ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5280

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

National Association of Postal Supervisors,

Plaintiff-Appellant,

v.

United States Postal Service,

Defendant-Appellee,

United Postmasters and Managers of America,

Intervenor Defendant-Appellee.

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

CORRECTED BRIEF FOR APPELLANT

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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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Glossary of Abbreviations

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

APA – Administrative Procedure Act

EAS – Executive and Administrative Schedule

NAPS – National Association of Postal Supervisors

PRA – Postal Reorganization Act

UPMA – United Postmasters and Managers of America

USPS – United States Postal Service

Jurisdictional Statement

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

Statement of the Issues

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

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

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

Pertinent Statutes

39 U.S.C. § 101. Postal policy

. . .

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

. . .

39 U.S.C. § 1003. Employment policy

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

. . .

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

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

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

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

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

(i) provide notice of agenda items, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) For purposes of this section—

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

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

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

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

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

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

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

Statement of the Case

I. Introduction

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

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

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

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

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

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

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

II. Statement of Facts

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

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

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

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

Substantively, the Postal Service must:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Procedural History

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

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

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

IV. Legal Standard and Standard of Review

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

Summary of Argument

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

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

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

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

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

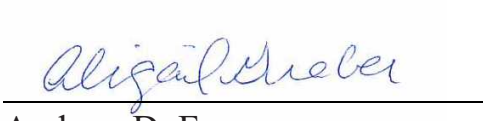
The Postal Service's position makes that even more clear. In the district court, for example, the Postal Service suggested that there was a distinction between "supervisors" and "professional and administrative personnel," or "supervisors" and "professional, technical, administrative, and clerical employees."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

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

Conclusion

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

Respectfully submitted,



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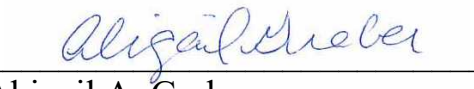

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