UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF POSTAL SUPERVISORS,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

Civil Action No. 19-2236 (RCL)

COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure ("Rule") 56, the Postal Service moves for summary judgment in this action under *ultra vires* review brought by the National Association of Postal Supervisors (the "Association"). This motion also constitutes the Postal Service's opposition to the Association's motion for summary judgment ("Pl. Mot", ECF No. 69-2).

INTRODUCTION

I. Summary Judgment For The Postal Service is Appropriate On The Two Remaining Claims Challenging The Final Field Pay Package.

The principal focus of this case is a challenge to certain aspects of the Postal Service's fiscal years 2016-2019 Final Field Pay Package for field Executive and Administrative Schedule ("EAS") employees ("final field pay package"), which was in effect from January 2019 to August 2021. Basing its claims solely on *ultra vires* review, Plaintiff alleges that the Postal Service acted beyond its authority under the Postal Reorganization Act, 39 U.S.C. § 101, et seq. (the "Act"), in enacting that specific pay package. The Complaint asserts three counts related to the final field pay package (Counts One through Three), but only two of those counts (Counts One and Two) remain at issue following the D.C. Circuit's decision reversing in part this Court's July 17, 2020 order granting the Postal Service's motion to dismiss. *See Nat'l Ass'n of Postal Supervisors v. Postal Serv*. ("*NAPS II*"), 26 F.4th 960, 969 (D.C. Cir. 2022) (upholding dismissal of Count III).

The remaining two claims regarding the final field pay package are: (1) that the final field pay package did not maintain compensation and benefits "comparable" to the private sector in violation of 39 U.S.C. §§ 101(c) and 1003(a) (Count One), and (2) that the final field pay package did not "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 working in the field in violation of 39 U.S.C. § 1004(a) (Count Two). Compl. (ECF No. 1) ¶¶ 60, 80-92.

For the Association to be successful on either of these claims, it must demonstrate that the Postal Service acted *ultra vires*, that is, that its actions amount to "extreme agency error." *Fed. Express Corp. v. Dep't of Comm.*, 39 F.4th 756, 764 (D.C. Cir. 2022). "Only error that is 'patently a misconstruction of the Act,' that 'disregard[s] a specific and unambiguous statutory directive,' or that 'violate[s] some specific command of a statute' will support relief" under *ultra vires* review. *Id*. The Postal Service is not subject to claims under the Administrative Procedure Act ("APA") and, consequently, *ultra vires* review is necessarily more rigorous than review under that statute. *Id*. at 765 ("Fed Ex's effort to dilute *ultra vires* review to the functional equivalent of the very APA action that Congress prohibited defies precedent and logic."); *accord Sears, Roebuck & Co. v. Postal Serv*., 844 F.3d 260, 265 (D.C. Cir. 2016) ("Apart from two very limited exceptions that are irrelevant here, the judicial review provisions of the Administrative Procedure Act ('APA') are not applicable to the exercise of the powers of the Postal Service." (cleaned up)). "An *ultra vires* challenge is 'essentially a Hail Mary pass'" where, for the plaintiff to prevail, the "agency overstep must be 'plain on the record and on the face of the [statute.]'" *Fed. Express*, 39 F.4th at 764. Thus, a claim that turns on statutory language that is subject to reasonable alternative interpretations fails. *See id*.

In its opening brief, the Association ignores this demanding *ultra vires* standard and instead bases its arguments on "garden-variety" error and its preferred interpretation of undefined statutory language (i.e., the terms "rates of pay" and "differential" in 39 U.S.C. § 1004(a)) that are plainly insufficient. *See id.* at 765. As explained below, the Postal Service acted within, and consistent with, its delegated powers through implementation of the final field pay package for field Executive and Administrative Schedule employees represented by the Association. Accordingly, summary judgment should be granted to the Postal Service on these remaining claims.

The D.C. Circuit also remanded a claim related to the final field pay package that does not correspond to any numbered count for "failing to give reasons for rejecting the Association's recommendations" pursuant to section 1004(b). Mem. Op. (ECF No. 42) at 6-7. As more fully set forth below, the Postal Service is likewise entitled to summary judgment on that claim.

II. The Association is Not Entitled to Anything Other than Prospective Relief on Its Claims Related to Representation.

The Complaint also asserts two counts (Four and Five) that are unrelated to the final field pay package. On these counts, the D.C. Circuit concluded that the Postal Service failed to consult with the Association regarding pay policies relating to its members who are (1) managers and supervisors at the Area and Headquarters levels or (2) postmasters. The D.C. Circuit held that consultation with both groups is required by 39 U.S.C. § 1004(b)'s statutory mandate that the Postal Service establish a "program of consultation" with recognized organizations representing supervisors, postmasters, and managers. *NAPS II*, 26 F.4th at 974-80. The Postal Service, in compliance with that holding, now recognizes the Association as the representative of EAS supervisors and managers at the Headquarters and Area level. Decl. of Bruce Nicholson ¶ 6. Accordingly, that claim is no longer "live" and should be dismissed as moot. *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 442 (D.C. Cir. 2020). The same is true of Count Five, which seeks solely prospective relief as to the Association's representation of its postmaster members. Compl. (ECF No. 1) ¶ 116 (B)(vi). In compliance with the D.C. Circuit's decision, *NAPS II*, 26 F.4th at 980, the Postal Service now recognizes the Association as representing postmaster employees who are members of the Association. Nicholson Decl. ¶ 6; Pl. Stmt. of Facts (ECF No. 69-16) ¶ 69. Accordingly, that claim is also moot and should be dismissed as well.

The Association, however, asserts that as relief for Count IV it is entitled to an order directing the Postal Service to "recognize [the Association] as the representative of *all* non-

postmaster EAS employees, including *all* 'Headquarters' and 'Area' EAS employees." Compl. (ECF No. 1) ¶ 116(B)(v) (emphasis added). As more fully set forth below, the Association's request for a judicial declaration that it represents *all* EAS employees, including non-supervisory and non-managerial EAS personnel, is plainly inconsistent with 39 U.S.C. § 1004 and should be rejected. Moreover, the relief sought for Counts Four and Five is necessarily forwarding-looking. The only alleged non-compliant pay package is the final *field* pay package, and that package excluded Headquarters and Area employees and also Postmasters. Nothing in the statute precludes the Postal Service from implementing separate pay packages for field employees, for Headquarters and Area employees, and for Postmasters. Thus, to the extent the Association's motion for summary judgment seeks retroactive relief as to Count Four or Count Five (Proposed Order (ECF No. 69-1 at 2-3)), there is no basis alleged in the Complaint for such relief because Count Four and Five relate to employees (Headquarters and Area employees and Postmasters) who were not covered by the sole pay package that is alleged in this action to be non-compliant with the Act.

BACKGROUND

I. Statutory Background

A. Compensation comparability requirement (Count One)

The Act directs the Postal Service to "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." 39 U.S.C. § 101(c). Section 1003(a) similarly 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 of the economy." 39 U.S.C. § 1003(a). The terms "comparable" and "standard of comparability" are undefined and thus, under the *ultra vires* review standard, the Postal Service

only could be found to have acted in violation of these provisions if it "patently" misconstrues them. *Fed. Express Corp*., 39 F.4th at 764. It has not, as addressed below.

B. Pay differential requirement (Count Two)

Section 1004(a) of the Act requires that there be "adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel." 39 U.S.C. § 1004(a). As the D.C. Circuit has explained, "Congress chose . . . to leave the precise differential to the discretion of the agency, mandating only that the differential at any time be 'adequate and reasonable." *Nat'l Ass'n of Postal Supervisors v. United States Postal Serv*., 602 F.2d 420, 433 (D.C. Cir. 1979) ("*NAPS I*").

Importantly, the statute does not define the terms "rates of pay" or "differential" and the parties offer different interpretations of both terms. The Association, for instance, relies on a statutory construction argument to contend that the term "rates of pay" should be interpreted to encompass gross pay, including overtime pay. Pl. Mot. (ECF No. 69-2) at ECF p. 21. In contrast, the Postal Service maintains that the term refers to base pay, and, further, that the Association's interpretation would be contrary to the statutory construction maxim against interpreting statutory language in a manner that leads to illogical outcomes.

The Association also relies on an accountant, Ms. Colleen Vallen, who lacks expertise in the study of pay systems, to argue that the term "differential" means a difference in the distribution of pay between the groups being compared (i.e., supervisors on the one hand and clerks and carriers on the other hand). Pl. Mot. (ECF No. 69-2) at ECF pp. 19-36. As understood by labor economists and others who specialize in studying pay systems, however, the term "differential" has a specific meaning—it refers to a comparison of average pay, or average pay adjusted through a regression analysis—between the two groups being compared. That is the methodology utilized by the Postal Service's labor economist expert—Dr. David Lamoreaux—who has opined that a "differential"

exists in pay between supervisors and clerks/carriers regardless of whether base pay or gross pay is utilized. Importantly, Ms. Vallen does not opine that Dr. Lamoreaux's methodology is contrary to accepted standards, and she acknowledges that she lacks expertise in the field of labor economics and statistics. Vallen Dep. at 57 ("I am not a labor economist" and "I do not have a specific understanding" of what the term "differential" means to labor economists who study pay systems); *id*. at 59 ("I'm not a statistician").

Ultimately, under the *ultra vires* standard, the Court need not determine which of the parties is correct in their interpretation of the statute or in the methodology they use for determining whether a "differential" has been achieved. As long as the Postal Service can "indicate that it has established '*some* differential'" between supervisory and clerk/carrier pay under a professionally accepted methodology—which there indisputably is here—that ends the inquiry. *NAPS II*, 26 F.4th at 973 (emphasis in original; quoting *NAPS I*, 602 F.2d at 435).

C. Consultation requirement (Counts Four and Five)

The Act draws a distinction between non-managerial employees, on the one hand, and supervisory and managerial personnel (including postmasters), on the other. 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. 39 U.S.C. § 1004(b). 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 organizations' "recommendations full and fair consideration," it is not required to accept any particular recommendation. *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 factfinding panel to 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).

II. Administrative Consultation and Factfinding

A. Initial Pay Proposal

On September 21, 2017, the Postal Service conveyed to the Association its initial pay proposal for field Executive and Administrative Schedule employees for fiscal years 2016-2019. AR2001-AR2003. From October 2017 through May 2018, the parties met seven times to discuss the pay proposal, with the Postal Service providing four revised proposals. AR1969. In response to the Association's demands which included incremental pay increases totaling 11 percent, the

Postal Service made various concessions including a 1.4 percent increase in the salary minimums and maximums. AR1972, AR1979. On June 28, 2018, the Postal Service issued its initial pay decision. AR1576. After the Association provided notice that it was invoking the factfinding process under 39 U.S.C. § 1004(f)(1), the Postal Service modified the pay decision on July 20, 2018, to include concessions it had made in a separate pay decision accepted by the United Postmasters and Managers of America. AR1580.

B. Factfinding Hearing

The factfinding panel held a two-day hearing in December 2018, the full transcript of which is contained in the Administrative Record. AR0064-AR0701. The Association submitted pre- and post-hearing briefs, presented exhibits as part of the hearing and as attachments to its briefs, and offered testimony from multiple witnesses, including its own compensation expert. For its part, the Postal Service also submitted pre- and post-hearing briefs, presented its own exhibits, and offered its own witnesses, including expert witnesses, who testified to both the compensation and benefits received by Association-represented employees and the factors influencing compensation and benefits for the employee population.

One of the witnesses was Dr. Sammi Park, a Postal Service labor economist who testified regarding the salary differentials between Association-represented employees and bargaining unit employees. Based on data from 2018 pay period 20, Dr. Park found that the average salary for the 30,762 Association-represented employees was $72,427, and the average salary for the 21,146 Association-represented employees in the most populated salary grade (Grade 17), was $68,393. USPS Factfinding Ex. F1 at 10 (AR1883); Factfinding Tr. Day 2 at 140-142 (AR0534-AR0536). In comparison, the average salaries for the four bargaining units representing clerks and carriers were all below $54,000. USPS Factfinding Ex. F1 at 9 (AR1882).

Tom Rand, a benefits expert and consultant for the Postal Service (AR1942), testified to the "substantial benefits premium" enjoyed by Association-represented employees compared to counterparts in the private sector. Factfinding Tr. Day 2 at 269:11-16 (AR0663). Association-represented employees enjoy a 68 percent benefits premium compared with private sector employees, which does not even include retiree health benefits. Factfinding Tr. Day 2, 256:10–259:21 (AR0650-AR0653); *see also* NAPS and Private Sector Benefits (AR1943-AR1967).

The Postal Service also presented the findings of an external market study conducted by compensation expert Preston Handler, an Associate Partner in the Compensation and Talent practice at the Aon Hewitt consulting firm. 2018 USPS Market Pay Comparability for EAS Positions (AR1901-AR1941). Mr. Handler conducted a comprehensive market study of eight EAS positions encompassing 21,000 employees, which is 68% of the Association-represented employee population. Factfinding Tr. Day 2, 216:15–217:6 (AR0610-AR0611). His findings included that: (1) for five of the eight positions the Postal Service paid between 5.1 percent and 21.1 percent above market, and for the other three positions the compensation trailed the market only slightly (between 1.1 percent and 1.8 percent below market); and (2) the actual salaries of NAPS-represented employees are approximately 5.7% above market. 2018 USPS Market Pay Comparability for EAS Positions at 8-37 (AR1910-AR1939); Factfinding Tr. at 216:15 – 230:15 (AR0610-AR0624). Mr. Handler concluded that the Postal Service's pay was "competitive" with the market. Factfinding Tr. Day 2, 231:12-16 (AR0624).

C. Post-Factfinding Hearing

On April 30, 2019, the factfinding panel issued its report and recommendations to the Postal Service, which included a recommendation for a retroactive increase in Executive and Administrative Schedule pay and establishment of a joint working group to explore many of the pay issues raised by the Association. (AR0792-AR0821).

On May 15, 2019, the Postal Service Vice President for Labor Relations, Doug Tulino (now Acting Postmaster General), issued the Postal Service's final field pay package decision. (AR2117-AR2129). The decision included a written explanation of the differences between the final pay decision and the panel's recommendations consistent with 39 U.S.C. § 1004(f)(5). *Id.* As summarized in Mr. Tulino's cover letter to the Association:

> While the Postal Service disagrees with many of the statements made by the factfinding panel in its April 30 report, the Postal Service accepts the majority of the panel's recommendations for topics of exploration for joint work group with NAPS, with the exception of discussion of a permanent cost-of-living adjustment for EAS employees. We have revised the pay decision accordingly. In addition, the panel recommended that the Postal Service increase EAS salary maximums, but did not make a specific recommendation as to how much maximums should increase. As you know, we increased salary maximums by 1.6 percent in January 2019 after factfinding hearings concluded and, therefore, that recommendation has already been implemented. (AR2117).

The Postal Service specifically rejected the factfinding panel's conclusion that its "long-term [financial] distress," AR0802, is not a relevant consideration in establishing pay for Association-represented employees. AR2122. The Postal Service noted that a prior factfinding panel had recognized the relevance of the Postal Service's "onerous financial challenges." *Id*. It also noted that the Postal Service's mandate "includes a responsibility to 'control costs and manage the . . . agency in a manner consistent with its views of what is the economical and efficient thing to do." *Id*. (quoting *Nat'l Ass'n of Postal Supervisors v. Postal Serv*. ("*NAPS I*"), 602 F.2d 420, 435-36 (D.C. Cir. 1979)).

On June 28, 2018, the Postal Service issued a letter making modifications to the final field pay package. (AR2097-AR2101). The final pay package was in effect from January 5, 2019 through August 22, 2021.

III. Procedural History

The Association brought this action on July 26, 2019, and this Court granted the Postal Service's motion to dismiss by Order dated July 17, 2020. Order (ECF No. 23). This Court dismissed the Association's *ultra vires* review claims on the basis that the statutory provisions at issue merely stated policy goals, not mandatory directives. Mem. Op. (ECF No. 22) at 12-14. The D.C. Circuit reversed, holding that the statutory provisions were mandatory directives that can be subject to *ultra vires* review. *NAPS II,* 26 F.4th at 970-72.

In so holding at the motion to dismiss stage, however, the D.C. Circuit had no occasion to consider whether specific terms within those directives were themselves susceptible to competing interpretations. For instance, although the D.C. Circuit observed that the "'differential guarantee' is not 'a meaningless, empty promise,'" *id.* at 973 (quoting *NAPS I*, 602 F.2d at 435, the D.C. Circuit did not opine as to the meaning of the term "differential" or address the methodology for calculating a "differential." The Court did note, however, that the Postal Service "has broad discretion to decide [the differential's] size and how it is computed. *Id*.

After resolving the question broadly presented to it—whether the cited statutory provisions were mandatory directives or policy goals—the Court determined that the Association's factual allegations (assumed as true under the Rule 12(b)(6) standard) adequately alleged a failure to comply with those provisions. *NAPS II,* 26 F.4th at 973 (holding that the Association had stated a claim for *ultra vires* review by alleging that the Postal Service had provided "*no* differential" in pay for thousands of supervisory employees); *see also id.* at 974 (allegation that the Postal Service failed to consider private sector compensation stated a claim for *ultra vires* review).

Following the D.C. Circuit's remand, the Postal Service answered the Complaint (ECF No. 33). The Postal Service also served the Administrative Record and simultaneously filed a certified index of the record (ECF No. 34). The Association filed a motion for entry of a civil

discovery order, which the Postal Service opposed on the basis that judicial review properly was limited to the Administrative Record. On August 15, 2023, the Court issued a Memorandum Opinion and Order allowing written discovery as to Count Two (the pay differential claim) and Count Four (failure to consult as to Headquarters and Area Executive and Administrative Schedule positions). The parties subsequently engaged in written discovery on both counts and conducted depositions of their respective experts on the differential issue in Count Two.

SUMMARY JUDGMENT STANDARD FOR *ULTRA VIRES* REVIEW

Judicial review here is being exercised under the "extraordinary" and "extremely limited scope" of non-statutory review to determine whether the Postal Service acted *ultra vires*. *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984); *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988). Non-statutory review "represents a more difficult course for [the Association] than would review under the APA . . . for acts 'in excess of statutory . . . authority.'" *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006) (quoting 5 U.S.C. § 706(2)(C)). Thus, the usual Rule 56 standard is inapplicable. *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 233 (D.D.C. 2019). Instead, "'in the context of *ultra vires* . . . claims, there are no questions of fact, because whether or not a statute . . . grants the [Executive Branch] the power to act in a certain way is a pure question of law.'" *Id.* In evaluating the parties' competing motions, therefore, the Court should review the Association's claims based on the administrative record (and any extra-record evidence the Court deems warranted) in the same manner as an appellate court addressing issues of law. *See id.*

ARGUMENT

I. THE POSTAL SERVICE MET THE REQUIREMENTS OF THE ACT IN SETTING COMPENSATION AND BENEFITS FOR FIELD EAS EMPLOYEES THROUGH THE FY2016-2019 FINAL FIELD PAY PACKAGE.

As the Court has previously acknowledged, the Association's pay comparability claim "will ultimately turn on whether the Postal Service adequately justified its conclusion that comparability has been achieved and maintained." Mem. Op. (ECF No. 42) at 17. Such justification involves "a good faith determination that compensation and benefits are comparable." *NAPS II*, 26 F.4th at 974. The Administrative Record supports that the Postal Service made a "good faith determination" that compensation and benefits in the final pay package for field EAS employees was comparable to compensation and benefits in the private sector as required by the Act. There has certainly been no "extreme agency error" or "clear departure" from a statutory mandate as would be required to sustain a finding that the Postal Service's actions were *ultra vires*. *Fed. Express Corp.*, 39 F.4th at 764. As demonstrated below, the Administrative Record supports that the Postal Service met the requirements of the Act by considering and achieving comparability throughout pay consultations with the Association, as presented at the factfinding hearing, and in issuing the final field pay package for FY2016-2019.

A. The Standard of Comparability Requires a Holistic Reading of the Act

As the Postal Service's compensation expert, Preston Handler, testified in explaining comparability: "market pricing involves a good deal of art. It's more art than science[.]" Factfinding Tr. Day Two, 209:22 – 210:3 (AR0602-603). Indeed, The Act does not define "standard of comparability," 39 U.S.C. § 1003(a), or prescribe how similar compensation and benefits at the Postal Service must be to the private sector. *See NAPS II*, 26 F.4th at 974. Nor does the Act specify the manner in which the Postal Service must achieve comparable compensation and benefits to the private sector. To the contrary, as the D.C. Circuit recognized "the Postal

Service has broad discretion to 'achieve and maintain' comparability to the private sector using the means it sees fit." *Id.* In exercising that discretion, the Postal Service may consider its "overall [statutory] responsibility of . . . providing 'prompt, reliable, and efficient' postal services," *NAPS I*, 602 F. 2d at 435-36, and "must have the freedom . . . to control costs" in an efficient manner. *NAPS II*, 26 F.4th at 974. This follows from one of the primary goals of the Act for the Postal Service to function as a self-sustaining enterprise.

Consistent with that goal, Section 1003(a) provides for comparability, but in that same subsection also includes a pay ceiling for Postal Service employees. The result of this and other Title 39 provisions is a salary cap for all Postal Service positions, including the highest paid officer of the Postal Service, the Postmaster General, who is paid a salary that is patently incomparable to the salary for chief executive officers at private companies. 39 U.S.C. § 3686(c) (limiting the compensation of the top twelve officers of the Postal Service, including the Postmaster General, to 120% of the Vice President salary, or $347,280). This ceiling for compensation and benefits reinforces that the standard of comparability does not bear the meaning of parity with the compensation and benefits in the private sector. Further still, the Act includes a debt cap for the Postal Service—unseen with any private sector entity—which necessarily influences the Postal Service's operations and fiscal responsibilities. 39 U.S.C. § 2005 (limiting the Postal Service's debt obligations to $15,000,000,000 for fiscal year 1992, and subsequent years).

As the Act makes clear, the delivery of mail is the Postal Service's "highest consideration," 39 U.S.C. § 101(e), (f), and is subject to the Universal Delivery Mandate imposed on the Postal Service by Congress. 39 U.S.C. § 101(a); *see also* 39 U.S.C. § 403 ("The Postal Service shall serve as nearly as practicable the entire population of the United States."). It is through this mandate, and due consideration of the Act's requirements as a whole, that "standard of comparability" must

be understood. The Association's preferred construction of the Act as requiring some form of "equivalen[ce]", Pl. Mot. (ECF No. 69-2) at ECF pp. 41, is inconsistent with a holistic reading of the statutory scheme and would override the Postal Service's responsibility to control its costs. *See*, *e.g.*, *NAPS II*, 24 F.4th at 974; *see also Kaseman v. Dist. of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) ("When possible, statutes should be interpreted to avoid 'untenable distinctions,' 'unreasonable results,' or 'unjust or absurd consequences.'"). Finally, it is undisputed that there is no true comparator to the Postal Service in the private sector as acknowledged by the factfinding panel, as well as by other federal agencies. Factfinding Report and Recommendation at 13 (AR0804); *see, e.g.*, Dept. of Labor, Standard Industrial Classifications Manual, online at http://www.osha.gov/data/sic-manual (last visited April 10, 2025) (classifying the United States Postal Service as it is own "industry.").

Ultimately, a consistent holistic reading of the Act supports that "comparable" does not, and cannot mean, "equivalent" in all respects. It would be a false equivalence given the statutory commands that Congress requires of the Postal Service that are not required of any entity in the private sector. The ultimate question under *ultra vires* review is whether the Postal Service has "patently" misconstrued a statutory mandate. *Fed. Express Corp.*, 39 F.4th at 764. The Act does not mandate that the Postal Service have equivalent compensation to the private sector, as suggested by the Association, and, accordingly, the Association has failed to meet its burden of establishing that the Postal Service has stepped "'plainly beyond the bounds" of its statutory authority as discussed more fully below. *Id.*

B. The Postal Service Met the Standard of Comparability with the FY2016-2019 Final Field Pay Package

The Administrative Record confirms that the final field pay package issued to the Association was comparable to private sector compensation.

1. The Financial Condition of the Postal Service is Relevant to the Pay Comparability Analysis

To begin, there can be no discussion of how the Postal Service makes decisions regarding compensation and benefits without consideration of the Postal Service's financial condition. During the factfinding, Postal Service Manager of Strategic Business and Financial Planning, Stephen Nickerson, testified to the business and financial challenges faced by the Postal Service, including regulatory limits on revenue streams, the requirement that the Postal Service meet its Universal Service Mandate, and the Postal Service's responsibility in funding retirement and retiree health benefits—all factors which impact the Postal Service's fiscal and operational responsibilities, but which do not exist for potential comparators of the Postal Service in the private sector. Factfinding Tr. Day 2, 10:14–11:4 (AR0404-AR0405); 17:12–21 (AR0411); 20:19–21:18 (AR0414). Mr. Nickerson's presentation also detailed that personnel costs account for an astronomical 77% of the Postal Service's operating expenses (AR1695), and that compensation cannot be considered separate and apart from benefits. (AR1696). Mr. Nickerson testified that "[t]o remain viable, the Postal Service must continue to bring costs in line with revenues[.]" (AR1702). It follows that consideration of pay comparability of compensation and benefits for Executive and Administrative schedule employees must be informed by the financial condition of the Postal Service and by the Postal Service's competing statutory obligations of providing "prompt, reliable, and efficient services to patrons in all areas," 39 U.S.C. § 101(a), while generating the necessary revenue to support its operations without taxpayer funding,[1] and without

[1] The Postal Reorganization Act of 1970 established the Postal Service as a self-funded entity without taxpayer subsidy. AR 1609. Thus, the Postal Service generally receives no tax dollars for operating expenses and relies on sale of postage, products and services to fund its operations.

exceeding a maximum debt level imposed by Congress. *See* 39 U.S.C. § 2005 (limiting the Postal Service's debt obligations to $15,000,000,000 for fiscal year 1992 and subsequent years).[2]

2. Compensation in the Final Field Pay Package Is Comparable to Compensation in the Private Sector

Even with the constraints of the Postal Service's financial situation, the Postal Service's compensation expert, Preston Handler, concluded that the Postal Service's compensation was "competitive" with the private sector. Factfinding Tr. Day 2, 231:12-16 (AR0624). The Association criticizes Mr. Handler's study for focusing on eight Executive and Administrative Schedule positions, but those eight positions comprised 21,000 employees representing 68 percent of the Association-represented employee population. Factfinding Tr. Day 2, 216:15–217:6 (AR0610-AR0611). That is important context the D.C. Circuit did not have when it stated that "[a]bsent a reasoned explanation showing otherwise, the Postal Service's belated and limited look at pay – and not total compensation or benefits – for only eight of 1,000 positions plainly fails to meet its statutory obligation[.]" *NAPS II*, 26 F.4th at 974. While the D.C. Circuit was constrained by incomplete and misleading allegations in the Association's Complaint, this Court now is not.

Mr. Handler testified that this representative sample, which reflects 68 percent of the Association-represented employee population, was "a pretty good sample size." Factfinding Tr. Day 2, 217: 2-6 (AR0610-AR0611). And again, nothing in the Act prescribes a particular sample size or requires, as the Association suggests, a study of all positions, which would be highly inefficient and impractical given the sheer number of positions. Further, for most of the positions studied by Mr. Handler, the Postal Service exceeded private sector compensation by upwards of

[2] Mr. Nickerson's presentation included the fact that the Postal Service's statutory debt ceiling of $15 billion was reached in 2012, and as of the factfinding hearing the Postal Service had $13.2 billion in debt outstanding. (AR1684).

20 percent, and for a few of the positions the Postal Service trailed the market slightly, between 1.1-1.8 percent. 2018 USPS Market Pay Comparability for EAS Positions at 8-37 (AR1910-AR1939); Factfinding Tr. at 216:15–230:15 (AR0610-AR0624). Again, the Act does not specify how similar the rates must be or require that the Postal Service beat private sector compensation in every position in order to be comparable.

Further, there is no evidence in the Administrative Record of a universal standard of compensation and benefits in the private sector upon which the Postal Service can "achieve and maintain compensation" for its employees. While the Association is focused on certain types of pay that it believes should be included in compensation for the Association-represented employees, it has presented no evidence of universal pay items in the private sector. For example, the Association highlights the absence of locality pay for Association-represented employees,[3] but many large private companies do not utilize locality pay. Factfinding Tr. Day 2, 234: 21 – 235:18 (AR0628-29).

Moreover, in many ways the Postal Service exceeds the private sector in compensation. Dr. Park, the Postal Service labor economist, testified at the factfinding hearing as to the types of compensation Association-represented employees are eligible to receive, which includes basic pay, special exempt overtime pay, premium pay for working night shifts or on Sundays, and annual leave buyback. AR1884. Dr. Park also detailed the benefits Association-represented employees are eligible to receive, including health benefits, paid leave, life insurance, pension, contributions to thrift savings plan, social security, Medicare, and retiree health benefits, many of which are

[3] Throughout pay consultations leading up to the factfinding, the Association never requested locality pay. Instead, the Association provided Dr. Risher's report to the Postal Service during pay consultations, and that report included information related to locality pay. To the extent the Association suggests that locality pay was requested during pay consultations, this is unsupported by the record.

"legislated" benefits, and which are not prevalent in the private sector. AR1899-91. The Postal Service's pension benefit is especially generous and relatively rare – a mere 12 percent of active employees were covered by a defined pension benefit plan in 2015, and very few private plans allow for cost-of-living increases and early retirement as the Postal Service's plan does. AR0655-0661, AR1950-1952.

Dr. Park also highlighted the low quit rate of Association-represented employees, an indicator that supports the adequacy of compensation and benefits. AR0549-AR0550. As described by Dr. Park during the factfinding, the voluntary resignation or quit rate for Executive and Administrative Schedule employees is substantially lower than the private sector quit rates. The striking absence of turnover for Association-represented employees reinforces that the compensation and benefits offered by the Postal Service are comparable to the private sector. Low quit rates have previously been studied and considered as evidence of a "substantial postal premium relative to comparable levels of work in the private sector." Barry T. Hirsch, et al., Postal Service Compensation and the Comparability Standard, 18 Research in Labor Economics at 267-68 (AR1504-05); *id.* at 265 (AR1502) ("It's hard to imagine that the cause of such low quit rates could be anything other than a sizeable compensation premium.")

When the Association's own compensation expert, Dr. Howard Risher, was asked about the low quit rates, he stated that postal employees were "locked in" to their benefits because they would otherwise be walking away from benefits "worth a lot." Factfinding Tr. Day One 302:18 – 303:10 (AR0366). Dr. Risher also opined that Association-represented employees would "find it very difficult to find a comparable paying job in the private sector." Factfinding Tr. Day One 304:2 – 305:2 (AR0367-AR0367). This evidence of low quit rates and high retention for Association-represented employees, including testimony of the Association's own expert, lends

further support to the conclusion that the Postal Service has complied with its statutory obligations with respect to compensation and benefits.

3. Benefits in the Final Field Pay Package Exceed Benefits in the Private Sector

Regarding benefits, the Administrative Record supports that Executive and Administrative Schedule employees enjoy a substantial benefits premium compared to their private sector peers. Benefits expert Tom Rand testified during the factfinding as to the benefits premium enjoyed by Association-represented employees. Specifically, that Association-represented employees enjoy a 68 percent benefits premium compared with private sector employees, and a virtually unheard-of pension benefit. Factfinding Tr. Day 2, 256:10–259:21 (AR0650-AR0653).

The Act requires comparability for "compensation *and benefits*," yet the Association completely ignores the value of the generous benefits package afforded to postal employees, which includes retirement *and* retirement health benefits, which are virtually nonexistent in the private sector. Instead, the Association takes issue with the way the Postal Service conducted the comparability analysis to attempt to refute the "substantial benefits premium" that Executive and Administrative Schedule employees receive. Pl. Mot. (ECF No. 69-2) at ECF pp. 40-41. Specifically, the Association contends that the Postal Service should have looked to employers "most comparable, at least in size." *Id.* at 35. But it is well-settled that the Act does not prescribe how the comparison should be made, or with whom, or the way that pay comparability must be achieved. *NAPS II*, 26 F.4th at 974 ("The statute does not specify how similar the rates must be, the manner in which rates are compared, or the method of study of private sector rates."). That the Association believes the comparability analysis should have been performed differently is not a basis for the Court to conclude that the Postal Service's actions were *ultra vires*.

In addition to the findings of the Postal Service's subject matter experts, and retained experts on compensation and benefits, several independent parties have reached the same

conclusion that postal compensation and benefits are comparable—or better than—compensation and benefits available in the private sector. These third parties include, but are not limited to, arbitrators, scholars, and a Presidential Task Force. Those third parties, in large part, agreed that the compensation and benefits offered by the Postal Service exceed those offered in the private sector. 2015 Goldberg Interest Arbitration Award with the American Postal Workers Union, AFL-CIO at 11 (AR1527) (the economic benefits offered by the Postal Service "are superior to those typically available to private sector employees); Task Force on the U.S. Postal Sys., Dep't of the Treasury, United States Postal Service: A Sustainable Path Forward (2018) at 61 (AR1661) ("USPS employees enjoy a pay and benefits premium over their private sector counterparts[.]"); Barry T. Hirsch, et al., Postal Service Compensation and the Comparability Standard, 18 Research in Labor Economics at 267 (AR1504) (concluding that "postal workers realize a substantial compensation premium relative to the private sector.").

Additionally, under the *ultra vires* inquiry, the Court is entrusted to examine the authority delegated to the Postal Service in setting compensation and benefits, and to consider whether the Postal Service's actions were within that authority. *See NAPS I*, 602 F. 2d at 432. The Court is not tasked with resolving a battle of the experts from the factfinding. As more fully set forth below, Mr. Handler's external market study was completed, presented to the factfinding panel, and considered by the Postal Service *before* the Postal Service issued the final field pay package on May 15, 2019. That market study confirmed that for most positions examined (five out of eight), the Postal Service was paying higher salaries than the salaries paid for comparable positions in the private. For the remaining three of the eight positions, the Postal Service fell nominally below the comparable positions in the private sector (less than 1.8 percent) but still well within what could reasonably be considered to be comparable. That the market study did not change the Postal

Service's decisions on compensation and benefits to the Association's satisfaction does not make it "blatantly lawless" action by the Postal Service as the Association would need to show to prevail. *Fed. Express Corp.*, 39 F.4th at 764.

C. The Postal Service Considered Private Sector Compensation and Benefits *Before* Issuing Its Final Field Pay Package

The Administrative Record includes evidence the Postal Service presented at the factfinding hearing through Postal Service witnesses and experts in labor economics, compensation, benefits, and operations, in addition to retained experts in benefits and compensation. The evidence included the compensation and benefits that Executive and Administrative Schedule employees are eligible for and which are not offered to employees in the private sector, the low quit rates by Executive and Administrative Schedule employees compared to the quit rates in the private sector, and past studies finding a postal premium exists for compensation and benefits to postal workers.

All of this information was considered by the Postal Service prior to issuing its final pay decision. The Association complains that Dr. Handler's study was not obtained until after the initial June 2018 pay decision, in preparation for the factfinding hearing. Pl. Mot. (ECF No. 69-2) at ECF p. 38. However, the Act does not require the Postal Service to commission an outside market study. As the D.C. Circuit stated "the Postal Service has broad discretion to 'achieve and maintain' comparability to the private sector *using the means it sees fit*[.]." *NAPS II*, 26 F.4th at 974 (emphasis added). That the Postal Service did not utilize the particular means of an external market study to assess pay comparability prior to its initial pay decision is not *ultra vires* conduct.

In any event, the Postal Service obtained the external market study, and considered it, prior to issuing the final pay decision on May 15, 2019. *See* FY2016-2019 Final Field Pay Package (AR2117). That May 2019 pay decision, not the Postal Service's initial June 2018 pay decision,

is the final agency action in this matter, and is the subject of the Association's dispute. That pay decision specifically cited Mr. Handler's study: "The expert compensation testimony presented at the factfinding hearing confirmed the existence of a substantial benefit premium, and that, in most instances, Executive and Administrative Schedule employees receive salaries at or above the market rate." *Id.* at AR2123. That the study was not completed until after the June 2018 initial pay decision (which is not final agency action at issue) is immaterial.

II. THE FIELD PAY PACKAGE CONTAINED A REASONABLE AND ADEQUATE DIFFERENTIAL IN PAY BETWEEN SUPERVISORS AND SUPERVISEES.

Section 1004(a) of the Act requires that there be "adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel." 39 U.S.C. § 1004(a). As the D.C. Circuit has explained:

> Section 1004(a) does not set a fixed differential . . . . It does not mandate that management personnel receive increases as much or more than . . . rank-and-file workers through the collective bargaining process; it does not hold the agency to an express formula for computing the salary differential; it does not define a precise relationship between the compensation received by one class of postal employees and that received by another . . . . Congress chose instead to leave the precise differential to the discretion of the agency, mandating only that the differential at any time be "adequate and reasonable."

NAPS I, 602 F.2d at 433. This Court, moreover, "cannot substitute its own judgment of what is adequate and reasonable for that of the Postal Service." *NAPS II*, 26 F.4th at 973. All that is required of the Postal Service is "to indicate that it has established '*some* differential'" between the rates of pay of supervisors and clerks/carriers. *NAPS II*, 26 F.4th at 973 (emphasis in original; quoting *NAPS I*, 602 F.2d at 435).

Because the terms "rates of pay" and "differential" are undefined in the Act, and because the Postal Service has discretion in determining what is an "adequate and reasonable" differential in rates of pay, this statutory directive is imprecise. Differences of opinion between the parties'

respective experts, and differing interpretations of the terms "rates of pay" and "differential" are thus insufficient to establish *ultra vires* conduct. *Fed. Express Corp*., 39 F.4th at 764-65. Because the record reflects that, through an accepted method of assessing a "differential," the final pay package achieves "some" differential in rates of pay between supervisors and clerks/carriers, summary judgment should be granted to the Postal Service on this claim. That is so regardless of whether Plaintiff advances a different (and unconventional) method for assessing a "differential" or interprets the term "rates of pay" more broadly than the Postal Service.

A. Supervisory Differential Adjustment

To comply with the pay differential requirement, the Postal Service has developed a mechanism called the Supervisor Differential Adjustment ("SDA"). An Overview of EAS Compensation (AR0823-AR0825). The SDA adjusts the salary of Fair Labor Standard Act-exempt employees (i.e., supervisors and managers) in positions in Executive and Administrative Schedule Grades 15 through 19 who directly supervise two or more bargaining unit employees to ensure that the starting salary of those employees is a minimum of five percent above a specified benchmark bargaining unit position. *Id.;* Employee and Labor Relations Manual., sec. 410.12 (AR1136-1137).

The benchmark bargaining unit positions established for the SDA are based on the salary of the most populous craft position, by grade and step, that an Executive and Administrative Schedule employees supervises for any given SDA-eligible position. AR0823-AR0825. For example, under the SDA, employees in front-line supervisor positions who supervise maintenance employees are guaranteed a minimum starting salary five percent above that of a bargaining unit maintenance employee at Grade 10, Step P. *Id.* SDA minimums for supervisors are adjusted each time the relevant bargaining unit salaries are increased, thereby ensuring that the difference is maintained. *Id.*; Factfinding Tr. Day 2 at 280:18-21 (Nicholson) (AR0674).

The SDA thus provides a mechanism through which entry-level supervisors will earn more than the majority of clerks and carriers, and more experienced supervisors who are promoted from within will earn more than clerks and carriers with a similar amount of experience and tenure. Ex. 1 to Lamoreaux Decl. (Initial Report) at 5. These benchmarks provide only a minimum salary amount for eligible supervisors; for each additional year of service as a supervisor their salary will continue to grow relative to the benchmark as the employee receives regular salary increases. *Id*.

To be clear, the goal of the SDA is to ensure a five percent difference in the starting salary of supervisors above a specified benchmark, not to ensure a five percent differential in the actual salary paid to all supervisors as compared to all supervisees. Ex. 1 to Lamoreaux Decl. (Initial Report) at 6; Factfinding Tr. Day 2 at 299 (AR0693). The Association's assertion, and the assumption underlying the analysis of its accounting expert, Ms. Colleen Vallen, is that the Postal Service had determined five percent to be an "adequate and reasonable" differential for the ultimate salaries resulting from application of the SDA (Vallen Dep. at 27) is incorrect and finds no support in the record. *Id.* at 133-35 (acknowledging that she has no knowledge of the Postal Service using five percent in any calculation other than the calculation of the SDA); Pl. Mot. (ECF No. 69-2) at ECF p. 24 n.6 (admitting that Vallen sought to determine "whether supervisors were paid 5% more than the line employee position they supervised").

The Association does not contend that the Postal Service failed to set starting salaries for supervisors at five percent above the applicable benchmarks. Vallen Dep. at 137-38. The Association's contention instead is that doing so did not translate into each and every supervisor being paid at least five percent more than the line employee position they supervised. Pl. Mot. (ECF No. 69-2) at ECF p. 24 n.6. But, as addressed more fully below, Ms. Vallen not only misappropriated the five percent measure of the SDA into her calculations, thereby exaggerating

non-supervisory pay, but, more fundamentally, she did not assess whether there was a "differential" in pay between supervisors and non-supervisors. Instead, she simply counted the number of supervisors being paid more or less than five percent above the salary or gross pay of the clerks and carriers being supervised. This is not a professionally accepted methodology for assessing a "differential." Ex. 2 to Lamoreaux Decl. (Supp. Report) at 1 ("Ms. Vallen's methodology is inconsistent with the generally accepted methodology of labor economists and other professionals who study pay systems for analyzing differentials in rates of pay"). When the accepted methodology is used, the SDA produced a "differential" in pay between supervisors and clerks/carriers that ranged from over six percent to over thirty percent depending on whether "rate of pay" included gross pay or was limited to base pay. Ex. 1 to Lamoreaux Decl. (Initial Report) at 13; Ex. 2 to Lamoreaux Decl. (Supp. Report) at 6.

B. Expert Analysis of Pay Package Salary Data Shows Substantial Salary Differentials Between Supervisors and Clerks/Carriers.

1. Dr. Lamoreaux's Expert Finding of a Significant Pay Differential is Sufficient For The Postal Service To Prevail Under The *Ultra Vires* Standard of Review, Without Regard to Whether The Analysis By The Association's Expert is Valid.

The Postal Service has "broad discretion to decide [the pay differential's] size *and how it is computed*." NAPS II, 26 F.4th at 973 (emphasis added). Among labor economists and professionals who study pay systems, which is the relevant field, the term "differential" refers to differences in the *average* rates of pay between the groups compared or *averages* adjusted using a regression analysis to remove variables that might skew the analysis. Lamoreaux Decl. ¶ 3.[4] Thus,

[4] That is consistent with the factfinding testimony of the Postal Service's expert, Dr. Park, a labor economist. For instance, based on data from 2018 pay period 20, Dr. Park found that the average salary for the 30,762 Association-represented employees was $72,427, and average salary for the 21,146 Association-represented employees in the most populated salary grade (Grade 17), was $68,393. Ex. F1 at 10 (AR1883); Factfinding Tr. Day 2 at 140-142 (AR0534-AR0536). In

as an initial matter, the Association's assertion that thousands of supervisors were not paid five percent more than clerks or carriers and that such a difference indicates the absence of an adequate "differential" in rates of pay misunderstands the concept of a "differential." *Id.*

Pay systems, including that of the Postal Service, often have pay bands that overlap rather than being mutually exclusive. Lamoreaux Decl. ¶ 5; Vallen Dep. at 109, 111-112. That is perhaps best exemplified by the GS-scale for federal government employees, where the highest-grade GS-14 employee has a significantly higher rate of pay ($185,234) than the lowest grade GS-15 employee ($167,603). *See* https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2025/DCB.pdf (last visited April 27, 2025). Thus, as the GS-scale reflects, it is not unexpected that under pay systems with overlapping pay bands, such as that of the Postal Service, there might be instances in which a non-supervisory employee has a higher salary than an employee starting in a supervisory position. Graphing out a distribution of pay and identifying instances where a lower graded employee made more than a higher graded employee, does not inform whether there is a "differential" in pay between two groups of employees. Lamoreaux Decl. ¶ 5. Nor is it an accepted methodology among pay professionals for assessing a "differential." *Id.*; Lamoreaux Dep. at 207-10. Indeed, in nearly thirty years of experience as a labor economist, the Postal Service's expert Dr. Lamoreaux has never seen a "differential" calculated in that manner. Lamoreaux Dep. at 209-10.

But that is the flawed methodology utilized by Ms. Vallen, who is an accountant and not a labor economist or an expert in pay systems. She merely graphed the distribution of the pay of supervisors as compared to the pay of clerks and carriers (adjusted upward by five percent) and

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comparison, the average salary for the four bargaining units representing clerks and carriers were all below $54,000. Ex. F1 at 9 (AR1882).

noted the instances where individuals in the clerks and carrier positions made more than individuals in supervisory positions (without accounting for whether the employees being compared were actually in a supervisory relationship). Vallen Dep. at 58, 108, 160. In short, Ms. Vallen did not attempt to examine whether the salary and pay data shows "differentials in rates of pay," 39 U.S.C. § 1004(a), between supervisors and non-supervisors. As Dr. Lamoreaux explains:

> Because the supervisor differential is only one factor of many impacting employee pay, there is nothing unexpected about Ms. Vallen's tabulations identifying individual supervisors making less money than individual clerks or carriers. Without looking further into the particular circumstances of each of these employees, we don't know what other factors (experience, skills, education, etc.) are contributing to the level of their wages in addition to any supervisory differential. In addition to the flaws in her measures of pay and selection of comparator groups, Ms. Vallen's analytical method of counting employees above and below cutoff levels of compensation, whether at 105% of the most populous bargaining unit step or any other level of compensation, is uninformative and not helpful in addressing the question of whether there is an adequate differential between supervisors and those they supervise.

Ex. 1 to Lamoreaux Decl. (Initial Report) at 7.

2. The Association's Expert Fails To Utilize An Accepted Methodology For Calculating A Pay Differential.

Ms. Vallen's opinion—which was based on counting the raw number of supervisors who earn less than five percent more than non-supervisors and graphing out that distribution—fails to satisfy the test for the admission of expert testimony as stated in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579 (1993). "Courts are obligated to 'determine whether [expert] testimony has a reliable basis in the knowledge and experience of [the relevant] discipline.'" *See Heller v. D.C.*, 801 F.3d 264, 271 (D.C. Cir. 2015) (alterations in original) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999); *see also Sacchetti v. Gallaudet Univ.*, 344 F. Supp. 3d. 233, 245-246 (D.D.C. 2018). Before expert testimony may be admitted at trial, Federal Rule of Evidence 702 and *Daubert* require the Court to perform a "gatekeeping" function by "engag[ing] in a preliminary assessment of the scientific validity of the expert's reasoning or

methodology." *Ambrosini v. Labarraque*, 101 F.3d 129, 138 n.11 (D.C. Cir. 1996) (citing *Daubert*, 509 U.S. at 592–93).

Specifically, the party seeking to introduce the opinion testimony must establish by a preponderance of the evidence the qualifications of the proffered expert and that: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702; *see also United States v. Hite*, 769 F.3d 1154, 1168 (D.C. Cir. 2014). In establishing the reliability of the expert's conclusions, the party proffering the expert need not prove that the expert's opinions are correct, but only that a qualified person has reached the opinions in a sound and methodologically reasonable manner. *Carmichael v. West*, No. 12-1969 (BAH), 2015 U.S. Dist. LEXIS 193447, at *20 (D.D.C. Aug. 31, 2015). Thus, in addition to the expert's qualifications, the Court "must focus solely on principles and methodology, not on the conclusions that they generate." *Ambrosini*, 101 F.3d at 133 (internal quotation marks omitted) (quoting *Daubert*, 509 U.S. at 595).Here, because Ms. Vallen lacks the qualifications to assess a pay differential and utilized a flawed methodology, her testimony will not help the Court "understand the evidence or . . . determine a fact in issue," it is not "the product of reliable principles and methods," and the Court should disregard her opinion. Fed. R. Evid. 702; *Carmichael*, 2015 U.S. Dist. LEXIS 193447, at *21; *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) ("If proffered expert testimony fails to cross Daubert's threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment.").

Ms. Vallen, who is not a labor economist and does not specialize in pay systems, lacks the relevant qualifications to assess a "differential" in pay. Her only degree is in accounting and her expertise, based on her current employer's description of the practice area that Vallen leads, is focused on maximizing the value of client "premium coverage after large and complex events, including catastrophic property losses." Vallen Dep. at 44-46, 65-69. Ms. Vallen lacks an understanding of what the term "differential" means to labor economists and understood her task as "comparing data." Vallen Dep. at 55-58. In purporting to calculate a "differential," Ms. Vallen also failed to utilize a generally accepted methodology to do so. Lamoreaux Decl. ¶ 4.

3. Dr. Lamoreaux's Analysis Establishes That There Are Significant Pay Differentials Between Supervisors And The Carriers And Clerks They Supervise

Importantly, although the Postal Service demonstrates above that the Court should disregard Ms. Vallen's testimony for failing to satisfy *Daubert*, the Court need not reach that issue or resolve a "battle of experts" under *ultra vires* review. Ms. Vallen conceded at her deposition that she was not disagreeing with Dr. Lamoreaux's testimony that the professional standard among labor economists who study pay systems is to utilize average base rates of pay in calculating a pay differential. Vallen Dep. at 158-59, 161-62. She also conceded that she was not disagreeing with Dr. Lamoreaux's approach of utilizing averaging to determine the differential. *Id.* at 158, 163 ("I'm not offering an opinion on that"). Ms. Vallen also does not dispute that, under Dr. Lamoreaux's approach, there is some differential in pay between supervisors and clerks/carriers. *Id*. at 160 (acknowledging that "I did not do averages of my data").

Dr. Lamoreaux's approach is therefore an appropriate way to assess a differential in rates of pay and indisputably shows "some differential" in the rates of pay between supervisors and clerks and carriers in compliance with section 1004(a). That is sufficient for the Postal Service to

prevail under the applicable *ultra vires* standard, regardless of the validity of Ms. Vallen's alternative analysis.

During discovery, the Postal Service produced base salary ("Form 50") data for all Executive and Administrative Schedule supervisory employees, and all clerks and carriers, for four "snapshot" pay periods during the time that the pay package at issue was in effect (January 5, 2019 to August 22, 2021). This data was analyzed by Dr. Lamoreaux, a labor economist with extensive experience studying pay systems and analyzing pay differentials in employee populations. Lamoreaux Decl. ¶ 1. That experience includes "well in excess of 1000" assessments of pay systems in his almost 30-year career. Lamoreaux Dep. at 210.

Using a statistical methodology called "multiple regression analysis,"[5] Dr. Lamoreaux determined that, on average, supervisors earned between 34.1% and 48.0% more in base pay than the carriers and clerks they supervise. Ex. 1 to Lamoreaux Decl. (Initial Report) at 15. More specifically, Dr. Lamoreaux found that the average supervisor of carriers had an annualized salary $20,636 to $22,785 higher than the average carrier, or 42.1 percent to 46.1 percent higher, depending on the snapshot date. *Id*. And the average supervisor of clerks had an annualized salary $17,126 to $22,582 higher than the average clerk, or 34.1 percent to 48.0 percent higher. *Id*. at 16.

Without the regression controls, the differentials were slightly greater: the average supervisor of carriers had an annualized salary $20,979 to $23,097 higher (42.9 percent to 46.8 percent higher) than the average carrier, and the average supervisor of clerks had an annualized

[5] Multiple regression analysis "provides an estimate of the average pay difference between the supervisor and supervisee, after filtering out the influence of other factors in the analysis." Ex. 1 to Lamoreaux Decl. (Initial Report) at 13. To prepare the data for regression analysis, Dr. Lamoreaux (1) restricted the data to the same set of occupation codes and levels used by Ms. Vallen in her analysis; (2) excluded 6,095 non-supervisory postmaster positions; and (3) annualized the salaries of rural carriers whose base salaries reflect more than a 40-hour work-week. Ex. 1 to Lamoreaux Decl. (Initial Report) at 15.

salary $17,520 to $22,827 (35.2% to 48.7%) higher than the average clerk. These results easily satisfy the D.C. Circuit's directive that the Postal Service must establish the existence of "*some* differential." *NAPS II*, 26 F.4th at 973 (emphasis in original; quoting *NAPS I*, 602 F.2d at 435).

4. The Association's Attempt to Rely on Gross Pay Should Also Be Disregarded.

Although the Association's expert, Ms. Vallen, focused her initial report on base salary, the Association also contends in its motion that the term "rates of pay" encompasses gross pay, that is, actual earnings including any overtime earnings. Pl. Mot. (ECF No. 69-2) at ECF pp. 20-21. As the basis for that assertion, the Association relies on principles of statutory construction, noting that the phrase "rates of basic pay" appears in a different, unrelated part of the Act and that the term "rates of pay" appears in section 1004(a). *Id*. at 21. From that, the Association argues that under a "'familiar principle of statutory construction . . . a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.'" *Id*. at 15-16.

The Association's construction cannot be squared with a common sense reading of the term "rates of pay" as found in section 1004(a). Indeed, as the Postal Service notes above, section 1003(a) sets forth a pay cap on Postal Service employees, and in doing so references "compensation at a rate" that is plainly intended to refer to an employee's salary, or base pay, not gross pay. Moreover, when the Fair Labor Standards Act ("FLSA") references the term "rate," it plainly refers to an employee's regular base rate of pay. *See* 29 U.S.C. § 207. As with its private sector comparability claim, that the Association has its own preferred interpretation of undefined statutory language is plainly insufficient. *Fed. Express Corp*., 39 F.4th at 765. Rather, to prevail on an *ultra vires* claim, the Postal Service only could be found to have acted in violation of these provisions if it "patently" misconstrues them. *Id.* at 764. Given how other statutes, including a separate provision of Title 39 refers to "rate," the Association's preferred construction of section

1004(a) should be rejected. Indeed, it is the Association that is misconstruing the statutory language here, not the Postal Service.

Moreover, another principle of statutory construction provides that "[w]hen possible, statutes should be interpreted to avoid 'untenable distinctions,' 'unreasonable results,' or 'unjust or absurd consequences.'" *Kaseman*, 444 F.3d at 642. As explained by Dr. Lamoreaux, the Association's construction would be absurd because premium pay (such as overtime) is a factor of hours actually worked which can only be ascertained retrospectively, not at the time a pay package is implemented. Lamoreaux Decl. ¶ 8. Thus, to ensure that each supervisor earned more in gross pay than each supervisee under such a scenario, an employer either would need to somehow divine at the beginning of the labor budget planning process the number and type of hours each employee would work in the future or somehow budget to adjust supervisor pay upward after-the-fact—that is, after supervisees have worked and been paid for all hours and premiums. *Id*. In almost thirty years of work as a labor economist studying employer pay systems across hundreds of organizations, Dr. Lamoreaux is not aware of any employer engaged in that type of labor budget planning. *Id.* Indeed, consistent with Dr. Lamoreaux's opinion, testimony at the factfinding hearing established that basing the Supervisor Differential Adjustment on gross pay would be "unfeasible to administer," in part because "overtime fluctuate[s] within the organization". AR0675.

In any event, even were the Court to assume that "rates of pay" means "gross pay," Dr. Lamoreaux's analysis establishes that, even when gross pay is considered, there is still "some differential." Specifically, in the three periods covered by the gross pay data, Dr. Lamoreaux found average differentials of 14.12 percent, 6.88 percent, and 14.71 percent between supervisors of clerks and clerks, and average differentials of 28.84 percent, 30.07 percent and 33.60 percent

between supervisors of carriers and carriers. Ex.2 to Lamoreaux Decl. (Supp. Report) at 6.[6] While lower than the average differentials found by Dr. Lamoreaux utilizing base salary data, these results utilizing gross pay data still show "some differential"—and indeed substantial differentials –of at least 6.88 percent in each time period as to both clerks and carriers. The Postal Service has therefore satisfied the statutory requirement of providing an "adequate and reasonable" differential in compliance with 39 U.S.C. § 1004(a), regardless of whether the differential is analyzed using base pay or gross pay.

Even were the Court to accept the Association's position that one possible interpretation of the term "rates of pay" in section 1004(a) is that it refers to gross pay (which the Postal Service disputes), all that would establish is that the term "rates of pay" is ambiguous. Any such ambiguity or disagreement is immaterial under the *ultra vires* standard, because the Court's role is not to resolve an ambiguity as it might under the APA but solely to determine whether the Postal Service's construction is "patently" wrong. *Fed. Express Corp.*, 39 F.4th at 764. Given that principles of statutory construction also support the Postal Service's interpretation, that the Postal Service's reading avoids absurd results, and that the supervisory differentials are significant even when analyzed under the Association's preferred approach, there is no basis for the Court to find that the Postal Service acted *ultra vires* in issuing the final field pay package.

III. Summary Judgment Should Be Granted On The Association's Failure To Provide Reasons Claim.

The D.C. Circuit found that the Association stated a claim for *ultra vires* review based on its allegation, set forth in paragraphs 53-54 of the Complaint, that the Postal Service did not provide

[6] The Association had requested in discovery information regarding overtime as well as information regarding base pay, and the Postal Service provided overtime information in the payroll files that it produced. Vallen Dep. at 28.

the Association with reasons for rejecting its recommendations before issuing the final pay decision. *NAPS II*, 26 F.4th at 980. As the Administrative Record reflects, however, the Postal Service provided reasons for its rejection of the Association's recommendations during the consultation process. The parties met seven times, and during the third and fourth meetings the Postal Service provided responses to the Association's unadopted proposals with an explanation of its reasoning. AR1970. The Postal Service also provided extensive responses to the Association's positions and arguments during the factfinding hearing through briefing, testimony and exhibits. See, e.g., AR0690-0694 (responding to the Association's criticisms of the Supervisor Differential Adjustment); AR0741-0742 (responding to the Association's argument that the Postal Service should implement locality pay); AR0743-0746 (responding to the Association's argument for retroactive wage increases). Accordingly, summary judgment should be granted to the Postal Service on this claim.

IV. The Association Is Not Entitled to Summary Judgment On Its Contention That It Represents All Executive and Administrative Schedule Employees.

Count Four of the Complaint alleges that the Postal Service violated section 1004(b) by failing to permit NAPS to "participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to" Headquarters and Area Executive and Administrative Schedule employees." Compl. (ECF No. 1) ¶ 106. But the Complaint does not identify the pay policies or programs at issue and thus does not seek any retroactive relief for that alleged violation.

Instead, the Association seeks only prospective relief, specifically, that it is entitled to declaratory and injunctive relief to the effect that it represents "all" Executive and Administrative Schedule employees, including "all 'Headquarters' and 'Area' [Executive and Administrative Schedule] employees." Compl. (ECF No. 1) ¶ 116.A.vi and 116.B.v. As to that specific issue,

summary judgment should be denied to the Association and granted to the Postal Service. Although the D.C. Circuit indicated that on remand this Court should determine which Area and Headquarters employees have been improperly excluded from the right of representation granted in 39 U.S.C. § 1004(b), that is not relief that the Association has requested in the Complaint. Compl. (ECF No. 1) ¶ 116.A.vi and 116.B.v.[7]

A. NAPS' Argument That It Represents *All* EAS Positions Is Inconsistent With The Plain Language And Structure § 1004(b).

The Act requires the Postal Service to "provide a program for consultation with recognized organizations of supervisory and other managerial personnel who are not subject to collective-bargaining agreements." 39 U.S.C. § 1004(b). It is undisputed that the Postal Service has recognized the Association as a "supervisory organization" under § 1004(b). It is also undisputed, in light of the D.C. Circuit's decision, that as a recognized supervisory organization the Association is "entitled to participate directly in the planning and development," of compensation policies as to supervisors, managers and postmasters, including supervisor and managers at the Headquarters and Area level. *Id*.

The Association claims, however, that it represents not just supervisors, managers, and postmasters, but "all Postal Service [Executive and Administrative Schedule] employees across the country who perform supervisory and managerial functions, necessary to the management of

[7] In its memorandum opinion granting in part and denying in part NAPS' motion for entry of a civil discovery order, the Court stated it was "confused" by the Postal Service's representation that "there is no known disagreement" as to which employees the Association is entitled to represent at the Headquarters and Area levels. (ECF No. 42 at 16; ECF No. 37 at 17-18). The Postal Service was referring to the fact that, because the parties had previously adhered to the 1978 Memorandum of Understanding whereby the Association agreed not to represent Headquarters and Area supervisors and managers in exchange for being allowed to represent non-supervisor and non-manager field Executive and Administrative Schedule positions, the parties had never had occasion to address nor had they attempted to identify those Headquarters and Area positions.

the Postal Service, including administrative employees who support those functions." Pl. Mot. (ECF No. 69-2) at ECF p. 45. The Association also suggests, without support, that the Postal Service is somehow arbitrarily excluding employees it is entitled to represent under the Act. *Id.* at 39.

The genesis of this dispute is a Memorandum of Understanding ("MOU") the parties entered into in 1978, whereby the Postal Service agreed to recognize the Association as the representative of approximately 11,000 non-supervisory, non-managerial field Executive and Administrative Schedule positions which the Association would not otherwise have been entitled to represent. In exchange, the Association agreed to forego representation of supervisory and managerial personnel at the Headquarters and Area levels. Nicholson Decl. ¶ 3. Such an agreement regarding the scope of representation is authorized under 39 U.S.C. 1004(d)(4). This agreement expired by its terms three years later, in 1981, but the Postal Service and the Association continued to adhere to it for decades.[8] *Id.* ¶ 5. The Association, however, elected to abandon that agreement by seeking to enforce its right to represent Headquarters and Area supervisors and managers in the instant litigation. The Postal Service has informed the Association that this will likely impact the Postal Service's continued recognition of the Association as representative of the 11,000 non-supervisory, non-managerial field EAS positions. Ex. 1 to Nicholson Decl. (Aug. 2, 2021 Letter from Bruce Nicholson to Brian Wagner) at 2 ("[T]he Postal Service also could disregard that [Memorandum of Understanding] agreement, and re-define the scope of NAPS's representation more narrowly to be consistent with the statutory parameters of 39 U.S.C.

[8] Over the years, as certain Field EAS positions have been re-aligned as Headquarters or Area positions due to reorganization and new reporting structures, the Postal Service has continued to recognize NAPS as representing those positions in response to NAPS' requests. Those positions were covered by the field EAS pay package at issue even though they are Headquarters or Area positions. Nicholson Decl. ¶ 5.

§ 1004(b).”). As the Postal Service explained, the Association is entitled to represent employees consistent with that 1978 Agreement, or consistent with Title 39, but not both. *Id.* at 1.

The Association bases its claim that it is entitled to represent “all” Executive and Administrative Schedule employees on its contention that the statutory term “supervisory and managerial employees” is “synonymous” with all Executive and Administrative Schedule employees.” Pl. Mot. (ECF No. 69-2) at ECF p. 43. But that is not supported by the record. Although some Executive and Administrative Schedule positions are supervisory and managerial, many are not. Executive and Administrative Schedule positions include a variety of non-supervisory and non-managerial positions ranging from “Chauffeur” to “Supply Clerk” to “Executive Administrative Assistant” in what is broadly referred to as “professional, technical, and administrative positions.” AR0822; Pl. Ex. 8 (ECF No. 69-11). Under the plain statutory language, the Association is entitled to represent “supervisory and other managerial personnel” but not non-supervisory, non-managerial employees in “professional, technical, and administrative positions.”

Although the Act does not define “supervisor” or “manager,” the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151-169, which applies to the Postal Service,[9] defines “supervisor” as follows: “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or

[9] 29 U.S.C. § 1209(a) (”Employee-management relations shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of subchapter II of chapter 7 of title 29 [National Labor Relations Act]”); *see also NAPS II*, 26 F.4th at 967; *McCandless v. MSPB*, 996 F2d 1193, 1198 (Fed. Cir. 1993).

clerical nature, but requires the use of independent judgment." The determination of whether an individual's job duties and responsibilities meet the definition of "supervisor" is a "highly fact intensive inquiry." *Kentucky River Community Care, Inc. v. N.L.R.B.*, 193 F.3d 444, 453 (6th Cir. 2000). Consistent with that statutory definition, the Postal Service's Employee and Labor Relations Manual (the "Postal Service Manual"), section 113.2, defines a "supervisor" as "one who has a direct responsibility for ensuring the accomplishment of work through the efforts of others." *See* https://about.usps.com/manuals/elm/html/elmc1_003.htm (last visited Apr. 27, 2025).

The same is true of the term "manager," the meaning of which is not defined in the NLRA but has been developed by the National Labor Relations Board and the Supreme Court through case law. *See N.L.R.B. v. Bell Aerospace Co*., 416 U.S. 267, 275 (1974) ("the [NLRA] . . . did not expressly mention the term 'managerial employee.' After the Act's passage, however, the Board developed the concept of 'managerial' employee in a series of cases involving the appropriateness of bargaining units."). In *Bell Aerospace*, the Supreme Court defined managerial employees as "executives who formulate and effectuate management policies by expressing and making operative decisions of their employer." *Id*. at 286. To assess whether an employee is managerial, the Board will evaluate whether "he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *N.L.R.B. v. Yeshiva Univ*., 444 U.S. 683 (1980). The Postal Service Manual defines a "manager" as "one who plans, organizes, directs, guides, controls, and evaluates the efforts of subordinate managers, employees, or both to achieve organizational goals." *See* https://about.usps.com/manuals/elm/html/elmc1_003.htm (last visited Apr. 27, 2025).

Accordingly, even if Executive and Administrative Schedule employees at Headquarters and Area offices have some role or involvement in the management of Postal Service operations (AR0822), that does not make them "supervisors" or "managers" within the meaning of section 1004(b). Occupying "professional, technical, and administrative positions," they provide technical and administrative support for management functions but are not themselves supervisors or managers as those terms are understood in the labor context. At a minimum, the Postal Service's interpretation of the terms "supervisor," "supervisory personnel" and "manager" in section 1004(b) is not clearly erroneous under *ultra vires* review.

The Association asserts that "supervisory personnel" is "broader than just 'supervisors' [and] encompasses all functions of overseeing or managing work, whereas 'supervisor' refers only to the specific person overseeing others conducting that work." Pl. Mot. (ECF No. 69-2) at ECF p. 45. The Association argues similarly that "managerial personnel" is "broader than just 'managers' [and] encompasses all personnel involved in the management of the Postal Service." *Id*.

But there is no statutory or other basis for these contentions beyond the Association's preferred construction. The phrase "supervisory personnel" and "supervisors" are used interchangeably in section 1004(b). Similarly, just as "supervisory personnel" means "supervisors, "managerial personnel" means "managers." As the D.C. Circuit explained, the statutory structure "gives Postal Service *managers* and postmasters the choice to throw in their lot with the general supervisory organization . . . or, if they prefer, to join their own, category-specific negotiating

body." *NAPS II*, 26 F.4th at 979-80 (emphasis added); *see also id*. at 978 (describing §1004(b)'s "nested structure" as consisting of "supervisors," "postmasters," and "managers").[10]

The Association also cites language from the 1970 Senate report referring to "supervisory personnel, postmasters or administrative employees," Pl. Mot. (ECF No. 69-2) at ECF p. 45 (quoting S. Rep. No. 96-856 (quoting S. Rep. No. 91-912, at 6-7 (1970))), to support its argument that "managerial personnel" should be read to encompass "administrative employees." However, the report appears to use the word "administrative" to refer to managerial personnel, consistent with the statutory language. In any event, "it is the enacted text rather than the unenacted legislative history that prevails." *Owner-Operator Independent Drivers Association v. Mayflower Transit LLC*, 615 F.3d 790, 792 (7th Cir. 2010) (citing *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568–71 (2005)).

Ultimately, the Association establishes at most an ambiguity in the term "supervisory and other managerial personnel" in section 1004(b). But that falls far short of establishing a violation of "a clear and specific statutory mandate" as required to prevail under *ultra vires* review. *NAPS II*, 26 F.4th at 971.

B. The Association Has Failed To Show It Is Entitled To Represent Any, Let Alone All, Of The Approximately 1050 Headquarters and Area Positions Identified By The Postal Service As Non-Supervisory and Non-Managerial.

In response to a discovery request by the Association, the Postal Service produced a listing and position descriptions of approximately 1050 Headquarters and Area EAS positions that the Association does not represent because they are non-supervisory and non-managerial. Pl. Ex. 8 (ECF No. 69-11); Nicholson Decl. ¶ 8. The Association contends, based on a superficial analysis

[10] The Association quotes out of context the D.C. Circuit's statement that "[s]upervisory organizations – beyond having to show they represent a majority of supervisors – are not limited in who else they can represent." *NAPS II*, 26 F.4th at 978.

of the job titles and descriptions, that the Postal Service's assessment is incorrect as to each and every one of these positions, and that all 1050 are supervisory and managerial positions that NAPS is entitled to represent. Pl. Mot. (ECF No. 69-2) at ECF pp. 46-51.

The Association, however, fails to establish that the Postal Service's identification of these positions as non-supervisory and non-managerial is inconsistent with any "clear and specific statutory mandate." Despite its burden of establishing an *ultra vires* violation, the Association's argument does not cite or rely upon any statutory definition of the terms "supervisor" and "manager" that would potentially give rise to such a mandate. Instead, the Association simply applies its own preferred understanding of what constitutes a "supervisory or managerial function." Pl. Mot. (ECF No. 69-2) at ECF p. 47 ("The Postal Service also seeks to exclude more than 200 positions with job descriptions that include supervisory or other managerial functions such as coordinating among departments and overseeing employees and/or workflows."); *id*. at 49 ("Accounting personnel take discretionary financial action to implement the Postal Service's budgetary priorities and policies."); *id*. at 50 ("Marketing personnel serve the managerial function of creating and implementing the Postal Service's public-facing communications about its policies and programs."). But that is insufficient to satisfy *ultra vires* review. Accordingly, the Postal Service is entitled to summary judgment on the Association's request for relief under count four which seeks an order that it represents "all" Executive and Administrative Schedule employees.

V. To The Extent The Court Awards Any Relief, It Should Be Prospective Only.

The D.C. Circuit acknowledged that "'[t]he history of the Postal Act indicates that Congress contemplated a very restricted judicial role in the Postal Service's compensation decisions[.]'" *NAPS II,* 26 F.4th at 972 (quoting *NAPS I*, 602 F.2d at 432). In the event the Court were to rule in favor of the Association on Counts One or Two or determine that the Postal Service

must recognize the Association's representation of all Executive and Administrative Schedule employees, then any relief should be prospective.

If, notwithstanding the Postal Service's arguments above, the Court were to rule in the Association's favor on Counts One or Two, it should not vacate the final field pay package and direct the Postal Service to retroactively issue a revised package. Instead, in that event, the Postal Service should be directed to adjust whatever non-compliant issue the Court might identify with respect to the field pay package going forward. *See Am. Great Lakes Ports Ass'n v. Zukunft,* 301 F. Supp. 3d 99, 105 (D.D.C. 2018) ("[T]he Court finds that the appropriate remedy is to remand the matter to the Coast Guard and for the Coast Guard to evaluate and justify an appropriate adjustment to benchmark compensation for its ratemaking methodology going forward."); *see also Milk Train, Inc. v. Veneman,* 310 F.3d 747, 756 (D.C. Cir. 2002) (holding that remand without vacatur was appropriate when there was "no apparent way to restore the status quo ante"); *Sugar Cane Growers Co-op of Fla. V. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (holding that remand without vacatur was appropriate because "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante"). To do otherwise would contravene Congress' express determination that the Postal Service has the authority to make the "final decision on the matters covered by factfinding" regarding pay-related matters. 39 U.S.C. § 1004(f)(5).

The same applies to Count Four, which seeks as relief an order recognizing the Association as the representative of "all" Executive and Administrative Schedule Headquarters and Area personnel. Compl. (ECF No. 1) ¶ 116(B)(v). As the Association acknowledges, however, the sole pay package at issue was limited to employees in the *field* and did not apply to Headquarters and Area employees. *Id*. ¶ 60. The Association has not pled that any pay package for Headquarters and Area employees was statutorily non-compliant and thus has not alleged any past injury by

those employees for which retroactive relief could be sought for those employees. *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought").

The Complaint fails to allege or identify any harm to itself or its members resulting from the Postal Service's failure to recognize the Association as the representative of Headquarters and Area Executive and Administrative Schedule employees. Even if that omission constituted a clear statutory violation, the Supreme Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

Although the D.C. Circuit indicated that on remand this Court should determine which Headquarters and Area employees have been improperly excluded from the right of representation granted in 39 U.S.C. § 1004(b), that is not relief that the Association has requested in the Complaint. The Complaint instead seeks as relief an order recognizing the Association as the representative of "all" Headquarters and Area Executive and Administrative Schedule employees. Compl. (ECF No. 1) ¶ 116(B)(v). Because the record does not support that the Association is entitled to represent "all" such employees, summary judgment should be granted on that claim—the claim that has been pled—in favor of the Postal Service.

It is undisputed that the Postal Service, in compliance with the D.C. Circuit's holding, now recognizes the Association as the representative of EAS supervisors and managers at the Headquarters and Area level. Nicholson Decl. ¶ 6. Accordingly, that claim is no longer "live" and should be dismissed as moot. *Zukerman*, 961 F.3d at 442. To the extent the Court determines that there remains a dispute as to what positions qualify as supervisors or managers beyond the

limited review of the Association's claim that it represents all EAS employees, the parties can address and resolve that outside the context of this litigation.

The same is true of Count Five, which seeks only prospective relief as to the Association's representation of its postmaster members. Compl. (ECF No. 1) ¶ 116 (B)(vi). Because the Postal Service now recognizes the Association as representing postmaster employees that are members of the Association, Pl. Stmt. (ECF No. 69-16) ¶ 69, that claim is moot and should be dismissed. To the extent the Association seeks retroactive relief for Count Five, that should be rejected for reasons similar as to why such relief is inapplicable to Count Four. *See* AR 2110 ("[t]his is to clarify that [the Association's] intent to represent postmaster interests and engage in consultation with the Postal Service is prospective in nature and does not extend to the retroactive representation of postmaster interests in the pending factfinding proceedings involving [the Association]").

CONCLUSION

For these reasons, the Postal Service's motion for summary judgment should be granted and the Association's competing motion should be denied.

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Respectfully submitted,

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