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. 19-cv-2236 (RCL)

REPLY IN SUPPORT OF PLAINTIFF'S MOTION
FOR ENTRY OF CIVIL DISCOVERY ORDER

INTRODUCTION

In its Opposition to Plaintiff's Motion for Entry of Civil Discovery Order, the Postal Service never mentions Federal Rule of Civil Procedure 26 or that rule's limited (and inapplicable) exemptions from the generally applicable rules regarding discovery. Nor does it point to any case holding that routine civil discovery is unavailable for *ultra vires* claims against it. Instead, the Postal Service begins its argument from the wrong place, erroneously contending that "this Court's review on remand is limited to assessing whether the Postal Service considered certain factors that the Act required" and then arguing that, because it claims to have considered these statutory requirements in setting the 2016-2019 EAS Pay Package, it is entitled to unfettered discretion in setting that pay package, including discretion to violate the statutory requirements under the Postal Reorganization Act ("PRA"). But NAPS's claims are based on the Postal Service's failure to comply with those obligations, not just its failure to consider them.

The fact that the Postal Service has discretion to decide *how* to comply with the PRA does not give it discretion *not* to comply. The Postal Service fails to explain how the Court can

answer the questions before it on remand without additional fact discovery. Meanwhile, NAPS's members are seven years past the beginning of the pay period at issue in this litigation—and more than three years past the end of it—but have yet to receive any compensation to account for the Postal Service's failure to "maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation of and benefits paid for comparable levels of work in the private sector," 39 U.S.C. § 1003(a), or to make up for the lack of any "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)—both of which the Factfinding Panel found were inadequate in the 2016-2019 pay package and both of which the D.C. Circuit agreed were required by the PRA.

The factfinding record, which the Postal Service claims renders civil discovery unnecessary and unavailable in this case, provides no details regarding which EAS employees were paid how much (so as to allow determinations of whether the Postal Service fulfilled its statutory obligation for a supervisory differential); it does not show that all EAS compensation is comparable to compensation in the private sector; nor does it provide any information regarding the Postal Service's position that some "Headquarters" and "Area" EAS employees are not "supervisory or other managerial employees." In essence, the Postal Service says "trust us" to comply with the law while it (1) admittedly paid thousands of supervisors less than the carriers they supervised from FY 2016 through FY 2019, (2) failed (according to the allegations in the complaint and the factfinding panel's findings) to take private sector compensation into account in setting EAS compensation, let alone achieve any level of pay comparability, (3) provided no information regarding what Headquarters or Area employees it excluded (and continues to exclude) from its consultations with NAPS or why, and (4) did nothing since the D.C. Circuit's

decision to correct those violations of the law. Without discovery, there is no way for the Court to assure that the Postal Service complies with the PRA.

ARGUMENT

I. The Postal Service ignores Federal Rule of Civil Procedure 26 and has not cited a single *ultra vires* review case in which discovery was denied.

Although NAPS began both the introduction and the argument section of its motion with references to the relevant provisions of Federal Rule of Civil Procedure 26 and the Local Rules, the Postal Service's brief fails to address those rules or their narrow and inapplicable exemptions.

For its assertion that NAPS must instead satisfy a "narrow exception" for discovery beyond an administrative record, the Postal Service points only to cases in which claims were brought under the APA or under other statutes to which courts had consistently held the APA standard of judicial review and record review applied. Those cases, and their discussion of the "narrow exception" requirement, were all premised on the foundational principle that "[j]udicial review of agency action *under the APA* is generally confined to the administrative record." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 113-114 (D.D.C. 2009) (claim under Endangered Species Act "confined" to record review because "judicial review of decisions made under the ESA is had under the same standard as the Administrative Procedures [sic] Act"); *see also e.g.*, *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015) ("In evaluating agency action under the APA, our review must be based on the full administrative record that was before the Secretary when she made her decision.")(quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The APA requires courts to review the whole record or those parts of it cited by a party. Ordinarily, courts confine their review to the administrative

record. The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made.") (internal quotation marks and citations omitted); *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 219 (D.C. Cir. 2012)(noting "a few tenets of administrative law" including that "in applying the APA's arbitrary and capricious standard, the focal point for judicial review must be the administrative record already in existence,") (internal quotation marks omitted); *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 33 (D.D.C. 2008) (citing *Kempthorne*, 530 F.3d at 1002, for the "general rule that record is limited under APA to [the] administrative record"); *Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (noting the claims in that case were "reviewed under the Administrative Procedure Act, which limits review to the administrative record") (internal citations omitted).

The Postal Service then argues, without legal support, that the APA record review rule should apply to NAPS's *ultra vires* case because *ultra vires* claims apply to a narrower category of agency conduct than the APA. ECF No. 37 at 10 ("Discovery should not be allowed for the same reasons that apply in APA record-review cases," citing only *Camp v. Pitts*, 411 U.S. 138, 142 (1973), a case brought under the APA). The "judicial role" of the court in conducting "non-APA review" in *ultra vires* cases is distinct from its role in cases that challenge agency action under the APA: "[T]o determine the extent of the agency's delegated authority and then determine whether the agency has acted within that authority. In this as in other settings, courts owe a measure of deference to the agency's own construction of its organic statute, *but the ultimate responsibility for determining the bounds of administrative discretion is judicial*." *New York v. Biden*, No. 20-CV-2340(EGS), 2022 WL 5241880, at *11 (D.D.C. Oct. 6, 2022) (quoting

Nat'l Ass'n of Postal Sup'rs v. U.S. Postal Serv., 602 F.2d 420, 432-33 (D.C. Cir. 1979) ("*NAPS I*") (emphasis added).

The Postal Service previously argued, unsuccessfully, that the narrow scope of non-APA, *ultra vires* review entirely precluded NAPS's claims in this case. *Nat'l Ass'n of Postal Sup'rs v. U.S. Postal Serv.*, 26 F.4th 960, 970, 972 (D.C. Cir. 2022) ("*NAPS II*"). The Postal Service's new position is that even if NAPS's claims fall within that narrow scope of *ultra vires* review, NAPS is still not entitled to discovery of facts integral to proving those claims, as discussed below.

The Postal Service's remaining argument that discovery is *sometimes* precluded for non-APA claims likewise points to no case law denying discovery for *ultra vires* claims, relying instead on cases where plaintiffs appended constitutional (not *ultra vires*) claims to APA claims challenging the outcome of agency action in an attempt to widen the scope of discovery. *See Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018) (noting courts' concerns in these instances of litigants "asserting a constitutional challenge to agency action to avoid the APA's bar on extra-record evidence"); *Chang v. Citizenship & Immigr. Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017) (noting "allow[ing] fresh discovery, submission of new evidence and legal arguments would incentivize every unsuccessful party to agency action to allege constitutional violations in order to trade in the APA's restrictive procedures for the more evenhanded ones of the Federal Rules of Civil Procedure.") (internal quotation marks omitted).

The Postal Service points to no case in which such concerns arose in the context of a non-APA, *ultra vires* challenge, nor are they present in this case. NAPS has not bootstrapped a constitutional challenge in order to receive discovery to which it is already entitled for its *ultra vires* claim. Rather, NAPS has challenged the Postal Service's failure to comply with the mandates of 39 U.S.C. §§ 1003(a) and 1004(a), as it previously did in *NAPS I*, 602 F.2d at 427,

and on which it was previously allowed discovery in that case. The D.C. Circuit's conclusion in the *previous case* that the district court's remedy was too far reaching—in that it granted specific salary increases and mandated a specific supervisory differential, *id.* at 441—has no bearing on whether civil discovery is available regarding whether any supervisory differential or compensation comparable to the private sector *actually existed*.

Without citing any language from *New York v. Biden*, Civ. A. No. 20-2340 (EGS), 2022 WL 5241880 (D.D.C. Oct. 6, 2022), in support, the Postal Service contends that that case falls into one of the narrow exceptions to the APA record-review rule, ECF No. 37 at 12-13. But no such position was asserted by the Postal Service in that case—rather, it agreed to civil discovery for the non-APA claim.[1] The Postal Service's attempt to distinguish *New York v. Biden* from the present case because no administrative record existed in that case is inapposite where, similarly, no such record exists here and where *ultra vires* review inquires as to whether the ultimate outcome of agency action complied with the statutory mandate, not whether the administrative process undertaken by the agency complied with the APA or some other statutory requirement.

As with all other cases the Postal Service cites in its Opposition, *New York v. Biden* does not require NAPS to establish its entitlement to discovery on its *ultra vires* claim and in no way replaces the baseline presumption under Federal Rule of Civil Procedure 26(d) and (f) and Local Civil Rule 16.3 that such discovery is available.

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[1] Moreover, the court in that case rejected the Postal Service's argument that the court exercising subject matter jurisdiction over the *ultra vires* challenges under the PRA would "short-circuit" an administrative review process, finding that where, as here, "Congress had specified a procedure for judicial review" of agency action, the Court could step in to provide nonstatutory remedies for *ultra vires* action. *New York v. Biden*, 2022 WL 5241880 at *10 (D.D.C. Oct. 6, 2022).

II. NAPS seeks fact discovery aimed at the questions this Court has been instructed to answer on remand—including questions that were not addressed or answered before the Factfinding Panel.

As outlined in its Motion, NAPS intends to seek fact discovery specifically tailored to the merits of the questions before the Court on remand: 1) facts showing whether the Postal Service provided an adequate and reasonable differential in rates of pay between supervisors and line employees and, if it did not, facts to determine which supervisors were paid at a lower rate than the employees they supervised; 2) facts showing whether the Postal Service achieved and maintained compensation and benefits comparable to the private sector, and, if it did not, to determine what such comparable pay would have been; and 3) facts showing which "Headquarters" or "Area" employees the Postal Service has classified as not "supervisory or other managerial personnel" and the basis for that classification.

In response, the Postal Service erroneously asserts that this Court "has no role but to determine whether the Postal Service considered the factors that the D.C. Circuit has held the Postal Service was statutorily required to consider." ECF No. 37 at 2 (citing *NAPS II*, 26 F.4th at 973). The language that the Postal Service cites from the D.C. Circuit opinion to support this assertion states only that a court may not substitute its own judgment by mandating a specific supervisory differential, but that it can both compel the Postal Service to "consider *and fulfill* the differential requirement." *NAPS II*, 26 F.4th at 973 (emphasis added); *accord id.* (subheading "2" stating "The Postal Service Acted Ultra Vires by Failing to Consider Private Sector Pay *and Achieve Comparability*") (emphasis added).[2] This instruction not to order a specific supervisory

[2] The Postal Service's Opposition twice quotes *NAPS II*'s mandate that this Court determine not only whether the Postal Service "considered" the PRA's requirements but also whether it "fulfilled" them. ECF No. 37 at 6, 11. But it never addresses how this Court could determine whether the Postal Service fulfilled those requirements without the discovery NAPS seeks.

differential does not foreclose the Court's review of the evidence regarding whether the salaries in the pay package comply with the PRA's statutory requirements for *some* supervisory differential and for market comparability. That evidence was not part of the factfinding record, is thus not currently before the Court or accessible to NAPS, and therefore requires discovery.

The D.C. Circuit's caution regarding limits on the remedy this Court can impose does not mean, for example, that the Court cannot examine evidence regarding whether the salaries in the pay package comply with the PRA's requirement that "some" differential exist between supervisory and managerial employees and the employees they supervise. *Id*. (citing *NAPS I*, 602 F.2d at 435). As NAPS explained in its Motion, for that determination, the Court will need "data on EAS employees—*i.e.*, their position (including grade), location, base salary, and overtime pay—and the same for each clerk and carrier they supervise in order to properly compare the two and ensure the SDA calculation methodology." ECF No. 36 at 10.

Similarly, the Postal Service's Opposition cites language from *NAPS II* about not substituting the Court's judgment for the Postal Service's regarding what the specific supervisory differential should be, but that does not constrain this Court from reviewing, on remand, evidence regarding "the compensation and benefits paid for comparable levels of work in the private sector," 39 U.S.C. § 1003(a). To ascertain whether the Postal Service's pay package failed to "achieve and maintain compensation" for NAPS employees "comparable to the rates and types of compensation paid in the private sector" and was thus an *ultra vires* act, *NAPS II*, 26 F.4th at 972—*i.e.*, one that "clearly violat[ed] [the PRA's] terms," *id*. at 971—requires this Court to consider evidence of what such comparable private sector compensation is. *See NAPS II*, 26 F.4th at 974; 39 U.S.C. § 101(c)).

The Postal Service claims this Court can only review the factfinding record—and the agency's subsequent determination that it need not comply with the Factfinding Panel's recommendation—in order to determine whether the Postal Service acted *ultra vires* in failing to achieve comparable compensation. ECF No. 37 at 5-6. But determining whether the Postal Service has sufficiently considered and *achieved* comparability in its rates of compensation requires evidence of "what those rates are," *NAPS II* at 974, evidence that, as NAPS explained in its Motion, includes "information related to the salaries and other forms of compensation for all EAS employees," ECF No. 36 at 13-14.

Finally, with respect to Count IV (whether the Postal Service has failed to consult with NAPS regarding pay issues for supervisory and other managerial employees whom it classified as Area or Headquarters employees), the Postal Service concedes that the D.C. Circuit found that NAPS stated a cognizable claim. *See* ECF No. 37 at 17-18. And it does not dispute that no evidence regarding that claim was presented to or considered by the factfinding panel. *Id*. The Postal Service argues instead that discovery is not needed on Count IV because "as far as the Postal Service is aware there is no known disagreement" about "all supervisors, regardless of alignment to Area and Headquarters levels" being represented by NAPS. ECF No. 37 at 17-18. The wording of the Postal Service's Opposition continues to ignore that representation applies not only to supervisors but to all "supervisory and other managerial employees." 39 U.S.C. § 1004(b). Moreover, it recently failed to consult with NAPS about a pay program that applies to some Headquarters *supervisors* (as well as to other managerial employees whom NAPS has told the Postal Service have a right to representation by NAPS). The Postal Service's claim not to know of any disagreement does not comport with its ongoing refusal to consult with NAPS regarding compensation for all EAS Area and Headquarters employees. NAPS wrote to the

Postal Service in October 2022, asking it to, "Please identify which Headquarters and Area non-PCES positions the Postal Service will recognize as 'supervisory and other managerial employees' represented by NAPS; which positions the Postal Service considers to be neither supervisory nor managerial, but instead eligible for representation by the unions; and which, if any, the Postal Service considers to be exempt from representation." The Postal Service neither responded to the letter nor consulted with NAPS as to the pilot compensation program for those employees, whom NAPS contends are "supervisory or other managerial employees." Discovery is needed to ascertain which, if any, Area or Headquarters EAS employees the Postal Service contends are not represented by NAPS and why.

NAPS plans to propose a discovery plan specifically tailored to these issues—the scope of which the Postal Service will have the opportunity to object to should it believe NAPS seeks discovery beyond the scope of the questions before this Court on remand.

CONCLUSION

For the foregoing reasons, NAPS respectfully requests that the Court grant its Motion for Entry of Civil Discovery Order.

Respectfully submitted,

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