[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5280

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

NATIONAL ASSOCIATION OF POSTAL SUPERVISORS,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee, and

UNITED POSTMASTERS AND MANAGERS OF AMERICA,

Intervenor Defendant-Appellee.

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

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

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

B. Rulings under Review

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

C. Related Cases

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

/s/ Sean Janda
Sean Janda

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GLOSSARY

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

INTRODUCTION

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

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

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

STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

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

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

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

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

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

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

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

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

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

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

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

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

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

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

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

B. Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This appeal followed.

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The District Court Properly Dismissed NAPS's Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/ Sean Janda
Sean Janda

ADDENDUM

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39 U.S.C. § 101

§ 101. Postal Policy

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

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

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

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

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

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

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

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

39 U.S.C. § 1003

§ 1003. Employment Policy

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

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

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

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

39 U.S.C. § 1004

§ 1004. Supervisory and other managerial organizations

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

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

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

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

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

(i) provide notice of agenda items, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) For purposes of this section—

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

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

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

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

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

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

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