

# NATIONAL ASSOCIATION OF POSTAL SUPERVISORS

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February 22, 2021

## **Board Memo 014-2021: NAPS Files Brief in Appeal Seeking Reversal of District Court Decision**

Executive Board,

NAPS HQ filed an appeal brief in the U.S. Court of Appeals for the District of Columbia Circuit on February 19. Attached is a newsbreak with more information and a link to the brief and appendix filed.

Please share this memo and attached with your membership. This Board Memo will be posted on the NAPS website, too.

Thank you and be safe.

NAPS Headquarters

No. 20-5280

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

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National Association of Postal Supervisors,

*Plaintiff-Appellant,*

v.

United States Postal Service,

*Defendant-Appellee,*

United Postmasters and Managers of America,

*Intervenor Defendant-Appellee.*

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

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**BRIEF FOR APPELLANT**

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February 19, 2021

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## **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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*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. Rsv. 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.<sup>1</sup>

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

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<sup>1</sup> 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 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.



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.

**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.<sup>2</sup> 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.

**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

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

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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February 19, 2021

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

JOINT APPENDIX

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APPEAL,CLOSED,TYPE-E

**U.S. District Court**  
**District of Columbia (Washington, DC)**  
**CIVIL DOCKET FOR CASE #: 1:19-cv-02236-RCL**

NATIONAL ASSOCIATION OF POSTAL SUPERVISORS v.  
UNITED STATES POSTAL SERVICE  
Assigned to: Judge Royce C. Lamberth  
Case in other court: USCA, 20-05280  
Cause: 39:0409 Action by or against the Postal Service

Date Filed: 07/26/2019  
Date Terminated: 07/17/2020  
Jury Demand: None  
Nature of Suit: 890 Other Statutory Actions  
Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
07/26/2019	<a href="#"><u>1</u></a>	COMPLAINT against All Plaintiffs ( Filing fee \$ 400 receipt number 0090-6282161) filed by NATIONAL ASSOCIATION OF POSTAL SUPERVISORS. (Attachments: # <a href="#"><u>1</u></a> Civil Cover Sheet, # <a href="#"><u>2</u></a> Summons)(Espo, Joseph) (Entered: 07/26/2019)
07/29/2019	<a href="#"><u>2</u></a>	NOTICE of Appearance by Jean M. Zachariasiewicz on behalf of NATIONAL ASSOCIATION OF POSTAL SUPERVISORS (Zachariasiewicz, Jean) (Entered: 07/29/2019)
07/29/2019	<a href="#"><u>3</u></a>	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Andrew D. Freeman, :Firm-Brown, Goldstein & Levy LLP, :Address- 120 E. Baltimore Street, Suite 1700, Baltimore, MD 21202. Phone No. - (410) 962-1030. Fax No. - (410) 385-0869 Filing fee \$ 100, receipt number 0090-6284072. Fee Status: Fee Paid. by NATIONAL ASSOCIATION OF POSTAL SUPERVISORS (Attachments: # <a href="#"><u>1</u></a> Declaration)(Zachariasiewicz, Jean) (Entered: 07/29/2019)
07/29/2019	<a href="#"><u>4</u></a>	NOTICE OF WITHDRAWAL OF APPEARANCE as to NATIONAL ASSOCIATION OF POSTAL SUPERVISORS. Attorney Joseph B. Espo terminated. (Espo, Joseph) (Entered: 07/29/2019)

2/12/2021

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		07/29/2019)
07/30/2019		Case Assigned to Judge Royce C. Lamberth. (zrdj) (Entered: 07/30/2019)
07/30/2019	<a href="#">5</a>	SUMMONS (3) Issued Electronically as to UNITED STATES POSTAL SERVICE, U.S. Attorney and U.S. Attorney General (Attachments: # <a href="#">1</a> Notice and Consent)(zrdj) (Entered: 07/30/2019)
07/30/2019		MINUTE ORDER granting <a href="#">3</a> Motion for Leave to Appear Pro Hac Vice. Signed by Judge Royce C. Lamberth on 07/30/2019. (lcrcl2) (Entered: 07/30/2019)
07/31/2019	<a href="#">6</a>	NOTICE of Appearance by Andrew D. Freeman on behalf of NATIONAL ASSOCIATION OF POSTAL SUPERVISORS (Freeman, Andrew) (Entered: 07/31/2019)
08/02/2019	<a href="#">7</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 8/2/2019. Answer due for ALL FEDERAL DEFENDANTS by 10/1/2019. (Freeman, Andrew) (Entered: 08/02/2019)
08/02/2019	<a href="#">8</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 08/02/2019. (Freeman, Andrew) (Entered: 08/02/2019)
08/02/2019	<a href="#">9</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES POSTAL SERVICE served on 8/2/2019 (Freeman, Andrew) (Entered: 08/02/2019)
09/26/2019	<a href="#">10</a>	Consent MOTION for Extension of Time to <i>Answer or Otherwise Respond to Complaint</i> by UNITED STATES POSTAL SERVICE (Attachments: # <a href="#">1</a> Proposed Order)(Simon, Jeremy) (Entered: 09/26/2019)
09/26/2019		MINUTE ORDER granting <a href="#">10</a> Motion for Extension of Time to Answer or Otherwise Respond to Complaint. Defendant shall have until, and including, October 25, 2019, to answer or otherwise respond to the Complaint. Signed by Judge Royce C. Lamberth on 09/26/2019. (lcrcl2) (Entered: 09/26/2019)
10/25/2019	<a href="#">11</a>	MOTION to Dismiss <i>and Supporting Memorandum</i> by UNITED STATES POSTAL SERVICE (Attachments: # <a href="#">1</a> Proposed Order)(Simon, Jeremy) (Entered: 10/25/2019)
10/30/2019	<a href="#">12</a>	Consent MOTION for Extension of Time to <i>File an Opposition to Defendant's Motion to Dismiss Complaint</i> by NATIONAL ASSOCIATION OF POSTAL SUPERVISORS (Attachments: # <a href="#">1</a> Text of Proposed Order)(Freeman, Andrew) (Entered: 10/30/2019)
10/31/2019	<a href="#">13</a>	ORDER granting <a href="#">12</a> Motion for Extension of Time to File an Opposition to Defendant's Motion to Dismiss. Plaintiff shall have until November 20, 2019, to file an opposition. Signed by Judge Royce C. Lamberth on 10/31/2019. (lcrcl2) (Entered: 10/31/2019)
11/01/2019		Set/Reset Deadlines: Response to Dispositive Motions due by 11/20/2019. (lsj) (Entered: 11/01/2019)
11/07/2019	<a href="#">14</a>	Unopposed MOTION to Intervene by UNITED POSTMASTERS AND MANAGERS OF AMERICA (Attachments: # <a href="#">1</a> Memorandum in Support Memorandum Of Points And Authorities In Support Of Motion To Intervene By United Postmasters And Managers Of America, # <a href="#">2</a> Exhibit Exhibit 1 Proposed Motion To Dismiss)(Greenbaum, Jonathan) Modified on 11/7/2019 (ztd). (Entered: 11/07/2019)
11/14/2019	<a href="#">15</a>	NOTICE of Appearance by Kobie A. Flowers on behalf of NATIONAL ASSOCIATION OF POSTAL SUPERVISORS (Flowers, Kobie) (Entered: 11/14/2019)
11/20/2019	<a href="#">16</a>	Memorandum in opposition to re <a href="#">11</a> MOTION to Dismiss <i>and Supporting Memorandum</i>

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		filed by NATIONAL ASSOCIATION OF POSTAL SUPERVISORS. (Freeman, Andrew) (Entered: 11/20/2019)
11/25/2019	<a href="#">17</a>	Unopposed MOTION for Extension of Time to <i>File Reply In Support Of Motion To Dismiss</i> by UNITED STATES POSTAL SERVICE (Attachments: # <a href="#">1</a> Proposed Order) (Simon, Jeremy) (Entered: 11/25/2019)
11/25/2019	<a href="#">18</a>	ORDER granting <a href="#">17</a> Motion for Extension of Time to File Reply. Defendant shall file its reply no later than December 20, 2019. Signed by Judge Royce C. Lamberth on 11/25/2019. (lcrcl2) (Entered: 11/25/2019)
11/26/2019		Set/Reset Deadlines: Replies due by 12/20/2019. (lsj) (Entered: 11/26/2019)
12/03/2019		MINUTE ORDER granting <a href="#">14</a> Unopposed Motion to Intervene. Signed by Judge Royce C. Lamberth on 12/03/2019. (lcrcl2) (Entered: 12/03/2019)
12/03/2019	<a href="#">19</a>	MOTION to Dismiss by UNITED POSTMASTERS AND MANAGERS OF AMERICA (jf) (Entered: 12/03/2019)
12/17/2019	<a href="#">20</a>	REPLY to opposition to motion re <a href="#">11</a> MOTION to Dismiss <i>and Supporting Memorandum Intervenor; United Postmasters And Managers Of America Reply Brief</i> filed by UNITED POSTMASTERS AND MANAGERS OF AMERICA. (Greenbaum, Jonathan) (Entered: 12/17/2019)
12/20/2019	<a href="#">21</a>	REPLY to opposition to re <a href="#">19</a> MOTION to Dismiss filed by UNITED STATES POSTAL SERVICE. (Simon, Jeremy) Modified text on 12/20/2019 (ztd). (Entered: 12/20/2019)
07/17/2020	<a href="#">22</a>	MEMORANDUM OPINION. Signed by Judge Royce C. Lamberth on 07/17/2020. (lcmb) (Entered: 07/17/2020)
07/17/2020	<a href="#">23</a>	ORDER granting <a href="#">11</a> Motion to Dismiss and <a href="#">19</a> Motion to Dismiss. Signed by Judge Royce C. Lamberth on 07/17/2020. (lcmb) (Entered: 07/17/2020)
09/11/2020	<a href="#">24</a>	NOTICE OF APPEAL TO DC CIRCUIT COURT by NATIONAL ASSOCIATION OF POSTAL SUPERVISORS. Filing fee \$ 505, receipt number ADCDC-7581466. Fee Status: Fee Paid. Parties have been notified. (Zachariasiewicz, Jean) (Entered: 09/11/2020)
09/13/2020	<a href="#">25</a>	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re <a href="#">24</a> Notice of Appeal to DC Circuit Court. (zjf) (Entered: 09/13/2020)
09/15/2020		USCA Case Number 20-5280 for <a href="#">24</a> Notice of Appeal to DC Circuit Court filed by NATIONAL ASSOCIATION OF POSTAL SUPERVISORS. (zrdj) (Entered: 09/15/2020)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
02/12/2021 16:28:20			
<b>PACER Login:</b>	sdoyle060	<b>Client Code:</b>	03983.002
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:19-cv-02236-RCL
<b>Billable Pages:</b>	3	<b>Cost:</b>	0.30

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

NATIONAL ASSOCIATION OF  
POSTAL SUPERVISORS  
1727 King Street, Suite 400  
Alexandria, Virginia 22314,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE  
475 L’Enfant Plaza, SW  
Washington, DC 20260,

Defendant.

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Case No. 1:19-cv-2236

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**COMPLAINT**

The National Association of Postal Supervisors (“NAPS”) files this complaint against the United States Postal Service (“USPS” or “the Postal Service”) for failing to meet statutory requirements regarding compensation for postal supervisors, managers, and other professional and administrative employees who are not covered by collective bargaining agreements, and alleges as follows:

**INTRODUCTION**

1. By failing to adequately compensate its Executive and Administrative Schedule (“EAS”) employees – the nearly 50,000 managers, supervisors, and other middle-management employees who are not members of collective bargaining units – the Postal Service violates the Postal Reorganization Act of 1970 (“the Act”), 39 U.S.C. §§ 101, 1003, and 1004, and contributes to the Postal Service’s terrible morale problems. After the Postal Service belatedly announced its “final” pay package for “Field EAS employees” for Fiscal Years 2016-2019 in June 2018, NAPS, pursuant to the Act, sought and obtained review by a three-person fact-finding



panel convened by the Federal Mediation and Conciliation Service, as provided by the Act. In April 2019, that fact-finding panel issued a unanimous report and recommendation, finding that the Postal Service was and is violating the Act by inadequately compensating its EAS employees in a variety of manners, and that this inadequate compensation contributes to severe morale problems as well as problems with the attraction and retention of qualified supervisors and managers. In May 2019, the Postal Service rejected most of the factfinding panel's substantive recommendations and issued a new "Final Field EAS Pay Package" that suffers from the same deficiencies – and violates the Act in the same manners – as the previous "final" pay package. This lawsuit also challenges the Postal Service's refusal to consult with NAPS regarding compensation for EAS employees classified by the Postal Service as "Headquarters" or "Area" EAS employees (subcategories that are not recognized by the Act) and the Postal Service's refusal to recognize NAPS as the representative of the thousands of postmasters who are members of NAPS, also in violation of the Act.

### **PARTIES**

2. Plaintiff National Association of Postal Supervisors is a "recognized organization[] of supervisory and other managerial personnel" employed by the United States Postal Service "who are not subject to collective-bargaining agreements." 39 U.S.C. § 1004(b). NAPS represents approximately 27,000 active and retired USPS managers, supervisors, postmasters, and other professionals. NAPS's headquarters is located in Alexandria, Virginia, and it has almost 280 local branches across all 50 states as well as Guam, Puerto Rico, and the U.S. Virgin Islands.

3. Defendant the United States Postal Service is an independent federal agency that delivers 47 percent of the world's mail to nearly 159 million delivery points. It has

approximately 625,000 employees and annual revenue exceeding \$70 billion. USPS's headquarters is located in the District of Columbia.

### **JURISDICTION AND VENUE**

4. This Court has 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 has jurisdiction under 28 U.S.C. § 1339, which states that “[t]he district courts shall have original jurisdiction arising under any Act of Congress relating to the postal service.”

5. Venue is proper under 28 U.S.C. § 1391(e), which provides that a suit against a federal agency is appropriate where “a defendant resides,” “a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the action is situated,” or the “plaintiff resides.” USPS headquarters is located in the District of Columbia, the decisions challenged in this case were made at that headquarters, and a substantial number of NAPS members affected by those decisions work or reside in the District.

### **STATEMENT OF FACTS**

#### **A. Background**

6. Approximately 49,000 of the Postal Service's 625,000 employees are EAS employees – managers, supervisors, postmasters, and other professionals and administrative employees who, under the direction of the organization's approximately 500 executives, manage its approximately 442,000 career and 133,000 non-career employees (carriers, clerks, and others who are represented by four bargaining units).

7. EAS employees are distributed among over 1,000 job titles and job levels.

8. The Postal Reorganization Act of 1970 requires the Postal Service to compensate its employees, including its EAS employees, comparably to employees at similar jobs in the private sector. 39 U.S.C. § 1003(a). The Postal Service must ensure that both the “rates and types of compensation” that it pays its officers and employees are comparable to those in the private sector. 39 U.S.C. § 101(c).

9. Under the Act, *id.* § 1004(a), the Postal Service must also:

- a. “provide compensation, working conditions, and career opportunities that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel;”
- b. “provide adequate and reasonable differentials in rates of pay” between carriers and clerks and supervisory and other managerial personnel; and
- c. “establish and maintain continuously a [compensation and promotion] program ... that reflects the essential importance of a ... well-motivated force to improve the effectiveness of postal operations.”

10. As a “recognized organization of supervisory and other managerial personnel who are not subject to collective-bargaining agreements,” NAPS is 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.* § 1004(b).

11. The Act sets out a timeline for engagement between USPS and NAPS on pay policies and schedules and fringe benefit programs. *See id.* § 1004(d)-(e).

12. NAPS is entitled to review and make recommendations with respect to any USPS proposed pay policies and schedules and fringe benefit programs, and USPS must give NAPS’s recommendations “full and fair consideration.” *Id.* § 1004(d)(1).

13. If NAPS believes that any USPS final decision regarding pay policies and schedules and fringe benefit programs does not meet the statutory requirements for EAS compensation, NAPS may request that the Federal Mediation and Conciliation Service (“FMCS”) convene a factfinding panel concerning the decision. *Id.* § 1004(f)(1).

14. The panel must recommend standards for pay policies and schedules and fringe benefit programs affecting NAPS members, consistent with the policies of the Act. *Id.* § 1004(f)(3).

15. Within 15 days of the panel’s recommendation, USPS must provide NAPS with its final decision, giving “full and fair consideration to the panel’s recommendation.” *Id.* § 1004(f)(5).

**B. The Postal Service’s 2016-2019 EAS Pay Package Decision**

16. In September 2017, after reaching a retroactive collective bargaining agreement with the National Association of Letter Carriers for the years 2016-2019, the Postal Service sent a proposed “EAS Pay Package Proposal/Fiscal Years 2016-2019/Field EAS Employees” to NAPS.

17. The package covered six areas regarding EAS pay and benefits: Pay for Performance, Salary Ranges, Health Benefits Contribution, Promotional Pay Increase, Position Upgrade, and Work Groups.

18. Between September 2017 and June 2018, NAPS and the Postal Service consulted via meetings, letters, and emails regarding the proposed pay package.

19. The Postal Service rejected most of NAPS’s recommendations regarding the EAS Pay Package and issued a “final” decision on June 28, 2018, which it revised slightly on July 20, 2018.

20. On July 6, 2018, NAPS wrote to the FMCS to request the factfinding process provided under 39 U.S.C. § 1004(f).

**C. The Postal Service Fails to Compensate EAS Employees Comparably to Similar Jobs in the Private Sector**

21. The Postal Service's compensation for its supervisors, managers, professionals, and administrators (i.e., all of its non-postmaster EAS employees) is significantly below compensation that comparable private sector companies provide for comparable jobs.

22. The Postal Service has not ensured that EAS compensation matches market compensation for comparable private sector jobs, nor has it ensured that its compensation keeps pace with increases in the private sector.

23. The Postal Service neither conducted nor obtained any surveys or studies regarding private sector compensation between 2012 and its July 2018 final EAS Pay Package Decision for Fiscal Years 2016-2019. In preparation for the factfinding hearing in December 2018, the Postal Service commissioned a study of nationwide salaries for eight of its approximately 1,000 EAS positions, but that study did not consider the total compensation for any of those positions, nor did the study look at what the private sector pays in high-wage locations. Thus, the Postal Service does not regularly maintain data to ensure that its EAS compensation is comparable to compensation for similar jobs in the private sector.

24. Unlike the rest of the federal government and all employers with nationally dispersed worksites, the Postal Service does not provide for locality pay. Thus, in high-wage areas such as New York, San Francisco, and Washington, D.C., the Postal Service's compensation is more than 20% below what private companies pay for comparable jobs.

25. It is also standard practice in the private sector to provide for annual or biennial reviews of market compensation and make adjustments to salary levels as needed to remain

competitive. But EAS employees receive no pay increase tied to increases in market rates of pay or inflation due to USPS policy.

26. Instead, all EAS pay increases (other than by promotion or as a result of the Supervisory Differential Adjustment, discussed below) are determined by the Postal Service's Pay for Performance ("PFP") system. As found by the factfinding panel "the PFP system, as constructed and implemented by the Service, does not satisfy the statutory criteria of comparability and the maintenance of a well-motivated workforce."

27. In many years, all or a substantial number of EAS employees (even employees who perform well) receive no pay increase or minimal pay increases, even when market rates increase substantially. In 2012 and 2013, no EAS employee received a pay increase, and in 2014, they all received only a 1% pay increase. In 2015, the average increase was less than 2%. In 2016, the average increase was only 1.3%, and over 11,500 EAS employees (over 38% of non-postmasters) received no pay increase. In 2017, the average increase was 2.6%. In 2018, the average pay increase was only 1.3%, and over 5,000 EAS employees (16%) did not receive any pay increase.

28. In 2019 (based on the FY2018 PFP), the average increase for EAS salaries was again under 2%. In 2019, 18.5% of EAS employees received a 2.5% raise, 38.2% received a 2.0% raise, and 38.5% (over 16,500 EAS employees) received no pay increase at all. Less than 5% of EAS employees received a raise greater than 2.5%.

29. According to the Postal Service, in the nine years from FY 2009 to FY 2018, the average Field EAS salary increased by a *total* of 6%.

30. These increases contrast with comparable private sector employees, whose average and median salaries have increased by approximately 3% *annually* for the last several years.

31. These salary gains in the private sector do not reflect total compensation, since typical private-sector employees also earn bonuses of seven-to-ten percent of their salary, which EAS employees do not receive.

32. The meager or non-existent EAS pay increases also contrast with the members of USPS bargaining units (the employees supervised and managed by the EAS employees), all of whom received annual pay raises in the 2016-2019 contracts negotiated with the Postal Service.

33. In addition, EAS employees at the top of the salary ranges for their pay grade are eligible only for a lump sum payment rather than an increase in base salary. Thus for 2018, the approximately 4,000 EAS employees at the top of their pay grade received no pay increase, but at most a lump sum payment if they were in box 4 or higher of the 15-box PFP pay matrix (since boxes 1 through 3 provide for no increase at all).

34. As a result of these multiple failures of the Postal Service to ensure that EAS employee salaries keep pace with their private-sector peers, the midpoint of salary ranges for EAS employees is almost always below the national average. After accounting for additional cash compensation widely offered in the private sector (bonuses, stock options, etc.) and for locality pay, EAS total cash compensation lags far behind the private sector. Thus, EAS compensation is not comparable to the rates and types of compensation paid in the private sector for comparable jobs, in violation of 39 U.S.C. §§ 1003(a) and 101(c).

**D. The Postal Service Does Not Provide an Adequate Differential Between What It Pays Clerks and Carriers and What It Pays Their Supervisors and Managers**

35. Despite the statutory requirement for “adequate and reasonable differentials in the rates of pay” between clerks and carriers and the EAS employees who supervise and manage them, thousands of EAS employees supervise tens of thousands of craft employees whose base salary exceeds their supervisor’s, despite the fact that supervisors generally work the same or longer hours. Once overtime is taken into account, tens of thousands more craft employees earn more than their supervisors (on an hourly basis).

36. The Postal Service uses a Supervisory Differential Adjustment (“SDA”) that purports to ensure that EAS employees earn more than the clerks and carriers they supervise but in practice fails to meet that statutory requirement.

37. Three interrelated problems with the way the Postal Service calculates its SDA result in thousands of EAS employees earning less than the craft workers they supervise: The first problem involves the Postal Service’s use of a lower-paid clerk position (rather than a higher-paid and more populous carrier position) as the benchmark for the calculation of the SDA minimum for the “all other” category of EAS positions. The second problem involves the ability of craft employees to earn overtime at a substantially higher rate than their supervisors, quickly surpassing their supervisors in total cash compensation. The third problem involves the inadequacy of the 5% differential, which contributes to problems 1 and 2.

38. For over a decade, the Postal Service has calculated its SDA by grouping all front-line supervisors into four categories (Plant Maintenance, Vehicle Services, Postal Police, and All Other Eligible) and then (until recently) adding 5% to the salary of the most populous craft position supervised by EAS employees in each category. The fourth category of supervisors, “All Other Eligible” EAS employees, lumps a wide range of EAS positions into one



category, ignoring the fact that some of those positions supervise craft employees who earn substantially more than the salary for the clerk position that the Postal Service uses to set the “SDA minimum” for the entire “All Other Eligible” category. The fact-finding panel found that this “overly broad approach” to calculating the SDA “has, in many instances, resulted in ... unreasonable and inadequate pay differentials when applied to individual supervisors.”

39. For example, for the 2016-2019 EAS Pay Package, the Postal Service has refused to calculate the SDA minimum salary for Supervisors of Customer Service based on the salary of the City Carriers they supervise (\$64,413 as of November 2018), despite the fact that there are 105,000 City Carriers, Step O, making it the most populous position and step in the entire Postal Service. Instead, it calculates the SDA for Supervisors of Customer Service based on a lower Clerk salary (\$60,737 as of September 2018). The result is that in FY2019, over 4,100 Supervisors of Customer Service, the vast majority of whom supervise City Carriers, received an SDA minimum salary of \$63,774 (105% of \$60,737) that is over \$600 less than the \$64,413 base salary for the City Carriers they supervise.

40. The inadequacy of the SDA is compounded by the fact that clerks and carriers earn overtime after fewer hours worked than their supervisors and at a higher rate than their supervisors. Craft employees are entitled to time-and-a-half pay for overtime after eight hours (and double-pay after 10 hours), while supervisors are, at most, paid for extra hours at their usual hourly rate after eight-and-a-half hours. Many supervisors and managers get no overtime pay at all. Many clerks and carriers work substantial overtime, and thus many craft employees (even those whose base salary is less than their supervisors’) earn more than their supervisors who work the same hours. This problem of significant numbers of line employees using overtime to out-earn their supervisors is not a problem in the private sector, as private employers typically

maintain considerably higher pay differentials between front-line supervisors and the workers they supervise (generally 20 to 30% or more) that leaves an adequate differential even if the workers earn substantial overtime.

41. The larger pay increases that craft employees receive compared to EAS employees contributes to undermining the supervisor differential. The clerks and carriers whom EAS employees supervise have received, and continue to receive, pay raises (including retroactive raises), cost-of-living increases, and step increases that have narrowed and often eliminated whatever small pay differential previously existed between front-line supervisors and craft employees, especially when craft workers' overtime pay is accounted for. Thus, USPS's pay rates and schedules for Field EAS employees violates 39 U.S.C. § 1004(a) in this manner, as well.

**E. The Postal Service Does Not Provide Adequate Compensation to Its EAS Employees Sufficient to Maintain a Well-Motivated Workforce**

42. The Postal Service's inadequate compensation to its EAS employees contributes to the organization's distressing morale, which in turn affects the agency's success and productivity.

43. According to the Postal Service's own internal surveys, 75% of its workforce is either "Not Engaged" or "Actively Disengaged." These results place the Postal Service in the first percentile (the lowest possible) of Gallup's survey of "GrandMean Company-Level Engagement."

44. The survey data for engagement among Field EAS employees tracks the poor engagement of Postal Service employees overall, with levels of engagement between the 10th and 13th percentile of managers nationwide.

45. In 2016, NAPS conducted its own survey of member morale that confirmed the poor results from the Gallup survey.

46. The PFP determines the maximum amount of a pay increase that EAS employees may receive through a complex formula of over 30 metrics and multiple sub-indicators reflecting corporate and unit performance in the previous fiscal year that are largely out of employees' control. As the factfinding panel found, "[t]he corporate and unit criteria utilized by the Service [to calculate the PFP scores] are so complex and numerous that they are dissociated and attenuated from the work of the EAS supervisors and managers. As a result, the program fails to effectuate its goals, namely to motivate its supervisors and managers to effectuate the Service's mission."

47. The Postal Service's EAS pay policies, including for base salary levels and annual adjustments in pay, translate into a poorly motivated workforce, in contravention of the requirements of the Postal Reorganization Act.

**F. The Postal Service Does Not Provide Adequate Compensation to Its EAS Employees Sufficient to Attract Qualified and Capable Supervisory Personnel**

48. The Postal Service often has difficulty filling EAS positions with qualified and capable people. Over one-fifth of EAS grade 17 jobs (the jobs that most frequently directly supervise clerks and carriers) nationwide are not filled within 90 days of being posted. The actual number of unfilled jobs is likely higher than that, as the Postal Service "manages" that statistic by taking down job postings and then re-posting them.

49. Qualified craft employees do not wish to apply for supervisory jobs that entail longer hours and greater stress for the same or less pay.

50. The difficulty recruiting for supervisory positions is particularly acute in high-wage cities.

51. The Postal Service's EAS pay policies, including those in the EAS Pay Package for Fiscal Years 2016-2019, prevent it from meeting its statutory obligation to attract qualified and capable supervisory personnel. *See* 39 U.S.C. § 1004(a).

**G. The Postal Service Did Not Allow NAPS to Directly Participate in the Planning and Development of the 2016-2019 EAS Pay Package**

52. Despite the Postal Reorganization Act's requirement that NAPS "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), and that the Postal Service give any recommendations from NAPS "full and fair consideration in deciding whether or how to proceed with the program," the Postal Service rejected nearly every recommendation from NAPS in developing and finalizing the 2016-2019 EAS Pay Package proposal, including those recommendations later echoed by the FMCS fact-finding panel.

53. Further, 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.

54. The Postal Service simply provided NAPS with its draft and then final decisions, with no explanation or support.

55. The Postal Service has also failed entirely to consult with NAPS regarding compensation and benefits for "Headquarters" and "Area" employees.

56. During the 2017-2018 pay talks between USPS and NAPS regarding the Postal Service's FY2016-2019 EAS Pay Package Proposal, the Postal Service distinguished between "Field" EAS employees on the one hand, and "Headquarters" and "Area" EAS employees on the other.

57. NAPS represents over 7,500 employees located throughout the country whom the Postal Service categorizes as “Headquarters” or “Area” EAS employees, as opposed to “Field” EAS employees. This includes employees who perform supervisory and managerial responsibilities associated with a range of functions, including vehicle maintenance, shared services, financial, sales, and marketing.

58. The Postal Service has acknowledged that NAPS represents EAS employees in the sales and vehicle maintenance divisions as well as certain other positions for disciplinary representation purposes, despite those employees being “Headquarters” employees.

59. The Postal Service has failed entirely to consult with NAPS, let alone allow NAPS’s participation, with respect to pay and benefits talks for all Headquarters and Area EAS employees.

60. The full name of the pay package proposed by the Postal Service for Fiscal Years 2016-2019 was “EAS Pay Package Proposal Fiscal Years 2016-2019 Field EAS Employees.” The proposed package applied *only* to the subset of EAS Employees categorized as EAS Field employees, as reflected in the title.

61. On September 4, 2018, NAPS wrote to the Postal Service to point out that it had never received any proposed pay package for the Headquarters and Area EAS employees it represents. NAPS also raised the issue in the Pre-Hearing Briefing submitted to the Factfinding Panel.

62. On December 28, 2018, without any consultation with NAPS (or even any notice to NAPS), the Postal Service issued a document titled, “Area and Headquarters EAS and Pay-Band Pay Package Through Fiscal Year 2019” that purports to be a final pay package for “Area” and “Headquarters” EAS employees. That document begins with a statement that “this pay

package will not apply to those Headquarters and Area positions who are represented by the National Association of Postal Supervisors (NAPS)” and provides a list of the positions that the Postal Service recognizes as represented by NAPS, but reflects the Postal Service’s position that it will not recognize NAPS’s representation of other Headquarters and Area EAS positions (the majority of such positions).

63. 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.

#### **H. The Factfinding Panel’s Report and Recommendations**

64. The Factfinding Panel convened pursuant to 39 U.S.C. § 1004(f) held a two-day factfinding hearing on December 10 and 11, 2018, during which both USPS and NAPS presented evidence through exhibits and witnesses.

65. Both parties also engaged in post-hearing briefing at the request of the Panel.

66. The Panel issued its Report and Recommendations on April 30, 2019.

67. The Panel’s findings included the following:

- a. The Postal Service violated its obligations under the Postal Reorganization Act by issuing its July 20, 2018, EAS Pay Package decision without conducting any market survey examining comparable levels of work in the private sector;
- b. The Postal Service’s use of an exceedingly broad-based calculus for the SDA and its failure to adequately increase EAS salary maximums has resulted in unreasonable and inadequate pay differentials between EAS supervisors and managers and the craft employees they supervise;

- c. The SDA, as applied, contributes to the Postal Service's failure to attract qualified and capable supervisory staff;
- d. The PFP system, as constructed and implemented by the Postal Service, does not satisfy the Postal Service's statutory obligations regarding comparability and maintenance of a well-motivated workforce; and
- e. The proof submitted during the factfinding hearing clearly demonstrated a reasonable basis for establishing locality pay in certain areas of the country. The Postal Service's failure to examine the issue of locality pay prior to issuing its 2016-2019 EAS Pay Package decision contributed to its failure to satisfy its obligations under the Act, and the lack of locality pay may adversely impact employee motivation.

68. The Panel made the following recommendations:

- a. All Field EAS employees should receive retroactive raises in base pay and lump sums, including that "each NAPS-represented employee receive, in addition to raises and/or lump sum payments already received, the following retroactive increases in base salary for the following fiscal years, with the caveat that the amount by which any such increase exceeds the maximum of an employee's salary grade will be paid in the form of a lump sum payment: FY2017 – 1.10%; FY2018 – 2.15%";
- b. Changes made as part of the July 20, 2018, Pay Package decision should be applied as of that date;
- c. The Postal Service should establish a joint work group to address the failure of the SDA to provide adequate and reasonable differentials in rates of pay

between supervisors and managers and their subordinates, including reviewing how the SDA is calculated and salary range minimums and maximums;

- d. The PFP system should be included among the issues to be explored and resolved by a joint work group, because the program as currently designed and administered is “seriously flawed”;
- e. The joint work group, with the assistance of a compensation expert, should examine the issue of locality pay;
- f. The joint work group should examine the establishment of a permanent Cost of Living Adjustment for career, non-bargaining unit employees in Field EAS positions;
- g. The joint work group should engage a mutually-selected mediator and compensation expert;
- h. The joint work group should issue a report and recommendations on these issues no later than six months after the Postal Service’s final decision on the matters covered by the factfinding; and
- i. The Postal Service should provide NAPS with written reasons for not accepting and implementing any recommendations of the joint work group or the mediator.

**I. The Postal Service’s Response to the Panel’s Recommendations**

69. On May 15, 2019, the Postal Service issued its final decision concerning changes to pay policies, schedules, and fringe benefits for EAS employees.



70. The Postal Service rejected most of the findings and recommendations of the Panel.

71. The final EAS Pay Package Decision through Fiscal Year 2019 for Field EAS Employees maintains the same PFP matrix contained in the Postal Service's July 20, 2018 EAS Pay Package decision.

72. The Postal Service did not change the way the SDA is calculated, nor did it adjust the differential used from its existing level of 5%.

73. The Postal Service did not agree to provide any retroactive salary increases, nor did it make any changes in the decision retroactive to July 20, 2018 (the date of its "final" pay package for FY2016-2019).

74. While the Postal Service agreed to convene a work group to explore resolving issues regarding Field EAS salaries and grades, locality pay, the PFP program, and how salary range minimums and maximums are established, it did not agree to engage a mediator or compensation expert for the work group.

**J. The Postal Service Has Refused to Recognize NAPS's Right to Represent Postmasters**

75. NAPS's membership includes over 4,100 postmasters.

76. Other than the United Postmasters and Managers of America ("UPMA"), NAPS represents the highest share of postmasters in the country.

77. The majority of postmasters (including almost all of the approximately 8,400 Level 18 postmasters) have no supervisors who report to them.

78. On October 1, 2018, NAPS wrote to the Postal Service requesting that the Postal Service recognize NAPS's right to represent postmasters.

79. The Postal Service did not respond until February 25, 2019, when it wrote that “the Postal Service cannot lawfully recognize NAPS as a representative of postmasters in addition to supervisors.”

**COUNT I**  
**Failure to Pay Comparably to the Private Sector**  
**in violation of 39 U.S.C. § 1003(a) and 39 U.S.C. § 101(c)**

80. Plaintiff incorporates the allegations in the preceding paragraphs.

81. The Postal Reorganization Act, 39 U.S.C. § 1003(a), requires 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.”

82. Section 101(c) of that statute requires that the Postal Service “achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector.”

83. The Postal Service has failed to conduct or obtain any studies to evaluate the comparability of EAS employees’ compensation with compensation in the private sector for comparable work.

84. The Postal Service has also failed to appropriately adjust minimum and maximum salary ranges to ensure that EAS employees’ salary ranges keep pace with the market.

85. Unlike the private sector, the Postal Service does not provide any annual salary adjustments for its EAS employees.

86. Unlike the private sector, the Postal Service has refused to implement locality pay adjustments to account for the compensation paid for comparable private-sector jobs in high-wage areas.

87. As a result, the compensation of EAS employees in the Postal Service lags behind that of employees who do comparable work in the private sector, in violation of the statute.

**COUNT II**

**Failure to Provide for an Adequate Supervisory Differential Adjustment,  
in violation of 39 U.S.C. § 1004(a)**

88. Plaintiff incorporates the allegations in the preceding paragraphs.

89. The Postal Reorganization Act, 39 U.S.C. § 1004(a), 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.”

90. The Postal Service uses an SDA of only 5%, while comparable employers in the private sector pay their front-line supervisors at least 15 to 20% more than the employees they supervise.

91. The Postal Service also uses an overly broad method of calculating the SDA, such that many supervisors earn less than the craft employees they supervise, especially after overtime is taken into account.

92. The Postal Service has thus failed to ensure that there are “adequate and reasonable differentials in rates of pay” between EAS employees and the clerk and carrier employees they supervise.

**COUNT III**

**Failure to Provide Compensation Sufficient to Attract and Retain  
Qualified and Capable Supervisory and Managerial Personnel,  
and Failure to Establish and Maintain a Compensation Program  
Adequate to Maintain a Well-Motivated Workforce,  
in violation of 39 U.S.C. § 1004(a)**

93. Plaintiff incorporates the allegations in the preceding paragraphs.

94. The Postal Reorganization Act, 39 U.S.C. § 1004(a), requires the Postal Service to “provide compensation . . . that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel.”

95. 39 U.S.C. § 1004(a) also requires that the Postal Service “establish and maintain...a [compensation] program...that reflects the essential importance of a...well-motivated workforce.”

96. As a result of the Postal Service’s inadequate pay policies and schedules, experienced line employees are generally unwilling to apply to be supervisors.

97. As a result of the Postal Service’s inadequate pay policies and schedules, the Postal Service has trouble attracting qualified and capable supervisory and managerial personnel.

98. As a result of the Postal Service’s inadequate pay policies and schedules, the Postal Service has not and cannot maintain a well-motivated workforce. The Postal Service has commissioned its own studies that demonstrate abysmal employee engagement among its managers and supervisors, as well as its front-line workers, but has not changed its pay policies and schedules to address the problem. Also as described above, NAPS has surveyed its own members and similarly found abysmal morale among EAS employees.

99. Thus, the Postal Service has violated its obligation to “provide compensation . . . that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel” as well as its obligation to “establish and maintain...a [compensation] program...that reflects the essential importance of a...well-motivated workforce.”

**COUNT IV**  
**Failure to Consult with NAPS Regarding Compensation and Benefits for**  
**“Headquarters” and “Area” Employees,**  
**in violation of 39 U.S.C. § 1004(b)**

100. Plaintiff incorporates the allegations in the preceding paragraphs.

101. The Postal Reorganization Act does not distinguish between Field EAS employees and Headquarters or Area EAS employees.

102. All 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. 39 U.S.C. § 1004(b).

103. As NAPS is the representative of all EAS employees (other than the portion of postmasters who are represented by UPMA), the Act requires the Postal Service to consult with NAPS in formulating new policies and procedures relating to all EAS employees, including those whom the Postal Service denominates as “Headquarters” or “Area.”

104. The Postal Service has failed entirely to consult with NAPS with respect to Headquarters and Area EAS employees.

105. Among other shortcomings, the Postal Service did not provide NAPS with advance notice of its proposed decision-making regarding pay policies for Headquarters and Area EAS employees, sufficient reasons underlying its proposal, or an opportunity to make recommendations on the proposals.

106. Accordingly, the Postal Service has violated its obligation under 39 U.S.C. § 1004(b) to permit NAPS to “participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to” Headquarters and Area EAS employees.

**COUNT V**  
**Refusal to Recognize NAPS’s Representation of Postmasters,**  
**in violation of 39 U.S.C. § 1004(b)**

107. Plaintiff incorporates the allegations in the preceding paragraphs.

108. 39 U.S.C. § 1004(b) provides three distinct options for eligibility for consultation under the statute: (1) a supervisory organization that represents a majority of supervisors; (2) an organization other than those representing supervisors that represents at least 20% of postmasters; or (3) a managerial organization (other than an organization representing supervisors or postmasters) that represents a substantial percentage of managerial employees. This language is in the disjunctive.

109. NAPS qualifies under the first avenue – it is a supervisory organization that represents a majority of supervisors.

110. By the statute’s terms, once an organization qualifies under any of those three options, 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 statute confers consultation and participation rights to a qualifying *organization* – not a limited subset of its members. Those rights include the right to consult on behalf of all its “supervisory and other managerial employees.”

111. Postmasters 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.

112. The title of § 1004 also employs the broad “supervisory and other managerial” formulation. By not separately delineating postmasters, the statute conveys that postmasters are encompassed within that title.

113. Because NAPS is a qualifying organization, it is entitled to consult on behalf of the over-4,100 postmasters it represents, including by “participat[ing] directly in the planning

and development of pay policies and schedules, fringe benefit programs, and other programs relating to” those postmasters.

114. The Postal Service has violated 39 U.S.C. § 1004(b) by refusing to recognize NAPS’s right to represent postmasters in pay and benefit consultations and other programs relating to postmasters.

115. The Postal Service has also deprived the over-4,100 postmasters who have joined NAPS of their chosen representation in pay and benefit consultations.

#### **PRAYER FOR RELIEF**

116. WHEREFORE, Plaintiff National Association of Postal Supervisors prays that this Court grant judgment in its favor and against Defendant United States Postal Service as follows:

- A. Declare, pursuant to 28 U.S.C. § 2201, that the United States Postal Service has violated and continues to violate the Postal Reorganization Act, 39 U.S.C. §§ 101(c), 1003(a), and 1004(a) and (b), by
  - i. Failing to achieve and maintain compensation for all EAS employees comparable to the rates and types of compensation paid in the private sector for comparable jobs;
  - ii. Failing to maintain compensation and benefits for all EAS employees on a standard of comparability to the compensation and benefits paid for comparable work in the private sector of the economy;
  - iii. Failing to provide for an adequate and reasonable differential in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel;

- iv. Failing to provide compensation sufficient to attract and retain qualified and capable supervisory and managerial personnel;
  - v. Failing to provide a compensation system adequate to maintain a well-motivated workforce;
  - vi. Refusing to recognize NAPS as the representative of all non-postmaster EAS employees, including all “Headquarters” and “Area” EAS employees; and
  - vii. Refusing to recognize NAPS as the representative of all postmasters who are active members of NAPS and refusing to allow NAPS to participate in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to postmasters.
- B. Enter an injunction requiring the Postal Service to
- i. retain a neutral compensation expert to conduct a market survey to determine, for each year from FY2016 to the present, (a) the national average salary in the private sector for each EAS position, (b) the national average total compensation (including bonuses) for each EAS position; and (c) locality pay differentials in high-wage areas (i.e., the additional compensation paid by the private sector in and around cities such as New York, San Francisco, and Washington, D.C.) ;
  - ii. pay all EAS employees total cash compensation comparable to the total cash compensation paid for comparable positions in the private sector, including retroactive pay to compensate for any and all

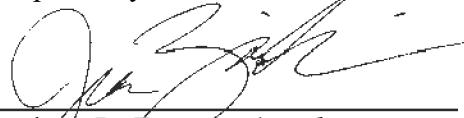


difference between the compensation that the Postal Service paid to its EAS employees from October 1, 2015, to the date of final judgment and the total cash compensation paid for comparable positions in the private sector;

- iii. either (a) pay all EAS employees total compensation comparable to the total compensation paid for comparable jobs in the highest-paid location in the country or (b) implement a locality pay adjustment that will assure that EAS employees in high-wage areas are paid comparably to what the private sector pays in that area;
- iv. pay each and every EAS employee eligible for a Supervisor Differential Adjustment a salary with a reasonable and adequate differential above the salary that the Postal Service pays to bargaining-unit employees supervised by the position held by that EAS employee (no less than the 15 to 20% differential that is the low end of the typical private-sector differential), including retroactive pay based on that formula from October 1, 2015, to the present;
- v. recognize NAPS as the representative of all non-postmaster EAS employees, including all “Headquarters” and “Area” EAS employees; and
- vi. recognize NAPS as the representative of all postmasters who are active members of NAPS; and

C. Grant Plaintiff such other relief as this Court deems just and proper.

Respectfully submitted,



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Dated: July 26, 2019

*Counsel for Plaintiff National Association of  
Postal Supervisors*

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

NATIONAL ASSOCIATION OF POSTAL  
SUPERVISORS,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

Case No. 1:19-cv-2236 (RCL)

**DEFENDANT'S MOTION TO DISMISS COMPLAINT**

Defendant, United States Postal Service, by undersigned counsel, respectfully moves to dismiss the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The grounds for this motion are set forth more fully in the accompanying supporting memorandum.

Respectfully submitted,

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Case 1:19-cv-02236-RCL Document 11 Filed 10/25/19 Page 2 of 22

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

NATIONAL ASSOCIATION OF POSTAL  
SUPERVISORS,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

Case No. 1:19-cv-2236 (RCL)

**DEFENDANT’S MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT**

The Complaint brought by the National Association of Postal Supervisors (“NAPS”) fails to state a claim upon which relief can be granted. In its Complaint, NAPS asserts that the Postal Service’s pay determinations violate the Postal Reorganization Act (“PRA”) based on alleged failures by the Postal Service to further certain policies pertaining to compensation identified in the PRA in the manner that Plaintiffs would prefer. As relief, Plaintiff requests that the Court invalidate those pay decisions for field Executive Administrative Schedule (“EAS”) employees and order the Postal Service to increase their pay.

As more fully set forth below, Plaintiff has failed to identify a source of law authorizing the Court to review the underlying Postal Service pay decisions. Plaintiff purports to assert claims based on alleged violations of the PRA, but the PRA does not afford a private cause of action that could support such claims. Moreover, to the extent Plaintiff’s claims challenge the manner in which the Postal Service seeks to achieve certain policies related to compensation in the PRA, judicial review of the Postal Service’s decisionmaking in that regard is exempt from review under the Administrative Procedure Act (“APA”) (as Plaintiff implicitly recognizes by failing to cite the APA in its Complaint). In the absence of any claim under the PRA and APA, the only other

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ganization 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.

*See* 39 U.S.C. § 1004(b).

For reasons discussed above, Plaintiff does not have a private right of action under the PRA to assert any such claims under section 1004(b). But even if it did, as a supervisors' organization, NAPS does not have the right to participate in pay consultations with the Postal Service involving any non-supervisory EAS employees. NAPS also does not have the right to participate in pay consultations with the Postal Service involving managerial employees (which are a distinct category from "supervisors" within the meaning of section 1004(b)) or postmasters (which also is a distinct category). Instead, NAPS's scope of representation, within the context of section 1004(b), is limited to those employees that fall within the category of supervisory EAS employees. Postmasters are thus excluded from the scope of NAPS's representation, as are most "area" and "headquarter" EAS employees.<sup>6</sup>

Count IV of the Complaint is premised on an erroneous understanding of the scope of NAPS's representation. According to Plaintiff's own allegations, the "nearly 50,000" EAS employees at the Postal Service (Compl. ¶ 1) "are distributed among 1,000 job titles and job levels" and include not just supervisors but also "managers, . . . , postmasters, and other professionals and administrative employees." (Compl. ¶¶ 6-7) Despite this acknowledgment, Plaintiff alleges in

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<sup>6</sup> Although the Postal Service acknowledges that some "area" and "headquarters" EAS employees would qualify as supervisors subject to NAPS representation, most do not fall within that category as Plaintiff implicitly recognizes by acknowledging that EAS employees "are distributed among over 1,000 job titles and job levels" and include not just supervisors, but also "managers, . . . postmasters, and other professionals and administrative employees." (Compl. ¶¶ 6-7) EAS personnel also include technical and clerical employees. Employee and Labor Relations Manual ("ELM") § 411.1. (<https://about.usps.com/manuals/elm/elmc4.pdf>) The ELM is a regulation of the Postal Service. *See* 39 C.F.R. § 211.2.

Count IV that “all EAS employees” qualify for representation by NAPS within the meaning of section 1004(b) (Compl. ¶ 102)<sup>7</sup> and, on that basis, alleges that the Postal Service “has failed entirely to consult with NAPS with respect to Headquarters and Area EAS employees.” (Compl. ¶ 104) Although the Postal Service acknowledges that some “headquarters” and “area” EAS employees qualify as supervisors who fall within the scope of NAPS’s representation, Plaintiff vastly overstates the scope of its representation in stating this claim, as EAS employees also include professional, technical, administrative and clerical employees. (ELM § 410) Thus, because this Count is based on an implausible premise concerning the scope of NAPS’s representation of EAS employees, it should be dismissed for failure to state a claim. Similarly, Count V should be dismissed because the NAPS does not represent postmasters and, therefore, the Postal Service could not violate section 1004(b) by failing to consult with the NAPS in that capacity.

**1. The PRA Does Not Afford NAPS The right To Represent Non-Supervisors.**

Section 1004(b) grants three types of organizations consultation rights under the PRA: “a supervisory organization” representing “a majority of supervisors[;]” a postmaster organizations that represents “at least 20% of postmasters[;]” and “a managerial organization” that “represents a substantial percentage of managerial employees[.]” The statute explicitly prohibits one group from fulfilling multiple functions by stating that a postmaster organization must be one “other than an organization representing supervisors” and that an organization representing “other managerial

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<sup>7</sup> In other words, NAPS alleges that it is entitled to represent and to consult on behalf of approximately 50,000 EAS personnel, including active and retired managers, supervisors, postmasters, professionals, and all other EAS employees, excluding only approximately 8,500 postmasters represented by another organization. (Compl. ¶¶ 1, 21-23, 33-34, 42, 57, 87, 102-103, 116A.i-ii, vi) In addition to managers, supervisors and postmasters, EAS personnel include professional and administrative employees in approximately 1,000 job titles (Compl. ¶¶ 6-7).

employees” must be one “other than an organization representing supervisors or postmasters.” 39 U.S.C. § 1004(b). The PRA does not permit a supervisors’ organization to represent and consult on behalf of any EAS professional and administrative personnel. Accordingly, an organization representing supervisors may consult only for supervisors, a managers’ organization only for managers, and a postmasters’ organization only for postmasters. NAPS, which is an organization representing supervisors, is thus limited to consult only for supervisors. Its assertion that the PRA allows it to represent all three groups – supervisors, managers, and postmasters – as well as all other EAS personnel (Compl. ¶102) runs counter to the text of the Act, and thus should be rejected.

That textual conclusion is supported by the history of postal legislation. When Congress created the fact-finding process in 1980, it only mentioned fact-finding rights for supervisors. *See* S. Rep. No. 96-856 (1980), 1980 WL 13081 (Leg. Hist.), at 1. Indeed, the Senate Report specifically notes that the categories of employees recognized as represented by the supervisors’ organization are defined by a Memorandum of Understanding signed on May 3, 1978, by the Postmaster General and the President of NAPS, which specifically excludes postmasters from NAPS representation. *Id.* at 5. Further, the Report states that the Committee believes that the May 3, 1978 MOU “fairly implements the representation provisions of Section 1004(B)” and “[t]he Committee does not intend the bill to expend [sic] or contract the representation of the supervisors’ organization.” *Id.* at 6.

Similarly, in 2003, when Congress extended parallel consultation rights for postmasters in the Postmasters Equity Act, the accompanying Senate Report explained that, prior to the Act, postmasters did not have the same ability to vindicate their rights as supervisors, and that the purpose of the legislation was to afford postmasters and postmasters’ organizations the same pay



\* \* \*



## I. BACKGROUND

### A. The Postal Reorganization Act

The Postal Reorganization Act of 1970 (“PRA”), Pub. L. No. 91-375, 84 Stat. 719 (1970), created USPS as “an independent establishment of the executive branch of the Government of the United States,” 39 U.S.C. § 201, with broad internal operating powers, *id.* § 401. Under the PRA, USPS establishes compensation policies after negotiations with employee representatives. *See id.* §§ 1202–09. Collective bargaining units represent non-managcrial employees in discussions governed by National Labor Relations Board (“NLRB”) policies. *Id.* § 1202.

In contrast, supervisory and managerial personnel are expressly excluded from collective bargaining and NLRB policies. *Id.* § 1202(1). Instead, managerial and supervisory personnel are represented by “recognized organizations” which are “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.* § 1004(b). Recognized organizations review USPS’s compensation proposals and provide recommendations. *Id.* § 1004(d)(1)(B). USPS is not required to accept but only “give any recommendation from the organization full and fair consideration.” *Id.* § 1004(d)(1)(C).

If a recognized organization is dissatisfied with a USPS compensation decision, the organization may request the creation of a fact-finding panel. *Id.* § 1004(f)(1). USPS and the recognized organization present their compensation proposals to a panel of three experts on managerial compensation policies. *Id.* §§ 1004(f)(2)–(3). After reviewing both sides, the panel issues its own recommendations to USPS. *Id.* § 1004(f)(4). Just as with the recognized organization’s recommendations, Congress only instructed USPS to “give full and fair consideration to the panel’s recommendation.” *Id.* § 1004(f)(5).

Separately, a recognized organization may ask for a panel to review the “effectiveness” of USPS employment policy procedures. *Id.* § 1004(g). Under this process, the panel provides recommendations directly to Congress. *Id.*

### **B. Factual Background**

This action involves proposed compensation policies for Executive and Administrative Schedule (“EAS”) employees, described as “the nearly 50,000 managers, supervisors, and other middle-management employees who are not members of collective bargaining units.” Compl. ¶ 1, ECF No. 1. The Association, a recognized organization, claims to represent approximately 27,000 active and retired EAS employees, which include “active and retired USPS managers, supervisors, *postmasters*, and other professionals.” *Id.* at ¶ 2 (emphasis added).

USPS sent the Association a proposed EAS pay and benefits package for fiscal years 2016–19 that addressed areas such as “Pay for Performance, Salary Ranges, Health Benefits Contribution, Promotional Pay Increase, Position Upgrade, and Work Groups.” *Id.* at ¶¶ 16–17. For the next nine months, the Association provided recommendations to USPS regarding changes to the pay package “via meetings, letters, and emails.” *Id.* at ¶ 18.

USPS then issued its final proposed pay package. *Id.* at ¶ 19. Dissatisfied with USPS’s decision, the Association requested a factfinding panel to review USPS’s proposal in accordance with the dispute resolution mechanism provided by 39 U.S.C. § 1004(f). *Id.* at ¶ 20. Both USPS and the Association presented exhibits and witnesses to the panel during a two-day hearing. *Id.* at ¶ 64. Afterwards, the panel issued a report incorporating several of the Association’s recommendations, including pay increases for certain Association-represented employees, a revision of salary differentials between supervisors and their subordinates, and the establishment of a working group to review future compensation policies. *Id.* at ¶¶ 66–68. In response, USPS

issued a revised pay package agreeing to engage a working group but declining to implement pay increases or adjust the differential. *Id.* at ¶¶ 69–74.

The Association then instituted this action raising the following claims:

- 1) USPS violated 39 U.S.C. § 1003(a) and 39 U.S.C. § 101(c) by failing to pay comparably to the private sector (*see id.* ¶¶ 80–87);
- 2) USPS violated 39 U.S.C. § 1004(a) by failing to provide for an adequate supervisory differential adjustment (*see id.* at ¶¶ 88–92);
- 3) USPS violated 39 U.S.C. § 1004(a) by failing to provide sufficient compensation to attract or retain qualified management personnel and failing to establish a compensation program adequate to maintain a well-motivated workforce (*see id.* at ¶¶ 93–99);
- 4) USPS violated 39 U.S.C. § 1004(b) by failing to consult the Association regarding compensation for different categories of employees (*see id.* at ¶¶ 100–06); and
- 5) USPS violated 39 U.S.C. § 1004(b) by refusing to recognize the Association’s authority to represent postmasters (*see id.* at ¶¶ 107–15).

The complaint seeks a declaratory judgment, an injunction requiring USPS to adjust future pay, and purported injunction requiring USPS to provide retroactive pay increases. *See id.* at ¶ 116. USPS moved to dismiss the complaint, arguing that the PRA provisions cited by the Association do not provide a private cause of action. *See* USPS Mot. to Dismiss 6–9, ECF No. 11. USPS further argued that the Association did not have authority to represent certain groups, including employees, managers, and postmasters. *See id.* at 15–20. Intervenor Postmasters separately moved to dismiss Claim 5, arguing that Postmasters—not the Association—was the recognized organization with the authority to represent postmasters. *See* Postmasters Mot. to Dismiss, ECF No. 19.

## II. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(6) requires courts to dismiss any case wherein the plaintiff has failed to state a legal claim upon which relief can be granted. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to

relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must construe the pleadings broadly and assume that the facts are as the plaintiff alleges; however, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. Additionally, courts are not obligated to “accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Moreover, “a plaintiff who fails to show that the law authorizes him to bring his lawsuit fails to state a claim upon which relief can be granted.” *Eagle Tr. Fund v. U.S. Postal Serv.*, 365 F. Supp. 3d 57, 63 (D.D.C. 2019) (citing *Sacks v. Reynolds Sec., Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978)).

### III. ANALYSIS

#### A. Private Cause of Action

It is well-settled that the “violation of a federal statute alone is inadequate to support a private cause of action.” *Tax Analysts v. IRS*, 214 F.3d 179, 185 (D.C. Cir. 2000). Instead, courts must first look to the statute’s text to determine if the statute provides an express cause of action. *See Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (“[i]f the text of a statute does not provide a cause of action, there ordinarily is no cause of action.”).

Implied causes of action are permitted “on rare occasions,” but only if the court finds a clear congressional intent “to create a ‘private right’ and a ‘private remedy.’” *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). “[T]hat is a high bar to clear” because “[the court] ha[s] to conclude that Congress *intended* to provide a cause of action even though Congress did not expressly say as much in the text of the statute.” *Id.* at 1097–98 (emphasis in original).

If a statute does not provide an express or implied cause of action, a plaintiff suing a federal agency in federal court may obtain a legal remedy through the Administrative Procedure Act

(“APA”). See 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

Non-statutory review is the final option for judicial review of administrative agency activities. See *Mittleman v. Postal Reg. Comm’n*, 757 F.3d 300, 307 (D.C. Cir. 2014). However, non-statutory review is unavailable if the court finds either that (a) Congress intended to preclude judicial review or (b) the issues involved are better left to agency discretion. *Nat’l Ass’n of Postal Supervisors v. U.S. Postal Serv.* (“NAPS”), 602 F.2d 420, 429–30 (D.C. Cir. 1979). When conducting non-statutory review, a court’s only role is “to determine whether the agency has acted ‘ultra vires’— that is, whether it has ‘exceeded its statutory authority.’” *Mittleman*, 757 F.3d at 307 (quoting *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003)). An agency acts *ultra vires* when it violates a “clear and mandatory” statutory provision. See *Int’l Ass’n of Machinists & Aero. Workers v. Griffin*, 590 F. Supp. 2d 171, 176 (D.D.C. 2008) (citing *Nat’l Air Traffic Controllers Ass’n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006)). A statutory provision is “clear and mandatory” when it has only one unambiguous interpretation. See *Nat’l Air Traffic Controllers*, 437 F.3d at 1264.<sup>1</sup>

**B. The Association Cannot Sue Under Any Statutory Cause of Action.**

- i. The cited PRA provisions neither provide an express cause of action nor are susceptible to APA review.*

While the Circuit has not addressed the specific question of whether the PRA provides private causes of action, this Court and other circuits consistently find that various provisions of the PRA “do[] not indicate a 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) (refusing to recognize a cause

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<sup>1</sup> The Association argues that an action is *ultra vires* when, in undertaking the action, the agency fails to engage in reasoned decision making. See Association Opp’n 14–15, ECF No. 16. The Circuit’s precedent favors “clear and mandatory” as the standard for non-statutory review. See *Mittleman*, 757 F.3d at 307.

of action under 39 U.S.C. § 1001); *see generally Glenn v. U.S. Postal Serv.*, 939 F.2d 1516, 1520 (11th Cir. 1991) (refusing to recognize a cause of action under § 1006); *Stupy v. U.S. Postal Serv.*, 951 F.2d 1079, 1081–82 (9th Cir. 1991) (same); *Kaiser v. U.S. Postal Serv.*, 908 F.2d 47, 50–52 (6th Cir. 1990) (same); *Blaze v. Payne*, 819 F.2d 128, 129–30 (5th Cir. 1987) (refusing to recognize a cause of action under § 1001); *Gaj v. U.S. Postal Serv.*, 800 F.2d 64, 68–69 (3d Cir. 1986) (same). Because Congress enacted the PRA to increase operational efficiency, improve labor relations, and establish “a new ‘businesslike’ agency,” *NAPS*, 602 F.2d at 430, the law does not leave room for judicial interference in USPS compensation decisions. *see id.* at 431–32.

Additionally, the Circuit has already determined that “the Postal Service is exempt from review under the Administrative Procedure Act.” *Mittleman*, 757 F.3d at 305 (citing *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 858 (D.C. Cir. 2012)). This position is rooted in the plain text of the PRA, which states that, absent specific exceptions not relevant here, “no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.” 39 U.S.C. § 410(a).

ii. *The cited PRA provisions neither provide an implied cause of action nor are susceptible to non-statutory review.*

The PRA provisions cited by the Association—39 U.S.C. §§ 101, 1003, and 1004—do not contain express private causes of action, nor are USPS actions subject to APA review. Therefore, the only possible way for the Association to obtain the remedy it seeks is through either (1) an implied private cause of action or (2) non-statutory review. Neither of these options are available.

Count 1 of the Association’s complaint alleges that USPS’s failure to maintain compensation commensurate with the private sector violates 39 U.S.C. § 101(c) and § 1003(a). *See Compl.* ¶¶ 80–87. These provisions read similarly, stating: “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,” 39 U.S.C. § 101(c), and “[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 of the economy,” *id.* at § 1003(a). USPS’s failure to conduct studies of comparable salaries in the private sector and failure to appropriately adjust EAS employees’ salaries allegedly violates these provisions. *See* Compl. ¶¶ 83–87.

Of the few courts to review cases brought under § 101 or § 1003, all determined that the provisions do not provide private causes of action. *See, e.g., Williams v. Brennan*, No. CV 17-1285 (TSC), 2017 U.S. Dist. LEXIS 114101, at \*2 (D.D.C. Jul. 17, 2017); *Reeder v. Frank*, 813 F. Supp. 773, 778 (D. Utah 1992), *aff’d*, 986 F.2d 1428 (10th Cir. 1993). These courts found that Congress did not intend to imply a private cause of action or create judicially manageable standards for review. This Court agrees.

Counts 2 and 3 involve § 1004(a), which states:

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.

39 U.S.C. § 1004(a). The Association alleges that USPS’s use of a different salary differential adjustment and calculation method than the private sector, *see* Compl. ¶¶ 90–92, resulted in “inadequate pay policies and schedules” and impeded the attraction and retention of qualified management, thus violating § 1004(a), *see id.* at ¶¶ 96–99.

The Circuit previously ruled on the merits of a case involving the differential requirement in § 1004(a) but declined to address the question of whether the Association had a private cause of action. *See NAPS*, 602 F.2d at 429–32. The *NAPS* court found that it had jurisdiction to hear the case under 28 U.S.C. § 1339,<sup>2</sup> *id.* at 427, but also that Congress intended for courts to give strong deference to USPS discretion, *see id.* at 441. In ruling on the merits, the Circuit stated that “[s]ection 1004(a) does not set a fixed differential” and that “Congress chose instead to leave the precise differential to the discretion of the agency, mandating only that the differential at any given time be ‘adequate and reasonable.’” *Id.* at 433. The Circuit determined it could not reverse Congress’s decision to give deference to USPS’s determination of the differential; or in other words, that the courts could not “through statutory construction create more precise standards and rights than Congress elected to create.” *Id.*

Regardless, following *Sandoval*, it is clear that neither the differential requirement nor the mandate to develop a “well-trained and well-motivated force” in § 1004(a) generates an implied private cause of action because the text does not display a congressional intent to create a “private right” or a “private remedy.” *See Sandoval*, 532 U.S. at 286.

Relatedly, even though *NAPS* referred to the case as a “nonstatutory review proceeding,” *NAPS*, 602 F.2d at 432, the court determined that Congress did not intend for judicial review of USPS action, making the case ineligible for non-statutory review under the modern “clear and mandatory” standard. *See id.* at 431–32 (“Congress intended to vest the Postal Service with broad discretion in setting compensation policies and to limit judicial oversight of the Postal Service’s exercise of that discretion.”).

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<sup>2</sup> 28 U.S.C. § 1339 provides: “The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.”

Counts 4 and 5 allege violations of § 1004(b) for failure to consult with and recognize the Association's representation of certain "headquarters" and "area" employees as well as postmasters. *See* Compl. ¶¶ 100–15. Section 1004(b) states:

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 . . . 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.

39 U.S.C. § 1004(b).

While the Circuit has not addressed § 1004(b), this Court underscored the provision's discretionary nature by reading it to require that USPS "discuss its proposed . . . policies with the [Association] . . . in a meaningful, good faith manner" but further noted that "[u]nder no circumstances, however, does that mean that the Postal Service can be forced to accept [the Association's] proposals . . . on policies or even be compelled to negotiate those policies with [the Association]." *Nat'l Ass'n of Postmasters v. Runyon*, 821 F. Supp. 775, 778 (D.D.C. 1993) (quoting *NAPS*, 602 F.2d at 436).

The Association claims that USPS's previous denial of its request to represent postmasters was incorrect. *See* Compl. ¶114. USPS and intervenor Postmasters maintain that the Association does not have the legal authority to represent postmasters. USPS Mot. to Dismiss 15–19; *see also* Postmasters Mot. to Dismiss.

Overall, there are two fundamental reasons why 39 U.S.C. §§ 101(e), 1003(a), and 1004(a)–(b) are not subject to judicial review. First, when a statute is "phrased as a directive to federal agencies engaged in the distribution of public funds . . . there is far less reason to infer a

private remedy.” *Sandoval*, 532 U.S. at 289 (internal quotations and alterations omitted). Because the cited PRA provisions contain the type of directive language referenced by the Supreme Court as antithetical to implied private causes of action, it seems clear that Congress did not intend for these provisions to create such remedies. Moreover, the Circuit previously concluded that appealing to Congress—rather than the courts—is the proper recourse to resolve compensation-related disputes. *See NAPS*, 602 F.2d at 435 (“[i]f the Associations are dissatisfied and seek additional guarantees, they must carry their plea to the legislature.”)

Second, § 1004 provides for remedies other than judicial review which the Association failed to exhaust. “[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Ass’n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)). If the Association is dissatisfied with USPS policies enacted pursuant to § 1003 or § 1004, the Association may request the creation of a fact-finding panel to provide recommendations that USPS must consider. 39 U.S.C. § 1004(f). Separately, the Association may request the creation of a panel to review the effectiveness of the procedures and provisions of §§ 1003 and 1004 and make recommendations to Congress for changes. *Id.* § 1004(g).

After nine months of negotiating the details of the proposed FY 2016–19 pay package with USPS, “via meetings, letters, and emails,” the Association requested a factfinding panel to review the compensation proposal in accordance with § 1004(f). Compl. ¶¶ 18, 20. The panel delivered its report, *id.* at ¶ 66, and USPS issued a revised pay package which the Association felt did not adequately incorporate the panel’s recommendations. Association Opp’n 7. Then, the Association instituted the present action instead of requesting another panel pursuant to § 1004(g), as USPS argues was required. USPS Mot. to Dismiss 3. The Association contends that § 1004(g) is not

mandatory because “it is a process that can be invoked at any time—without connection to a dispute.” Association Opp’n 7 n.3.

The Association had a statutory remedy—§ 1004(g)—which it chose not to pursue. While failure to exhaust an optional remedy is not an independent ground to dismiss an action, the Association’s choice not to exercise an available option is further evidence of non-reviewability. Congress’s explicit addition of an alternate dispute resolution mechanism in the PRA indicates that Congress did not intend for implied judicial review. Additionally, though the Association is frustrated that USPS did not *accept* the panel’s recommendations, the Association has not sufficiently pleaded that USPS failed to *consider* its recommendations, which is all USPS is required to do by statute. *See* 39 U.S.C. § 1004(f)(5).

The PRA leaves significant room for agency discretion and provides specific procedures other than judicial review to challenge agency action. At this stage, only Congress can provide the remedy the Association seeks.

**C. Even if the Cited PRA Provisions Were Subject to Non-Statutory Review, the Association Has Not Sufficiently Pleaded that USPS Acted *Ultra Vires*.**

Since (1) *ultra vires* activity requires the violation of a clear and mandatory directive with only a single interpretation and (2) the Association has not shown that USPS’s conduct violated such a directive, the Association has not sufficiently pleaded that USPS acted *ultra vires*.

As stated above, 39 U.S.C. § 101 and § 1003 provide a broad directive to USPS to establish a policy for providing compensation commensurate with the private sector. Congress did not dictate how USPS should create such a policy or what metrics to use. Other than offering anecdotal evidence about how USPS’s compensation differs from the private sector, *see* Compl. ¶¶ 21–22, 24–27, 30–31, 34, and providing general suggestions for how USPS could improve its

compensation policy, *see id.* at ¶¶ 23–24. the Association has not established how USPS violated a clear and mandatory directive in either § 101 or § 1003.

Additionally, the Circuit already determined that § 1004(a) affords USPS significant discretion in setting a salary differential. *See NAPS*, 602 F.2d at 433. The Association claims that the current differential is too low. *See Compl.* ¶¶ 38–41. The differential, when combined with accelerated overtime rates for certain non-managerial employees, can result in occasional discrepancies where supervisors are paid less than their subordinates. *See id.* However, § 1004(a) only requires that the differential determination be “adequate and reasonable” as determined by USPS; a court “cannot substitute its own judgment of what is adequate and reasonable for that of the Postal Service.” *NAPS*, 602 F.2d at 435. Though the Association may disagree with USPS’s differential determination, it cannot demonstrate that § 1004(a) provides a clear and mandatory directive nor that the directive was expressly violated.

The same logic follows for the provisions of § 1004(b), which are similarly left to USPS’s discretion. *See Runyon*, 821 F. Supp. at 777. The Association cites USPS-commissioned surveys that demonstrate “abysmal employee engagement” as evidence that the Association’s constituents have low morale due to USPS’s “inadequate pay policies and schedules.” *See Compl.* ¶ 98. Though the Association implicitly suggests that increasing pay would increase employee morale, the Association does not demonstrate (a) that the reason for low morale is employee pay or (b) that USPS has violated a clear and mandatory directive regarding compensation.

Finally, the Association has multiple claims stemming from USPS’s alleged failure to recognize the Association’s authority to represent certain groups. *Compl.* ¶¶ 107–15. However, these claims necessarily fail based on the “clear and mandatory” *ultra vires* review standard. The Association, USPS, and intervenor Postmasters all provided their own reasonable interpretations

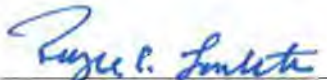
of whether the Association can represent postmasters and certain other types of employees. See USPS Mot. to Dismiss 15–20; Association Opp’n 19–24; Postmasters Mot. to Dismiss; USPS Reply 13–16. Based on these submissions, § 1004(b) does not establish a single, unambiguous interpretation, meaning that the Association has not met its burden to plead that USPS’s action was *ultra vires*.

**IV. CONCLUSION**

Based on the foregoing, the Court will **GRANT** USPS’s and Postmasters’ motions to dismiss by separate order.

**IT IS SO ORDERED.**

SIGNED this 17<sup>th</sup> day of July 2020.

  
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Royce C. Lamberth  
United States District Judge

