service did not recognize NAPS's representation of

most "Area" and "Headquarters" positions. Compl. ¶ 62, JA 18–19. The Postal Service has never issued a proposed pay package for the few "Area" and "Headquarters" employees it recognizes as represented by NAPS. Compl. ¶¶ 61–62, JA 18–19.

Over 4,100 postmasters are members of NAPS. Compl. ¶ 75, JA 22. NAPS represents the largest number of postmasters in the country after the United Postmasters and Managers of America ("UPMA"). Compl. ¶ 76, JA 22. On October 1, 2018, NAPS requested that the Postal Service recognize its right to represent postmasters. Compl. ¶ 78, JA 22. On February 25, 2019, the Postal Service responded, refusing NAPS's request. Compl. ¶ 79, JA 23.

III. Procedural History

NAPS filed its complaint in the district court on July 26, 2019. JA 2. The Postal Service filed a motion to dismiss on October 25, 2019. JA 3. NAPS filed its opposition on November 20, 2019. JA 3–4. The Postal Service filed a reply on December 20, 2019. JA 4.

UPMA filed an unopposed motion to intervene on November 7, 2019, attaching a motion to dismiss Count V of the Complaint, regarding NAPS's representation of postmasters. JA 3. The Court granted the motion to intervene and entered the motion to dismiss on the docket on December 3, 2019. JA 4. UPMA filed a reply in support of its motion on December 17, 2019. JA 4.

The Court granted the Postal Service and UPMA's motions to dismiss on July 17, 2020. JA 4. NAPS filed a notice of appeal on September 11, 2020. JA 4.

IV. Legal Standard and Standard of Review

This Court reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019). The Court "accept[s] plaintiff's well-pleaded factual allegations as true and draw[s] all reasonable inferences in plaintiff's favor." *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 788 (D.C. Cir. 2019).

Summary of Argument

Confusing non-statutory review (which is available here) with a private right of action (which is not), the district court dismissed NAPS's suit, holding that the Postal Service's actions were not subject to judicial review. In so holding, the district court misread this court's decision in *National Association of Postal Supervisors v. U.S. Postal Service* ("*NAPS*"), which held that, while the PRA restricted judicial review, it did not foreclose it, 602 F.2d 420, 432 (D.C. Cir. 1979)—a ruling that this Court reaffirmed in *Aid Association for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1173–74 (D.C. Cir. 2003), and that is still good law. Under non-statutory review, a district court can and should enjoin acts by the Postal Service that are *ultra vires*, i.e., that contravene statutory commands.

NAPS has pled such violations. As this Court found 40 years ago in *NAPS*, and as the statutory language mandates, the Postal Service must maintain *some* differential in supervisors' pay vis-a-vis the employees they supervise, even if the precise differential is within the Postal Service's discretion. Even then, the Postal Service's discretion is not unconstrained—it must consider the factors set forth in the PRA, including comparable private sector pay. By failing to provide any differential in pay between supervisory and managerial personnel, on the one hand, and clerks and carriers, on the other, and by failing to consider comparable private-sector pay when it developed the 2016–2019 Pay Package, the Postal Service acted *ultra vires*.

The Postal Service further defied Congress's commands when it refused to negotiate at all regarding thousands of NAPS's members. The PRA does not distinguish between supervisors or managers who are "Headquarters" and "Area" EAS employees and all other EAS employees. The over-7,500 "Headquarters" and "Area" employees who have elected to be represented by NAPS were therefore entitled to have the Postal Service consult with NAPS regarding their pay and benefits.

Under the PRA, postmasters are a subset of "supervisory and other managerial personnel," a category that NAPS represents. In 2003, the PRA was amended to allow "postmasters' organizations" (which previously participated in

pay talks on behalf of postmasters under the rubric of "organizations of supervisory and managerial personnel") to have access to the same factfinding panels to which NAPS already had access. That amendment did not require postmasters to join postmasters' organizations to exercise their rights. It left unchanged the relevant portions of 39 U.S.C. § 1004(b) that entitle NAPS to participate in developing pay policies and other programs on behalf of its over-4,100 postmaster members.

NAPS has the right to an injunction if it can prove, as it has alleged, that the Postal Service pays thousands of supervisory and managerial employees less than it pays clerks and carriers; that the Postal Service has failed to take private-sector compensation into account when setting supervisory and managerial pay; and that the Postal Service has failed to consult with NAPS regarding pay for postmasters and "Headquarters" and "Area" EAS employees. Each of those alleged actions and failures to act violates a clear mandate of the PRA.

Argument

I. Non-statutory review is available for supervisory organizations like NAPS to challenge the Postal Service's violations of the Postal Reorganization Act.

Even when there is no private right of action under a statute, non-statutory review remains available to determine whether an agency has acted contrary to its statutory authority. Defendant agencies face a heavy burden to show that Congress

intended to withdraw all judicial review of agency action. Ignoring this burden and confusing non-statutory review with a private right of action, the district court erred when it held that no non-statutory cause of action existed without finding any evidence of Congress's intent to withdraw judicial review entirely from claims like those at issue here. The district court's order runs headlong into this Court's decision over 40 years ago in *NAPS*, which is still good law. There, the Court held that non-statutory judicial review is available for just the kind of compensation dispute at issue in this case. The district court erred when it interpreted binding precedent establishing the reviewability of NAPS's claims to mean just the opposite.

A. The Postal Service bears the burden to show that NAPS's claims are not reviewable.

This Court begins with the "well-established presumption favoring judicial oversight of administrative activities." *NAPS*, 602 F.2d at 429. "Nonreviewability is not to be casually inferred." *Id.* at 430. The party seeking to establish nonreviewability bears the "heavy burden" to present "clear and convincing evidence" of Congress's intent to revoke the Court's oversight. *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 671–72 (1986) (citations omitted); *accord, e.g.*, *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 824 (D.C. Cir. 2020); *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013); *see NAPS*, 602 F.2d at 430 ("The case against judicial scrutiny of an agency's exercise of discretion must

be a compelling one."). Such evidence must show "a specific congressional intent to preclude judicial review that is fairly discernible in the detail of the legislative scheme." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (quoting *Bowen*, 476 U.S. at 673). The Court will not find that judicial review is foreclosed by implication; Congress must speak "clearly and directly." *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991); *see Bowen*, 476 U.S. at 674.

Although claims alleging violations of the PRA are generally not subject to review under the Administrative Procedure Act ("APA"), 39 U.S.C. § 410(a), that does not mean no review is available. This Court has repeatedly allowed plaintiffs to proceed against the Postal Service under "non-APA" or "non-statutory" causes of action. "It does not matter . . . whether traditional APA review is foreclosed, because '[j]udicial review is favored when an agency is charged with acting beyond its authority.'" *Aid Ass'n for Lutherans*, 321 F.3d at 1172–73 (second alteration in original) (quoting *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988)); *see Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 265 (D.C. Cir. 2016) ("Postal Service decisions are still subject to non-APA judicial review in some circumstances."); *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 858 (D.C. Cir. 2012) ("[T]he Postal Service is exempt from review under the Administrative Procedure Act, but its actions are reviewable to determine whether it has acted in excess of its statutory authority.").

Non-statutory review is available so long as there are standards by which a court can exercise its "responsibility of determining the limits of statutory grants of authority," *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1996) (quoting *Stark v. Wickard,* 321 U.S. 288, 310 (1944)), and so long as no specific congressional intent to eliminate all judicial review is discernible. "[I]n conducting that inquiry, courts must be careful not to transform a congressional intent to restrict the scope of judicial review into a finding that no review is appropriate at all." *NAPS*, 602 F.2d at 430.

B. The district court erred when it conflated non-statutory review with implied private rights of action and failed to hold the Postal Service to its burden.

The district court did not point to any evidence that Congress intended to foreclose non-statutory review of the Postal Service's supervisory compensation packages. Instead, it conflated non-statutory review with an implied private right of action. In so doing, it improperly shifted the burden to NAPS to show that a right of action exists, rather than leaving the burden on the Postal Service to show that judicial review is not available.

Discussing the availability of non-statutory review, the district court referred to concepts and caselaw relevant to whether a statute contains an implied private right of action. Op. 7–12, JA 45–50. These two pathways to judicial review are distinct—non-statutory review may be available even when there is no cause of

action under the statute. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006); *Reich*, 74 F.3d at 1328. The distinction is important, because while there is a strong presumption in favor of judicial review, and therefore in favor of non-statutory review, implied statutory rights of action are "disfavor[ed]." *Klay v. Panetta*, 758 F.3d 369, 373 (D.C. Cir. 2014). Put another way, while the party arguing against non-statutory review bears the burden of proving Congress's intent to revoke all judicial oversight over agency action, *see supra* Part I.A, "affirmative evidence of congressional intent must be provided *for* an implied remedy, not against it," *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001) (citation omitted).

The district court never acknowledged the Postal Service's burden to prove Congress's intent, nor did it cite evidence meeting that burden. While it noted that *Sandoval* states that private rights of action are less likely to be inferred under statutes directing the disbursement of federal funds, Op. 10–11, JA 48–49, *Sandoval* is not a non-statutory review case. The Supreme Court has counseled against drawing such inferences against *any* judicial review, in the absence of clear signs of congressional intent. *MCorp Fin.*, 502 U.S. at 44; *Bowen*, 476 U.S. at 674.[1]

[1] The district court also overread *Sandoval*. In that case, the Supreme Court remarked that "[s]tatutes that focus on the person regulated," such as the recipients of federal grant funds, "rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club,* 451 U.S. 287, 294 (1981)). The PRA provisions at issue here

The district court also improperly relied on NAPS's "failure to exhaust an optional remedy" by not invoking 39 U.S.C. § 1004(g). Op. 11–12, JA 49–50. Not only, as the district court noted, is section 1004(g) optional, but NAPS cannot use it to resolve its dispute with the Postal Service. Section 1004(g) allows NAPS, at any time, to request a panel to review the procedures and provisions of the PRA itself and make recommendations to Congress. It is not a dispute resolution mechanism for any particular compensation decision. NAPS could invoke section 1004(g) and convince the panel, and even Congress, to agree to whatever changes NAPS proposed to the PRA, but that would not resolve anything about the 2016–2019 Pay Package. "Administrative remedies that are inadequate need not be exhausted." *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

Neither the district court nor the Postal Service cited any evidence, much less clear and convincing evidence, of Congress's intent to eliminate non-statutory review of Postal Service supervisory compensation disputes. Such a cause of action is available in this case.

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relate to compensation of federal employees, not recipients of federal grants. NAPS's members are both the focus of the relevant PRA provisions and the persons whose rights are guaranteed by those provisions.

C. This circuit's precedent correctly establishes the reviewability of NAPS's claims.

The *NAPS* Court found that it could consider challenges to the Postal Service's compensation decisions for postal supervisors under non-statutory review. The district court's opinion that no review of such decisions is ever available, regardless of whether the plaintiff pleads claims ordinarily cognizable under non-statutory review, cannot be squared with this precedent. The district court misread *NAPS*, finding that "the court determined that Congress did not intend for judicial review of USPS action," Op. 9, JA 47, when the Court said just the opposite.

NAPS acknowledged the limits of judicial review, but the Court was clear that judicial review is available:

> That the Postal Service has broad discretion in setting compensation levels does not mean, however, that its decisions are entirely insulated from judicial surveillance. Courts can defer to the exercise of administrative discretion on internal management matters, but they cannot abdicate their responsibility to insure compliance with congressional directives setting the limits on that discretion. Reviewability and the scope of review are two separate questions. The history of the Postal Act indicates that Congress contemplated a very restricted judicial role in the Postal Service's compensation decisions. *It does not present the kind of evidence necessary to foreclose review altogether*.

602 F.2d at 432 (emphasis added). The Court characterized the case as a "nonstatutory review proceeding." *Id.* This Court reaffirmed *NAPS*'s holding on reviewability in 2003. *See Aid Ass'n for Lutherans*, 321 F.3d at 1173–74.

If NAPS's claims were reviewable in 1979, they are reviewable today. In 1979, NAPS challenged the Postal Service's reduction in the pay differential between supervisors and craft employees under 39 U.S.C. § 1004(a) and the Postal Service's refusal to consult "genuinely, meaningfully, and in good faith" under section 1004(b). *NAPS*, 602 F.2d at 433. The Court found these claims reviewable and held that it would consider the Postal Service's actions "in light of the other standards Congress included in the Postal Act to guide the Postal Service's compensation decisions," including those set forth in 39 U.S.C. §§ 101 and 1003. *Id.* at 435. NAPS brings claims today under the same provisions of the PRA. It alleges that the Postal Service's decision to pay thousands of supervisors less than the employees they supervise violates the pay differential requirement in section 1004(a). It claims that the Postal Service's refusal to consult with NAPS regarding thousands of NAPS's members violates section 1004(b). NAPS also alleges that the Postal Service established its compensation package without considering comparable compensation in the private sector, violating sections 101(c) and 1003(a).

NAPS found similar claims reviewable. This is not a case where Congress has instructed an agency to take action without imposing any limits on or directions to guide the agency's discretion. *Cf. Eagle Tr. Fund v. U.S. Postal Serv.*, 365 F. Supp. 3d 57, 67 (D.D.C. 2019) ("Plaintiffs have failed to point to any

federal statute that dictates the reasoning that USPS must use in mail-dispute proceedings."), *aff'd*, 811 F. App'x 669 (D.C. Cir. 2020). The fact that some aspects of a statutory scheme are discretionary does not mean all are. *See, e.g.*, *Reich*, 74 F.3d at 1331 (holding that "the President's broad authority under the Procurement Act" does not "preclude[] judicial review of executive action for conformity with that statute"); *NAACP v. U.S. Postal Serv.*, No. 20-CV-2295(EGS), 2020 WL 5995032, at *11 (D.D.C. Oct. 10, 2020) (holding that while "Congress did not intend for the courts to micromanage the operations of the USPS," courts retained the power to "requir[e] the USPS to act within its statutory authority").

The PRA requires the Postal Service to, among other things:

(a) maintain *some* differential in "rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel," 39 U.S.C. § 1004(a);

(b) consider "compensation and benefits paid for comparable levels of work in the private sector of the economy" when setting compensation for its employees, *id.* § 1003(a); *see id.* § 101(c); and

(c) consult with supervisory organizations and allow them to "participate directly in the planning and development of pay

> policies and schedules . . . relating to supervisory and other managerial employees." *Id.* § 1004(b).

As these statutory sections demonstrate, while the Postal Service has discretion in setting managerial and supervisory pay, it is not free to eliminate entirely the differential in pay between (a) supervisory and managerial personnel and (b) the clerk and carrier grades. *NAPS*, 602 F.2d at 435. Nor may it set pay without giving good faith consideration to compensation in comparable jobs in the private sector. *Id.* Nor may it refuse to consult in good faith with NAPS and consider NAPS's input. *Id.* at 439. These are judicially manageable standards under which the Postal Service can be subject to review.

There is no evidence of congressional intent to the contrary. In fact, Congress's actions after *NAPS* reinforce its intent to allow cases like this one to proceed. *See Azar*, 967 F.3d at 825 (looking to history of amendments to statute to determine reviewability of agency action). When it amended the PRA in 1980, Congress confirmed its understanding of the Court's 1979 decision and acquiesced in it. Congress was well aware of the case and its implications: the Senate Report cited *NAPS* and its holding allowing the plaintiff's claims to proceed. S. Rep. 96-856, at 4 (1980). After citing *NAPS*, Congress explained that, by amending the PRA to insert the modern dispute resolution scheme, it intended to "develop a dispute procedure which will make it *more likely* the parties can resolve their

differences through improved consultation, rather than through the courts." *Id.* at 4 (emphasis added). An intent to make court action less likely is not the same as an intent to eliminate it entirely. Having just reviewed *NAPS*, which emphasized that "courts must be careful not to transform a congressional intent to restrict the scope of judicial review into a finding that no review is appropriate at all," *NAPS*, 602 F.2d at 429–30, Congress knew the courts would understand as much. A co-sponsor of the bill in the House of Representatives, considering the Senate amendments to the bill that eventually became law, explicitly acknowledged that the doors to the courthouse remained open:

> Although I certainly hope that this legislation will alleviate the need to resort to judicial enforcement, this legislation provides a mechanism for arriving at a reasoned decision based on the statutory requirements at a given point in time. The legislation reaffirms the congressional intent that, if necessary, the courts can and should insure that the statutory requirements are being met including the requirement of adequate and reasonable differentials.

126 Cong. Rec. 20,741 (daily ed. July 31, 1980) (statement of Rep. Clay).

Where Congress is plainly aware of a court's statutory holding and declines to override it, courts infer its intent to allow the decision to stand. *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987). This is so when a court determines judicial review is *not* available and Congress declines to act. *Bowen*, 476 U.S. at 673 n.4. Given the presumption favoring judicial review, this principle applies with even more force when a court finds a cause of action is available and Congress

then passes a law on the subject that does not say otherwise, and particularly when Congress confirms its understanding of the court's holding.

Moreover, the presumption in favor of judicial review is strengthened where it is the plaintiff's only remedy if the agency refuses to follow its statutory duties. *See MCorp Fin.*, 502 U.S. at 43 ("First, central to our decision [establishing non-statutory review] was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights."); *cf. NetCoalition*, 715 F.3d at 352 (withholding judicial review while noting "our view is bolstered by the availability of judicial review down the road"); *Amador Cnty. v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011) (judicial review available under the APA when no other avenue available to enforce statute). The administrative remedy available through the PRA is non-binding and inadequate to protect the rights of NAPS's members. Indeed, the Postal Service rejected nearly all of the factfinding panel's recommendations, despite the panel's unanimous findings that the 2016–2019 Pay Package violated the PRA. Without judicial review, NAPS would have no way to bring the Postal Service into compliance. *See Nat'l Ass'n of Postmasters of U.S. v. Runyon*, 821 F. Supp. 775, 778 (D.D.C. 1993) (holding, in a pay dispute between the Postal Service and a supervisory organization, that "the Plaintiff has absolutely no method *other* than a

civil suit like the instant one to ensure that the Defendants do not exceed the bounds of their discretion in this matter").

Moreover, there is no administrative process by which NAPS can challenge the Postal Service's refusal to recognize NAPS's lawful representation of certain employees. Without judicial review, the Postal Service would have free reign to refuse to recognize NAPS's representation of any employees and to refuse to consult with it at all. The district court appeared to believe that a claim that the Postal Service refused to consult is unreviewable because NAPS does not have a right to force the Postal Service to accept NAPS's recommendations. Op. 10, JA 48. Contravening this Court's warning in *Reich*, 74 F.3d at 1331, the district court concluded, in essence, that because part of the PRA gave discretion to the Postal Service without judicially enforceable boundaries, the entire statute was unenforceable. But the fact that the Postal Service retains broad (although not total) discretion over the conclusions it draws from consultation does not eliminate its duty to consult with NAPS in good faith. As *NAPS* found, good faith consultation is plainly mandatory, *NAPS*, 602 F.2d at 436 (citing 39 U.S.C. § 1004(b) ("The Postal Service *shall* provide a program for consultation . . . ." (emphasis added))), and courts are competent to determine whether the Postal Service has engaged in it, *id.* at 439. The Postal Service's refusal to consult regarding some categories of

NAPS's members is no less a violation of the mandatory consultation provision than if it refused to consult regarding all of NAPS's members.

The district court's characterization of *NAPS* as finding that Congress intended to foreclose review of Postal Service compensation decisions is contradicted by this Court's holding that the Postal Service had not "present[ed] the kind of evidence necessary to foreclose review" of such claims. *NAPS*, 602 F.2d at 432. It is also contradicted by the subsequent legislative history ratifying *NAPS* and the principles generally underlying the availability of non-statutory causes of action, which the district court ignored entirely.

II. The Postal Service's failures to pay *any* supervisory differential and to conduct *any* evaluation of pay comparability to the private sector violate clear mandates of the Postal Reorganization Act and, when proved, can and should be enjoined as *ultra vires*.

A. Non-statutory review redresses agency actions contrary to statutory authority and actions not justified by a contemporaneous explanation.

The scope of non-statutory review recognized in *NAPS* is consistent with the law today. *NAPS* opined that "[t]he judicial role is to determine the extent of the agency's delegated authority and then determine whether the agency has acted within that authority." 602 F.2d at 432. Modern courts echo that formulation: non-statutory review "is available only to determine whether the agency has acted 'ultra vires'—that is, whether it has 'exceeded its statutory authority.'" *Mittleman v. Postal Regul. Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014) (quoting *Aid Ass'n for*

Lutherans, 321 F.3d at 1173). An agency also acts *ultra vires* when its decision is not supported by "a contemporaneous justification by the agency itself," but only by "*post hoc* explanation of counsel." *N. Air Cargo*, 674 F.3d at 860 (citing *SEC v. Chenery*, 318 U.S. 80 (1943)); *see Sears, Roebuck & Co.*, 844 F.3d at 265–66.

Whether an agency has acted contrary to its statutory authority is, in essence, a *Chevron* question—that is, a question of whether the agency's actions reflect a reasonable construction of the statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see Aid Ass'n for Lutherans*, 321 F.3d at 1174 ("[T]he scope of review elaborated in [*NAPS*] is in all important respects perfectly consistent with *Chevron* and *Mead*."). "It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of a statute or because the agency's construction is utterly unreasonable and thus impermissible." *Aid Ass'n for Lutherans*, 321 F.3d at 1174. Both are *ultra vires*.

The PRA sets forth judicially enforceable requirements that go beyond "consider[ing]" NAPS's proposals, as the district court erroneously held. Op. 12, JA 50; *see supra* Part I.C. As NAPS has pled, and as discussed further below, the Postal Service has failed to provide any differential in the rates of pay between thousands of supervisors and the employees they supervise; refused to consider compensation in comparable private-sector jobs when developing the 2016–2019 Pay Package; and failed to provide any contemporaneous justification for how

these actions are grounded in reasonable interpretations of the PRA. In doing so, it "has transgressed the will of Congress" and therefore acted *ultra vires*. *Eagle Tr. Fund*, 365 F. Supp. 3d at 68.

B. The Postal Service's failure to provide any differential in the rate of pay between thousands of supervisors and the clerks and carriers they supervise violates a clear statutory mandate and so is *ultra vires*.

The Postal Service's decision to pay thousands of supervisors less than the employees they supervise violates a clear statutory mandate and is therefore *ultra vires* action. The PRA requires the Postal Service "to provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel." 39 U.S.C. § 1004(a). While the Postal Service has discretion to determine what differential is "adequate and reasonable," that discretion is not unbounded. "The Postal Act does require *[s]ome* [supervisory] differential." *NAPS*, 602 F.2d at 435 (emphasis added). The Court has the power to ensure that the Postal Service "arrives at a good faith judgment regarding a differential that is adequate and reasonable *in light of [the] factors*" set forth in the PRA (not merely in the Postal Service's own, unconstrained judgment) and that "the Postal Service . . . consider[s] and *fulfill[s]* the differential requirement." *Id.* (emphases added).

NAPS has not argued that the differential set by the Postal Service is too low. Rather, it argues that the Postal Service has failed to "fulfill" the requirement

to have "some differential" at all, because under the 2016–2019 Pay Package, "thousands of EAS employees earn[] less than the craft workers they supervise." Compl. ¶ 37, JA 13. That is true no matter how one interprets the mandate to set the differential in "rates of pay." Over 4,000 EAS employees who work as "Supervisors of Customer Service" earn lower base salaries than the employees they supervise. Compl. ¶ 39, JA 14. Craft employees earn overtime at higher rates and after fewer hours of work than supervisors. Compl. ¶ 40, JA 14–15. Craft employees also earn higher pay raises, cost-of-living increases, and step increases. Compl. ¶ 41, JA 15.

There is no support for the district court's implication that the differential results in lower supervisory pay only "when combined with accelerated overtime rates for certain non-managerial employees," nor for its implication that the result is only "occasional discrepancies where supervisors are paid less than their subordinates." Op. 13, JA 51. Not only is NAPS entitled to the benefit of every reasonable inference, but it expressly pled that *thousands* of supervisors have lower base salaries than craft workers and that all (not only "certain") non-managerial employees work for more remunerative overtime rates. Compl. ¶¶ 35, 39, 40, JA 13–15.

At the time the Postal Service established the 2016–2019 Pay Package, it was required to explain how that package fulfilled the differential requirement in

light of the PRA's other mandates. 39 U.S.C. § 1004(d)(2)(C); *NAPS*, 602 F.2d at 440–41; *see N. Air Cargo*, 674 F.3d at 860. It never did. Compl. ¶¶ 54–55, JA 17. Moreover, even if the Court defers to the Postal Service's conclusion that a 5% supervisory differential is adequate and reasonable, in practice, with thousands of supervisors earning less than the employees they supervise, the Postal Service has not implemented that differential. It has never determined that a differential rate lower than 5% fulfills the statutory requirements. Even assuming the Postal Service's interpretation of section 1004(a) regarding the appropriate size of the pay differential is reasonable, it has contravened the statutory mandate, because it has not followed its own interpretation.

C. The Postal Service's failure to consider comparable private-sector compensation in setting the 2016–2019 Pay Package violates a clear statutory mandate and so is *ultra vires*.

The Postal Service may not set compensation for supervisory employees without following the PRA's requirement that it "maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy." 39 U.S.C. § 1003(a); *accord id.* § 101(c). Nor may the Postal Service maintain a construction of the comparability requirement that is "utterly unreasonable," *Aid Ass'n for Lutherans*, 321 F.3d at 1174, or that it has not justified in light of the whole context of the statute, *NAPS*, 602 F.2d at 440–41.

NAPS alleges that the Postal Service has disregarded this factor or deprived it of all reasonable meaning, without justification. In some places, for example, "the Postal Service's compensation is more than 20% below what private companies pay for comparable jobs." Compl. ¶ 24, JA 10. Indeed, the Postal Service could not consider or fulfill the comparability mandate because it did not undertake, commission, or review any studies to evaluate private sector pay before issuing the 2016–2019 Pay Package. Compl. ¶¶ 23, 83, JA 10, 23. The *post hoc* study it presented to the factfinding panel addressed only eight of the approximately 1,000 EAS positions, leaving the Postal Service's obligations to the rest of its EAS employees unaddressed. Compl. ¶ 23, JA 10. The Postal Service has also refused to follow the factfinding panel's recommendation that it engage a compensation expert to advise it on bringing the 2016–2019 Pay Package up to market standards. Compl. ¶ 74, JA 22.

The district court's dismissal of NAPS's claims as offering only "anecdotal evidence" construes inferences against NAPS at best and ignores the Complaint at worst. Op 12–13, JA 50–51. NAPS asserted structural deficiencies in the Postal Service's process that make clear that drastic underpayment compared to the private sector is common, not "anecdotal." For example, NAPS explained that the Postal Service neither studies high-wage locations nor provides locality pay, leaving its compensation grossly inadequate in "areas such as New York, San

Francisco, and Washington, D.C." Compl. ¶ 24, JA 10. Nor does the Postal Service attempt to adjust supervisory pay increases to keep pace with market increases or even inflation. Compl. ¶ 25, JA 10–11. NAPS alleged that "[i]n many years, all or a substantial number of EAS employees (even employees who perform well) receive no pay increase or minimal pay increases," Compl. ¶ 27; *see* Compl. ¶¶ 28–29, JA 11, while comparable private sector employees' "average and median salaries have increased by approximately 3% *annually* for the last several years," Compl. ¶ 30, JA 12. These and the other allegations in the Complaint do not present "anecdotal" instances where supervisory pay dipped below market rates. They make credible claims that significant underpayment results from generally applicable policies that affect almost all of NAPS's members.

The district court's characterization of NAPS's claims as "general suggestions" for improvement also defies logic. Op. 12–13, JA 50–51. Neither the Postal Service nor the district court ever explained how the Postal Service could fulfill the pay comparability requirement without studying comparable pay in the private sector. The fact that the PRA does not expressly command NAPS to conduct such a study is not a barrier to judicial review, when the need for such action is necessarily implied. *See Aid Ass'n for Lutherans*, 321 F.3d at 1174–75 (interpretation of a statute can be unreasonable and *ultra vires* even when the statute "does not expressly foreclose the construction advanced by the agency");

Reich, 74 F.3d at 1327 ("[G]enerally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." (quoting *Harmon v. Brucker,* 355 U.S. 579, 581–82 (1958))); *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 28 (D.D.C. 1999) ("Forcing the government to take basic measures to reach their legal duty of giving plaintiffs an accounting can hardly be said to be inconsistent with Congress's demand that an accounting be given."). Developing baseline knowledge of comparable pay in the private sector is not a "general suggestion"—it is intrinsic to the statutory mandate.

The Postal Service acted *ultra vires* when it failed to explain how it could fulfill the comparability requirement without studying more than eight of the approximately 1,000 EAS positions at issue, especially when that study did not look at total compensation or high-wage areas.[2] Compl. ¶¶ 53–54, JA 17. While, as the district court noted, Congress did not specify the metrics the Postal Service must follow, Op. 12–13, JA 50–51, the Postal Service must still offer some explanation of the metrics it did follow and how those metrics reasonably interpret the statute. NAPS has plausibly alleged that the Postal Service has not done so and thereby defied Congress's commands.

[2] Notably, this study was done after the Postal Service set the original 2016–2019 Pay Package. Compl. ¶ 23, JA 10.

III. The Postal Service acted *ultra vires* when it refused to consult with NAPS regarding pay policies and other programs relating to NAPS members who are postmasters or whom the Postal Service categorizes as "Headquarters" and "Area" EAS employees.

In enacting the Postal Reorganization Act, Congress recognized that Executive and Administrative Schedule employees—the nearly 50,000 managers, supervisors, and other middle-management employees who are not members of collective bargaining units—should have a representative organization to advocate with the Postal Service on their behalf regarding pay, benefits, and other policies affecting them. Compl. ¶ 1, JA 5–6; 39 U.S.C. § 1004(b). "Supervisory and other managerial employees," as that term is used in the Act, is synonymous with EAS employees—those who are neither executives nor members of collective bargaining units but who carry out the supervisory and managerial function of assuring that the policies set by the executives are carried out by the craft employees. *See* S. Rep. No. 96-856 (citing S. Rep. No. 91-912, at 6–7 (1970)).

A. The Postal Reorganization Act is clear on its face that NAPS is entitled to participate in the development of pay packages for all of its members.

Section 1004(b) describes three kinds of organizations that are eligible to participate in consultation on pay and benefit programs "relating to supervisory and other managerial employees": (1) a supervisory organization that represents a majority of supervisors; (2) an organization, other than one representing supervisors, that represents at least 20% of postmasters; or (3) an organization,

other than an organization representing supervisors or postmasters, that represents a substantial percentage of managerial employees. 39 U.S.C. § 1004(b). NAPS is a "recognized organization[] of supervisory and other managerial personnel" within the meaning of the PRA. Compl. ¶ 10, JA 8; 39 U.S.C. § 1004(b). Once the Postal Service recognizes an organization under one of any of the three pathways, the Postal Service "shall" consult with it on programs that affect its members, *id.* § 1004(d)(1), regardless of their job title.

"'[S]hall' is 'mandatory' and 'normally creates an obligation impervious to judicial discretion.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998)). The PRA does not say that the Postal Service must consult with NAPS with regard to only "some" of its members. If, as NAPS alleges, it validly represents postmasters and "Headquarters" and "Area" EAS employees, the Postal Service's refusal to let it participate in the development of pay packages for those NAPS members is *ultra vires*.

The district court found, without analysis, that both NAPS and the Postal Service had presented plausible interpretations of the scope of a supervisory organization's right to represent employees under the PRA. Op. 13–14, JA 51–52. The plain language and purpose of the PRA counsel otherwise.

1. The Postal Reorganization Act allows any supervisory or managerial employee, regardless of where she works or her job title, to join NAPS.

The PRA does not suggest a rigid separation between supervisors, postmasters, and managers. It does not provide for any distinction between "Field," "Headquarters," and "Area" employees, terms that are not found in the statute. The plain language of the PRA shows that Congress anticipated that a supervisory organization such as NAPS may represent any kind of supervisory or managerial employee, including postmasters and "Headquarters" and "Area" employees.

The statute refers to organizations like NAPS as "recognized organizations of supervisory *and* other managerial personnel." 39 U.S.C § 1004(b) (emphasis added). It provides that each recognized organization "*shall* be entitled to participate" in consultation on "programs relating to supervisory *and* other managerial employees." *Id.* § 1004(b) (emphasis added). The PRA does not say that recognized organizations may participate in programs "relating to supervisory *or* managerial employees *or* postmasters," as would be expected if each recognized organization represented only one of these categories. Nor does the statute say that "a supervisory organization . . . shall be entitled to participate directly in the planning and development of pay policies and schedules . . . relating *only* to supervisory employees." The "conjunctive 'and'" at the end of section 1004(b) indicates that organizations may represent both supervisory employees and

managerial employees. *See Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (finding that statute's use of "conjunctive 'and'" provided "strong indication that Congress did not intend the requirements as alternatives"). Moreover, while the Act places limits on membership in postmasters' organizations (which cannot represent supervisors) and managerial organizations (which cannot represent supervisors or postmasters), such limits are conspicuously absent from the definition of supervisors' organizations. 39 U.S.C. § 1004(b), (i)(1).

The Postal Service's position that NAPS cannot represent postmasters or certain kinds of supervisory and managerial employees would read text into the statute that Congress omitted. But the job of the Court is "neither to add nor to subtract, neither to delete nor to distort" the words of a statute. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). The Court should reject the invitation to restrict the scope of NAPS's representation beyond the limits Congress has seen fit to establish.

2. The 2003 amendments to the Postal Reorganization Act confirmed the right of postmasters to continue to have NAPS represent them in pay talks if they wished.

Prior to 2003, the PRA made no reference to a "postmasters' organization." Postmasters were considered to be a subset of supervisory or managerial employees under section 1004(b). *See Runyon*, 821 F. Supp. at 777

(acknowledging that the Postal Service recognized the National Association of Postmasters of the United States as a supervisory or managerial organization).

The Postmasters' Equity Act of 2003, Pub. L. No. 108–86, 117 Stat. 1052, added references to "postmasters' organizations" to section 1004 in order to allow postmasters' organizations access to the procedures established by the 1980 amendments to the Act in 39 U.S.C § 1004(c)–(g), including the right to convene a factfinding panel. S. Rep. No. 108-112, at 3–4 (2003). Neither the language nor legislative history of the 2003 amendments evinces an intent to strip postmasters of their existing right to join NAPS or other supervisory or managerial organizations. The 2003 amendments left the definition of a supervisory organization unchanged as "the organization recognized by the Postal Service under subsection (b) of this section as representing a majority of supervisors," without further limitation. 39 U.S.C. § 1004(i)(1). The 2003 amendments therefore also left unchanged the practice of allowing postmasters to join supervisory organizations. In fact, the Act clarifies that postmasters can be managers or supervisors: "'postmaster' means an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors." *Id.* § 1004(i)(3). Postmasters and other managerial employees have a choice: they can throw in their lot with the general supervisory organization, which represents the interests of all supervisory and managerial employees (including postmasters), or, if they prefer,

they can join their own, category-specific negotiating body. Over 4,100 postmasters have chosen the first path and joined NAPS. Compl. ¶ 75, JA 22.

3. The Postal Service's refusal to consult with NAPS regarding pay or other programs affecting "Headquarters" and "Area" employees—subcategories of supervisory employees not recognized by the Postal Reorganization Act—is *ultra vires*.

Over 7,500 "Headquarters" and "Area" EAS employees are members of NAPS. Compl. ¶ 57, JA 18. They include employees who perform supervisory and managerial responsibilities, and the Postal Service has acknowledged that NAPS represents at least some of them. Compl. ¶¶ 57, 58, JA 18. Nevertheless, although the PRA makes no distinction among supervisory and managerial employees based on where they work, the Postal Service entirely failed to consult with NAPS, let alone allowed NAPS to participate directly in the planning and development of pay and benefit policies and programs, for any "Headquarters" and "Area" employees. Compl. ¶ 59, JA 18.

The Postal Service's refusal to consult with NAPS regarding pay for "Headquarters" and "Area" employees contravenes both the purpose of the statute and longstanding practice. *See Michigan v. EPA*, 576 U.S. 743, 752–53 (2015) (holding agency statutory interpretation unreasonable "[a]gainst the backdrop of . . . established administrative practice"); *Azar*, 967 F.3d at 826, 830 (looking to agency practice to determine whether agency reasonably interpreted statute).

Congress designed the PRA in recognition of the fact that "employees in the lower levels of supervision or administration in the Postal Service," who were not entitled to participate in collective bargaining, deserved an "active voice through [their] chosen representatives in the development of programs affecting [them]." S. Rep. 96-856, at 3. While Congress intended to create a pathway to some form of representation for all non-executive employees not covered by collective bargaining agreements, no standalone, manager-specific organization exists. If NAPS were not permitted to represent those employees (at their election), managers who are not postmasters would not be entitled to any representation in the pay consultation process.

As there is no dispute that NAPS is a supervisors' organization representing a majority of supervisors, under § 1004(b) it is "entitled to" consult on policies and programs relating to any supervisory and managerial employees that it represents, including postmasters and "Headquarters" and "Area" employees. The Postal Service's refusal to recognize this right is *ultra vires*.

B. The Postal Service did not offer a contemporaneous justification for its refusal to consult with NAPS with regard to its members who are "Headquarters" or "Area" EAS employees.

Even if the PRA allowed the Postal Service to refuse to recognize NAPS's representation of *some* supervisory or managerial employees, which it does not, the district court would need to be reversed and the case remanded for factfinding

because the Postal Service never provided a contemporaneous justification for the lines it has drawn (and which, as noted above, contradict its past policy). Compl. ¶ 63, JA 19 ("The Postal Service has provided no explanation for treating EAS 'Field' employees differently from 'Headquarters' and 'Area' employees, or for its failure to consult with NAPS regarding compensation for Headquarters and Area EAS employees."). When an agency fails to advance an "authoritative interpretation," or offers one that is only "conclusory," with "no attempt . . . made to parse or reconcile the ambiguous statutory language," it exceeds its authority. *N. Air Cargo*, 674 F.3d at 860.

Even if the Postal Service had advanced a reasoned justification for why NAPS could not consult on behalf of certain supervisory and managerial employees, questions of fact, or mixed questions of fact and law, would remain regarding whether the employees about whom the Postal Service has refused to consult fit into the categories the Postal Service has drawn. *See B.R. ex rel. Rempson v. District of Columbia*, 524 F. Supp. 2d 35, 39 (D.D.C. 2007) (explaining that courts must "treat the complaint's factual allegations—including mixed questions of law and fact—as true and draw all reasonable inferences therefrom in the plaintiff's favor"); *SEC v. RPM Int'l, Inc.*, 282 F. Supp. 3d 1, 23–25 (D.D.C. 2017) (recognizing that "courts have cautioned against granting a motion to dismiss" based on mixed questions of law and fact such as the

materiality of a misrepresentation, and finding that resolution of that issue would be more appropriate "on summary judgment after the record has been more fully developed"). NAPS has alleged that "[a]ll EAS employees—whether they are categorized as Field, Headquarters, or Area EAS—qualify as 'supervisory and other managerial personnel who are not subject to collective bargaining agreements,' and so are represented by NAPS." Compl. ¶ 102, JA 26 (quoting 39 U.S.C. § 1004(b)). It has also alleged that "[p]ostmasters are a subset of 'supervisory and other managerial employees' (as that term is used in § 1004(b)) and thus are within the scope of employees represented by NAPS." Compl. ¶ 111, JA 27. These are mixed allegations of fact and law that cannot be resolved at this stage.

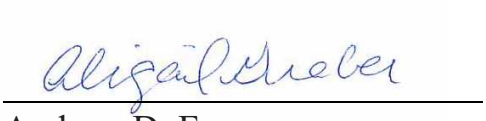
The Postal Service's position makes that even more clear. In the district court, for example, the Postal Service suggested that there was a distinction between "supervisors" and "professional and administrative personnel," or "supervisors" and "professional, technical, administrative, and clerical employees." Mot. Dismiss 17–18, ECF No. 11, JA 35–36. The Postal Service did not define any of these terms or otherwise explain the distinction or where it proposed to draw the line between EAS employees who could be represented by NAPS and those who could not. It did not explain why administrative employees, who assist in the management of the Postal Service, could not be supervisory or managerial

personnel, nor why "Headquarters" or "Area" employees fell into one category or another. Without further factual development, it is impossible for the Court to know whether either or both of the Postal Service's definitions of "supervisory and other managerial personnel," or "professional, technical, administrative, and clerical employees" encompasses the postmaster, "Headquarters," and "Area" employees about whom it refuses to consult with NAPS.

Conclusion

For all of these reasons, the judgment of the district court should be reversed and the case remanded for a ruling on the merits and with instructions to enter judgment in favor of NAPS on its request for declaratory relief with respect to its right to represent all EAS employees who join the organization, including postmasters and "Headquarters" and "Area" EAS employees.

Respectfully submitted,



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February 19, 2021

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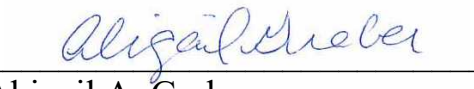

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February 19, 2021

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5280

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

National Association of Postal Supervisors,

Appellant,

v.

United States Postal Service,

Appellee,

United Postmasters and Managers of America,

Intervenor for Appellee.

On appeal from the United States District Court
for the District of Columbia

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May 11, 2021

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Cases

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GLOSSARY OF ABBREVIATIONS

2016–2019 Pay Package – the United States Postal Service's 2016–2019 pay package for its "Field" Executive and Administrative Schedule personnel

APA – Administrative Procedure Act

EAS – Executive and Administrative Schedule

NAPS – National Association of Postal Supervisors

PRA – Postal Reorganization Act

UPMA – United Postmasters and Managers of America

SUMMARY OF ARGUMENT

In its brief, the Postal Service abandons most of the grounds on which the district court dismissed the National Association of Postal Supervisors' ("NAPS") suit. The Postal Service does not rely on the standards governing inferred private rights of action, *see* Mem. Op. 10–11, JA 48–49; it does not contend that NAPS failed to exhaust administrative remedies, *see* Mem. Op. 11–12, JA 49–50; and it does not contend that its decisions regarding supervisory pay are unreviewable under the Postal Reorganization Act of 1970 ("PRA"), Pub. L. No. 91-375, 84 Stat. 719, *see* Mem. Op. 11, JA 49. The Postal Service now concedes that non-statutory review generally applies to its decisions regarding supervisory pay, Appellee's Br. 1, 17, 27.

Nevertheless, the Postal Service contends that the statutory provisions at issue in this case are "'policy' goals" that are "not limitations on the Postal Service's authority enforceable through non-statutory ultra vires review." Appellee's Br. 18. As explained throughout NAPS's opening brief, *see, e.g.*, Appellant's Br. 27–29, that position conflicts directly with the statute's mandatory language concerning the Postal Service's obligations to establish pay differentials between supervisors and the employees they supervise; to provide compensation comparable to the private sector; and to consult with the supervisors' organization regarding pay and benefits for supervisory and other managerial employees. That

position also conflicts with this Court's previous interpretation of the PRA in *National Association of Postal Supervisors v. United States Postal Service* ("*NAPS*"), which found similar claims reviewable. 602 F.2d 420, 432–39 (D.C. Cir. 1979).

This Court can review NAPS's claims while maintaining the distinction between non-statutory review (also known as *ultra vires* review) and review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* Where, as here, an agency fails to adhere to requirements mandated by statute, including failing to take statutorily required factors into account when exercising its discretion, the agency has acted *ultra vires*. That is what the Postal Service has done by refusing to provide for any differential in rates of pay between thousands of supervisors and the employees they supervise and by failing to consider compensation in comparable private-sector positions when setting the compensation of postal supervisory and managerial personnel.

The Postal Service similarly abandons the district court's holding that the Postal Service's actions are unreviewable when it refuses to consult with NAPS regarding (1) "Headquarters" and "Area" employees and (2) postmasters, even though these employees have chosen to join NAPS.

The Postal Service's justifications for refusing to consult on compensation packages for NAPS's members whom the Postal Service classifies as

"Headquarters" or "Area" employees find no basis in the statutory text, which includes no reference to those terms or their equivalents. The Postal Service never explained its position before NAPS commenced this litigation. It now claims that NAPS cannot represent employees in "professional, technical, administrative and clerical" positions, Appellee's Br. 10, but it fails to explain why not—especially when the Postal Service recognizes NAPS's representation of employees in the same or substantially similar positions when they work in "Field" offices. The Postal Service offers no explanation for the inconsistency of its stance. It offers no explanation at all for refusing to propose a pay package, and therefore refusing to consult with NAPS, regarding the subset of Headquarters and Area employees whom it professes to recognize as being represented by NAPS.

NAPS is equally entitled to consult with the Postal Service regarding the pay of its postmaster members. The Postal Service and Intervenor United Postmasters and Managers of America's ("UPMA") textual argument does not survive an encounter with the statutory text itself, which entitles the supervisors' organization to consult regarding compensation for all of its members. The text imposes no restrictions on that membership other than that members be "supervisory and other managerial personnel who are not subject to collective-bargaining agreements." 39 U.S.C. § 1004(b). The PRA's provisions for postmasters' and managerial organizations do not deprive postmasters of the right to be represented by the

supervisors' organization any more than a separate managerial organization (which has never existed) would deprive managers of that right.

For the first time on appeal, the Postal Service turns to a different subsection of the statute, which defines "members of the supervisors' organization" as employees who are recognized as such under an agreement between the Postal Service and the supervisors' organization, and claims it can refuse to recognize NAPS's representation of any employees whom the Postal Service wishes to exclude from representation. The Court should reject the Postal Service's attempt to reserve for itself the power to reject the supervisory organization's right to represent any of its members, for any reason or no reason at all—an attempt that, if accepted, would entitle the Postal Service to refuse to allow NAPS to represent anyone.

ARGUMENT

I. NAPS has pled claims cognizable under non-statutory review.

NAPS and the Postal Service agree that *ultra vires* review is distinct from review under the APA. NAPS does not, as the Postal Service contends, ask the Court to review the Postal Service's decision-making as "arbitrary and capricious." Appellee's Br. 31–32. That is not the standard, because NAPS has alleged that the PRA establishes mandatory factors that the Postal Service must consider, but that it

has ignored, when setting supervisory compensation. Nor can NAPS agree with the Postal Service that NAPS's claims regarding the 2016–2019 Pay Package are unreviewable because the Postal Service exercises discretion in setting supervisory pay. *See* Appellee's Br. 34 (contending that acts in the Postal Service's "informed discretion" are unreviewable). Where a statue sets limits on an agency's discretion, those limits are enforceable.

Although the Postal Service concedes that non-statutory review generally applies to its decisions regarding supervisory pay, Appellee's Br. 1, 17, 27, it claims the statutory provisions at issue in this case are "'policy' goals" that are "not limitations on the Postal Service's authority enforceable through non-statutory ultra vires review." Appellee's Br. 18; *see also id.* at 30–31.[1] Labeling statutory mandates as "policy" does not make them any less mandatory. The Postal Service confuses a statutory delegation of considerable discretion with a blank check. NAPS does not contend that the Postal Service "erred in weighing the relevant

[1] Intervenor UPMA continues to press the argument that the PRA does not create a private right of action. Intervenor's Br. 9. UPMA ignores the standard for non-statutory review, which is all that is at issue in this case.

considerations in developing the pay package for supervisory employees." Appellee's Br. 2. Rather, NAPS contends that the Postal Service failed to follow statutorily mandated requirements for its pay packages and gave *no* consideration to factors that Congress required it to consider, and thus acted *ultra vires*.

Moreover, even if the Postal Service were correct—which it is not—that the inclusion of the phrase "it shall be the policy of the Postal Service" in Sections 1003(a)[2] and 1004(a)[3] somehow allows it to ignore those mandates, that phrase does not appear in Section 101(c), which provides a second source of the Postal Service's obligation to provide compensation comparable to the private sector, [4] or in Section 1004(b), which is the statutory foundation of the Postal Service's obligation to consult with NAPS. [5]

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[2] "It shall be the policy of the Postal Service to maintain compensation and benefits" comparable to those paid by the private sector. 39 U.S.C. § 1003(a).

[3] "It shall be the policy of the Postal Service . . . to provide adequate and reasonable differentials in rates of pay . . . ." 39 U.S.C. § 1004(a).

[4] "[T]he Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector . . . ." 39 U.S.C. § 101(c).

[5] "The Postal Service shall provide a program for consultation" with the supervisory organization. 39 U.S.C. § 1004(b).

The law is clear that *ultra vires* review permits NAPS to seek enforcement of all of these statutory mandates, which the Postal Service has failed to honor.

A. NAPS's claims do not expand non-statutory review into APA review.

The distinction between this case and one reviewed under the APA for arbitrary and capricious agency action is that Congress has mandated specific standards the Postal Service must satisfy and specific factors it must consider when setting supervisory pay. Under the APA, a plaintiff can challenge agency action as arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider," echoing the scope of non-statutory review, but also if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In contrast, NAPS contends that the Postal Service has ignored its statutory mandates, not that its actions are unreasonable in light of non-statutory factors.

The fact that a claim that an agency has failed to consider statutorily mandated factors would also be cognizable in a suit under the APA, were that law to apply, does not withdraw those factors from the scope of *ultra vires* review. The

APA codified (and expanded upon) pre-existing law establishing the scope of judicial review of agency action. *See N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012); *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006). That pre-existing law forms the basis for *ultra vires* review today. *See Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172–73 (D.C. Cir. 2003). Where APA review is withdrawn, *ultra vires* review remains. *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review." Withdrawing APA review "serves only to take away what the APA has otherwise given—namely, the APA's own guarantee of judicial review.").

Ultra vires review goes forward even when agencies assert that they are acting within the limits of broad delegations of authority. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 492 (2015) (agency compliance with statute reviewable even when "[e]very aspect" of the "provision smacks of flexibility"); *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1330–31 (D.C. Cir. 1996) (holding, under non-statutory review, that the "broad" "procurement power *must* be exercised consistently with the structure and purposes of the statute . . . ." (citation omitted)); *NAPS*, 602 F.2d at 432 ("Courts can defer to the exercise of administrative discretion on internal management matters, but they cannot abdicate their responsibility to insure compliance with congressional directives setting the limits

on that discretion."). To show that *ultra vires* review is not available, an agency must demonstrate that "Congress has . . . left *everything* to the [agency]." *Mach Mining*, 575 U.S. at 488; *see Reich*, 74 F.3d at 1331 (*ultra vires* review is not available "when a statute entrusts a discrete specific decision to the [agency] and contains *no limitations* on the [agency's] exercise of that authority" (emphasis added)). The Postal Service cannot make that showing. The PRA places limitations on the Postal Service's discretion with regard to supervisory pay, and this Court has the power to enforce those limits.

B. The Postal Reorganization Act's supervisory differential and compensation comparability provisions set forth standards that a court can enforce, and claims under those provisions are therefore reviewable.

The Postal Service's contention that the supervisory differential requirement in 39 U.S.C. § 1004(a) "do[es] not impose constraints on the Postal Service's authority that are enforceable through non-statutory review," Appellee's Br. 30, directly contravenes this Court's decision in *NAPS*. The Postal Service contends that *NAPS* "suggests" only "that claims founded on the supervisory differential *might* be reviewable" and that the case "did not explicitly consider the extent to which the supervisory differential provision actually represented a limit on the Postal Service's statutory authority." Appellee's Br. 34–35 (emphasis added). That is incorrect. In plain language, the Court explained that courts may review claims that the Postal Service had failed to provide a supervisory differential:

> Of course, the fact that Congress refused to establish a Fixed differential does not mean that the differential guarantee is a meaningless, empty promise, one which the Postal Service can ignore at will. The Postal Act does require Some differential, and requires that that differential be adequate and reasonable. . . . [A] court can compel the Postal Service to consider *and fulfill* the differential requirement.

NAPS, 602 F.2d at 435 (emphasis added) (capitalization in original).

NAPS similarly decided that the Postal Service's adherence to the compensation comparability requirement of 39 U.S.C. §§ 101(c) and 1003(a) is subject to judicial review. The Court stated, "[T]he Postal Service *must* demonstrate that the compensation decisions . . . complied with the requirements of the Postal Act," and "those provisions require that the Postal Service set its compensation levels by reference, Inter alia, to the compensation paid for comparable work in the private sectors of the economy." *Id.* at 440 (emphasis added). The Court thus contemplated a "judicial inquiry" into whether "the Postal Service considers each of these factors and arrives at a good faith judgment." *Id.* at 435.

NAPS's claims in this case are reviewable just as similar claims were reviewable in *NAPS*. Rather than dismiss those claims, the *NAPS* court determined that it was "unable to say in the posture of this case that the Postal Service indeed lawfully exercised its discretion," *id.* at 439, and remanded the case for the Postal Service to "at the very least show that . . . it considered all the factors as directed by the Postal Act and that it applied such factors in establishing adequate and

reasonable salary differentials for all supervisory and other managerial personnel," *id.* at 440–41. The Postal Service's insistence that claims under 39 U.S.C. §§1003(a) and 1004(a) are unreviewable is inconsistent with a decision remanding similar claims for the trial court to determine whether the relevant statutory requirements were met.

The Postal Service's attempt to dodge this Court's holding by recasting the supervisory differential and comparability requirements as "policy goals," Appellee's Br. 18, is semantics, not a valid reason to discard long-established precedent. A statutory requirement that "it shall be the policy" of an agency to do something is a mandate, not merely a consideration. That Congress did not ascribe a difference in reviewability to requirements it labeled as "policy" is confirmed by its inconsistent use of the term "policy" in reference to the same requirements: the mandate for compensation comparable to the private sector is repeated twice in the statute, once with the phrase "it shall be the policy," 39 U.S.C. § 1003(a), and once without that phrase, *id.* § 101(c).

While the Postal Service has suggested that the supervisory differential and comparability requirements may be "in tension" with other, unnamed "general goals," Appellee's Br. 31, it has not identified any actual conflict nor argued that it is impossible to follow all parts of the statute. Nor can it so argue at this stage of the litigation. To assume that the Postal Service has failed to provide for a

supervisory differential or compensation comparability because they conflict with other statutory mandates would draw inferences in the Postal Service's favor to which it is not entitled. *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 529 (D.C. Cir. 2015) ("When reviewing a motion to dismiss, we treat the complaint's factual allegations as true and must grant the plaintiff the benefit of all inferences that can be derived from the facts alleged." (citation omitted)).

1. The Postal Service ignores the fact that it provides *no* differential in the rate of pay between thousands of supervisors and the craft employees they supervise, despite this Court's holding in *NAPS* that the Postal Reorganization Act requires that *all* supervisors earn *some* supervisory differential.

NAPS alleges that the Postal Service has failed to follow Congress's express direction to "to provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel." Compl. ¶¶ 35, 89, JA 13, 24 (quoting 39 U.S.C. § 1004(a)). The Postal Service has not, as it asserts in conclusory fashion, satisfied the supervisory differential by providing *some* supervisory personnel with a 5% increase in base pay over the employees they supervise. Appellee's Br. 32. It calculates the supervisory differential for broad categories of supervisory positions based on just one craft position, despite the fact that hundreds of thousands of craft workers in other positions earn higher base salaries than those in the benchmark position. Compl. ¶¶ 38–39, JA 13–14. The Postal

Service ignores the fact that, as a result of using the lower paid position as its benchmark, thousands of supervisors oversee craft employees with higher base salaries than those of their supervisors. Compl. ¶¶ 38–39, JA 13–14. The statute does not say, as the Postal Service would have it, that it must provide a differential "in rates of pay between *some* employees in the clerk and carrier grades in the line work force and *some* of the supervisory and other managerial personnel." Thus, the Court in *NAPS* found the Postal Service's explanation for its supervisory differential inadequate in part because "there is no way of knowing from the affidavit [filed by the Postal Service] whether *all* supervisory and other managerial personnel actually receive some kind of differential." 602 F.2d at 440 (emphasis added).[6]

The Postal Service quotes this Court's holding in *NAPS* that the PRA "does not set a fixed differential," Appellee's Br. 33, but it entirely ignores the Court's holding that "[t]he Postal Act *does require Some differential*, and requires that that differential be adequate and reasonable." 602 F.2d at 435 (emphasis added). The Postal Service has not fulfilled that mandate.

[6] The Court in *NAPS* further indicated that it would evaluate the differential between supervisors and the employees they actually supervised when it found that the Postal Service could "set different differentials for those employees who actually supervise workers and those who do not." *NAPS*, 602 F.2d at 439.

2. The Postal Service's after-the-fact survey comparing the pay of eight of its 1,000 Executive and Administrative Schedule positions with private-sector jobs did not meet its statutory requirement to maintain compensation and benefits for all employees comparable to the private sector.

NAPS's allegations that the Postal Service has not considered its responsibility "to maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy," 39 U.S.C. § 1003(a), are cognizable under *ultra vires* review. While the degree of comparability lies within its discretion, that does not, as the Postal Service implicitly argues, allow it to ignore comparability or to fail even to gather the data that would allow it to consider comparability. Most damningly, the Postal Service *never* evaluated "compensation and benefits" in comparable private sector positions for the time period covered by the 2016–2019 Pay Package. Compl. ¶¶ 23, 83, JA 10, 23. The factfinding panel convened pursuant to 39 U.S.C. § 1004(f) concluded that the Postal Service violated the statutory requirement for compensation comparability by issuing its pay package decision without conducting or obtaining any survey examining comparable jobs in the private sector. Compl. ¶ 67, JA 19–20. The trial court can similarly determine whether the Postal Service in fact considered this requirement and whether it "arrive[d] at a

good faith judgment" regarding the 2016–2019 Pay Package in light of this requirement. *NAPS*, 602 F.2d at 435.

NAPS's allegations more than raise the inference that the Postal Service did not compare its compensation and benefits to the private sector and did not reach any good faith judgment as to whether its compensation and benefits were comparable. The Postal Service's brief does not and cannot dispute that allegation. The Postal Service points to a survey of eight positions it commissioned for the factfinding hearing, Appellee's Br. 33, but this belated, half-hearted measure does not satisfy its statutory obligations. Section 1003(a) requires the Postal Service to consider "compensation and benefits" (in contrast to § 1004(a)'s reference to "rates of pay") and to do so for "all . . . employees." The Postal Service's witness surveyed only salaries, not total compensation or benefits, for only eight positions and gave no consideration to what the private sector pays in high-wage locations. Compl. ¶ 23, JA 10.[7] The Postal Service cannot wave away these deficiencies in its study by referencing its own "internal expertise," Appellee's Br. 33, of which there is no evidence and which, again, would require the Court to construe inferences in the Postal Service's favor.

[7] There is also no allegation that all eight postal positions were paid comparably to the private sector.

When an agency action is mandatory, necessary predicates to that action are also mandatory and court enforceable. *See Mach Mining*, 575 U.S. at 488 (to meet requirement that EEOC engage in "informal methods of conference, conciliation, and persuasion," it "must tell the employer about the claim . . . and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance"). NAPS has alleged that the Postal Service has not engaged in the necessary predicate to reaching a good faith judgment regarding private-sector compensation comparability. It therefore plausibly claims that the Postal Service did not, in fact, consider such comparability. That claim is reviewable under non-statutory review.

Moreover, even if the Postal Service's reliance on its after-the-fact survey of eight out of 1,000 positions were not "utterly unreasonable," *Aid Ass'n for Lutherans*, 321 F.3d at 1174, which it is, there is no allegation in the Complaint that the Postal Service actually considered this study when constructing the 2016–2019 Pay Package, and the Postal Service is not entitled to that inference. Indeed, the Postal Service conducted the study only after it finalized the 2016–2019 Pay Package. Compl. ¶ 23, JA 10. It did not make any changes to improve compensation comparability thereafter, even though the factfinding panel found the final package violated Section 1003(a). Compl. ¶¶ 67, 70–74, JA 19, 22. The Postal Service defends its decision by referring to the statutory requirements for

giving "full and fair consideration" to input from NAPS and the factfinding panel, Appellee's Br. 35–36, as though the fact of the statutory requirement were itself evidence that the Postal Service had followed it. To the contrary, "[i]t is not sufficient merely to recite a statutory directive and to avow in the broadest terms the agency's continuing devotion to that directive." *NAPS*, 602 F.2d at 440. The Court need not "accept the [Postal Service's] say-so that it complied with the law. . . . [T]he point of judicial review is instead to *verify* the [Postal Service's] say-so." *Mach Mining*, 575 U.S. at 490; *see also Reich*, 74 F.3d at 1332 (refusing to abandon judicial review merely because "the President *claims* that he is acting pursuant to the Procurement Act in the pursuit of governmental savings").[8]

II. The Postal Service's refusal to consult with NAPS regarding NAPS's "Headquarters," "Area," and postmaster members is *ultra vires*.

The Postal Service supports its refusal to consult with NAPS regarding compensation for NAPS's "Headquarters," "Area," and postmaster members with conclusory statements and requests that the Court assume facts in its favor. Because its position contravenes the statutory text and is unsupported by the

[8] The Postal Service is not entitled to the inference that it followed the mandate to give "full and fair consideration" to NAPS's input, 39 U.S.C. § 1004(d)(2)(C), especially when NAPS has alleged that "the Postal Service did not provide NAPS with reasons for its 2016–2019 EAS Pay Package decision, the information on which the decision was based, or the reasons the Postal Service rejected NAPS's recommendations," Compl. ¶ 53, JA 17, as the PRA requires, *id.* § 1004(d)(2)(C).

record, the Postal Service's refusal to consult regarding those employees does not survive non-statutory review.

A. The Court should not accept the Postal Service's unsupported, conclusory refusal to consult with NAPS regarding pay packages for all of NAPS's members who are "Headquarters" and "Area" supervisory and managerial employees.

The Postal Service does not attempt to justify its refusal to recognize NAPS's representation of supervisory and managerial personnel whom it labels as "Headquarters" and "Area" employees with any reference to the statute.[9] Instead, the Postal Service asks the Court to accept its *ipse dixit* that NAPS simply cannot represent "professional, technical, administrative and clerical employees." Appellee's Br. 10; *see* Appellee's Br. 20, 44. Conclusory statements like those the Postal Service advances to explain its actions do not survive non-statutory review. *See N. Air Cargo*, 674 F.3d at 860.

[9] The Postal Service claims that the only allegation in the Complaint that NAPS represents the "Headquarters" and "Area" employees covered by the disputed pay package for such personnel is the allegation that NAPS "'is the representative of all EAS employees' (other than a discrete group of postmasters represented by intervenor)." Appellee's Br. 43 (quoting Compl. ¶ 103, JA 26). That is incorrect. NAPS alleges that it "represents over 7,500 employees located throughout the country whom the Postal Service categorizes as 'Headquarters' or 'Area' EAS employees." Compl. ¶ 57, JA 18. The Complaint also states that the Postal Service has taken the position that "it will not recognize NAPS's representation of other Headquarters and EAS positions" covered by the disputed Headquarters and Area pay package. Compl. ¶ 62, JA 18–19.

As NAPS pointed out in its opening brief, Appellant's Br. 16, 43, the distinctions among employees that the Postal Service draws do not exist in the statute. The PRA does not refer to "Headquarters" or "Area" EAS employees, or to professional, technical, administrative, or clerical employees, or in any way distinguish those employees from other EAS employees. Nor do such purported distinctions exist in the legislative history, which describes "mid-level and senior managers in . . . marketing, finance, human resources and maintenance" as "postal supervisors." S. Rep. No. 108-112, at 2 (2003); *see Aid Ass'n for Lutherans*, 321 F.3d at 1176–77 (looking to legislative history when construing PRA on *ultra vires* review). Moreover, the "Headquarters" and "Area" employees regarding whom the Postal Service refuses to consult with NAPS "include employees who perform supervisory and managerial responsibilities." Compl. ¶ 57, JA 18.

The Postal Service's brief fails to explain or justify its refusal to consult with NAPS based on where employees work or to whom they report. The only reasonable conclusion from the Postal Service's continued failure to explain why "Headquarters," "Area," professional, technical, administrative, and clerical employees cannot be "supervisory and managerial employees" is that it does not have an explanation. The Postal Service does not even consistently take this position. It states that "*most* Field EAS employees" are not "professional, technical, administrative and clerical employees," Appellee's Br. 10—but some

are. Yet, the Postal Service recognizes NAPS's representation of all "Field" EAS employees, including not only supervisors but also managers and professional, technical, administrative, and clerical employees. *See* Compl. ¶ 60, JA 18 (noting that the pay package as to which the Postal Service consulted with NAPS was for all "Field EAS employees," without limitation). Similarly, the Postal Service acknowledges that NAPS represents some "Headquarters" and "Area" EAS employees, Appellee's Br. 10, but never explains or justifies its position that NAPS does not represent the balance of such employees. Thus, the Postal Service's position that NAPS cannot represent certain administrative employees because of *where* they work or to whom they report is an "utterly unreasonable" construction of the PRA, which draws no such distinctions. *Aid Ass'n for Lutherans*, 321 F.3d at 1174.

The Postal Service has not even fulfilled its duty to consult with NAPS regarding the relatively small number of "Headquarters" and "Area" employees it acknowledges NAPS represents. Pointing to the fact that it "explicitly excluded from [the Headquarters and Area Pay Package] all employees who[m] the Postal Service recognizes as represented by NAPS," Appellee's Br. 43 (citing Compl. ¶ 62, JA 18–19), the Postal Service ignores the fact that it never issued any proposed or final pay package for those workers. *See* Compl. ¶¶ 59–63, JA 18–19. It thus undisputedly violated its statutory obligation to consult as to them.

On appeal, the Postal Service asserts for the first time that "many" (but not all) EAS employees are "entitled to union representation and collective bargaining" and that NAPS therefore cannot represent them. Appellee's Br. 44. This argument was not raised in the district court and has therefore been forfeited. *See United States v. Manafort*, 897 F.3d 340, 347 (D.C. Cir. 2018). The Postal Service does not go so far as to contend that the employees who are allegedly entitled to union representation are any or all of the members of NAPS about whom the Postal Service refuses to consult, rendering its argument irrelevant.

Moreover, the statute requires the Postal Service to consult with NAPS with respect to "all managerial personnel who are not *subject to* collective bargaining agreements." 39 U.S.C. § 1004(b) (emphasis added). The Postal Service does not and cannot assert that the thousands of Headquarters and Area EAS employees as to whom it has refused to consult with NAPS are subject to (*i.e.*, covered by) any collective bargaining agreement. On a motion to dismiss, the Court is required to accept as true NAPS's allegation that all of the EAS employees whom the Postal Service classifies as "Headquarters" or "Area" EAS employees are supervisory or other managerial personnel not subject to a collective bargaining agreement. Compl. ¶ 102, JA 26.[10]

[10] As NAPS explained in its opening brief, even if the PRA could be read to exclude certain EAS employees from the definition of "supervisory and managerial

Also for the first time on appeal, the Postal Service argues that the definition of "members of the supervisors' organization" as employees who are recognized as such under an agreement between the Postal Service and the supervisors' organization allows the Postal Service to refuse to recognize NAPS as the representative of any employees whom the Postal Service wishes to exclude from representation. Appellee's Br. 41 (citing 39 U.S.C. § 1004(i)). But that argument proves too much. If it were so, the Postal Service could refuse to recognize NAPS as representing anyone, for any reason or no reason at all, stripping 39 U.S.C. § 1004(b)–(i) of all effect and all supervisory and managerial employees of the rights Congress granted them. Avoiding the "sacrifice or obliteration of a right which Congress had created" is the outcome that non-statutory review is designed to prevent. *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (citation omitted). The Court should reject the Postal Service's attempt to reserve for itself the power to reject the supervisory organization's right to represent any of its members.

The fact that this is the first time the Postal Service has raised these contentions is further evidence of the ad hoc and unreasoned nature of its refusal to recognize NAPS's representation of "Headquarters" and "Area" employees. While the Postal Service contends that it would "transform the nature of ultra vires

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personnel," a question of fact would remain regarding whether the employees at issue fall into the excluded categories. Appellant's Br. 48–50.

review" to hold that agency action must be justified by a contemporaneous explanation, Appellee's Br. 37, this Court has long recognized that such a requirement has been part of *ultra vires* review:

> Although, as we have observed, the Postal Service is exempt from APA review, that only means, essentially, that procedural restraints placed on agencies by that statute, which went beyond pre-existing administrative law requirements, do not apply. Long before passage of the APA, the Supreme Court had held in the seminal case of *SEC v. Chenery*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), that agency action—in that case apparently an informal adjudication—can be upheld only on the basis of a contemporaneous justification by the agency itself, not *post hoc* explanation of counsel. And we have held that that proposition applies to statutory interpretations.

N. Air Cargo, 674 F.3d at 860 (footnote omitted); *see id.* at 860 n.10 ("Congress would have to specifically excuse an agency from providing the *Chenery*-required contemporaneous explanation to clearly allow post hoc explanations by counsel in such a situation."); *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 265 (D.C. Cir. 2016) (affirming that non-statutory review encompasses "a question focusing on whether a Postal Service decision was supported by the agency's contemporaneous justification or, instead, reflected counsel's *post hoc* rationalization."). Having offered nothing more than a shifting array of *post hoc* rationalizations, untethered to any standard or language in the statute, the Postal Service's position cannot be sustained.

B. The Postal Reorganization Act does not limit the supervisory organization's representation of postmasters who choose to become members.

The Postal Service and UPMA's argument that the PRA deprives the supervisory organization of the power to represent postmasters reads language into the statute rather than the language of the statute itself. While the Postal Service and UPMA argue that "a single organization may not be both a recognized supervisory organization and a recognized postmasters' organization," Appellee's Br. 38–39; *see* Intervenor's Br. 10, NAPS is not asking to be recognized under the rules governing postmasters' organizations. While postmasters' organizations cannot represent supervisors, the converse is not true: the PRA does not say that a supervisory organization cannot represent postmasters. 39 U.S.C. § 1004(b); *see* Appellant's Br. 44.

Speculation that supervisory personnel and postmasters "maybe" have "conflicting interests," Appellee's Br. 19; *see* Appellee's Br. 38–39—a proposition for which the Postal Service cites no support—is not a reason to override the statutory language or the choice of NAPS's postmaster members.[11] The Postal Service's repeated, derisive references to postmasters as people NAPS "claims" as

[11] UPMA's statement that postmasters "manage a group of supervisors," Intervenor's Br. 11, contravenes facts alleged in the Complaint. Compl. ¶ 77, JA 22 ("The majority of postmasters (including almost all of the approximately 8,400 Level 18 postmasters) have no supervisors who report to them.").

members, Appellee's Br. 41–42, mischaracterizes the relationship between NAPS and its members. Over 4,100 postmasters have voluntarily joined NAPS; the Postal Service's position denies them "their chosen representation in pay and benefit consultations." Compl. ¶ 115, JA 28.

The Postal Service's effort to arrogate to itself the right to deny representation to any of its supervisory or managerial employees, Appellee's Br. 41, no matter the statutory language and those employees' choice, is no more persuasive when applied to postmasters than it is for "Headquarters" and "Area" employees. *See supra* Part II.A.

The Postal Service's purported fear that NAPS could intrude on "all policies affecting postmasters or managerial employees" with just one postmaster or managerial member, Appellee's Br. 42, is a red herring, given that NAPS has alleged that its membership includes over 4,100 postmasters, Compl. ¶ 75, and given that the Postal Service has consistently consulted with NAPS regarding pay and policies relating to all "Field" managers. The PRA gives the supervisors' organization consultation rights "in the planning and development of programs . . . which affect members of the supervisors' organization." 39 U.S.C. § 1004(d)(1); *see also id.* § 1004(e)(1) (same).

Finally, the Postal Service must do more than "raise[] compelling arguments regarding the proper interpretation of the disputed statutory provisions."

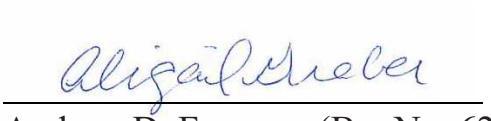
Appellee's Br. 42 (quoting *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel* ("*NATCA*"), 437 F.3d 1256, 1264 (D.C. Cir. 2006)). This Court made clear that "the scope of review elaborated in [*NAPS*] is in all important respects perfectly consistent with *Chevron* and *Mead*," and that it would determine whether the agency had permissibly construed the statute, not only whether its argument was a good one. *Aid Ass'n for Lutherans*, 321 F.3d at 1174. *NATCA*, on which the Postal Service relies, was in a different posture. In that case, this Court recognized that Congress had prohibited judicial review of the agency action at issue. *NATCA*, 437 F.3d at 1262 (citing *Council of Prison Locs. v. Brewer*, 735 F.2d 1497, 1498 (D.C. Cir. 1984)). The Postal Service concedes that no such prohibition applies in this case and that some of its actions regarding compensation for supervisory and managerial personnel are reviewable. Appellee's Br. 17; *see also* Appellee's Br. 31 (conceding that claims under at least part of 39 U.S.C § 1003(a) are reviewable). *NATCA* appears to contemplate a stricter form of review in non-statutory proceedings when a court finds that Congress intended to entirely withdraw judicial review. That is not this case.

CONCLUSION

The district court's decision granting the Postal Service's motion to dismiss should be reversed. The case should be remanded for further proceedings on NAPS's claims related to the supervisory differential and compensation

comparability and with instructions to the district court to enter a judgment for NAPS declaring its right to represent "Headquarters and "Area" employees and postmasters.[12]

Respectfully submitted,



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May 11, 2021

[12] If for any reason the Court affirms the motion to dismiss, it should nonetheless remand with instructions that the district court should dismiss without prejudice to allow NAPS to amend its Complaint to add allegations clarifying its claims. "A dismissal *with prejudice* is warranted only when a trial court 'determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (citation omitted).

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), it contains 6,305 words.

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May 13, 2021

NAPS Newsbreak

NAPS Completes Briefing of Appeal in Lawsuit Against U.S. Postal Service

On May 11, 2021, the National Association of Postal Supervisors filed its reply brief in the United States Court of Appeals for the District of Columbia Circuit, responding to arguments made in briefs filed last month by the Postal Service and United Postmasters and Managers of America.

Refuting the Postal Service's arguments that the requirements of the law are mere "policy guidelines," NAPS's brief explains why its members' rights are enforceable in court. NAPS further explained that, by providing no supervisory differential for thousands of supervisors and by entirely failing to consider private sector-compensation in comparable employment when setting EAS pay, the Postal Service violated enforceable statutory requirements. It also explained how the Postal Service's refusal to recognize NAPS's representation of most Headquarters and Area EAS employees and its refusal to recognize NAPS's representation of its over-4,100 postmaster members violates the law. As NAPS briefed the Court, the law requires that the Postal Service consult with NAPS regarding pay packages and other programs that affect all supervisory and managerial employees, *i.e.*, all EAS employees who are NAPS members.

Oral argument before a three-judge panel of the Court of Appeals is likely to occur sometime in the fall.

All the briefs filed may be found on the NAPS website at naps.org

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5289

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

National Association of Postal Supervisors,
Plaintiff-Appellant,

v.

United States Postal Service,
Defendant-Appellee,

United Postmasters and Managers of America,
Intervenor Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

Brief for Intervenor Defendant-Appellee

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Certificate as to Parties, Rulings, and Related Cases

Parties

Appellant is the National Association of Postal Supervisors ("NAPS"). Appellee is the United States Postal Service ("Postal Service"). The United Postmasters and Managers of America ("UPMA") intervened in the district court and is also an appellee here. There were no amici in the district court not, at the time of filings, before this court.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, NAPS certifies that it is a nonstock corporation incorporated in Virginia, that it is not a publicly held corporation, that it does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Rulings Under Review

The ruling under review is the district court's order of July 17, 2020 (Judge Royce C. Lamberth), JA 53, and accompanying memorandum opinion issued the same day, JA 39. The memorandum opinion is published at *National Association of Postal Supervisors v. U.S. Postal Service*, No. 1:19-CV-2236-RCL, 2020 WL 4039177 (D.D.C. July 17, 2020).

Related Cases

The case on review has not previously been before this Court or any other, save the district court from which it originated. The undersigned counsel is unaware of any related cases currently pending in this Court or any other court

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TABLE OF AUTHORITIES

Cases

Statutes

Other

* *Authorities chiefly relied upon are marked with asterisks.*

Glossary of Abbreviations

PRA – Postal Reorganization Act

NAPS – National Association of Postal Supervisors

UPMA – United Postmasters and Managers of America

UPSPS – United States Postal Service

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 39 U.S.C. § 409(a), which states that "[e]xcept as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." The court also had jurisdiction under 28 U.S.C. § 1339, which states that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service." This Court has jurisdiction under 28 U.S.C. § 1291, because this appeal is from the district court's grant of the Postal Service and UPMA's motions to dismiss on July 17, 2020, which disposed of all parties' claims. Appellant filed its notice of appeal on September 11, 2020.

STATEMENT OF THE ISSUE

Whether the Postal Service's refusal to recognize NAPS's representation of Postmasters violates 39 U.S.C. § 1004(b)?

PERTINENT STATUTES

39 U.S.C. § 1004. Supervisory and other managerial organizations

(a) It shall be the policy of the Postal Service to provide compensation, working conditions, and career opportunities that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel; to provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel; to establish and maintain continuously a program for all such personnel that reflects the essential importance of a well-trained and well-motivated force to improve the effectiveness of postal operations; and to promote

the leadership status of such personnel with respect to rank-and-file employees, recognizing that the role of such personnel in primary level management is particularly vital to the process of converting general postal policies into successful postal operations.

(b) The Postal Service shall provide a program for consultation with recognized organizations of supervisory and other managerial personnel who are not subject to collective-bargaining agreements under chapter 12 of this title [39 USCS §§ 1201 et seq.]. Upon presentation of evidence satisfactory to the Postal Service that a supervisory organization represents a majority of supervisors, that an organization (other than an organization representing supervisors) represents at least 20 percent of postmasters, or that a managerial organization (other than an organization representing supervisors or postmasters) represents a substantial percentage of managerial employees, such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees.

(c) (1) The Postal Service and the supervisors' organization shall, unless otherwise mutually agreed to, meet at least once each month to implement the consultation and direct participation procedures of subsection (b) of this section.

(2) (A) At least 7 days before each meeting, each party shall—

(i) provide notice of agenda items, and

(ii) describe in detail the proposals such party will make with respect to each such item.

(B) Grievances of individual employees shall not be matters which may be included as agenda items under this paragraph.

(d) (1) In order to facilitate consultation and direct participation by the supervisors' organization in the planning and development of programs under subsection (b) of this section which affect members of the supervisors' organization, the Postal Service shall—

(A) provide in writing a description of any proposed program and the reasons for it;

(B) give the organization at least 60 days (unless extraordinary circumstances require earlier action) to review and make recommendations with respect to the program; and

(C) give any recommendation from the organization full and fair consideration in deciding whether or how to proceed with the program.

(2) If the Postal Service decides to implement a program described in paragraph (1) of this subsection, the Postal Service shall before such implementation—

(A) give the supervisors' organization details of its decision to implement the program, together with the information upon which the decision is based;

(B) give the organization an opportunity to make recommendations with respect to the program; and

(C) give such recommendations full and fair consideration, including the providing of reasons to the organization if any of such recommendations are rejected.

(3) If a program described in paragraph (1) of this subsection is implemented, the Postal Service shall—

(A) develop a method for the supervisors' organization to participate in further planning and development of the program, and

(B) give the organization adequate access to information to make that participation productive.

(4) The Postal Service and the supervisors' organization may, by agreement, adopt procedures different from those provided by this subsection.

(e) (1) The Postal Service shall, within 45 days of each date on which an agreement is reached on a collective bargaining agreement between the Postal Service and the bargaining representative recognized under section 1203 of this title which represents the largest number of employees, make a proposal for any changes in pay policies and schedules and fringe benefit programs for members of the supervisors' organization which are to be in effect during the same period as covered by such agreement.

(2) The Postal Service and the supervisors' organization shall strive to resolve any differences concerning the proposal described in paragraph (1) of this subsection under the procedures provided for, or adopted under, subsection (d) of this section.

(3) The Postal Service shall provide its decision concerning changes proposed under paragraph (1) of this subsection to the supervisors' organization within 90 days following the submission of the proposal.

(f) (1) If, notwithstanding the mutual efforts required by subsection (e) of this section, the supervisors' organization believes that the decision of the Postal Service is not in accordance with the provisions of this title, the organization may, within 10 days following its receipt of such decision, request the Federal Mediation and Conciliation Service to convene a factfinding panel (hereinafter referred to as the "panel") concerning such matter.

(2) Within 15 days after receiving a request under paragraph (1) of this subsection, the Federal Mediation and Conciliation Service shall provide a list of 7 individuals recognized as experts in supervisory and managerial pay policies. Each party shall designate one individual from the list to serve on the panel. If, within 10 days after the list is provided, either of the parties has not designated an individual from the list, the Director of the Federal Mediation and Conciliation Service shall make the designation. The first two individuals designated from the list shall meet within 5 days and shall designate a third individual from the list. The third individual shall chair the panel. If the two individuals designated from the list are unable to designate a third individual within 5 days after their first meeting, the Director shall designate the third individual.

(3) (A) The panel shall recommend standards for pay policies and schedules and fringe benefit programs affecting the members of the supervisors' organization for the period covered by the collective bargaining agreement specified in subsection (e)(1) of this section. The standards shall be consistent with the policies of this title, including sections 1003(a) and 1004(a) of this title.

(B) The panel shall, consistent with such standards, make appropriate recommendations concerning the differences between the parties on such policies, schedules, and programs.

(4) The panel shall make its recommendation no more than 30 days after its appointment, unless the Postal Service and the supervisors' organization agree to a longer period. The panel shall hear from the Postal Service and the supervisors' organization in such a manner as it shall direct. The cost of the panel shall be borne equally by the Postal Service and the supervisors' organization.

(5) Not more than 15 days after the panel has made its recommendation, the Postal Service shall provide the supervisors' organization its final decision on the matters covered by factfinding under this subsection. The Postal Service shall give full and fair consideration to the panel's recommendation and shall explain in writing any differences between its final decision and the panel's recommendation.

(g) Not earlier than 3 years after the date of the enactment of this subsection [enacted Aug. 8, 1980], and from time to time thereafter, the Postal Service or the supervisors' organization may request, by written notice to the Federal Mediation and Conciliation Service and to the other party, the creation of a panel to review the effectiveness of the procedures and the other provisions of this section and the provisions of section 1003 of this title. The panel shall be designated in accordance with the procedure established in subsection (f)(2) of this section. The panel shall make recommendations to the Congress for changes in this title as it finds appropriate.

(h) (1) In order to ensure that postmasters and postmasters' organizations are afforded the same rights under this section as are afforded to supervisors and the supervisors' organization, subsections (c) through (g) shall be applied with respect to postmasters and postmasters' organizations—

(A) by substituting "postmasters' organization" for "supervisors' organization" each place it appears; and

(B) if 2 or more postmasters' organizations exist, by treating such organizations as if they constituted a single organization, in accordance with such arrangements as such organizations shall mutually agree to.

(2) If 2 or more postmasters' organizations exist, such organizations shall, in the case of any factfinding panel convened at the request of such organizations (in accordance with paragraph (1)(B)), be jointly and severally liable for the cost of such panel, apart from the portion to be borne by the Postal Service (as determined under subsection (f)(4)).

(i) For purposes of this section—

(1) "supervisors' organization" means the organization recognized by the Postal Service under subsection (b) of this section as representing a majority of supervisors;

(2) "members of the supervisors' organization" means employees of the Postal Service who are recognized under an agreement between the Postal Service and the supervisors' organization as represented by such organization;

(3) "postmaster" means an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors;

(4) "postmasters' organization" means an organization recognized by the Postal Service under subsection (b) as representing at least 20 percent of postmasters; and

(5) "members of the postmasters' organization" shall be considered to mean employees of the Postal Service who are recognized under an agreement—

(A) between the Postal Service and the postmasters' organization as represented by the organization; or

(B) in the circumstance described in subsection (h)(1)(B), between the Postal Service and the postmasters' organizations (acting in concert) as represented by either or any of the postmasters' organizations involved.

STATEMENT OF CASE

1. Statement of Facts

Plaintiff-Appellant ("NAPS") is an organization recognized by the United States Postal Service ("Postal Service") as an organization representing supervisory personnel employed by the Postal Service. JA 06. NAPS claims to represent approximately 27,000 active and retired Executive and Administrative Schedule employees. JA 6, Compl. ¶ 2. The Postal Service sent NAPS a proposed

pay and benefits package for fiscal years 2016-19 in September 2017. JA 9, Compl. ¶¶ 16-17. For the following nine months, NAPS provided recommendations to the pay package. JA 9, Compl. ¶ 18. On June 28, 2018, the Postal Service issued its final decision. JA 9, Compl. ¶ 19. Dissatisfied with the decision, NAPS requested a factfinding panel to review the proposal in accordance with 39 U.S.C. § 1004(f). JA 10, Compl. ¶ 20.

Intervenor Defendant-Appellee ("UPMA") represents the highest share of postmasters in the country. JA 22, Compl. ¶ 76. UPMA is recognized as a postmasters organization by the Postal Service for purposes of pay consultations. On October 1, 2018, NAPS wrote to the Postal Service requesting that the Postal Service recognize NAPS' right to represent postmasters with respect to pay consultations. JA 22, Compl. ¶ 78. The Postal Service responded on February 25, 2019, explaining "the Postal Service cannot lawfully recognize NAPS as a representative of postmasters in addition to its supervisors." JA 23, ¶ 78.

2. Procedural History

NAPS filed its complaint in the district court on July 26, 2019. JA 2. The Postal Service filed a motion to dismiss on October 25, 2019. JA 32-38. UPMA filed an unopposed motion to intervene on November 7, 2019, moving to dismiss Count V of the complaint regarding NAPS's representation of postmasters. JA 3; Unopposed Mot. to Intervene, Nov. 7, 2019, ECF. No. 14. The district court

granted the motion to intervene on December 3, 2019. JA 4; Order Granting Mot. to Intervene. The district court granted the Postal Service and UPMA's motions to dismiss on July 17, 2020. JA 39-53. NAPS filed a timely notice of appeal on September 11, 2020. JA 4.

SUMMARY OF ARGUMENT

UPMA's intervention is limited to the claim asserted in Count V of the Complaint. JA 26-28. The Postal Reorganization Act ("PRA") does not create a private remedy. Additionally, this Court should rely on the plain language of 39 U.S.C. § 1004(b) and legislative history to find that NAPS, as an organization recognized by the Postal Service to represent supervisors cannot also be recognized to represent postmasters. Moreover, this Court should also find NAPS has not acted ultra vires because the Postal Service did not violate a clear and mandatory directive. Accordingly, the Postal Service's interpretation of its governing statute is entitled to deference.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss for failure to state a claim. *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019). The Court "accept[s] plaintiff's well pleaded factual allegations as true and draw[s] all reasonable inferences in

plaintiff's favor." *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 788 (D.C. Cir. 2019).

ARGUMENT

I. Postal Service's interpretation of 39 U.S.C. § 1004 is entitled to deference

The PRA does not contain congressional intent to create a private remedy. *Nat'l Postal Prof'l Nurses v. U.S. Postal Serv.*, 461 F. Supp. 2d 24, 33 (D.D.C. 2006). The provisions cited by NAPS, specifically 39 U.S.C. §§ 101, 1003, and 1004 do not create private rights are action nor are subject to APA review. *Mittleman v. Postal Reg. Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014). The clear intent of the PRA was to create "an independent executive agency" and "neither the language nor its legislative history shows that Congress intended to create a private remedy." *Gaj v. U.S. Postal Serv.*, 800 F.2d 64, 68 (3d Cir. 1986).

The Supreme Court has held "time and again that courts must presume that a legislature says in a statute what it means." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Accordingly, the plain language of 39 U.S.C. § 1004(b) demonstrates that an organization representing at least 20 percent of postmasters, such as Intervenor, which is not an organization representing supervisors, may be recognized to represent the postmasters in pay and benefit consultations with the Postal Service. Under the plain language of the Act, an organization representing

supervisors in pay and benefit consultations cannot also represent postmasters. The Act states, in part:

> Upon presentation of evidence satisfactory to the Postal Service
> . . . that an organization (**other than an organization representing supervisors**) represents at least 20 percent of **postmasters**, …, such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees.

39 U.S.C. § 1004(b) (emphasis added). The language, "other than an organization representing supervisors;" precludes NAPS by law from representing postmasters in pay consultations with USPS. 39 U.S.C. § 1004(b). Therefore, NAPS, as a recognized supervisor organization, is precluded from representing postmasters in pay consultations.

The legislative history further illustrates a distinction between a postmaster and a supervisor. *See* S. Rep. No. 108-86 (2003). "Postmaster" is defined as "an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors." 39 U.S.C. § 1004(i)(3). Conversely, "[m]embers of the supervisors organization means employees of the Postal Service who are recognized under an agreement between the Postal Service and the supervisor's organization as represented by such organization". 39 U.S.C. § 1004(i)(2). NAPS alleges and acknowledges in the

Complaint that it is such a supervisors' organization. The postmaster title and job provide postmasters with the responsibility to manage a group of supervisors, managers and other employees and to ensure their postal operation runs efficiently. The Postal Reorganization Act, its legislative history, as well as established practice recognize the distinct and separate status of supervisor and postmaster organizations.

In addition to the plain language and legislative history, this Circuit has determined that 39 U.S.C. § 1004(a) affords the Postal Service significant discretion in setting compensation policies. *See Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv.*, 602 F.2d 420, 431-32 (1979). The trial court determined that 39 U.S.C. § 1004(b) did not establish a single, unanimous interpretation and as a result, the Postal Service is entitled to deference.[1] JA 52; *Nat'l Ass'n of Postal Supervisors*, 602 F.2d at 432 ("courts owe a measure of deference to the agency's own construction of its organic statute"). So long as the differential set by the agency is "adequate and reasonable," it is entitled to the agency's discretion. *Nat'l Ass'n of Postal Supervisors*, 602 F.2d at 433.

[1] UPMA agrees, as it must, that the Postal Service is entitled to deference as to its own construction of its governing statute. UPMA believes that the Postal Service's refusal to recognize NAPS as an organization that can represent postmasters for purposes of pay and benefit consultations with the Postal Service was in accordance with the plain language of the statute.

II. Even if the Provision are not subject to non-statutory review, NAPS has not plead the Postal Service Acted *Ultra Vires*

The trial court determined "ultra vires activity requires a violation of a clear and mandatory directive with only a single interpretation." JA 50. The trial court correctly determined NAPS has not established how the Postal service violated a clear and mandatory directive in sections 101 or 1003. JA 51. Additionally, NAPS has not shown the Postal Service violated a clear and mandatory directive regarding compensation under 39 U.S.C. § 1004(b). Since there is no violation, the Postal Service's interpretation of this provision is entitled to discretion. *See National Ass'n of Postmasters v. Runyon*, 821 F.Supp. 775, 777 (D.D.C. 1993) (the Postal Service "has 'broad discretion' in conducting its affairs under § 1004").

CONCLUSION

For the aforementioned reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

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s/Jonathan Greenbaum
Jonathan Greenbaum

March 18, 2021

[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5280

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

NATIONAL ASSOCIATION OF POSTAL SUPERVISORS,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee, and

UNITED POSTMASTERS AND MANAGERS OF AMERICA,

Intervenor Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff in district court, and appellant here, is the National Association of Postal Supervisors. Defendant in district court, and appellee here, is the United States Postal Service. In addition, the United Postmasters and Managers of America intervened in district court and is an appellee here. There were no amici in the district court nor, at the time of filing, before this Court.

B. Rulings under Review

The rulings under review are the opinion and order entered on July 17, 2020 (Dkt. Nos. 22, 23), *see National Ass'n of Postal Supervisors v. U.S. Postal Serv.*, No. 1:19-cv-2236 (D.D.C.), 2020 WL 4039177 (Lamberth, J.).

C. Related Cases

The case on review has not previously been before this Court or any other, save the district court from which it originated. The undersigned counsel is unaware of any related cases pending in this Court or any other court.

/s/ Sean Janda
Sean Janda

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GLOSSARY

APA	Administrative Procedure Act
EAS	Executive and Administrative Schedule
J.A.	Joint Appendix
NAPS	National Association of Postal Supervisors
U.S.	United States

INTRODUCTION

The National Association of Postal Supervisors (NAPS) challenges various actions taken by the Postal Service with respect to its employees. NAPS claims that the Postal Service did not properly weigh various considerations in implementing a recent pay package for supervisory employees represented by NAPS and that the Postal Service improperly failed to recognize NAPS as representing postmasters and other non-supervisory employees.

Congress has provided that the Administrative Procedure Act (APA) does not "apply to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(a). Accordingly, NAPS's claims may proceed only through "non-statutory review," a form of judicial review that is "quite narrow" and "available only to determine whether the agency has acted ultra vires—that is, whether it has exceeded its statutory authority." *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014) (quotations omitted). That limitation accords with Congress's determination that the Postal Service "must have the freedom" to "control costs and manage" itself in an efficient way. *National Ass'n of Postal Supervisors v. U.S. Postal Serv.*, 602 F.2d 420, 432 (D.C. Cir. 1979).

The district court correctly held that claims that the Postal Service erred in weighing the relevant considerations in developing the pay package for supervisory employees are not cognizable under ultra vires review because such claims do not speak to the agency's statutory authority to act. NAPS's claims premised on the allegation that it represents certain postmasters and other non-supervisors similarly fail: the relevant statute makes clear that supervisory organizations like NAPS may represent only supervisors, and, at a minimum, NAPS's claims do not meet the high bar for non-statutory review.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1339 and 39 U.S.C. § 409(a). This Court has jurisdiction under 28 U.S.C. § 1292. The district court entered judgment dismissing plaintiff's complaint with prejudice on July 17, 2020, and plaintiff filed a timely notice of appeal on September 11, 2020.

STATEMENT OF THE ISSUES

1. Whether NAPS's allegations about the Postal Service's implementation of a pay package for supervisory employees state a claim that the Postal Service plainly exceeded its statutory authority.

2. Whether NAPS's allegations that the Postal Service failed to consult the association concerning issues related to postmasters and implementation of

a pay package for certain non-supervisory employees state a claim that the Postal Service plainly exceeded its statutory authority.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified as amended at Title 39 of the U.S. Code), created the U.S. Postal Service as "an independent establishment of the executive branch," 39 U.S.C. § 201, with broad authority, including the power to "classify and fix the compensation and benefits of all officers and employees in the Postal Service," *id.* § 1003(a).

Congress also provided a number of general policy objectives to guide the Postal Service's exercise of its authority. For example, Congress provided that the Postal Service should be run as "a basic and fundamental service"; that, in formulating policies, the Postal Service should "give the highest consideration" to the "expeditious collection, transportation, and delivery of important letter mail"; and that a "primary goal of postal operations" should be to implement "[m]odern methods of transporting mail" and "programs designed to achieve overnight transportation" of important mail. 39 U.S.C.

§ 101(a), (e), (f). And of particular relevance to this case, Congress also provided that "[i]t shall be the policy of the Postal Service" to "provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel," *id.* § 1004(a), and to "maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy," *id.* § 1003(a); *see also id.* § 101(c) (similar).

In contrast to those general policy goals, Congress also provided for a handful of "[s]pecific limitations" on the Postal Service's authority. 39 U.S.C. § 404a. For example, the Postal Service "may not" generally promulgate any regulation "the effect of which is to preclude competition" and "may not" "compel the disclosure, transfer, or licensing of intellectual property to any third party." *Id.* § 404a(a); *cf. id.* § 404(a) ("Subject to the provisions of section 404a, . . . the Postal Service shall have the following specific powers . . . ."). And to enforce those limitations, Congress has provided that "[a]ny party . . . who believes that the Postal Service has violated" one of those specific limitations may bring a complaint with the Postal Regulatory Commission (and may ultimately be entitled to judicial review of an adverse

decision of the Commission). *Id.* § 404a(c); *cf. id.* § 3663 (providing for judicial review of Commission decisions).

2. In structuring the Postal Service's operations, Congress decided to draw a distinction between non-managerial employees, on the one hand, and supervisory and managerial personnel, on the other hand. For non-managerial and non-supervisory employees, Congress determined that it was appropriate to allow those employees to bargain collectively, with some exceptions, under a framework similar to (and incorporating large portions of) the framework established by the National Labor Relations Act. *See* 39 U.S.C. §§ 1202-1209. Thus, when the Postal Service sets workplace policies for such employees, the Postal Service is required to engage in collective bargaining with recognized bargaining representatives. *See id.* § 1206. And Congress has provided mechanisms to resolve disputes over that process, including by directing the parties (in certain circumstances) to engage in mediation or binding arbitration and by providing for district court jurisdiction over certain actions related to the collective bargaining agreements. *See id.* §§ 1207-1208.

By contrast, Congress expressly provided that no "management official or supervisor" may be included in any bargaining unit under those provisions. 39 U.S.C. § 1202(1). Instead, such employees may be represented by a recognized supervisory, postmasters', or managerial organization. *Id.*

§ 1004(b). To obtain recognition, such an organization must present "evidence satisfactory to the Postal Service that" (1) "a supervisory organization represents a majority of supervisors"; (2) "an organization (other than an organization representing supervisors) represents at least 20 percent of postmasters"; or (3) "a managerial organization (other than an organization representing supervisors or postmasters) represents a substantial percentage of managerial employees." *Id.* Once recognized, "such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees." *Id.* Although the Postal Service is required, as part of that participation, to give the organizations' "recommendations full and fair consideration," it is not required to accept any particular recommendations. *Id.* § 1004(d).

In addition to providing for consultation and participation procedures for such organizations, *see* 39 U.S.C. § 1004(c)-(e), Congress also provided for dispute resolution procedures. Specifically, if a recognized organization believes that the Postal Service has acted inconsistently with the statute, it may request that the Federal Mediation and Conciliation Service convene a fact-finding panel and that panel will hold a hearing and provide recommendations to the Postal Service. *Id.* § 1004(f). As with the recognized organizations'

recommendations, the Postal Service is required to "give full and fair consideration to the panel's recommendation," but it is not required to accept any particular recommendation of the panel. *Id.* § 1004(f)(5).

Finally, if a recognized organization is dissatisfied with those dispute resolution procedures, it may request that the Federal Mediation and Conciliation Service convene a panel to review the procedures and to provide recommendations to Congress for changes to those procedures. 39 U.S.C. § 1004(g). Despite providing that reticulated dispute resolution procedure (and in contrast to the procedures provided to resolve collective bargaining disputes), Congress did not include any provisions authorizing binding arbitration—or resort to the courts—for managerial and supervisory employees.

B. Factual and Procedural Background

1. This case concerns in large part the Postal Service's implementation of a pay package for certain Executive and Administrative Schedule (EAS) employees. Plaintiff National Association of Postal Supervisors (NAPS) is a recognized organization of supervisory personnel under the Postal Reorganization Act, *see* 39 U.S.C. § 1004(b), and it represents

more than 20,000 EAS supervisors (and purports to represent more than 4,000 postmasters). *See* J.A.[1] 6, 22 (Compl. ¶¶ 2, 75).

As alleged in NAPS's complaint, the Postal Service employs approximately 49,000 EAS employees, who are "managers, supervisors, postmasters, and other professionals and administrative employees." J.A. 7 (Compl. ¶ 6). Those employees, who serve in more than 1,000 different job titles and job levels, operate under the direction of the Postal Service's approximately 500 executive employees, and they in turn manage approximately 442,000 career, and 133,000 non-career, employees, such as carriers and clerks. J.A. 7 (Compl. ¶¶ 6-7). In September 2017 the Postal Service sent NAPS a proposed pay package for so-called "Field" EAS employees—as distinguished from "Headquarters" and "Area" EAS employees—covering Fiscal Years 2016-2019. J.A. 9, 17 (Compl. ¶¶ 16, 56). Over the following nine months, the Postal Service consulted with NAPS about the proposal through "meetings, letters, and emails." J.A. 9 (Compl. ¶ 18). Following that consultation, the Postal Service finalized the package in June 2018 (with a slight revision made the following month). J.A. 9 (Compl. ¶ 19).

[1] Citations to the "J.A." refer to the Joint Appendix submitted by the parties.

After the Postal Service finalized the pay package, NAPS invoked its right to have the Federal Mediation and Conciliation Service convene a fact-finding panel to review the package. J.A. 10 (Compl. ¶ 20). Following a two-day evidentiary hearing, the panel issued a report in April 2019. J.A. 19 (Compl. ¶¶ 64-66). In relevant part, the report concluded that various specific components of the package failed to achieve adequate compensation for EAS employees (either relative to comparable private-sector employees or relative to lower-level Postal Service employees) and that those shortcomings would adversely affect recruitment and employee motivation. *See* J.A. 19-20 (Compl. ¶ 67). In addition, the report included a variety of recommendations to the Postal Service, including a retroactive increase in EAS pay and establishment of a joint working group to explore many of the pay issues raised by NAPS. *See* J.A. 20-21 (Compl. ¶ 68).

The following month, the Postal Service issued its final decision on the pay package. J.A. 21 (Compl. ¶ 69). The Postal Service agreed to convene a working group along the lines suggested by the fact-finding panel to explore possible ways to resolve NAPS's dissatisfaction with various aspects of the Postal Service's pay-related decisionmaking. J.A. 22 (Compl. ¶ 74). The Postal Service did not, however, accept many of the panel's recommendations related

to retroactively adjusting specific components of the pay package. *See* J.A. 22 (Compl. ¶¶ 70-73).

2. While the process of administrative consultation and fact-finding related to the Field EAS employees was ongoing, the Postal Service was also developing a pay package for Headquarters and Area EAS employees. Unlike most Field EAS employees, many Headquarters and Area EAS employees are not supervisors but are instead "professional, technical, administrative and clerical employees." *See* J.A. 35-36. For that reason, the Postal Service did not consult with NAPS while developing the Headquarters and Area EAS pay package. J.A. 18 (Compl. ¶ 62).

In December 2018, the Postal Service issued its final pay package for Area and Headquarters EAS employees. J.A. 18 (Compl. ¶ 62). The package provides that it "will not apply to those Headquarters and Area positions who are represented by [NAPS]," J.A. 18-19 (Compl. ¶ 62), and it includes a list of the Headquarters and Area positions that the Postal Service understands are properly represented by NAPS, J.A. 19 (Compl. ¶ 62).

Unrelated to that pay package, NAPS claims to have over 4,100 members who are postmasters, in addition to its members who are supervisors. J.A. 22 (Compl. ¶ 75). In October 2018, NAPS requested in writing that the Postal Service recognize that NAPS may properly represent postmasters. J.A.

22 (Compl. ¶ 78). In February 2019, the Postal Service informed NAPS that it did not believe NAPS could properly represent both postmasters and supervisors. J.A. 23 (Compl. ¶ 79); *cf.* 39 U.S.C. § 1004(b) (distinguishing between "a supervisory organization" that obtains representation rights when it "represents a majority of supervisors" and an "organization (other than an organization representing supervisors)" that obtains representation rights when it "represents at least 20 percent of postmasters").

3. NAPS filed this lawsuit in July 2019. NAPS's complaint raised two separate sets of claims. First, it asserted three claims alleging that the Postal Service violated the Postal Reorganization Act through its promulgation of the pay package for Field EAS employees. Separately, it asserted two claims alleging that the Postal Service violated the statute by failing to recognize NAPS's purported representation of all Headquarters and Area EAS employees and some postmasters.

NAPS alleged that the pay package fails to meet the Postal Service's statutory obligations in two ways. First, NAPS alleged that the package improperly fails to provide compensation comparable to that provided by similar private-sector jobs (Count I). According to NAPS, that failure violates 39 U.S.C. § 1003(a), which provides that "[i]t shall be the policy of the Postal Service to maintain compensation and benefits for all officers and employees

on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector," and 39 U.S.C. § 101(c) ("Postal [P]olicy"), which provides that "the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector." J.A. 23 (Compl. ¶¶ 81-82). NAPS alleged that the Postal Service violated those provisions by failing to conduct any specific studies of private-sector compensation before proposing the package; by failing to adjust minimum and maximum salary ranges; by failing to provide annual salary adjustments; and by failing to implement locality pay adjustments. J.A. 23 (Compl. ¶¶ 83-86); *see also* J.A. 10-12 (Compl. ¶¶ 21-34).

Second, NAPS alleged that the package improperly fails to ensure an adequate differential in pay between supervisors and supervised employees (Count II). According to NAPS, that failure violates 39 U.S.C. § 1004(a), which provides that "[i]t shall be the policy of the Postal Service . . . to provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel." J.A. 24 (Compl. ¶ 89). Consistent with previous packages, the pay package contains a Supervisory Differential Adjustment of 5% that aims to ensure that an employee in a supervisory position earns a base

salary of, at a minimum, 5% more than that position's most common subordinates. NAPS asserted that the differential is inadequate, that the formula should be based on the most-highly-compensated (rather than the most common) subordinate, and that the calculation is flawed because subordinates are able to earn more overtime than supervisors. *See* J.A. 24 (Compl. ¶¶ 90-91); *see also* J.A. 13-15 (Compl. ¶¶ 35-41).[2]

The complaint also stated two counts related to the Postal Service's failure to recognize NAPS's representation of particular subsets of EAS employees. First, NAPS alleged that the Postal Service's issuance of a pay package for Area and Headquarters EAS employees without consulting NAPS violated 39 U.S.C. § 1004(b), which provides that "[u]pon presentation of evidence satisfactory to the Postal Service" that an organization of supervisory or managerial personnel meets certain representation thresholds, the organization "shall be entitled to participate" in developing pay packages related to represented employees (Count IV). As noted, the pay package

[2] In its complaint, NAPS also included a separate count alleging that the pay package violates purported statutory mandates to provide sufficient compensation to attract and retain qualified supervisory personnel and to ensure a well-motivated workforce (Count III). *See* J.A. 24-25 (Compl. ¶¶ 93-99). In its opening brief, NAPS has failed to develop any argument regarding this Count, and so any challenge to the district court's dismissal of this Count has been forfeited. *See Baan Rao Thai Rest. v. Pompeo*, 985 F.3d 1020, 1025 n.1 (D.C. Cir. 2021). But even if it were not forfeited, it would fail for the same reasons as Counts I and II, *see infra* Part II.A.

provided that it did not apply to supervisory employees for whom the Postal Service recognizes NAPS's representation. NAPS alleged, however, that (save a discrete group of postmasters who are represented by intervenor) it "is the representative of all EAS employees"—a group that includes, in addition to supervisors, "managers, . . . postmasters, and other professionals and administrative employees"—and so is entitled to consultation on "new policies and procedures relating to all EAS employees." J.A. 7, 26 (Compl. ¶¶ 6, 102-103).

In the second count, NAPS alleged that the Postal Service has violated section 1004(b) by refusing to recognize it as properly representing a group of approximately 4,100 postmasters (Count V). Although NAPS's complaint alleged generally that the Postal Service has refused to recognize its "right to represent postmasters in pay and benefit consultations and other programs relating to postmasters," J.A. 27-28 (Compl. ¶¶ 113-114), NAPS has not alleged that any specific pay package or other policy has been promulgated in the absence of required consultation.

4. The Postal Service moved to dismiss, and the United Postmasters and Managers of America—a recognized organization representing postmasters—moved to intervene and to dismiss Count V (relating to NAPS's

claim to represent postmasters). The district court granted each of those motions.

In granting the Postal Service's motion to dismiss, the district court explained at the outset (in rulings not challenged on appeal) that the relevant provisions of the Postal Reorganization Act do not provide an express cause of action, that they explicitly preclude review of the Postal Service's decisionmaking under the APA, and that they do not give rise to an implied private right of action. *See* J.A. 43-50.

The court noted that in some circumstances "non-statutory review" may nevertheless be available "to determine whether the agency has acted 'ultra vires.'" J.A. 44 (quoting *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014)). The court explained, however, that such review is rare and narrow. At the threshold, it may be unavailable if Congress has expressly precluded judicial review or the relevant issues are left to agency discretion. *Id.* (citing *National Ass'n of Postal Supervisors v. U.S. Postal Serv.*, 602 F.2d 420, 429-30 (D.C. Cir. 1979)). And even when non-statutory review is available, it is limited to determining whether an agency has acted ultra vires by violating a mandatory limit on its statutory authority. *Id.* (citing *National Air Traffic Controllers Ass'n AFL-CIO v. Federal Serv. Impasses Panel*, 437 F.3d 1256, 1263-64 (D.C. Cir. 2006)).

Given those limitations, the district court concluded that the relevant Postal Reorganization Act provisions were not susceptible to non-statutory review. J.A. 45-50. In reaching that conclusion, the court explained that many of the relevant provisions did not impose any "clear and mandatory," J.A. 47 (quotation omitted), limit on the Postal Service's authority; that the relevant provisions are generally phrased as "directive[s]" to the agency rather than as creating rights in organizations like NAPS, J.A. 48-49; and that Congress's inclusion of alternative dispute resolution provisions rather than a judicial cause of action suggested an intent to preclude judicial review, J.A. 49-50. And even assuming that the relevant statutory provisions were susceptible to non-statutory review, the district court concluded in the alternative that NAPS's complaint failed to allege sufficient facts to demonstrate that the Postal Service had acted ultra vires. J.A. 50-52. The court explained that NAPS's claims related to the pay package generally constituted "anecdotal" complaints about particular provisions or "general suggestions" for improvement, rather than allegations that the Postal Service had violated any specific statutory limitation. J.A. 50-51. And with respect to NAPS's claims related to its purported representation of all EAS employees (and specifically postmasters), the court explained that the Postal Service's interpretation of NAPS's representation authority as limited by statute to supervisors was "reasonable"

and, therefore, that the agency's refusal to recognize NAPS's representation of additional groups did not violate any clear statutory directive. J.A. 51-52.

This appeal followed.

SUMMARY OF ARGUMENT

I. Neither the APA nor the Postal Reorganization Act provides a cause of action allowing NAPS to obtain ordinary judicial review of the Postal Service's actions. Nevertheless, the agency recognizes that NAPS may obtain so-called "non-statutory," or ultra vires, review under a narrow doctrine derived from Supreme Court cases recognizing that, even in the absence of a statutory cause of action, a plaintiff may obtain review of claims that an agency has exceeded its statutory authority.

Although NAPS may seek non-statutory review, this Court has repeatedly explained that such review is "quite narrow" and "available only to determine whether the agency has acted ultra vires." *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014) (quotation omitted). In particular, NAPS may only prevail if it can demonstrate that the Postal Service has "plainly act[ed] in excess of its delegated powers," a standard that "covers only extreme agency error, not merely garden-variety errors of law or fact." *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (alteration and quotations omitted). And strictly enforcing those limitations on the scope of

non-statutory review is important to avoid undermining Congress's choice not to provide a cause of action covering claims like NAPS's and to ensure that plaintiffs may not use what is meant to be an extraordinary exception to routinely end-run the APA's limitations on judicial review.

II.A. NAPS fails to plausibly allege that the Postal Service acted ultra vires in implementing the Field 2016-19 Pay Package. NAPS argues first that the package violates statutory requirements to maintain a supervisory pay differential and to provide pay comparable to that provided by private-sector positions. But those statutory provisions are not limits on the Postal Service's authority. The Postal Reorganization Act vests broad authority in the Postal Service to "classify and fix the compensation and benefits of all officers and employees." 39 U.S.C. § 1003(a). The supervisory differential and comparability provisions are simply two of many (often conflicting) "policy" goals noted in the statute. Those goals guide Postal Service decisionmaking, but they are plainly not limitations on the Postal Service's authority enforceable through non-statutory ultra vires review.

Even assuming that some type of egregious disregard of those goals could properly form the basis of a challenge, no such circumstances exist here. NAPS acknowledges that the pay package includes a specific 5% "Supervisory Differential Adjustment," J.A. 13 (Compl. ¶¶ 36-37), and NAPS cannot

plausibly dispute that the Postal Service provided fair and adequate consideration to both the supervisory differential and the comparability goals. That NAPS believes that the agency's calculation should have included different elements or arrived at a different result does not give rise to an enforceable claim.

B. NAPS has also failed to plausibly allege that the Postal Service plainly violated its statutory authority in declining to recognize its representation of postmasters and by promulgating the Headquarters and Area Pay Package without consulting NAPS.

First, as the Postal Reorganization Act makes clear, *see* 39 U.S.C. § 1004(b), supervisors and postmasters are distinct groups of employees, and a supervisory organization such as NAPS may not also validly represent postmasters. That limitation sensibly reflects the fact that the statute's goal of efficient consultation is not served by allowing representation of distinct groups with distinct, and maybe even conflicting, interests. In any event, the Postal Service has at a minimum "raised compelling arguments regarding the proper interpretation of the disputed statutory provisions," *National Air Traffic Controllers Ass'n AFL-CIO v. Federal Serv. Impasses Panel*, 437 F.3d 1256, 1264 (D.C. Cir. 2006).

Second, the Headquarters and Area Pay Package expressly excludes from its coverage all employees represented by NAPS, which means that the Postal Service had no statutory obligation to consult NAPS before implementing it. And although NAPS cursorily asserts that it was entitled to consultation because it validly represents nearly all EAS employees, that assertion is incorrect. As NAPS's complaint acknowledges, *see* J.A. 7 (Compl. ¶ 6), EAS employees include not only supervisors validly represented by NAPS but also postmasters, managers, and various other professional and administrative employees, none of whom NAPS may represent. Thus, the Postal Service did not violate any statutory obligation by issuing a pay package covering a subset of those employees who NAPS does not appropriately represent.

STANDARD OF REVIEW

This Court "reviews *de novo* the District Court's decision to grant a motion to dismiss." *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 944 (D.C. Cir. 2017).

ARGUMENT

I. Review of the Postal Service's Actions in this Context Is Limited to Determining Whether the Postal Service Has Clearly Exceeded Its Statutory Authority

As the district court recognized, and as NAPS does not contest in this appeal, the Postal Service's actions in this context are not subject to ordinary judicial review under either the APA or the Postal Reorganization Act. Congress has explicitly exempted the Postal Service from the provisions of the APA, including its private cause of action to challenge agency decisions, *see* 39 U.S.C. § 410(a), and has not otherwise provided an applicable private right of action in the agency's organic statute.

In the absence of a statutory cause of action, "in exceptional circumstances, a district court may exercise federal jurisdiction to invalidate" an agency's action "made 'in excess of its delegated powers.'" *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500-01 (D.C. Cir. 1984) (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)); *cf. Northern Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 858 (D.C. Cir. 2012) ("[T]he Postal Service is exempt from review under the Administrative Procedure Act, but its actions are reviewable to determine whether it has acted in excess of its statutory authority."). That "non-statutory review" is, however, "quite narrow" and "available only to

determine whether the agency has acted ultra vires." *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014) (quotations omitted).

1. As this Court has explained, the "font of the nonstatutory review doctrine" is the Supreme Court's decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 190 n.21 (D.C. Cir. 2006). In *McAnnulty*, the Postmaster General had directed a local postmaster to cease delivering mail to an organization, which filed suit and sought to enjoin enforcement of that directive. Although the organization did not identify a statutory cause of action authorizing the suit, the Supreme Court concluded that the organization was entitled to relief, explaining that the organization "had the legal right" under the relevant statute "to have their letters delivered at the postoffice as directed" and that the Postmaster General's directive was "not authorized" by statute. *McAnnulty*, 187 U.S. at 109-10. As such, the Court concluded that the federal courts' general jurisdiction must encompass the ability to grant equitable relief against the Postmaster General's ultra vires action, because "[o]therwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Id.* at 110.

Following the enactment of the APA, the Supreme Court confirmed the continuing vitality of *McAnnulty*'s rule in *Leedom*, 358 U.S. 184. That case involved a challenge to the National Labor Relations Board's certification of a bargaining unit consisting of both professional and non-professional employees without taking a vote among the professional employees, despite a statutory provision declaring that "the Board shall not" certify such a mixed unit "unless a majority of such professional employees vote for inclusion in such unit." *Id.* at 185 (quoting 29 U.S.C. § 159(b)). The Court explained that the relevant statutory judicial review provisions did not provide for review of the certification order because such an order is not final, *id.* at 187, but that it was nevertheless appropriate to enjoin the Board's order as ultra vires. Because the Board's certification was "[p]lainly" an "attempted exercise of power that had been specifically withheld" and that "deprived the professional employees of a 'right' assured to them by Congress," the Court concluded, following in the tradition of *McAnnulty*, that federal district courts had jurisdiction over a suit "to prevent deprivation of a right so given." *Id.* at 189.

Since *Leedom*, this Court has similarly recognized that "in exceptional circumstances, a district court may exercise federal jurisdiction to invalidate" an agency "order made 'in excess of its delegated powers and contrary to a specific prohibition of'" a statute. *Council of Prison Locals*, 735 F.2d at 1500-01

(quoting *Leedom*, 358 U.S. at 188). But, this Court has repeatedly cautioned, such non-statutory review is "extraordinary," *id.* at 1501, and "extremely narrow in scope," *National Air Traffic Controllers Ass'n AFL-CIO v. Federal Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006).

As this Court has explained, *Leedom* "carefully and clearly delineated the narrow scope of its holding" by repeatedly explaining that the agency was charged with acting in excess of its powers and disobeying an express statutory command. *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 495-96 (D.C. Cir. 1980) (en banc). Thus, to obtain non-statutory review, a plaintiff must plausibly allege that the agency has "plainly act[ed] in excess of its delegated powers," a standard that captures "only extreme agency error, not merely garden-variety errors of law or fact." *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (alterations and quotations omitted); *cf. Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) ("The [*Leedom*] exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law.").

This Court has described the relevant scope of review in various terms. Consistent with *Leedom*'s description of the relevant statutory provision in that

case as a "clear and mandatory" "specific prohibition," 358 U.S. at 188, some of this Court's cases suggest (as the district court did here) that *Leedom* review "applies only when," among other things, the agency has acted "contrary to a specific prohibition in the statute that is clear and mandatory," *DCH Reg'l Med. Ctr.*, 925 F.3d at 509 (quotation omitted). In other cases, this Court has recognized that an agency may plainly exceed the bounds of its statutory authority by, for example, failing to comply with a "positive statutory command[]," *National Air Traffic Controllers Ass'n*, 437 F.3d at 1263; or clearly "depriv[ing]" a private party of a statutorily conferred right, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996); or construing an authorizing statute in an "utterly unreasonable and thus impermissible" manner, *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003).

Regardless of those variations in terminology, however, this Court has expressly and repeatedly confirmed that non-statutory review "is available only to determine whether the agency has acted ultra vires—that is, whether it has exceeded its statutory authority." *Mittleman*, 757 F.3d at 307 (quotations omitted); *see also, e.g.*, *Chamber of Commerce*, 74 F.3d at 1327 (explaining that the basis for non-statutory review is the principle that agency actions "must be justified by some law" (quotation omitted)); *Aid Ass'n for Lutherans*, 321 F.3d at

1175 (holding the Postal Service's regulation invalid only where it "exceed[ed] the agency's delegated authority" under the statute).

This Court has also repeatedly confirmed that a mere allegation that an agency has exceeded its statutory authority is not sufficient to allow federal courts to determine whether the agency's action was in fact lawful. Instead, to obtain relief through non-statutory review, a plaintiff must show that an agency has "plainly" or "clearly" exceeded its statutory authority. *DCH Reg'l Med. Ctr.*, 925 F.3d at 509 (quotation omitted) ("plainly"); *Council of Prison Locals*, 735 F.2d at 1501 ("clearly"). Thus, where both parties "have raised compelling arguments regarding the proper interpretation of the disputed statutory provisions," this Court has refused to conclusively determine the bounds of the statute or provide relief, explaining that such competing compelling arguments demonstrate that the agency has not "contravened a clear" limit on its statutory authority, "as required by *Leedom*." *National Air Traffic Controllers Ass'n*, 437 F.3d at 1264. And, similarly, where the validity of an agency action depends on whether the agency has correctly evaluated relevant facts in its "informed discretion," this Court has concluded that non-statutory review of the action is unavailable. *Physicians Nat'l House Staff Ass'n*, 642 F.2d at 496.

NAPS spends a substantial portion of its brief arguing that the "heavy burden" of establishing total nonreviewability falls on the Postal Service and assailing the district court's reasoning. *See* NAPS Br. 20-33. But the Postal Service does not contend that this case involves an "express" statutory "bar on judicial review," *DCH Reg'l Med. Ctr.*, 925 F.3d at 509, that would preclude review of any agency action. Rather, because the barrier to judicial review here is "implied," *id.* (quotation omitted), from the statute's withdrawal of the APA cause of action and from the broader statutory structure, limited ultra vires review is available. As this Court has explained, "[r]eviewability and the scope of review are two separate questions." *National Ass'n of Postal Supervisors v. U.S. Postal Serv.* (*NAPS*), 602 F.2d 420, 432 (D.C. Cir. 1979). Plaintiffs' assertions here fail to state a claim within the scope of ultra vires review.

2. Application of those principles in this case is particularly important to effectuate congressional intent. In enacting the Postal Reorganization Act, Congress expressly determined that the APA—including its provision of a cause of action to challenge certain agency actions—should not apply to the Postal Service. *See* 39 U.S.C. § 410(a). And although Congress has provided for judicial review of other Postal Service actions—including in the closely related context of allegations that the Postal Service has violated a collective bargaining agreement with lower-level employees—it has chosen not

to provide for judicial review of the Postal Service's actions in this context. *See, e.g.*, *id.* § 1208(b) (providing for judicial review of "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees"); *id.* §§ 3662-3663 (providing for both administrative and judicial review of complaints that the Postal Service is violating particular statutory provisions); *id.* § 409(c) (providing that the Postal Service may be sued for certain torts). Indeed, rather than providing for judicial review, Congress instead crafted an alternative dispute resolution mechanism, requiring the Postal Service to engage in a fact-finding process with organizations like NAPS and giving such organizations the right to convene a special panel to provide a report to Congress if they believe the dispute resolution mechanism is not working properly.

Congress's determination not to provide for judicial review in this context is consistent with the broader "legislative determination" that the Postal Service "must have the freedom given by the statute to control costs and manage" itself consistent with its own understanding "of what is the economical and efficient thing to do." *NAPS*, 602 F.2d at 432. Indeed, before the enactment of the Postal Reorganization Act, "Congress alone set postal rates and the wages of postal employees" while simultaneously requiring the Postal Service "to provide an efficiency-conscious nationwide postal delivery

system." *Id.* at 430. And the goal of the Act was to "afford the new postal agency with the control over revenue and costs" necessary to allow the Postal Service to structure its operations in a way that best enables it to meet its fundamental obligation to provide efficient national postal delivery. *Id.* at 430-31. Strictly limiting judicial review over the Postal Service's decisions related to supervisory compensation is a necessary component of achieving that statutory goal because courts are "in no position to assess and to weigh the numerous and sundry considerations the Postal Service must address in fulfilling its statutory duty to classify and fix the compensation and benefits of its employees." *Id.* at 432.

Plaintiff fails to recognize that ultra vires review does not simply duplicate review under the APA, which authorizes courts to set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Nonstatutory review "represents a more difficult course for [plaintiffs] than would review under the APA." *Trudeau*, 456 F.3d at 190.

II. The District Court Properly Dismissed NAPS's Claims

A. NAPS's Claims That the Postal Service's 2016-19 Field EAS Pay Package Was Issued Ultra Vires Fail

1. NAPS's allegations that the 2016-19 Field EAS Pay Package did not provide an adequate supervisory differential or comparable pay to the

private sector fail to state a cognizable claim for purposes of non-statutory review. Those claims fail for two different reasons: first, they fail because the relevant provisions do not impose constraints on the Postal Service's statutory authority that are enforceable through non-statutory review; and second, even if they did provide such enforceable constraints, the Postal Service has not violated—much less plainly violated—those provisions.

First, NAPS's claims fail at the threshold because the statutory provisions establishing a policy in favor of a supervisory pay differential and pay comparability do not represent limitations on the Postal Service's statutory authority. Congress has vested the Postal Service with exceptionally broad statutory authority relating to employee pay, providing in categorical terms that "the Postal Service shall classify and fix the compensation and benefits of all officers and employees in the Postal Service." 39 U.S.C. § 1003(a). And it is indisputable that, in promulgating the pay package, the Postal Service was acting within its statutory authority to "classify and fix the compensation and benefits" of the relevant employees.

In addition to that broad grant of statutory authority, Congress also provided for a number of general goals that the Postal Service should attempt to achieve. Among those goals are statements that it is the "policy" of the Postal Service to maintain comparability to the private sector, 39 U.S.C.

§ 1003(a), and to provide adequate supervisory pay differentials, *id.* § 1004(a). The Postal Service, in considering those aims, must weigh them together with other statutory goals, including that it is the "policy" of the Postal Service to give the "highest consideration" in all determinations to ensuring expeditious collection and delivery of important mail, *id.* § 101(e), and to provide "effective and regular" service to rural areas and small towns, *id.* § 101(b). Those general goals, which may at times be in tension, are not enforceable mandates. Congress knew how to provide clear statutory limitations, rather than advisory goals, when it wished to. In the same statutory subsection as the comparability goal, Congress expressly provided that "[n]o officer or employee shall be paid compensation at a rate in excess of the rate for level I of the Executive Schedule under section 5312 of title 5." *Id.* § 1003(a); *cf. id.* § 404a (providing for "[s]pecific limitations"—enforceable through administrative and judicial review, *see* 39 U.S.C. §§ 3662-3663—on the Postal Service's statutory authority).

At base, NAPS's argument is that, in considering its compliance with the supervisory differential and comparability goals, the Postal Service did not appropriately assess and weigh different factors or "entirely failed to consider" certain "important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But such

claims are, fundamentally, claims that the Postal Service's action was "arbitrary and capricious," *id.*, or that the agency did not engage in "reasoned decisionmaking," *Eagle Tr. Fund v. U.S. Postal Serv.*, 811 F. App'x 669, 670 (D.C. Cir. 2020), *petition for cert. filed*, No. 20-1026 (U.S. Jan. 25, 2021). And a "heartland arbitrary-and-capricious challenge under the APA" is not cognizable in non-statutory review because it is "not a claim that the [Postal] Service exceeded its statutory authority." *Id.*

Moreover, even if the comparability and supervisory differential provisions were to provide some limits on the agency's statutory authority, NAPS does not plausibly allege that the Postal Service violated—much less plainly violated—those provisions. With respect to the supervisory differential, NAPS's complaint admits that the pay package includes a specific 5% "Supervisory Differential Adjustment," which is intended "to ensure that EAS employees earn more than the clerks and carriers they supervise." J.A. 13 (Compl. ¶¶ 36-37). On its face, the inclusion of that differential adjustment satisfies any requirement in the statute that the Postal Service attempt to maintain a reasonable differential. And although NAPS complains about the particular method of calculating the differential adjustment, as well as about lower-level employees' ability to earn more quickly overtime and salary increases, *see* J.A. 13-15 (Compl. ¶¶ 37-41), NAPS cannot credibly claim that

the Postal Service's calculation method or its provision of overtime and pay increases to low-level employees is foreclosed—or plainly foreclosed—by the statute. *Cf. NAPS*, 602 F.2d at 433 (explaining that the statute "does not set a fixed differential," nor does it "define a precise relationship between the compensation received by one class of postal employees and that received by another").

Similarly, although NAPS cursorily alleges that "EAS compensation is not comparable" to the private sector, J.A. 12 (Compl. ¶ 34), and complains about various specific features of the Postal Service's compensation package or about compensation in particular locations, *see* J.A. 10-12 (Compl. ¶¶ 21-33), NAPS here too argues in essence that the Postal Service's determination was arbitrary and capricious. *Cf.* NAPS Br. 38-39. It does not assert that the statute requires parity or that the Postal Service failed to adhere to an established standard. And although NAPS complains about the scope and detail of the study, it admits that, as part of the fact-finding process and before promulgating the final pay package, the Postal Service "commissioned a study of nationwide salaries" for a set of the EAS positions. J.A. 10 (Compl. ¶ 23). Therefore, it is clear that the Postal Service was cognizant of the comparability provision and, in addition to bringing its own internal expertise to bear on the

issue, went so far as to commission an outside study to ensure it was meeting the policy goal.

Thus, even assuming that the provisions identified by NAPS represent enforceable limitations on the agency's statutory authority, it is clear that the Postal Service arrived at the pay package after considering the relevant facts and goals and in light of its "informed discretion." *Physicians Nat'l House Staff Ass'n*, 642 F.2d at 496. As such, NAPS's arguments that the Postal Service should have balanced the considerations differently or arrived at some other result do not provide a basis for relief through non-statutory review. *See id.*

2. Each of NAPS's contrary arguments is unavailing. First, NAPS contends, relying on this Court's decision in *NAPS*, that the supervisory differential imposes limits on statutory authority that are enforceable through non-statutory review. NAPS argues that the statute contains enforceable requirements that the Postal Service ensure "some supervisory differential" and that it "arrive[] at a good faith judgment regarding a differential that is adequate and reasonable in light of" the Act's various factors. NAPS Br. 35 (alterations and emphases omitted) (quoting *NAPS*, 602 F.2d at 435).

Although *NAPS* suggests that claims founded on the supervisory differential might be reviewable, that case did not explicitly consider the extent to which the supervisory differential provision actually represented a limit on

the Postal Service's statutory authority. And as more recent cases from this Court have expressly and repeatedly made clear, such a determination is essential to deciding whether a claim is cognizable for purposes of non-statutory review, because such review is "quite narrow" and "available only to determine whether the agency has acted ultra vires—that is, whether it has exceeded its statutory authority." *Mittleman*, 757 F.3d at 307 (quotations omitted). For all of the reasons given above, it is clear that neither the supervisory differential nor the comparability provision represents such a plain limit on the Postal Service's statutory authority, and non-statutory review does not permit this Court to impose or enforce the sort of discretionary requirements identified in *NAPS*.

In any event, whether or not a court could review a plain disregard of one of the statutory goals, that is plainly not the case here. Nowhere does NAPS specifically allege (with respect to either the supervisory differential or the comparability provision) that the Postal Service failed to arrive at a "good-faith" judgment reached "in light of" the various statutory factors. Indeed, as part of the consultation and fact-finding processes, the Postal Service is specifically required to give "full and fair consideration" to NAPS's and the fact-finding panel's recommendations and to provide an explanation to NAPS if it rejects any recommendation of NAPS or of the panel. *See* 39 U.S.C.

§ 1004(d)(2)(C), (f)(5). And NAPS has not alleged that the Postal Service failed to fulfill any of its obligations with respect to the consultation and fact-finding processes. Therefore, it is clear that the Postal Service has accorded the statutory factors, and NAPS's recommendations and arguments, fair consideration and arrived at a good-faith judgment—and, at the absolute least, NAPS has failed to plausibly allege that the Postal Service plainly violated either such requirement.

Separately, NAPS argues that the Postal Service's failure to explain how the package met both requirements violates a principle that agencies act ultra vires when they do not provide a contemporaneous explanation for their actions. *See* NAPS Br. 33-34, 36-37, 40. That argument relies primarily on *Northern Air Cargo*, 674 F.3d 852, in which the Postal Service had determined that Peninsula Airways, a private company, was permitted to enter particular service routes as a "mainline bypass mail carrier"; under the statute, the Postal Service could only permit such entry if the company "met certain statutory conditions." *Id.* at 855 (quotation omitted). When that decision was challenged by competitor companies, this Court explained that one of the relevant statutory conditions defining the scope of the Postal Service's authority was "one of the most extraordinary"—and extraordinarily ambiguous—"pieces of statutory language we have ever encountered." *Id.* at 858. Rather than granting

Chevron deference to the Postal Service's interpretation (explained for the first time in litigation) of that exceptionally ambiguous provision, this Court chose to remand to the agency to allow the Postal Service to explain its interpretation as part of the administrative adjudication process.

Northern Air Cargo did not transform the nature of ultra vires review by holding that an agency action without a contemporaneous formal explanation is ultra vires, a rule that would be flatly at odds with this Court's repeated admonitions that non-statutory review is "extraordinary," *Council of Prison Locals*, 735 F.2d at 1501, and "quite narrow," *Mittleman*, 757 F.3d at 307. Indeed, such a rule would improperly incorporate the requirements of the APA into non-statutory review. Instead, *Northern Air Cargo* simply made clear that even in non-statutory review cases, this Court will not afford *Chevron* deference to an agency's interpretation of a highly ambiguous limitation on its statutory authority if that interpretation was first advanced in litigation. It does not afford a basis for relief here.

In any event, neither NAPS nor the Postal Service claims that the provisions contain any ambiguity, nor is the Postal Service asking for *Chevron* deference for its interpretation of those provisions. And to the extent that the statute requires a contemporaneous justification when the agency rejects a recommendation in the consultation and fact-finding process, it is undisputed

that the Postal Service provided the required justification. *See* 39 U.S.C. § 1004(d)(2)(C), (f)(5).

B. NAPS's Claims Related to the Postal Service's Refusal to Recognize NAPS as Legitimately Representing Postmasters and Non-Supervisory Employees Also Fail

1. NAPS's claim that the Postal Service is acting ultra vires by refusing to consult with NAPS with respect to issues affecting postmasters fails because the Postal Reorganization Act does not clearly require the Postal Service to recognize NAPS's representation of postmasters.

In relevant part, the statute requires the Postal Service to consult with "recognized organizations of supervisory and other managerial personnel." 39 U.S.C. § 1004(b). In defining such "recognized organizations," the statute draws a clear distinction between a recognized "supervisory organization," a recognized postmasters' organization, and a recognized "managerial organization." *Id.* And, in particular, the statute makes clear that a single organization may not serve as both a supervisors' organization and a postmasters' (or a managerial) organization. To obtain recognition as a supervisory organization, an organization must demonstrate that it "represents a majority of supervisors." *Id.* But to obtain recognition as a postmasters' organization, an organization must both "represent[] at least 20 percent of postmasters" and be "other than an organization representing supervisors." *Id.*

And to obtain recognition as a managerial organization, an organization must both "represent[] a substantial percentage of managerial employees" and be "other than an organization representing supervisors or postmasters." *Id.* Thus, as the statute makes clear, a single organization may not be both a recognized supervisory organization and a recognized postmasters' organization—and, as such, may not obtain consultation rights with respect to both supervisors and postmasters.

Congress's determination in that provision that a single organization may not represent multiple groups of employees accords with similar limitations in other bargaining contexts. As this Court has explained, when a group of employees wishes to join together to collectively bargain under the National Labor Relations Act, the National Labor Relations Board is required to determine whether the employees' "proposed bargaining unit" is "'appropriate'" for collective bargaining. *Rhino Nw., LLC v. National Labor Relations Bd.*, 867 F.3d 95, 98 (D.C. Cir. 2017) (quoting 29 U.S.C. § 159(b)). As part of that analysis, the Board is required to ensure that "the petitioned-for employees . . . share a community of interest," *id.* (quotation omitted), because a "cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining and prevents a minority interest group from being submerged in an overly large unit," *National Labor Relations*

Bd. v. Action Auto., Inc., 469 U.S. 490, 494 (1985) (citation omitted). Similarly here, Congress's determination that a single organization may not validly represent both supervisors and postmasters reflects the reality that supervisors and postmasters (and managers) are distinct groups of employees with different, possibly even conflicting, interests—and that, as such, their representation by a single organization would not "serve the [statute's] purpose of effective" consultation.

In response to that straightforward understanding of the statute, NAPS isolates two pieces of statutory text that it says support its claim that it is entitled to consult on programs affecting postmasters. *See* NAPS Br. 41-44. But neither of NAPS's identified provisions can bear the weight that NAPS places on it.

First, NAPS points to language stating that recognized "organizations shall be entitled to participate directly in the planning and development of . . . programs relating to supervisory and other managerial employees." 39 U.S.C. § 1004(b). According to NAPS, the use of "and" in that provision suggests that, as a recognized organization, it is entitled to participation rights with respect to both supervisory "and" other EAS employees. But that misreads the statute. Section 1004(b) outlines the rights of all recognized organizations—supervisors', postmasters', and managers' organizations. In that context,

Congress provided that "such organizations" shall be entitled to participate in developing programs relating to supervisors "and" other managerial employees. But because that provision encompasses all such organizations collectively, nothing in that provision suggests that any particular organization is entitled to represent more than one group of employees.

Second, NAPS points to language stating that a supervisors' organization shall be entitled to consultation on programs "which affect members of the supervisors' organization." 39 U.S.C. § 1004(d). According to NAPS, because it claims a group of postmasters as "members," that language entitles it to consultation with respect to programs affecting postmasters. But a different provision of the statute confirms that an organization's relevant "members" do not include everybody who the organization happens to claim as a member. Instead, "members of the supervisors' organization" are limited to employees "who are recognized under an agreement between the Postal Service and the supervisors' organization as represented by such organization." *Id.* § 1004(i)(2) (quotation omitted). And here, NAPS's complaint makes clear that the Postal Service has refused to recognize postmasters as represented by the organization. Thus, under the statute, the postmasters are not in fact relevant "members of the supervisors' organization."

NAPS's contrary argument—that it is entitled to consultation with respect to programs affecting any employee who it claims as a member—cannot be reconciled with that definitional provision and would undermine Congress's clear determination that postmasters, supervisors, and managers do not share a sufficient community of interests to be effectively represented together. Moreover, under NAPS's understanding of the provision, a supervisors' organization that claims even a single postmaster or managerial employee as a member would be entitled to consultation with respect to all policies affecting postmasters or managerial employees. That outcome could not be reconciled with Congress's clear choice to require substantial representation thresholds for recognized organizations.

In short, section 1004 outlines three separate types of organizations—supervisory, postmasters', and managerial organizations—and provides that a given organization may obtain recognition as only one of those three. Because NAPS is a recognized supervisors' organization, it may not, as a matter of law, also be a recognized postmasters' organization—and it thus has no right to consultation on issues affecting postmasters. In any event, it is clear at a minimum that the Postal Service has "raised compelling arguments regarding the proper interpretation of the disputed statutory provisions," *National Air Traffic Controllers Ass'n*, 437 F.3d at 1264, and therefore NAPS has failed to

demonstrate that the Postal Service has plainly acted outside its authority by refusing to consult with NAPS on issues affecting postmasters.

2. For similar reasons, NAPS's claim that the Postal Service acted ultra vires in refusing to consult with NAPS when issuing the agency's Headquarters and Area Pay Package likewise fails. As NAPS's complaint recognizes, the Postal Service explicitly excluded from that pay package all employees who the Postal Services recognizes as represented by NAPS. J.A. 18-19 (Compl. ¶ 62). Thus, to succeed on its claim that the Postal Service plainly violated its statutory consultation obligation, NAPS must plausibly allege that it clearly validly represents some group of employees who are covered by the pay package. In attempting to meet that standard, NAPS states only that it "is the representative of all EAS employees" (other than a discrete group of postmasters represented by intervenor). J.A. 26 (Compl. ¶ 103).

That assertion is incorrect as a matter of law for two reasons. First, as explained above, the statute draws a distinction between supervisors, postmasters, and managers, and the Postal Service reasonably recognizes NAPS as a supervisory organization entitled to consultation only on programs affecting supervisors. And because supervisors, postmasters, and managers are all EAS employees, *see* J.A. 7 (Compl. ¶ 6), it is clear that NAPS does not represent all EAS employees. Second, even beyond postmasters and managers,

EAS employees also include a large number of "professionals and administrative employees," *id.*, many of whom are not encompassed at all by section 1004—and many of whom would be entitled to union representation and collective bargaining rights if a majority of an appropriate bargaining unit voted in favor of such representation, *cf.* 39 U.S.C. § 1202. Therefore, even if NAPS were correct that, as a recognized supervisory organization, it is entitled to consultation with respect to all of its postmaster and managerial members, it still would not be entitled to represent additional personnel like administrative employees. As such, even under NAPS's understanding of the statute, it is clear that NAPS does not in fact validly represent all EAS employees.

NAPS has thus failed to plausibly allege that it represents all EAS employees, and it has not even attempted to allege facts demonstrating that it represents any discrete set of EAS employees covered by the Headquarters and Area Pay Package. Therefore, it has failed to state a claim cognizable in non-statutory review related to the promulgation of that package.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,401 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Sean Janda
Sean Janda

ADDENDUM

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39 U.S.C. § 101

§ 101. Postal Policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of

convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

39 U.S.C. § 1003

§ 1003. Employment Policy

(a) Except as provided under chapters 2 and 12 of this title, section 8G of the Inspector General Act of 1978, or other provision of law, the Postal Service shall classify and fix the compensation and benefits of all officers and employees in the Postal Service. It shall be the policy of the Postal Service to maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy. No officer or employee shall be paid compensation at a rate in excess of the rate for level I of the Executive Schedule under section 5312 of title 5.

(b) Compensation and benefits for all officers and employees serving in or under the Office of Inspector General of the United States Postal Service shall be maintained on a standard of comparability to the compensation and benefits paid for comparable levels of work in the respective Offices of Inspector General of the various establishments named in section 11(2) 1 of the Inspector General Act of 1978.

(c) Compensation and benefits for all Postal Inspectors shall be maintained on a standard of comparability to the compensation and benefits paid for comparable levels of work in the executive branch of the Government outside of the Postal Service. As used in this subsection, the term ‘‘Postal Inspector’’ included 2 any agent to whom any investigative powers are granted under section 3061 of title 18.

(d) The Postal Service shall follow an employment policy designed, without compromising the policy of section 101(a) of this title, to extend opportunity to the disadvantaged and the handicapped.

39 U.S.C. § 1004

§ 1004. Supervisory and other managerial organizations

(a) It shall be the policy of the Postal Service to provide compensation, working conditions, and career opportunities that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel;

to provide adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel; to establish and maintain continuously a program for all such personnel that reflects the essential importance of a well-trained and well-motivated force to improve the effectiveness of postal operations; and to promote the leadership status of such personnel with respect to rank-and-file employees, recognizing that the role of such personnel in primary level management is particularly vital to the process of converting general postal policies into successful postal operations.

(b) The Postal Service shall provide a program for consultation with recognized organizations of supervisory and other managerial personnel who are not subject to collective-bargaining agreements under chapter 12 of this title. Upon presentation of evidence satisfactory to the Postal Service that a supervisory organization represents a majority of supervisors, that an organization (other than an organization representing supervisors) represents at least 20 percent of postmasters, or that a managerial organization (other than an organization representing supervisors or postmasters) represents a substantial percentage of managerial employees, such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees.

(c)(1) The Postal Service and the supervisors' organization shall, unless otherwise mutually agreed to, meet at least once each month to implement the consultation and direct participation procedures of subsection (b) of this section.

(2)(A) At least 7 days before each meeting, each party shall—

(i) provide notice of agenda items, and

(ii) describe in detail the proposals such party will make with respect to each such item.

(B) Grievances of individual employees shall not be matters which may be included as agenda items under this paragraph.

(d)(1) In order to facilitate consultation and direct participation by the supervisors' organization in the planning and development of programs under subsection (b) of this section which affect members of the supervisors' organization, the Postal Service shall—

(A) provide in writing a description of any proposed program and the reasons for it;

(B) give the organization at least 60 days (unless extraordinary circumstances require earlier action) to review and make recommendations with respect to the program; and

(C) give any recommendation from the organization full and fair consideration in deciding whether or how to proceed with the program.

(2) If the Postal Service decides to implement a program described in paragraph (1) of this subsection, the Postal Service shall before such implementation—

(A) give the supervisors' organization details of its decision to implement the program, together with the information upon which the decision is based;

(B) give the organization an opportunity to make recommendations with respect to the program; and

(C) give such recommendations full and fair consideration, including the providing of reasons to the organization if any of such recommendations are rejected.

(3) If a program described in paragraph (1) of this subsection is implemented, the Postal Service shall—

(A) develop a method for the supervisors' organization to participate in further planning and development of the program, and

(B) give the organization adequate access to information to make that participation productive.

(4) The Postal Service and the supervisors' organization may, by agreement, adopt procedures different from those provided by this subsection.

(e)(1) The Postal Service shall, within 45 days of each date on which an agreement is reached on a collective bargaining agreement between the Postal Service and the bargaining representative recognized under section 1203 of this title which represents the largest number of employees, make a proposal for any changes in pay policies and schedules and fringe benefit programs for members of the supervisors' organization which are to be in effect during the same period as covered by such agreement.

(2) The Postal Service and the supervisors' organization shall strive to resolve any differences concerning the proposal described in paragraph (1) of this subsection under the procedures provided for, or adopted under, subsection (d) of this section.

(3) The Postal Service shall provide its decision concerning changes proposed under paragraph (1) of this subsection to the supervisors' organization within 90 days following the submission of the proposal.

(f)(1) If, notwithstanding the mutual efforts required by subsection (e) of this section, the supervisors' organization believes that the decision of the Postal Service is not in accordance with the provisions of this title, the organization may, within 10 days following its receipt of such decision, request the Federal Mediation and Conciliation Service to convene a factfinding panel (hereinafter referred to as the ''panel'') concerning such matter.

(2) Within 15 days after receiving a request under paragraph (1) of this subsection, the Federal Mediation and Conciliation Service shall provide a list of 7 individuals recognized as experts in supervisory and managerial pay policies. Each party shall designate one individual from the list to serve on the panel. If, within 10 days after the list is provided, either of the parties has not designated an individual from the list, the Director of the Federal Mediation and Conciliation Service shall make the designation. The first two individuals designated from the list shall meet within 5 days and shall designate a third individual from the list. The third individual shall chair the panel. If the two individuals designated from the list are unable to designate a third individual within 5 days after their first meeting, the Director shall designate the third individual.

(3)(A) The panel shall recommend standards for pay policies and schedules and fringe benefit programs affecting the members of the supervisors' organization for the period covered by the collective bargaining agreement specified in subsection (e)(1) of this section. The standards shall be consistent with the policies of this title, including sections 1003(a) and 1004(a) of this title.

(B) The panel shall, consistent with such standards, make appropriate recommendations concerning the differences between the parties on such policies, schedules, and programs.

(4) The panel shall make its recommendation no more than 30 days after its appointment, unless the Postal Service and the supervisors' organization agree to a longer period. The panel shall hear from the Postal Service and the

supervisors' organization in such a manner as it shall direct. The cost of the panel shall be borne equally by the Postal Service and the supervisors' organization.

(5) Not more than 15 days after the panel has made its recommendation, the Postal Service shall provide the supervisors' organization its final decision on the matters covered by factfinding under this subsection. The Postal Service shall give full and fair consideration to the panel's recommendation and shall explain in writing any differences between its final decision and the panel's recommendation.

(g) Not earlier than 3 years after the date of the enactment of this subsection, and from time to time thereafter, the Postal Service or the supervisors' organization may request, by written notice to the Federal Mediation and Conciliation Service and to the other party, the creation of a panel to review the effectiveness of the procedures and the other provisions of this section and the provisions of section 1003 of this title. The panel shall be designated in accordance with the procedure established in subsection (f)(2) of this section. The panel shall make recommendations to the Congress for changes in this title as it finds appropriate.

(h)(1) In order to ensure that postmasters and postmasters' organizations are afforded the same rights under this section as are afforded to supervisors and the supervisors' organization, subsections (c) through (g) shall be applied with respect to postmasters and postmasters' organizations—

(A) by substituting ''postmasters' organization'' for ''supervisors' organization'' each place it appears; and

(B) if 2 or more postmasters' organizations exist, by treating such organizations as if they constituted a single organization, in accordance with such arrangements as such organizations shall mutually agree to.

(2) If 2 or more postmasters' organizations exist, such organizations shall, in the case of any factfinding panel convened at the request of such organizations (in accordance with paragraph (1)(B)), be jointly and severally liable for the cost of such panel, apart from the portion to be borne by the Postal Service (as determined under subsection (f)(4)).

(i) For purposes of this section—

(1) ''supervisors' organization'' means the organization recognized by the Postal Service under subsection (b) of this section as representing a majority of supervisors;

(2) ''members of the supervisors' organization'' means employees of the Postal Service who are recognized under an agreement between the Postal Service and the supervisors' organization as represented by such organization;

(3) ''postmaster'' means an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors;

(4) ''postmasters' organization'' means an organization recognized by the Postal Service under subsection (b) as representing at least 20 percent of postmasters; and

(5) ''members of the postmasters' organization'' shall be considered to mean employees of the Postal Service who are recognized under an agreement—

(A) between the Postal Service and the postmasters' organization as represented by the organization; or

(B) in the circumstance described in subsection (h)(1)(B), between the Postal Service and the postmasters' organizations (acting in concert) as represented by either or any of the postmasters' organizations involved.