ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5280

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

National Association of Postal Supervisors,

Appellant,

v.

United States Postal Service,

Appellee,

United Postmasters and Managers of America,

Intervenor for Appellee.

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

REPLY BRIEF FOR APPELLANT

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GLOSSARY OF ABBREVIATIONS

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

APA – Administrative Procedure Act

EAS – Executive and Administrative Schedule

NAPS – National Association of Postal Supervisors

PRA – Postal Reorganization Act

UPMA – United Postmasters and Managers of America

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

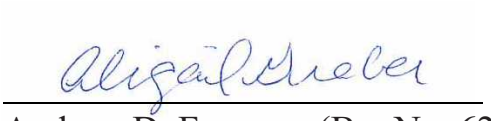
Appellee's Br. 42 (quoting *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel* ("*NATCA*"), 437 F.3d 1256, 1264 (D.C. Cir. 2006)). This Court made clear that "the scope of review elaborated in [*NAPS*] is in all important respects perfectly consistent with *Chevron* and *Mead*,"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

CONCLUSION

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

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

Respectfully submitted,



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

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